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VOLUME 171  
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CONTAINING ALL THE CURRENT DECISIONS OF THE  
SUPREME AND APPELLATE COURTS OF

ARKANSAS, KENTUCKY, MISSOURI, TENNESSEE  
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**NETH v. DELANO et al. (No. 11283.)**

(Kansas City Court of Appeals, Missouri.

Nov. 2, 1914. Rehearing Denied

Dec. 7, 1914.)

**1. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.**

Where two fellow servants were carrying a heavy car sill and one of them dropped his end, causing the other to drop the sill on his foot, the mere fact that the sill was dropped will not raise a presumption of negligence on the part of the fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**2. MASTER AND SERVANT (§ 150\*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.**

Where two servants were carrying a heavy car sill and one of them dropped his end, that he did not warn plaintiff, held not negligence on his part.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.\*]

**3. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—BURDEN OF PROOF.**

Where a servant carrying a heavy wooden beam was injured when another servant dropped the other end, the injured servant has the burden of proving negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by John Neth against Frederick A. Delano and others, as receivers of the Wabash Railroad Company, a corporation. From a judgment for defendants, plaintiff appeals. Affirmed.

M. J. Lilly, of Moberly, for appellant. J. L. Minnis, of St. Louis, and Robertson & Robertson, of Mexico, Mo., for respondents.

**TRIMBLE, J.** Appellant was employed in operating a boring or mortising machine in the "millroom," where woodwork was done, in the car department of the shops of the Wabash Railroad at Moberly. In this room all sorts of timbers were cut, mortised, shaped, and bored for use by carpenters who afterwards and elsewhere built or repaired cars. Appellant's work was to mortise timbers for car sills, and he had been engaged in such

work for 16 years. When a sill was finished according to specifications, appellant would remove the sill from the mortising machine and place it on a trestle, where it would remain until laborers would carry it elsewhere for use by the carpenters. These sills were large and heavy, and appellant could not move them without help. Authority was given him, therefore, to call to his aid any other employé in the room when he desired to remove a finished sill from the machine to the trestles. On the 14th of March, 1912, the appellant had finished mortising an end sill, and called on a nearby coemployé and fellow servant, Golay by name, to assist him in moving it from the machine to the trestle. This sill was of oak, 9 feet long, 9 inches thick, and 11 inches wide, and weighed somewhere between 400 and 500 pounds. Golay readily consented, and took hold of one end of the sill while appellant took the other end and, holding the sill thus about three feet from the ground, they started toward the trestle and had taken about three steps when Golay dropped his end, which caused appellant to lose his hold on the sill, and it fell across his foot, injuring it, for which appellant brought this suit. The petition charged negligence in the following terms:

"That said other employé handled said sill in such a careless and negligent manner that he let same fall or drop without notice or warning to plaintiff, a distance of about three feet, causing the same to strike plaintiff upon and across his left foot; that by reason of the carelessness and negligence of defendants, their agent and employé, in letting said sill drop or fall without notice or warning to plaintiff, as aforesaid, upon and across plaintiff's left foot, plaintiff was seriously and permanently injured."

At the close of plaintiff's case in chief, the trial court sustained two demurrers offered by the defendant. One was upon the ground that in the opinion of the court the plaintiff was not engaged in "the work of operating a railroad" within the meaning of section 5434, R. S. Mo. 1909, abolishing the fellow-servant rule as to railroads where the injured employé is so engaged. The other demurrer was sustained upon the ground that the appellant had failed to prove that he was injured as the result of any negligence on the part of the said coemployé. Appellant thereupon in due time brought the case here.

[1-3] We are of opinion that the trial court properly took the case from the jury. No evidence was offered tending to show that Golay was negligent, or from which an inference of negligence could be drawn. The evidence was that while the two men were carrying the sill, Golay dropped his end. How he came to drop it is not shown nor touched upon by the evidence. There can be no inference that he *threw* it down, because the evidence is that he *dropped* it. All that plaintiff knew was that, while he was not looking Golay's end dropped. There was no evidence that Golay intentionally let it fall, nor that he was careless or negligent in any way. Appellant could not say whether Golay's feet slipped or not. So far as the evidence shows, the dropping of the sill was not on account of the way Golay was holding or carrying it nor because he went about it in an unusual or different method from that theretofore used. In other words, there is nothing to show it was not an accident in the strict sense of that term. Neither can negligence be predicated upon the fact that Golay did not warn appellant before the sill fell from his hands. Appellant says that he did not think Golay said anything before it fell, but from appellant's description of the occurrence the fall must have occurred suddenly. The sill was only 3 feet from the ground, and as the sill would drop 16½ feet the first second, the sill must have struck the floor like a flash, in the fraction of a second after Golay lost his hold thereon. This was too short a time to give a warning, and after it struck, appellant knew it as well as Golay. There is no room, under the facts of the case, for the application of the doctrine of *res ipsa loquitur*. Consequently negligence does not arise as an inference from the facts. It devolved upon appellant to prove facts tending to show negligence. Having failed to do this, he has failed in his case, and the court did right in taking the case from the jury.

As this disposes of the case, there is no necessity for discussing the other question, whether appellant was "engaged in operating a railroad" within the meaning of the fellow servant statute.

The judgment is affirmed. All concur.

#### BANNER v. BANNER. (No. 11229.)

(Kansas City Court of Appeals. Missouri. Nov. 23, 1914.)

#### 1. HUSBAND AND WIFE (§ 30\*)—POSTNUPTIAL SETTLEMENTS—VALIDITY.

Agreements in the nature of postnuptial settlements having no element of fraud in them are upheld by the courts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 169-177, 882; Dec. Dig. § 80.\*]

#### 2. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENTS—VALIDITY.

Agreements between a husband and wife for separation and separate maintenance, if

made in prospect of an immediate separation, and reasonable, fair, and voluntary, are valid.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1048-1053; Dec. Dig. § 278.\*]

#### 3. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENTS—OPERATION AND EFFECT.

Where a reasonable provision is made in a deed of separation for the wife's separate maintenance, she is estopped from suing for further support.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

#### 4. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENTS—ALIMONY AND SUIT MONEY.

A separation agreement between a husband and wife, whereby the wife accepted certain property in full of all her interest and rights in the husband's estate, and agreed that in the event of any divorce proceedings she would make no claim for temporary alimony or alimony in gross, so far as it precluded her from asking suit money in an action by the husband for divorce, was void, as a contract not to defend a divorce suit or a contract which will result in facilitating a divorce is against public policy, and unless she was put in a situation where she could defend the suit it could not be determined whether she received sufficient property to enable her to defend the suit, while, even if she did, her circumstances might have subsequently changed, especially where under the agreement part of the land given to the wife had reverted to the husband upon the children attaining maturity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1048-1053; Dec. Dig. § 278.\*]

Appeal from Circuit Court, Putnam County; G. W. Wanamaker, Judge.

Action by Grant Banner against Mary B. Banner. From a judgment granting an allowance of suit money to the defendant, plaintiff appeals. Affirmed.

N. A. Franklin, of Unionville, for appellant. J. C. McKinley, of Unionville, for respondent.

TRIMBLE, J. A wife, on being sued for divorce, filed a motion for alimony pendente lite. Some years prior to the institution of the suit the wedded pair had separated, and, under a written contract entered into at that time, the wife accepted certain property in full of all her interest and rights in the then present and future estate of her husband. Said contract contained this further provision:

"And in the event of any divorce proceedings said Mary Bell Banner is to make no claim for either temporary alimony or alimony in gross."

Upon the filing of the wife's motion for alimony, the plaintiff husband set up the foregoing contract, and also set up that in 1913 the wife had brought a suit in equity to set the contract aside for fraud, in which suit she was unsuccessful, and the contract and this judgment were pleaded in bar of her motion for alimony. The trial court refused to allow anything for maintenance, but did allow the sum of \$100 for attorney fees and expenses of defending the divorce suit. The husband has appealed.

The motion for alimony alleged that defendant (the wife) has a meritorious defense; that she is without means to defend the suit; that her husband is worth \$15,000; that her witnesses live in St. Joseph and in Sullivan county (more than 40 miles from the place of trial, which is in Putnam county); that she needs \$300 for attorney's fees and for the proper preparation of her defense, and \$700 for her own maintenance during the suit.

The separation contract relied upon by the husband to bar the wife's right to suit money is dated September 11, 1909, and recites that the parties, being unable to live together, have mutually agreed to adjust and settle their property rights in all property now owned by them or held at any future time. Under it the wife got the use of 59 acres of land until the youngest child should become of age, when 40 acres of it should then revert to the husband, and he would then quitclaim to his wife the other 19 acres to be held by her for life with remainder to him should he survive her; if not, then to his children. At the time of making this quitclaim deed, he was to give her \$500 provided she fed, clothed, and cared for their two minor children until they reached their majority. In addition to the above, the wife was to have one mare and her colt, two cows, three head of hogs, 100 bushels of corn, and some stalkfield and pasture. The husband also agreed to pay \$37.50 worth of debts which the wife had incurred. Whether this contract was carried out or not we do not know. We presume, however, that it was. The husband's petition for divorce (which was filed March 20, 1914) alleges that the children are all now of age. There is no attempt to defeat alimony on the ground that as the wife has received a reasonable and fair proportion of her husband's property she is not entitled to any further allowance, nor is it claimed that she is able financially at this time to defend the suit. The sole point is that the above-quoted clause in the contract bars her from any right to suit money.

[1, 2] Agreements in the nature of post-nuptial settlements, having no element of fraud in them, are upheld by the courts. 21 Cyc. 1254. So, also, are agreements for separation and separate maintenance, if made in prospect of an immediate separation, and are reasonable, fair, and voluntary. 9 Cyc. 519; 21 Cyc. 1592; *Roberts v. Hardy*, 89 Mo. App. 86; *Fisher v. Clopton*, 110 Mo. App. loc. cit. 667, 85 S. W. 623. And it is also true that, where a reasonable provision is made in a deed of separation for the wife's separate maintenance, she is estopped from suing for further support. She cannot as a rule accept one provision in a contract of separation and separate maintenance and repudiate another. *State ex rel. Giroux v. Giroux*, 19 Mont. 149, 47 Pac. 798; 21 Cyc. 1595;

*Bailey v. Dillon*, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427; *Patton v. Patton* (N. J. Ch.) 58 Atl. 1019. The trial court therefore gave effect to the contract herein when it refused to allow the wife anything further in the way of maintenance. But an allowance for the defense of the suit stands, we think, upon a different footing. A contract not to defend a divorce suit is void as against public policy. 2 Bishop on Mar. Div. & Sepr. § 702. So, also, is a clause in a contract which will result in facilitating a divorce. *Phillips v. Thorp*, 10 Or. 494; *Shirk v. Shirk*, 75 Mo. App. 578. The public is a silent party to the marriage contract, and the parties thereto are without authority to enter into a contract which will bind the public. 2 Bishop on Mar. Div. & Sepr. § 703.

[3, 4] We do not mean to say that a husband may not make with his wife a valid settlement of the property rights obtained under the marriage, nor that, if he does so, and she is thereby put in possession of a fair and reasonable proportion of his property, and is thereby financially able to defend a suit for divorce brought by him, an agreement therein on her part that such settlement shall cover and include alimony in full will render such settlement null and void. It is not as to alimony for maintenance and support. But an agreement not to make a claim for suit money is an agreement that she will not ask the court to put her in a situation where she can defend the suit. And unless she admits having received sufficient property from her husband, how is the court to know that the husband's claim that he has fully paid her is true, if she is not provided with sufficient funds to contest his claims? So that to hold that a clause in a contract agreeing not to claim alimony for suit money can be enforced so as to bar her therefrom would be to preclude her from contesting the alleged fact of such contract.

But suppose the contract and the wife's reception of property thereunder is admitted; then, even though it be true, as claimed by plaintiff, that a wife who has, under a settlement, received a fair share of her husband's property and is thereby at that time financially able to defend a divorce suit, ought not to be given suit money when she has agreed that the amount received by her shall be in full of such claims, yet this agreement ought not to be binding upon the court without regard to the wife's circumstances at the time suit is brought. An agreement to make no claim for money with which to defend the suit, even if good at the time, cannot bind the indefinite future. If such an agreement be given force without regard to its real effect upon the trial of the divorce suit, then it is, in reality, an agreement not to defend the suit, or at least tends to facilitate the obtaining of a divorce, since it certainly shuts out opportunity for defense in those cases where there is delay in bringing

the suit, and, on account of misfortune occurring in the meantime, the party agreeing to make no claim is rendered financially unable to defend. When this is the case, surely the clause agreeing not to ask for suit money ought not to be given effect. In the interest of the public, the trial court ought not to be bound by any such agreement, but should be left free to allow such suit money as will enable a proper defense to be made to the end that the marriage tie shall not be lightly dissolved. In the case at bar the agreement to make no claim for suit money was made in 1908. Suit for divorce was not brought until 1914. In the meantime the wife has reared the children to maturity and 40 acres of the land she was using has reverted to the husband to be enjoyed by him along with his other lands. If now, after the lapse of these years and after the expense of rearing the children has been paid, the wife is financially unable to defend the suit, then the clause saying she will make no claim for funds with which to make such defense, if absolute and binding, becomes a contract tending to facilitate the husband's divorce, since it prevents the wife from making a defense. To this extent it is void as against public policy. The clause relied upon by the husband as a bar to her claim for suit money is therefore without effect.

The judgment is affirmed. All concur.

#### BROWN v. BARR. (No. 11277.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

##### 1. ASSAULT AND BATTERY (§ 35\*)—ACTION—EVIDENCE—SUFFICIENCY.

In an action for damages for an assault committed by defendant's son, evidence held to show that defendant aided, abetted, and encouraged his son in committing the assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.\*]

##### 2. ASSAULT AND BATTERY (§ 18\*)—LIABILITY—"PRINCIPAL."

One who is present aiding and abetting another who actually commits an assault is as much a "principal" as the actual assailant.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 17, 18; Dec. Dig. § 18.\*]

For other definitions, see Words and Phrases, First and Second Series, Principal.]

##### 3. ASSAULT AND BATTERY (§ 24\*)—DEFENSES—PLEADING.

The defense of son assault demesne is an affirmative one, and, unless especially pleaded in the answer will be deemed waived. Hence, where not set up in the answer, the question whether the defendant in an assault case acted in self-defense need not be submitted.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 25-31, 35; Dec. Dig. § 24.\*]

##### 4. DAMAGES (§ 216\*)—INSTRUCTIONS—SUFFICIENCY.

An instruction on the measure of damages in an action for an assault, which employed the term "liable to suffer" in connection with

the future consequences of the injury, is not bad.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

##### 5. TRIAL (§ 139\*)—JURY QUESTIONS—PEREMPTORY INSTRUCTIONS.

Where there was no substantial evidence to support defendant's counterclaim, the direction of a verdict for plaintiff on the counterclaim is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

##### 6. APPEAL AND ERROR (§ 261\*) — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where not excepted to below, improper argument of counsel cannot be taken advantage of on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 261.\*]

##### 7. TRIAL (§ 415\*)—WAIVER OF ERROR—ARGUMENT OF COUNSEL.

Where the court, after rebuking plaintiff's counsel for improper argument, asked defendant's counsel if he was satisfied, and defendant's counsel said that he was, defendant cannot complain of the improper argument on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 971; Dec. Dig. § 415.\*]

Appeal from Circuit Court, Ray County; F. P. Divebliss, Judge.

Action by Welsh Brown against I. N. Barr, who counterclaimed. From a judgment for plaintiff, defendant appeals. Affirmed.

Garner, Clark & Garner, of Richmond, and M. J. Kilroy, of Kansas City, for appellant. John A. Cross & Sons, of Lathrop, and J. L. Farris, Jr., & Sons, of Richmond, for respondent.

JOHNSON, J. Plaintiff instituted this suit in the circuit court of Clinton county against I. N. Barr and Fred Barr to recover actual and exemplary damages for an assault on plaintiff committed by defendant Fred, who is the son of his codefendant. The petition charged I. N. Barr, who was present at the alleged assault, "with wrongfully, unlawfully, and knowingly aiding, abetting, and encouraging and directing him, the said Fred Barr, in the wrongful, unlawful, and intentional assaulting, shooting, wounding, and injuring of plaintiff," etc. Summons was issued against both defendants and served on I. N. Barr but returned "non est" as to Fred. Thereafter the action was prosecuted against I. N. Barr as the sole defendant. An answer in the nature of a general denial was filed, and, in addition to answering, defendant filed a counterclaim in which he sought to recover damages for an assault he alleged plaintiff committed upon him. The cause was tried in Ray county on change of venue and resulted in a verdict and judgment for plaintiff for \$2,000 actual and \$500 exemplary damages and against defendant on his counterclaim. Defendant appealed.

The parties are farmers living near Lathrop in Clinton county. The alleged assault

occurred on a part of defendant's farm occupied by his son Fred as his tenant and at the barn, which was about 200 feet from the house. The home of defendant was half a mile distant, and defendant was there at the time of the beginning of the dispute which culminated in the assault. Frank P. Brown, the father of plaintiff, had bought some corn at a public sale held by defendant. The corn was in Fred's barn, which contained another bin of corn owned by Fred. Brown, his son Welsh (the plaintiff), and a farm hand named Asbury, began hauling the corn to Brown's farm, using two teams and wagons for that purpose. While loading one of the wagons, Brown the elder and Fred Barr had a dispute over the corn in the other bin. According to Brown's testimony, he offered to buy the corn and Fred refused to sell. He then remarked to Fred that he had tried to buy the corn from Fred's father at the sale, but he had declined to sell it on the ground that "Fred didn't want him to sell it." Fred answered, "I don't believe that you ever bought it, or tried to buy it, or he offered to sell it." Brown replied, "Yes, I did"; and Fred retorted, "You are a liar about it." Brown then said that Fred could keep his corn, that he did not like to be called a liar, but did not want any trouble. Fred went to the house and returned in a few moments with a shotgun. Brown said, "What are you going to do with your gun?" and he said, "I didn't mean no trouble, I was just going to my father," and he broke it open and showed there were no shells in it, and Brown said, "That's all right, of course; but it looked kind of funny coming with your gun."

Fred's version of the dispute with Brown, senior, is entirely different. He states the first thing the Browns did after coming for the corn was to throw open the barn doors allowing a sow to escape and then to run their wagon over the shafts of a buggy and break them. We shall relate what followed in the words of the witness:

"I went after the sow—she had got partly over towards my father, and drug her back, and when I drug her into the barn to shut the doors again, Frank Brown says: 'Oh, you ——! That's another one you stuffed in, and that's the reason your stuff didn't sell any better.' I never answered back. I never bid on a single thing, and he said, 'That's no good, your word's no good, and your damned old daddy is the same way;' and I turned to start away to the house where my sister was, and I had turned, and he said: 'We will be down to get the other corn to-morrow;' and I said, 'What corn?' and he said: 'That other corn; I bought that from your damned old father yesterday, and I am going to send down here to-morrow and get it.' And I disputed his word, and said he didn't buy it, and he called me vile names all the time, and I ran through the gate into the house, and, when I ran through the door into the kitchen, Frank Brown was almost ready to come in the door when I picked up the shotgun, and he said: 'Run! He's got the shotgun.' And Welsh was standing there with something in his hand which we afterwards found was a piece of an old scythe blade, and they ran back to the barn, and

he said: 'What do you mean coming down here with an old shotgun. You need not bring it around here without you using it or I use it.' And I opened it up and showed them it wasn't loaded, and I said, 'I am going to my father and tell him,' etc.

Fred, who carried loaded shells in his pocket, then proceeded to his father's house, and he and his father returned to the scene of the dispute in a wagon, bringing the shotgun back with them. In the meantime Brown, senior, had departed with a load leaving plaintiff and Asbury loading the second wagon. The parties disagree about what then occurred. Plaintiff and Asbury say that when the Barrs drove up in their wagon Fred called three times, "Brown! Come out here;" and, receiving no answer, he and his father entered the barn, the young man saying, "We are looking for trouble;" to which the old man added, "Yes, and we are going to have trouble." Plaintiff replied that he did not want any trouble. Fred approached, loading the gun. Plaintiff jumped forward, grasped the gun, and a struggle ensued for its possession which ended in a victory for plaintiff, who wrested the gun, now loaded, from his adversary and threw it under the wagon. While this was going on, Asbury was keeping the old man in check. Deprived of his gun, Fred ran to a nearby wood pile, snatched up an ax, and returned to the charge. Plaintiff fled for the gate at top speed, and Fred, on a suggestion from his father, regained the abandoned gun and, spurred on by his father, who yelled, "Shoot him, damn him! Shoot him!" fired a shot at his fleeing enemy, who was from 75 to 100 feet away. The gun was loaded with No. 6 birdshot, and a great number of them penetrated the back of plaintiff's left leg at and in the vicinity of the kneejoint. In corroboration of plaintiff's assertion that he was shot in the back, the testimony of Asbury, of the doctor who treated plaintiff, and the disclosures of a skiagraph of the wounded leg, show beyond question that the shot struck the back of the leg and, of course, came from behind.

From the evidence of defendant it appears that, on the return of Fred with his father, he inquired for Brown, senior, and plaintiff replied that his father had departed but, "By God! I fight his battles." Fred answered that they were not there to fight, "but I want to see what he meant by taking my corn." He then set his gun down, leaning it against the barn until the elder Brown appeared for another load. Finally, plaintiff, seizing a favorable opportunity, ran in, grabbed the gun, and, clubbing it, dealt Fred a blow which knocked him senseless for a moment. At the same time Asbury grabbed Barr, senior, from behind, and held him fast with his arms pinioned to his sides. Plaintiff dropped the gun, ran for the ax, and returned with it to assault Barr, senior, who was still being held fast by Asbury.

Fred recaptured the gun, loaded it, and, as plaintiff charged on his father with the ax, fired the shot which ended the battle.

[1, 2] None of the parties is fair in his testimony. There is evasion and palpable misstatement in the testimony of all the participants and eyewitnesses, but the controlling facts upon which the jury manifestly based their verdict are so well established as to be incontrovertible. Whatever the cause of the quarrel, the return of young Barr and his father with a shotgun and the means of quickly loading it was an offensive movement which proclaims that they came with hostile intent and were bent upon having their own way at all hazards, and, with the fact indisputably established that the shot must have been fired while plaintiff was running away, the defense of justification offered in the evidence, but not pleaded in the answer, is so completely swept away by the master facts we have mentioned that the jury could not well have done otherwise than to find as they did that an unjustifiable assault was made by young Barr upon plaintiff. And further we find ample evidence to support the finding of the jury that defendant urged his son to the assault. The rule is well settled that one who is present, aiding, and abetting another who commits an assault, is as much a principal as he who strikes the blow or fires the shot. *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 290; *Gray v. McDonald*, 104 Mo. 303, 18 S. W. 398; *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329; *State v. Johnson*, 111 Mo. 578, 20 S. W. 302; *State v. Valle*, 164 Mo. 539, 65 S. W. 232; *Willi v. Lucas*, 110 Mo. 219, 19 S. W. 726, 33 Am. St. Rep. 436; *Brouster v. Fox*, 117 Mo. App. 711, 93 S. W. 318; *Schafer v. Ostmann*, 172 Mo. App. loc. cit. 610, 155 S. W. 1102.

[3] All persons who wrongfully aid in the commission of a trespass are liable as principals, and each is liable to the extent of the resultant injury. *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283. But defendant argues that the instruction given at the request of plaintiff which assumed to cover the whole case was erroneous, in that it ignored the defense of justification, i. e., that the assault was delivered in the necessary defense of defendant whose life was in jeopardy. The defense of son assault demeane is an affirmative defense, which if not specially pleaded in the answer will be deemed waived. It cannot be raised under a general denial. *O'Leary v. Rowan*, 31 Mo. 117; *Sloan v. Speaker*, 63 Mo. App. 321. And since it was not specially pleaded in the answer, the instruction under consideration should not be condemned for ignoring it.

[4, 5] The objection to plaintiff's instruction on the measure of damages, which employed the term "liable to suffer" in referring to future consequences of the injury, is fully

answered in the opinion in *Dean v. Railroad*, 199 Mo. 386, 97 S. W. 910, where the use of the word "may" in a similar connection is held not to be reversible error. The court did not err, as defendant insists, in peremptorily directing a verdict for plaintiff on the counterclaim, since there is no substantial evidence in the record to support the cause pleaded therein.

[6, 7] The point that counsel for plaintiff made improper and prejudicial remarks in his argument to the jury cannot be considered for the reason that no exception thereto is preserved in the record. The rule is that such objection will not be considered in the appellate court unless an exception is duly taken at the time and is preserved in the record. *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461. Moreover, it appears from an additional abstract of the record brought here by plaintiff that the court rebuked the offending counsel, inquired of counsel for defendant "if the rebuke of the court was satisfactory," and was informed that it was. We do not understand why defendant should now complain of a ruling which he not only allowed to pass unchallenged by an exception but to which he gave express approval.

The judgment is affirmed. All concur.

#### IASER v. NELSON. (No. 11040.)

(Kansas City Court of Appeals. Missouri. Nov. 23, 1914.)

##### 1. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Where there is evidence to sustain the claim of each party to the action, the verdict of the jury is final, unless there is some error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

##### 2. APPEAL AND ERROR (§ 981\*)—NEW TRIAL (§ 99\*)—REVIEW—DISCRETION OF COURT—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A motion for a new trial on the ground of newly discovered evidence is largely addressed to the discretion of the trial court, and its ruling will not be reviewed, unless there was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981; New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.\*]

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by Jacob Iaser against David Nelson. Judgment for plaintiff, and defendant appeals. Affirmed.

Cooley & Murrell, of Kirksville, for appellant. J. M. McCall, of Kirksville, for respondent.

ELLISON, P. J. Plaintiff's action is for the price of certain personal property sold to defendant. He obtained judgment in the circuit court.

[1] The record shows that plaintiff sold his farm and crop and also some personal prop-

erty. The principal question was whether the sale of the personal property was a part of the sale of the farm and crop for a lump price for all. Plaintiff claims it was not; that the sale of the personal property was separate at an agreed price. There was evidence tending to support the claim of each, and we must accept the verdict of the jury as final, unless defendant's suggestion that there was error in plaintiff's instructions is found to be correct. We think there was not. They do not assume any of the issues as they developed in the trial. The sale of the property was admitted. The only controversy was whether it had been paid for, and this involved collateral matters so connected with the transaction as to be relevant. But the question all along was not whether there was a sale but whether there was payment. It would be altogether unreasonable to suppose that the jury was misled or did not understand the issue.

[2] Defendant insists that his motion for new trial should have been sustained on the ground of newly discovered evidence. This was alleged to have been learned from two witnesses, each of whom, it was claimed, would testify to matters sustaining defendant's theory of the sale and payment. Counter affidavits as to the knowledge of these witnesses and what their testimony would amount to were filed. The trial court heard the application, considered the question of diligence, and concluded no case was made on the motion which would justify a new trial, and hence denied it. Much must be left to the discretion of the trial court, but of course there must not be an abuse of it.

We have gone through the affidavits, the additional matter sent up from the original papers on file with the circuit clerk, and have concluded that we are without cause justifying an interference, and hence affirm the judgment. All concur.

#### HEARTSELL v. BILLOW. (No. 10856.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

#### MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—INJURY FROM AUTOMOBILE—QUESTION FOR JURY.

In an action for damages from being hit by defendant's automobile on the streets of a town, brought under Rev. St. 1909, §§ 8519, 8523, providing that automobiles shall not be driven in towns in turning a corner of intersecting streets, where the view is obstructed, at more than six miles an hour, *held*, on the evidence, that defendant's negligence in turning a corner and plaintiff's contributory negligence in the emergency, were for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

Appeal from Circuit Court, Carroll County; Frank P. Divilbiss, Judge.

Action by Garret Heartsell against M. D.

Bilow. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Conkling, of Carrollton, for appellant. Busby Bros. & Withers, of Carrollton, for respondent.

ELLISON, P. J. Plaintiff's action is for damages alleged to have resulted to him by reason of defendant running an automobile onto him in one of the streets of the town of De Witt. The judgment in the trial court was for the plaintiff in the sum of \$50.

The sole error alleged is the refusal of the trial court to sustain defendant's demurrer to the evidence, on the ground that it was not sufficient to authorize the jury to return a verdict for plaintiff. The case is bottomed on sections 8519 and 8523, R. S. 1909, wherein it is provided that in any part of towns and villages automobiles shall not be driven at a greater rate of speed than 10 miles per hour, and that in turning a corner of intersecting roads or streets where the view is obstructed the speed shall not exceed a rate of 6 miles an hour.

There was evidence tending to show that plaintiff was standing in Main street, talking with an acquaintance, when defendant, driving an automobile, turned the corner of Fourth and Main streets, where an embankment obstructs the view, going at a rate of speed of more than 6 miles per hour. This testimony further tended to show that the speed continued into Main street of more than 10 miles per hour, one or more stating it was 15 or 20 miles. Plaintiff was standing about 45 feet from the corner at Fourth street, and defendant could have seen him that distance. No horn was sounded. Plaintiff, on hearing some one call, looked and saw the approach of the machine. He started to get out of the way, when, after taking a step or two, he saw the machine was coming upon him and started the other way; but plaintiff swerved the machine and struck him.

As the case stands, we need not undertake to weigh the evidence, nor to make distinctions between that for plaintiff and for defendant. It seems clear that, considering the tendency of the evidence in plaintiff's behalf and all legitimate inferences to be drawn therefrom, a case was made for the jury. The jury was authorized to find that defendant had violated the statute in running his machine around the corner and onto Main street, and that he was guilty of negligence which resulted in running onto plaintiff. *Fink v. Railway Co.*, 161 Mo. App. 314, 143 S. W. 568; *Hodges v. Chambers*, 171 Mo. App. 563, 154 S. W. 429.

We do not think the evidence showed plaintiff to be guilty of contributory negligence as a matter of law. It is quite true that he might have avoided the machine by stepping in a different direction, and that he erred

in judgment when he altered his course of escape. But he was in peril through the negligence of defendant, and that his effort to avoid being struck was a mistaken one should not condemn him as a matter of law. *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972; *Hodges v. Chambers*, *supra*.

We are without authority to disturb the verdict, and hence affirm the judgment. All concur.

**RITTMAN v. MISSOURI PAC. RY. CO.**  
(No. 11313.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

**1. CARRIERS (§ 206\*)—CARRIAGE OF LIVE STOCK—FAILURE TO DELIVER CARS—DEFENSES.**

Where a carrier failed to furnish cars for a shipment of cattle, although its agent who was informed of the proposed shipment stated the cars would be ready, an action for damages for injuries to the cattle by reason of the delay is based, not upon any verbal contract, but upon the carrier's common-law duty, and a subsequent contract of shipment after arrival of the cars waiving damages for breach of any verbal contract will not defeat the action.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 916, 917; Dec. Dig. § 206.\*]

**2. CARRIERS (§ 206\*)—DUTY TO TRANSPORT GOODS—NEGLIGENCE.**

The fact that defendant's servants abandoned a train in Central Missouri because of the cold, and for that reason cars for the transportation of plaintiff's fat cattle were not furnished, shows negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 916, 917; Dec. Dig. § 206.\*]

Appeal from Circuit Court, Johnson County; A. A. Whitsett, Judge.

Action by Edward Rittman against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Green, of St. Louis, and Scott & Bowker, of Nevada, Mo., for appellant. Nick M. Bradley and M. D. Aber, both of Warrensburg, for respondent.

ELLISON, P. J. Defendant is a common carrier of freight from Centerville, Mo., to Kansas City, Kan. Plaintiff's action is for damages occasioned by defendant failing to furnish him cars and transport 35 head of fat cattle to the market at the latter place. He recovered judgment in the circuit court. Plaintiff's petition alleged a failure on defendant's part to furnish cars and to transport the cattle, as and when it was in duty bound to do. And that afterwards, on the next day, cars were furnished and the cattle transported to destination, but the delay injured the cattle by exposing them over night to severely inclement weather and they arrived at destination in a damaged condition. The answer was that the shipment was interstate and a general denial, with the further plea that there was a written contract of shipment, setting up many of its provisions

whereby plaintiff agreed to waive all damages arising out of any previous verbal contract, and whereby he agreed to give written notice of any claim for damage arising out of the contract within one day after delivery of the stock at destination, and whereby he further agreed that any action to which he thought himself entitled should be instituted within six months. It was then alleged that these provisions were not complied with by plaintiff. There was also an allegation that the shipment was interstate, and that this contract, limiting liability, was approved by the Interstate Commerce Commission. Plaintiff filed, and the court sustained, a motion to strike out all the answer concerning the written contract limiting liability, and as to the Interstate Commerce Commission. The defendant then went to trial on that part of the answer remaining, which was principally a general denial.

[1] The ground upon which the motion was sustained was that the petition declared on a carrier's common-law duty to carry, and not on a verbal contract, and that therefore the written contract afterwards executed did not relate, in any way, to the violated duty of defendant as a carrier; that that part of the answer was not responsive and did not constitute any defense under the following cases: *Baker v. Railroad*, 145 Mo. App. 189, 129 S. W. 436; *Bratton v. Railroad*, 167 Mo. App. 75, 150 S. W. 1124; *Vivion v. Railroad*, 172 Mo. App. 352, 157 S. W. 971. In answer to this the defendant insists that plaintiff's petition declares on a verbal contract to furnish the cars and transport. We do not think so. In order to bring about a breach of the common-law duty of a carrier to transport freight, there must be, of course, some request for a performance of that duty and a refusal or failure, on the part of the carrier, and that is what plaintiff alleged. It is true that in order to show how such refusal caused the damage he alleged, in effect, that, when he requested performance, defendant's agent asserted, and in consequence, relying upon such performance of duty, he exposed his cattle in the unsheltered stock pens.

[2] Defendant next insists that there was no evidence in the cause to show that the failure to transport the stock was through its fault, or by reason of its negligence in delay, or otherwise. We think there was. The cause was submitted to the trial court on an agreed statement of facts, which contained the following:

"That plaintiff would testify that defendant's said general agent told him the reason the train did not come on January 3, 1911 (the day the shipment was to be made), was that defendant's servants abandoned it that afternoon because of the cold."

We think that was competent evidence, and that it shows a reason for failure to take the cattle which is not a legal excuse. If a carrier may, through its agents and servants,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

abandon its duty "because of the cold" in this climate, the service of a common carrier would become too uncertain for all practical purposes.

The judgment is affirmed. All concur.

ALLEN v. LEACH et al. (No. 11298.)  
(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

MASTER AND SERVANT (§ 179\*)—INJURIES TO  
SERVANT—NEGLIGENCE OF FELLOW SERV-  
ANT—STATUTE.

Rev. St. 1909, § 5440, providing that every person operating a mine producing coal or other mineral shall be liable for damages sustained by a servant while engaged in operating such mine by reason of the negligence of any other servant, does not apply where the servant was injured while he and another were sinking a prospect hole on defendant's land in a search for coal which had not yet been found, and which in fact never was found.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

Appeal from Circuit Court, Cole County;  
J. G. Slate, Judge.

Action by Nancy Allen against George H. Leach and another. Judgment for plaintiff, and defendants appeal. Reversed.

Irwin & Peters, of Jefferson City, for appellants. Pope & Lohman, of Jefferson City, for respondent.

TRIMBLE, J. Respondent sued to recover damages for the alleged negligent death of her husband. The petition charges that deceased was in the employ of appellants engaged in operating a mine producing coal and other minerals, and that while in such employ her husband was killed by the negligence of a fellow servant working with him in the common service of appellants.

In order to escape the effect of the common-law fellow-servant doctrine, respondent relies upon section 5440, R. S. Mo. 1909, which provides that:

"Every person, company or corporation operating a mine or mines in this state producing lead, zinc, coal or other valuable minerals, shall be liable for all damages sustained by any agent or servant thereof while engaged in operating such mine or mines, by reason of the negligence of any other agent or servant thereof."

This abolishes the fellow-servant law as to every employer coming within its terms. The controlling question in the case is as to the applicability of that statute to this case.

Deceased and one Elias Wilhite were employed by appellants to sink a hole on their land in the work of prospecting for coal. In prosecuting this work the two had sunk a hole about 20 feet in depth. On the day deceased was killed he was engaged in digging up the earth at the bottom of this hole and putting it in a large tub, which when filled would be hoisted to the top by his fellow-servant Wilhite by means of a rope and wind-

lass. This rope was attached to the bail of the tub by means of a "pigtail" hoop, so called because in form it suggested a pig's tail, the end or point of the hook curving over to the lower part or bend thereof. When the tub reached the top it was Wilhite's duty to secure the tub and, after disengaging it from the hook, to empty the tub and then rehook it to the rope and, after warning the man below, to lower the tub to the bottom. On the day in question Wilhite had emptied the tub and rehooked it to the rope and, after giving the warning, was lowering the tub to the bottom, when in some way the bail of the tub came off the hook and the tub fell, striking respondent's husband upon the head and killing him.

As said before, the controlling question is whether section 5440 applies to the facts of this case. Appellants were not miners nor mine operators. They had an interest in and controlled certain land, and, desiring to seek for coal thereunder, employed the two men to sink the hole in question. Several other holes of varying depths had been sunk elsewhere upon this land, but without success in finding a mine. The hole in which the accident occurred was only about 20 feet in depth, and no coal had been found therein, nor was any ever found thereafter. In other words, appellants were not "operating a mine producing coal or other minerals" as specified and required in the statute. They were merely looking for a coal mine, but had not found it, and never did find one. The wording of the statute is peculiar. It does not say "every person engaged in mining or in mining operations," but "every person operating a mine or mines producing lead, zinc, coal or other valuable minerals," etc. And throughout the act such person is referred to as "so operating such mine or mines." The language used in the act is so precise in its meaning that the Legislature must be held to have clearly intended that the act should apply only to cases where there was an actual mine, and not to the mere efforts of a landowner to hunt for a mine. There was no difference between the work being done in this case and the sinking of an ordinary well by a farmer, except the purpose existing in the mind of the one having the work done. If the Legislature had intended the act to apply to a case of this kind, it would doubtless have used more comprehensive language. It is well within reason that the lawmaking power thought it wise to restrict the scope of the act to a mine after it has been found, rather than to include in its terms the mere work of prospecting or looking for a mine. The dangers to life and limb arising from the operation of a mine where many persons are likely to be engaged and in which the safety of all depends upon the care of each was the thing the Legislature had in mind in enacting the statute. We do not say that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

when a mine has been found and opened, minerals must be actually in process of being derived therefrom before it will come within the terms of the statute. But we do say that, in view of the wording of the statute, it does not apply to a state of facts such as is presented in the case at bar. This holding necessarily goes to the vitals of the case. Consequently it is unnecessary to pass upon the interesting question of whether there was any evidence whatever of negligence upon the part of the fellow servant.

The judgment is reversed. All concur.

#### STATE v. STEEL. (No. 11321.)

(Kansas City Court of Appeals. Missouri.  
Nov. 2, 1914. Rehearing Denied  
Nov. 23, 1914.)

#### 1. INDICTMENT AND INFORMATION (§ 57\*)—SUFFICIENCY—TIME OF OFFENSE.

Where one of the counts, in an indictment for unlawfully issuing prescriptions for whisky, stated the date of the prescription as several days after the date on which it was filled, and another stated the date as after the date of the indictment, but each count was confined to a specific offense in issuing a prescription to a named individual, the defect was cured by Rev. St. 1909, § 5115, providing that the failure to state the time of an offense or stating it imperfectly or on an impossible date do not impair the validity of the indictment, where time is not of the essence of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 177-179; Dec. Dig. § 57.\*]

#### 2. CRIMINAL LAW (§ 823\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Error in an instruction in a prosecution for issuing a prescription for whisky for other than medicinal purposes, which might be construed to permit a conviction if the jury found that the person who received the prescription intended to use it as a beverage, although defendant had no such intent in issuing it, was cured by an instruction which directed the jury to acquit if they found that defendant acted in good faith in prescribing the whisky as a medicine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

C. L. Steel was convicted of issuing prescriptions for whisky to be used for other than medicinal purposes, and he appeals. Affirmed.

J. B. Journey and A. J. King, both of Nevada, Mo., for appellant. J. M. Hull, of Nevada, Mo., for the State.

ELLISON, P. J. Defendant was indicted in three counts for issuing prescriptions for whisky to be used for other than medicinal purposes. The third count was abandoned, and a conviction had on the first and second.

[1] The first count charged the prescription was issued to J. C. Clark the 28th of September, 1913, while the prescription in

evidence was dated the 20th of September, 1913. Defendant insists that the indictment fatally contradicts itself in that it charges a prescription issued on the 28th which was filled on the 20th.

The second count charges a prescription was issued to one C. S. Brown on the 19th of October, 1913, and filled on that date, and yet the indictment was returned into court several days before that date, viz., October 11th.

These objections are cured by the statute (section 5115, R. S. 1909) that no imperfection shall affect an indictment for the following reasons:

"\* \* \* Fourth. \* \* \* For omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly; nor for stating the offense to have been committed on a day subsequent to the finding of the indictment or information, or an impossible day, or on a day that never happened."

Hence the state could show any time within a year prior to the indictment.

It is true that in certain instances a certain time may be of the highest importance, as when one is charged with several distinct like offenses committed at different times. In such case, in order to avoid two or more convictions for one offense, the time of each should be shown in evidence. *State v. Brotzer*, 245 Mo. 499, 150 S. W. 1078; *State v. Wilson*, 39 Mo. App. 184. But in this case each count is confined to a specific offense in furnishing a prescription to a certain named individual; and, while the proof must sustain the allegation as to the individual, there is no reason why the statute should not apply in curing allegations as to the time.

[2] Criticism is made of the first and second of the state's instructions in that it is said they permit a conviction if the parties prescribed for were in bad faith, regardless of what the defendant intended or thought when he issued the prescriptions to them. The instructions, considered alone, do leave it doubtful whether the words that the liquor was "to be used otherwise than for medicinal purposes" should be applied to the parties in receiving the prescriptions or to the defendant in issuing them. But this is made plain in other instructions telling the jury that, though the prescriptions were obtained in order to get whisky to drink as a beverage, yet, if defendant acted in good faith in prescribing it as a medicine, he was not guilty. The instructions, as a whole, show that the jury could not have been misled.

The only difficulty we have had in the case relates to the sufficiency of the evidence on the question of defendant's good faith to sustain a conviction. But considering the number and frequency and quantity of whisky prescribed, the parties to whom prescribed, and the nature of their ailments, we have

concluded there was sufficient to make a question for the jury.

The judgment is affirmed. All concur.

# LEBRECHT v. NELLIST. (No. 11022.)

(Kansas City Court of Appeals. Missouri. Nov. 2, 1914. On Rehearing Nov. 23, 1914. Motion to Transfer Denied Dec. 5, 1914.)

## 1. BILLS AND NOTES (§ 489\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE—APPLICABILITY TO PLEADING.

In an action upon a promissory note, where the defense is a total failure of consideration, evidence of a partial failure of consideration is admissible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.\*]

## 2. CORPORATIONS (§ 98\*)—STOCK—DELIVERY.

The placing of corporate stock in the name of defendant on the books of the corporation is not a complete delivery to him, but he is entitled to the actual delivery of the certificate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 436-443; Dec. Dig. § 98.\*]

## 3. APPEAL AND ERROR (§ 171\*)—QUESTIONS PRESENTED—THEORY IN LOWER COURT.

In an action on a renewal note, where plaintiff's contention at the trial was that a notation on the original note stated it was given for stock held as collateral, not for stock not yet delivered, as on the second note, he cannot, on appeal, contend that the notation was not binding on him, even if it was the same as on the second note.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1163; Dec. Dig. § 171.\*]

On Rehearing.

## 4. CORPORATIONS (§ 121\*)—SALE OF STOCK—RECOVERY OF PRICE.

In an action on a promissory note given for corporate stock which had never been delivered, plaintiff cannot recover without tendering the stock to defendant, or offering to deliver it into court, upon payment of the note, even though defendant had written plaintiff that he would not be able to pay the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by L. G. Lebrecht against C. P. Nellist. Judgment for defendant, and plaintiff appeals. Affirmed.

Hal R. Lebrecht and L. A. Laughlin, both of Kansas City, for appellant. Griffin & Orr, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is based on a promissory note for \$1,000. The judgment in the trial court was for the defendant. The note was given for purchase price of 1,000 shares of stock, which defendant claims were never delivered, and that therefore there was no consideration. The present note is a renewal of another of the same tenor, unless the difference is found in the notation found on it in these words:

"For 1,000 shares of the capital stock Las Vegas Irrigated Fruit Land Company, par value \$1 per share. Stock not yet delivered."

It is claimed by plaintiff that the notation on the original note was like this one, except that the closing words were:

"Stock held as collateral for the payment of this note."

If the notation on the original note was as claimed by plaintiff, then it is conceded the stock was delivered. The dispute was appropriately submitted to the jury, and we must accept the verdict on that head as conclusive as against the plaintiff.

[1] We pass, therefore, to the legal questions raised. The answer set up the defense that the note was given for stock in the Las Vegas Irrigated Fruit Land Company, and that such stock had never been delivered to defendant, and that the note was "wholly without consideration," and that plaintiff (and the bank for which he sued) knew it when they received the note. On the ground that the answer set up a total failure of consideration, plaintiff insists that a partial failure cannot be shown, and that, if it appears that there is any consideration, however slight, a judgment for plaintiff for the whole amount of the note must be rendered. But in *National Tube Co. v. Ice Machine Co.*, 201 Mo. 30, 59, 98 S. W. 620, and *Gamache v. Grimm*, 23 Mo. 38, the question was directly decided against plaintiff's view; the holding in those cases being that under a plea of total failure of consideration evidence of a partial failure may be heard.

[2] Plaintiff makes several objections to the action of the court at the trial and advances several theories, some of which are difficult to understand. We will therefore state our views, trusting in this way to dispose of the points made. The case is simple, and required only the application of the plainest rules in order to a proper disposition. The defense to the note was that it was given for stock in a corporation which had never been delivered, and it was therefore without consideration. The different ideas presented by plaintiff as to what the answer should and should not have alleged are not applicable to the facts of the case.

But plaintiff further insists that if the stock was placed in defendant's name on the books of the corporation that was sufficient, without delivering it to him, and his instruction to that effect was refused. He cites *White v. Salisbury*, 33 Mo. 150, which supports him. But that case was shown to be not in accord with the established rule in *Trust & Sav. Co. v. Home Lumber Co.*, 118 Mo. 447, 458, 24 S. W. 129, and it was said to be dictum by the Supreme Court (74 Mo. 77) in approving of the opinion of the St. Louis Court of Appeals in *Merchants' Bank v. Richards*, 6 Mo. App. loc. cit. 463. By these and other cases it is shown that a transfer and delivery of the certificate of stock is the ordinary mode of conveyance of such choses.

We therefore conclude that defendant was entitled to a delivery of stock certificates.

[3] Plaintiff finally insists that the notation in the note that it was given for stock not yet delivered was of no effect and should not have aided defendant in his defense. He bases this claim on the section 9974, R. S. 1909, reading as follows:

"An unqualified order or promise to pay is unconditional within the meaning of this chapter though coupled with: (1) An indication of a particular fund out of which reimbursements are to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or a promise to pay out of a particular fund is not unconditional."

We need not consider such question, from the fact that the theory of each party at the trial was that such notation was vital if it read as pleaded by defendant, but if it read as contended by plaintiff, that the stock was held as collateral for the note, then the defense of no delivery was not made out. Each party asked instructions on these theories, and it is too late to change on appeal; *Riggs v. Met. St. Ry. Co.*, 216 Mo. 304, 115 S. W. 969; *Fulwider v. Power Co.*, 216 Mo. 582, 116 S. W. 508. It is true that plaintiff asked a peremptory instruction; but the request for that instruction, as shown by the brief, was not on the ground of the noneffect of the notation, but on the theory of pleading a failure of consideration, which we have already discussed.

We are not impressed with what plaintiff has said about the answer in connection with a tender and the law applicable to cases of that nature.

On the whole record, it is manifest the judgment must be affirmed. All concur.

#### On Rehearing.

[4] On a rehearing of this cause plaintiff insists that he should not be prevented from recovering the amount of the note on account of not having tendered the stock for which the note was given. He says that defendant wrote certain letters stating that his financial situation was such that he could not pay the note, and that therefore a tender was useless and unnecessary. It is well understood that in certain instances, where it clearly appears that tender would be useless, it need not be made. But here plaintiff seems to have considered that defendant can pay and that he can be forced to pay, as the result of this action. The consideration for the note was certain stock, which has not been delivered. It cannot justly be supposed that defendant should be compelled to pay, or that a judgment should be rendered against him, absolute in terms, and yet he not get the property for the purchase price of which the note was given. Therefore, considering defendant wrote that he could not pay the note, it does not justify a suit or a judgment against him without at least tendering the stock into

court for him, to be turned over to him when he pays the money, either voluntarily or through execution. There should have been "profer in curia, and the securities brought into court." Hunt on Tender, § 515. Plaintiff has no right to collect the note, and yet hold to himself the consideration for which it was given. He should show that he was and is ready to deliver the stock when the money is paid. Hunt on Tender, § 469. Instead of that, when the answer set up the stock as the consideration for the note, and that it had not been delivered or tendered, he filed a reply of denial, without any excuse for non-tender, and without making profer in court.

We are satisfied the trial court rendered the only judgment which could have been properly rendered, and it is accordingly affirmed. All concur.

#### DUBOWSKY v. BINGGELI et al. (No. 11240.)

(Kansas City Court of Appeals. Missouri. Nov. 23, 1914.)

##### 1. PLEADING (§ 426\*)—MOTIONS—WAIVER.

Objections to a petition, as evidenced by motions, are waived by answering.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1425-1427; Dec. Dig. § 426.\*]

##### 2. PARTIES (§ 6\*) — PLAINTIFF — RIGHT TO MAINTAIN.

Where plaintiff was the party actually interested in the vacation of a release of a deed of trust given to another for her benefit, the fact that the instrument named such other person as the beneficiary, etc., will not preclude plaintiff from maintaining the action in her own name.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6, 7; Dec. Dig. § 6.\*]

##### 3. WITNESSES (§ 141\*)—COMPETENCY.

Plaintiff and another sister loaned their brother a sum of money upon his agreement to secure them by a deed of trust. The brother executed a deed of trust for the whole amount in the name of the husband of the sister. Upon payment of the debt due his wife and the brother's promise to pay plaintiff, the husband released the deed of trust. Held that, in an action to set aside the release of the deed of trust after the death of the brother, the sister's husband was competent to testify; it not appearing that he even discovered the fact that the deed of trust was for the whole amount until several months after its execution.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 576-579; Dec. Dig. § 141.\*]

##### 4. DEPOSITIONS (§ 90\*)—USE OR.

Where a witness is within the jurisdiction of the court, his deposition should not be used.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248-255, 258-260; Dec. Dig. § 90.\*]

##### 5. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR.

Where there was nothing in the alleged deposition which would have affected the judgment of the lower court, its rejection, though improper, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 6. TRUSTS (§ 63½\*)—ESTABLISHMENT—STATE-UTE OF FRAUDS.

Where plaintiff's brother, who borrowed from her as well as from another sister, agreeing to secure both by deeds of trust, executed only one deed of trust for the whole amount in the name of the sister's husband, plaintiff's right to set aside an improper release of the deed of trust and foreclose it cannot be affected by the statute of frauds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93; Dec. Dig. § 63½.\*]

### 7. LIMITATION OF ACTIONS (§ 48\*)—RUNNING OF STATUTE—ACCRUAL OF ACTIONS.

Where a note was executed in 1897, due in five years, limitations did not begin to run until its maturity, and hence an action begun in 1908 is not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 259-265, 351; Dec. Dig. § 48.\*]

### 8. LIMITATION OF ACTIONS (§ 73\*)—DISABILITY—MARRIED WOMAN.

The limitation statutes do not run as against a married woman.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 399-412; Dec. Dig. § 73.\*]

Appeal from Circuit Court, De Kalb County; A. D. Burnes, Judge.

Action by Rosie Dubowsky against Hannah Binggell, as administratrix, and others. From a judgment for plaintiff, defendants appealed to the Supreme Court, whence the cause was transferred to the Kansas City Court of Appeals (167 S. W. 999). Affirmed.

William M. Fitch, of Jefferson City, for appellants. Peter J. Carolus and John E. Dolman, both of St. Joseph, for respondent.

ELLISON, P. J. This case was appealed to the Supreme Court and transferred from there here. The evidence shows that at the time of the inception of this controversy plaintiff resided in Ray county, Mo., and her sister Mrs. Stephen Ushler resided in St. Joseph in the same state. They had a brother named Chris Binggell, who wished to purchase a farm in De Kalb county and needed \$1,000 in money. Each of them loaned him \$500, and he was to execute a note to each for that sum, secured by a deed of trust on the land purchased. It seems that the notary in preparing the papers wrote one note and deed of trust, for the whole sum in the name of Stephen, though the latter did not notice this until near three months afterwards. Chris Binggell died leaving the defendant his widow and administratrix. Before Chris died, he paid to each of his sisters \$100 on the principal and all accrued interest, thus leaving a balance of \$400 due to each. Afterwards he desired to sell, and, conceiving the notion that he could make a better sale without an incumbrance on the land, he paid Stephen for his wife the balance of the money due her, but did not pay plaintiff any part of the balance due her. On the contrary, he persuaded Stephen to release the deed of trust in full, promising

to "take care of his sister," saying, "I would not cheat her out of a cent." Plaintiff did not know this was being done; she did not authorize it, nor did she ever ratify the act. She learned of it some time afterwards, and her brother Chris finally died, we may concede, without any intent to "cheat his sister," but without paying her. She brought the present action to cancel the release and to foreclose the deed of trust. She prevailed in the trial court.

We do not doubt that the judgment should be affirmed. The defense is largely technical, and this is perhaps excusable, for it is made in behalf of minor heirs of the deceased who were made parties to the action.

[1] First, the objections to the petition, as evidenced by the motions, were waived by answering. *Paddock v. Somes*, 102 Mo. 235, 14 S. W. 746, 10 L. R. A. 254; *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981; *Blanchard v. Dorman*, 236 Mo. 443, 139 S. W. 395; *Shuler v. Ry. Co.*, 87 Mo. App. 618.

[2] The petition and the evidence show plaintiff to be the party in interest, and, for that reason, she is undoubtedly qualified to maintain the action. It is of no consequence what term may be applied in description of plaintiff or Ushler; it is evident she has a cause of action on the facts.

[3] Stephen Ushler was a witness, and it is insisted that, as the contract was in his name and the other party is dead, he was incompetent. We think the objections not sound, for the reason that the testimony given by him concerning this plaintiff's loan was not a matter in which he, or his wife, had any concern. This plaintiff's loan was not made by Ushler as her agent. He had nothing to do with her interest in the transaction and, as to the loan being included in the note to his wife, he knew nothing about that for several months afterwards.

[4, 5] Defendant Hannah Binggell's deposition was taken by the plaintiff, and defendant offered it in evidence, when on objection it was excluded. It was objected to on the ground that the witness was within the jurisdiction of the court. We think it was properly excluded; but, even if it were not, it contains nothing which should have affected the judgment of the trial court.

[6] It is difficult to see upon what ground the statute of frauds is interposed by defendant. If it be true that the plaintiff loaned the sum in controversy to her brother at the same time that her sister loaned him an equal sum, and that he was to secure it by deed of trust and note, but, instead of executing the note to her separately, he joined the two amounts and executed one note for the aggregate, securing the one note in the deed of trust instead of two, she is entitled to relief; and there is no provision in the statute of frauds to avoid it.

[7, 8] Finally, the statute of limitations is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

set up by defendant in bar of relief. The note and deed of trust are dated the 20th of February, 1897, due in five years. This would start the ten-year statute of limitation in February, 1902; the limitation period not expiring until February, 1912, and the action was brought in August, 1908. Besides, plaintiff was a married woman when the note was given and continued under that disability until after the trial. *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843; *Lindell Est. Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368.

Other objections are not considered of sufficient importance to alter the conclusion that the judgment of the trial court was manifestly for the right party, and it is consequently affirmed. All concur.

### DANIELS v. McDANIELS. (No. 11246.)

(Kansas City Court of Appeals. Missouri. Nov. 23, 1914.)

#### 1. CONTRACTS (§ 324\*) — PERFORMANCE — ACTION FOR PRICE.

Where a contract has been fully performed, and nothing remains but payment of the price, plaintiff may sue on a quantum meruit; the recovery therein being limited to the contract price.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.\*]

#### 2. WORK AND LABOR (§ 9\*)—PERFORMANCE OF CONTRACT—RIGHT OF ACTION.

Where plaintiff's work and material in boring a well at defendant's request were of value, he could recover therefor, even though the boring was not shown to be of value to defendant.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 23-24; Dec. Dig. § 9.\*]

#### 3. APPEAL AND ERROR (§ 1067\*)—HARMLESS ERROR—INSTRUCTIONS.

In an action on a quantum meruit for boring a well, where the jury were told that, if plaintiff agreed to produce a completed well with a strong and lasting flow of water, he could not recover unless he did so, the refusal of defendant's instruction on its counterclaim was immaterial, in view of a verdict for plaintiff, where the jury must have found that the counterclaim was without any support.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by Fred Daniels against Robert McDaniels. Judgment for plaintiff, and defendant appeals. Affirmed.

John S. Boyer, of St. Joseph, and F. B. Ellis, of Plattsburg, for appellant. Louis V. Stigall, of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff bored a well for defendant, for which the latter refused to pay, whereupon this action was instituted by filing a petition in two counts—the first on a specific contract for the work under certain conditions and for a certain price, and the second on a quantum meruit. The judgment

in the trial court was for the plaintiff on the latter count.

There was evidence in plaintiff's behalf that he made a contract with defendant's father for boring a well on defendant's farm, and at the same time contracted with the father for boring a well on the latter's farm near by. There was evidence further tending to prove that plaintiff guaranteed a strong well of water, and that unless the boring produced such a well he was not to charge anything. On the other hand, there was evidence that no guaranty was made. Defendant insists that the evidence showed a specific contract for boring the well and the price, in addition to the guaranty. Plaintiff, for all practical purposes, concedes by his instructions that there was a price agreed upon of \$1 per foot for drilling through rock and 50 cents per foot through dirt, and of 50 cents per foot for necessary casing. Plaintiff's instructions declared that if, at defendant's instance and request, he did the boring and furnished the material, the law presumed defendant intended to pay the reasonable value of the boring and the material, and he was entitled to a verdict for a sum not exceeding the contract price, unless the jury found that there was a guaranty by plaintiff of a strong well with a lasting flow of water. Defendant had an instruction also submitting the proposition of guaranty of a lasting flow of water, and directing a verdict for him if the jury believed such guaranty was made. So the jury must have found that plaintiff did not agree and guarantee that there should be a well with a strong and lasting flow of water, and must have found that \$476 was a reasonable charge, and that it did not exceed the price agreed upon.

[1] Recurring to the fact that there was a specific contract for the well and the price thereof, defendant insists that there can be no recovery on a quantum meruit, but that plaintiff is confined to an action on the contract as declared on in the first count and afterwards abandoned. This is not a correct view. When the contract has been fully performed, and nothing remains but payment of the price, an action in quantum meruit may be maintained; the recovery being limited within the contract price. *Williams v. Railway Co.*, 112 Mo. 463, 491, 20 S. W. 631, 34 Am. St. Rep. 403; *Mansur v. Botts*, 80 Mo. 651; *Henderson v. Mace*, 64 Mo. App. 393; *Cozad v. Elam*, 115 Mo. App. 186, 91 S. W. 434; *Printing Co. v. Publishing Co.*, 127 Mo. App. 141, 150, 89 S. W. 900; *Sackman v. Freeman*, 130 Mo. App. 384, 109 S. W. 818.

[2] Defendant, we think, does not put a proper construction on a part of plaintiff's instruction No. 1. He seems to interpret it as stating that the boring of the well was of value to defendant, and then follows this by saying there was no evidence of the boring

being of any value. It may not have been; but plaintiff's work and material in boring were of value. That is what his petition counts on, and he had a right to recover that value, if he performed the work at defendant's request, and there was abundant evidence that he did. It is shown by his knowledge of the work, directions given, etc. A man may hire another to perform work which is of no value to that man; but, if the work is done, it must be paid for. It would be a singular condition of affairs if a laborer must always insure that his work will prove profitable or valuable to his employer. If he does it in a workmanlike way, the risk is not his.

[3] Defendant's refused instruction on his counterclaim is of no practical importance. The jury had been explicitly told in instruction No. 1 for plaintiff, and No. 3 for defendant, that if plaintiff agreed to "produce for defendant a completed well, with a strong and lasting flow of water," he could not recover. The jury must have found that the counterclaim was without any support.

Objection to the propriety of the instruction as to any witness having sworn falsely is not well taken. The record does not show that we should set aside the trial court's discretion. We think the case is one depending altogether on the view of the jury as to the facts. They have been determined against defendant in a fair trial in which the law was properly declared by the trial court.

Hence we must affirm the judgment. All concur.

## CORNETT v. CHICAGO, B. & Q. R. CO. (No. 11282.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

### 1. TRIAL (§ 156\*)—DEMURRER TO EVIDENCE—EFFECT.

For the purposes of a demurrer to the plaintiff's evidence the court will consider the evidence in its aspect most favorable to plaintiff's pleaded cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.\*]

### 2. NEGLIGENCE (§ 2\*)—"ACTIONABLE NEGLIGENCE."

"Negligence" is a breach of duty which one man owes to another, and where there is no duty there can be no "actionable negligence."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence; Negligence.]

### 3. RAILROADS (§ 415\*)—INJURY TO STOCK—SIGNALS AND LOOKOUTS—PRIVATE CROSSING.

A failure to give a statutory signal does not make the road liable for stock injured at a private crossing; and, in the absence of statute, an engineer owes no duty to give a signal for such crossing, but his only duty in approaching it is to be on the lookout for stock.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1476-1482; Dec. Dig. § 415.\*]

### 4. RAILROADS (§ 419\*)—INJURY TO STOCK—CARE AS TO ANIMALS SEEN ON TRACK.

Where an engineer sees a cow on or near the track, ordinary stock signals are all the means required to keep the track clear; and it is only when it appears that such signals will be unavailing that reasonable care requires the stopping of the train or a resort to other means.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.\*]

### 5. RAILROADS (§ 441\*)—INJURY TO STOCK—BURDEN OF PROOF.

In an action against a railroad for the negligent killing of a cow at a private crossing on plaintiff's farm, the plaintiff had the burden of showing negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.\*]

Appeal from Circuit Court, Linn County; Fred Lamb, Judge.

Action by J. M. Cornett against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

C. C. Bigger, of Laclede, and M. G. Roberts, of St. Joseph, for appellant. A. L. Pratt, of Linneus, and E. B. Fields, of Browning, for respondent.

JOHNSON, J. Plaintiff brought suit before a justice of the peace for the negligent killing of a cow at a private railroad crossing on his farm in Linn county. A trial in the circuit court on appeal resulted in a judgment for plaintiff, and the defendant railroad company appealed.

The railroad, which runs north and south over plaintiff's farm, was inclosed with lawful fences, and was crossed by a private farm crossing maintained by defendant for the use and benefit of plaintiff. It is admitted that the crossing, fences, cattle guards, and crossing gates were of lawful construction and in good repair. Plaintiff pastured cattle on the land lying west of the railroad, and in the mornings and evenings drove them over the crossing to his land east of the road, where he had a well and facilities for watering stock. On the evening in question he opened the crossing gates, and the cattle at the west gate, being in need of water, crossed over voluntarily to the watering place on the east side. Plaintiff left both gates open, and stood on guard until the cattle had slaked their thirst and were in condition to be returned to the pasture, when he proceeded to the barn lot to drive them back. While thus proceeding, he heard a train coming from the north, and, looking up, saw one of his cows on the crossing. The inference is strong that this animal was not at the west gate when the gates were opened, but was on her way to the well. The train was a heavy freight train, and approached around a curve and through a cut, and, according to the testimony of the engineer and fireman, the crossing was 500 feet distant

when it became visible from the engine cab. The fireman first saw the cow, and warned the engineer, who immediately sounded the whistle (giving the usual stock signals), shut off steam, and applied the air brakes. The train slackened speed, but could not be stopped in the intervening space, and as the cow did not clear the track she was struck by the engine and killed.

[1, 2] Plaintiff admits that the stock signals were given, but states facts tending to show that the cow was visible to the operators of the engine for a distance of over 1,000 feet, and that no effort was made to stop or reduce speed. There is also evidence to the effect that the engineer failed to give the statutory signal for a public crossing some distance north of the cut. This evidence is contradicted by the engineer and fireman, but for the purposes of the demurrer to the evidence, which we think should have been given, we shall consider the evidence in its aspect most favorable to the pleaded cause, and shall assume that no signal was given for the public crossing, and that, when the engine reached the point from which the first view of the private crossing was afforded, the engineer could have seen the cow on the track and avoided the injury by stopping the train. The gravamen of the action is negligence in the operation of the train. Negligence, as has often been said, is a breach of duty which one man owes to another, and where there is no duty there can be no actionable negligence. *Coin v. Lounge Co.*, 222 Mo. loc. cit. 507, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888.

[3] The failure of the engineer to whistle for the public crossing was no breach of duty towards plaintiff or his property at the private crossing on his land. The statute requiring such signals to be given is intended only for the protection of persons and property at public crossings, and the failure to give such signal will not render the company liable for animals injured at other places on the track. *Wasson v. McCook*, 80 Mo. App. loc. cit. 488; *Degonia v. Railroad*, 224 Mo. loc. cit. 592, et seq., 123 S. W. 807; *Bell v. Railway*, 72 Mo. loc. cit. 58; 33 Cyc. 1214; 2 *White on Personal Injuries*, § 964. No cause of action inured to plaintiff by reason of the alleged omission to give the public crossing signal. Nor did the engineer owe plaintiff a duty to give a signal for his private crossing (*Maxey v. Railroad*, 113 Mo. 1, 20 S. W. 654), since such duty is not imposed by the statutes, which require no other crossing signals than those prescribed for public crossings.

[4] The only duty the engineer was bound to perform in approaching the private crossing in question was to be on the lookout for plaintiff and his property, and when he discovered, or should have discovered, the cow on the crossing, then it became his duty to exercise reasonable care to avoid injuring her. As we said in the recent case of *Alexander v. Railway*, 178 Mo. App. 184, 65 S. W. 1156:

"We may assume that, as the adjacent owner has a right to use, and must be expected to use, and is not a trespasser in using, the farm crossing which has been put in for his convenience, the railway servants in charge of its engine ought to be required to be on the lookout for him. *Bishop v. Railway*, 4 N. D. 538, 62 N. W. 605; *Railway v. Conlon*, 9 Kan. App. 116, 57 Pac. 1063. But with this assumption it does not follow that the owner should recover in all cases. The railway servants, though required to be on the lookout when approaching farm crossings, should not be required to look out for stock at any other place on the right of way between its fences than at the crossing. Nor should the company be held for the consequences of the owner's negligence (if it be found to be negligence) in turning his stock, uncontrolled, into the right of way, and permitting it to run off down the track. They were not under any duty to anticipate such condition and to be on the lookout for it."

Since the engineer and fireman state they saw the cow at the first possible moment, and the evidence of plaintiff tends to show that the train could have been stopped in the intervening distance, and that no prompt effort was made to stop it, the question arises of whether or not actionable negligence may be predicated of such omission, in view of the conceded fact that the engineer gave the usual stock signal, and continued to give it until it was too late to save the animal by stopping the train. In its last analysis the cause of action asserted by plaintiff is founded on the idea that the engineer of a locomotive, who discovers an animal on a private crossing ahead, is not warranted in relying solely upon the alarm whistle as a means of removing the obstruction, but, to avoid an imputation of negligence, must immediately proceed to stop, if, by stopping, a threatened collision may be averted.

There are circumstances in which an immediate effort to stop the train would be the only safe alternative. Thus, in *Young v. Railroad*, 79 Mo. 336, a panic-stricken horse ran towards the track on which a train was approaching. The Supreme Court held that:

"If, after discovering the horse in motion going toward the crossing, he [the engineer] could have reasonably and safely so far stopped the train as to have avoided the collision, and neglected to do so, the defendant was clearly liable."

In the late case of *Martin v. Railroad*, 175 Mo. App. 464, 161 S. W. 631, the Springfield Court of Appeals held, in substance, that it was the duty of the engineer, seeing an animal on or near the track, to take such steps to avoid an injury as the situation appeared to demand of a reasonably careful and prudent man in his position. In that case the engineer neither attempted to stop nor sounded the stock signal. The court said:

"The jury might rightly find that the engineer or fireman either saw or could with due care have seen the animal on the track, or coming on it, in time to have avoided killing her, by either scaring her from the track by some alarm, or by stopping the engine before the collision, or by both methods. If these trainmen did or with due care could have seen the cow lying close beside the track, they should have taken notice that she was likely to go on the

track as the engine approached, and governed themselves and the engine accordingly. Young v. Railroad, 79 Mo. 336, 340. The case is therefore one for the jury."

But these cases and others of like import we have examined fall far short of declaring that an engineer, seeing a cow on or near the track a sufficient distance ahead for the train to be stopped in safety, would not be justified in relying at all upon the efficacy of an alarm whistle, but must proceed at once to stop the train, if he would escape an imputation of actionable negligence. Ordinarily alarm signals are all the means required to clear the track of such animate obstructions, and it is only in instances where it appears that such signal would be unavailing that reasonable care would demand a resort to other means.

[5] There is nothing in the evidence from which it may be said that a reasonably careful and prudent person in the place of the engineer would have anticipated that the cow would prove refractory, and would not leave the track as the shrieking engine bore down upon her. When the futility of the alarm became apparent, the train was too close for a saving stop or check in speed to be made. There are no facts and circumstances in evidence that tend to accuse the engineer of conduct at variance with that to be expected of an ordinarily prudent person in his situation. The burden is on plaintiff to show negligence, and we must hold that he has failed entirely to discharge that burden. The demurrer to the evidence should have been sustained.

The judgment is reversed. All concur.

HUFFT v. DOUGHERTY et al. (No. 11242.)  
(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

1. MUNICIPAL CORPORATIONS (§ 706\*) — USE OF STREETS—ACTIONS FOR NEGLIGENCE—EVIDENCE—OWNER OF VEHICLE.

The application required by Laws 1911, p. 322, § 3, for the license number that was on a motor car at the time it caused a runaway on the street is admissible to show the ownership of the car, although the application was for a different year and a different car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

2. TRIAL (§ 192\*) — INSTRUCTIONS — ASSUMPTION OF FACTS—UNCONTROVERTED FACT.

Where a motor car driven by defendant's son along a street frightened plaintiff's team, an instruction, in an action for damages resulting therefrom, in which the defendant claimed that the car belonged to the son, but there was no evidence that if the car belonged to the defendant, the son was not defendant's agent, submitting the question of the ownership of the car, but assuming the agency of the son if the defendant owned the car, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

3. DAMAGES (§ 210\*) — ASSESSMENT — INSTRUCTIONS — APPLICABILITY TO PLEADINGS.

Where a petition for personal injuries considered as a whole alleged specific acts of negli-

gence, although with useless verbiage, an instruction following the language of the petition is not erroneous as allowing recovery for general negligence, which was not claimed in the petition, although disconnected portions thereof might be susceptible of that construction.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.\*]

4. MUNICIPAL CORPORATIONS (§ 706\*) — STREETS — NEGLIGENT USE — ACTIONS — INSTRUCTIONS.

An allegation that the place in question was a public highway in a city and was in continuous use for public travel for persons and vehicles is equivalent to an allegation that it was a place much used for travel so as to authorize an instruction as to the degree of care required in such place, by Motor Vehicle Act, Laws 1911, p. 330, § 12, subd. 9.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

5. TRIAL (§ 296\*) — INSTRUCTIONS — CONSTRUCTING CHARGE AS A WHOLE.

Where an instruction stated that the jury must find the specific negligence alleged in the petition before plaintiff could recover, an instruction, immediately following, that the law imposed upon one in defendant's position the exercise of the highest degree of care of a prudent person in like circumstances was not erroneous as allowing recovery for general negligence which was not alleged in the petition, especially where there was no evidence of any negligent acts except those alleged in the petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

6. APPEAL AND ERROR (§ 1033\*) — HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

Defendant cannot complain that an instruction, correctly stating that he was required to exercise a high degree of care under the circumstances, is inconsistent with other instructions requiring only ordinary care.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

7. TRIAL (§ 260\*) — REQUESTED INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

A requested instruction which was covered by other instructions, except as to one element which there was no evidence to sustain, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

8. APPEAL AND ERROR (§ 1001\*) — REVIEW—VERDICT.

Where there was substantial evidence to support the verdict, it cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from Circuit Court, Clinton County; A. D. Burns, Judge.

Action by L. L. Hufft against Royce Dougherty and another. Judgment for the plaintiff, and defendants appeal. Affirmed.

W. S. Herndon, of Plattsburg, for appellants. R. H. Musser, of Plattsburg, and Darl B. Cross, of Lathrop, for respondent.

TRIMBLE, J. While driving a team of mules upon a public street in the town of Lathrop, plaintiff was met by an automobile

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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which he says was driven at such a high, reckless, and dangerous speed and in such negligent manner that his team became frightened and ran away, throwing him out and seriously injuring him. He sues to recover damages.

That he was met on the street by the automobile, and that his team ran away, no one disputes. The automobile was driven by the defendant's son, a young man about 20 years of age, living with his father. The son claims that he and not the father owned the automobile. It is also claimed that certain errors were committed during the trial, which will be considered herein.

The petition alleges that Royce Dougherty, the son, was the agent and servant of the defendant J. Oscar Dougherty in operating the automobile, and that, in running it up a public highway in continuous use for public travel, known as Center street in the city of Lathrop, and in approaching plaintiff thereon, said automobile was negligently run at a high, dangerous, and unsafe rate of speed, without signal or warning and without checking speed, or stopping said automobile as it approached plaintiff's team, although the operator of the car knew, or by the exercise of care could have known, of the team's fright, and that by reason of such negligence said team was caused to run away and throw plaintiff out and injure him.

Upon the question of the ownership of the automobile, the plaintiff testified that he had a conversation with the father, J. Oscar Dougherty, after the accident, in which he admitted that he owned the automobile, and that his son was out showing the car. The father prior to this had been selling cars and receiving commissions therefor, and the son had been assisting in the work of demonstrating them, besides driving the car for pleasure and other purposes. There was testimony that both the father and son had driven this particular car. The father denied having an agency to sell cars at the time of the accident, but would not say he was not trying to sell cars, when asked that question, and admitted that if he had sold any he would have gotten a commission. He denied ownership of the car, but did not know how his son, who was not yet of age and still living at home, had obtained it. A letter written by the son and also one by the father tend to show that the latter was the real owner of the machine.

[1] An application to the Secretary of State for registration certificate No. 13453 for 1912, signed by J. Oscar Dougherty, was offered in evidence as tending to show ownership of the car. This application described a former car owned by Dougherty, and for this reason it was objected to and its admission is relied upon as error. But it was shown that the said defendant never applied for but one license, and that was No. 13453 of 1912; that this number was used on the car in question and was on it at the time of the accident. It

was permissible to show the ownership of the license number in use on the car as a circumstance showing the car's ownership. The application for this license was therefore admissible in evidence. *Whimster v. Holmes*, 177 Mo. App. 130, 164 S. W. 236; *Motor Vehicle Act*, § 3, Laws 1911, p. 323.

[2] Plaintiff's instruction No. 2 is attacked on the ground that it assumes that the son was the father's agent and does not require the jury to find that he was. The instruction read that if the jury found from the evidence certain facts, "and that at said time, defendant J. Oscar Dougherty was the owner of a certain automobile and his agent, servant, and employé, Royce Dougherty was then driving, running, and managing said automobile," etc. This certainly submitted to the jury the question whether J. Oscar Dougherty owned the automobile. And, if he did own it, then under the undisputed evidence the son was his servant running it. *Daily v. Maxwell*, 152 Mo. App. 415, loc. cit. 426, 427, 133 S. W. 351. The disputed question was solely whether the father owned the machine. If he owned it, then the son, in running it, was the father's agent, and there was nothing in the evidence to show otherwise. Under the evidence, the son's agency follows as a necessary consequence of the father's ownership. When that was found to be the situation, then there remained no question of the son's agency. Hence, the instruction was not erroneous as applied to the evidence in the case.

[3] The instruction, we think, followed the allegations of the petition. It should not be cut up and subdivided into different divisions and then construed as allowing a recovery upon general negligence when the petition charged particular negligence. The instruction, as well as the petition, perhaps, used more verbiage than necessary, but, considered in the entirety, the petition alleged specific charges of negligence, and the instruction followed the petition.

[4] It is claimed that plaintiff's instruction No. 3 is erroneous in that it authorizes a recovery on grounds not stated in the petition. We do not think the instruction is open to this charge. The petition alleged that the place in question was a public highway known as Center street in the city of Lathrop, and was in continuous use for public travel for persons and vehicles. This was an allegation that "the accident was at a place in a public highway much used for travel." The instruction told the jury that at such places the law imposed upon the operator of the automobile the duty to exercise the highest degree of care that a very careful person would use under like or similar circumstances. It is true the petition did not allege in so many words that there was a failure to exercise such high degree of care, but it alleged that the operator acted negligently, and section 12, subd. 9, of the Motor Vehicle Statute says that a failure to use

such high degree of care is negligence. *Laws* 1911, p. 330.

[5] Nor does the instruction turn the jury loose and authorize a recovery upon any act of negligence whether specified in the petition or not. The negligence charged was in running at a high rate of speed without signal or warning, and in failing to check or stop when plaintiff's perilous situation was, or could have been, discovered. Instruction No. 2, told the jury what they must find in this regard before plaintiff could recover. It followed the specifications of negligence stated in the petition. Now when, in instruction No. 3, the jury were told that the law imposed the duty to exercise the highest degree of care of a very prudent person in like or similar circumstances, this clearly would be understood as referring to the acts charged in the petition and specified in instruction No. 2. Especially is this true where there was no evidence of any negligent acts aside from those pleaded in the petition and set forth in said last-named instruction No. 2. The case is therefore unlike the cases of *Beave v. St. Louis Transfer Co.*, 212 Mo. 331, 111 S. W. 52, and *Conway v. Metropolitan Street Railway*, 161 Mo. App. 501, 143 S. W. 516, cited by appellants. In both of these cases there was no instruction which followed the petition and specified the negligent acts necessary to be found in order to support a recovery. The petitions in those cases specified the negligent acts, and then were immediately followed by instructions, which said nothing about the specific acts charged, but allowed a recovery for general negligence.

[6] With regard to the degree of care required, the instruction may have been inconsistent with other instructions given which defined negligence as the want of ordinary care, but this cannot be deemed reversible error, since the inconsistency was in favor of rather than against defendants.

With regard to plaintiff's instruction No. 4, the observations hereinbefore made concerning instruction No. 2 apply. If the father owned the car, then all the evidence, defendants' as well as plaintiff's, showed that the son was, in law, the agent of the father in operating the automobile. The instruction submitted to the jury the questions as to whether the father owned the car and whether he had permitted the son to run and operate it, and if both these things were true, then the law does presume, under the circumstances shown in evidence, that the son was acting as the father's agent and in the line of his service. The father did not dispute the son's operation and use of the car. He denied only that he owned it. As the instruction submitted the question of ownership, and there was no dispute as to what was done by the son, nor showing made that he was not in the line of his service, clearly

there was no error in giving the instruction.

[7] The refusal of defendants' instruction No. 2 is complained of. There was no evidence tending to show the mules were a dangerous span given to running away at sight of ordinary objects or otherwise, nor that they ran away because plaintiff jerked them. If there were any other elements of defendants' case in the instruction, they were fully covered by other given instructions, and this last applies to defendants' refused instruction No. 6. It was fully covered by defendants' given instruction No. 4.

[8] After a careful examination of the record we are unable to perceive any substantial error in the case. As to what were the true facts was for the jury. They have found them in favor of plaintiff, and there was substantial evidence to support that finding. We are therefore without authority to disturb it or the judgment based thereon. Therefore it is affirmed. All concur.

**TAPEE v. VARLEY-WOLTER CO. et al.**  
(No. 11268.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

**1. JUSTICES OF THE PEACE (§ 157\*)—APPEAL—PARTIES—DUAL CAPACITY.**

Rev. St. 1899, § 7570, provides that the party applying for an appeal from a justice's judgment, or some person for him, shall make affidavit that the application is not made for vexation or delay, but because he believes the appellant is injured by the judgment of the justice, etc. *Held*, that where a bank was compelled to appear as a defendant in a justice's court, and voluntarily appeared also in the capacity of an interpleader, and plaintiff procured a personal judgment against it as the sole defendant, the fact that an affidavit for an appeal referred only to its capacity as a defendant did not deprive the circuit court of jurisdiction, because the judgment was rendered against it in its capacity as interpleader.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 534-542; Dec. Dig. § 157.\*]

**2. BILLS AND NOTES (§ 353\*)—DRAFTS—BILL OF LADING—BONA FIDE PURCHASER.**

The rule that a bank, by discounting negotiable paper, placing the same to the depositor's credit, honoring his checks or drafts against it, surrendering him securities, or in some other manner making advances on the faith of the deposit, becomes a holder for value, but that mere discounting and crediting the depositor's account, without making payment or incurring any increased obligations or liabilities, is not sufficient, does not apply to the purchase by a bank of a draft with a bill of lading attached.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 814, 893-903½, 906, 907; Dec. Dig. § 853.\*]

**3. CARRIERS (§ 58\*)—BILL OF LADING—DRAFTS—TRANSFER—BANK'S LIABILITY.**

Where a bank discounted a draft with a bill of lading attached, drawn on the buyer of potatoes from the drawer, and the buyer obtained delivery of the potatoes after and by virtue of his acceptance and payment of the draft, the bank did not occupy the position of an intermediate purchaser of the potatoes, but rather as a holder of the bill of lading as security for

the draft, and hence was not liable to the buyer for alleged defects and deficiencies in the potatoes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.\*]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

Action by J. H. Tapee against the Varley-Wolter Company, in which the Market State Bank was joined as defendant and interpleaded. Judgment for plaintiff, and the bank appeals. Reversed and remanded.

Spencer & Landis, of St. Joseph, for appellant. W. N. Linn and E. M. Swartz, both of St. Joseph, for respondent.

JOHNSON, J. Plaintiff, a produce dealer in St. Joseph, brought suit by attachment in a justice court against the Varley-Wolter Company, of Minneapolis, Minn., and had the First National Bank of St. Joseph summoned as garnishee. Afterward, on motion of plaintiff, the Market State Bank of Minneapolis was joined as a defendant. The ground of attachment was the nonresidence of the defendants. An attempt was made to obtain constructive service on the original defendant, but at the trial in the justice court that defendant was dismissed, and a judgment was rendered "that plaintiff recover from the Market State Bank of Minneapolis the sum of \$45 so found as aforesaid, together with costs of this suit, and that plaintiff have execution therefor, and that said execution be a special execution on the property attached in this cause." The garnishee had answered:

"We have \$577.32 paid to us on account of draft received from the Market State Bank of Minneapolis, drawn by Varley-Wolter Company, which is claimed by above-mentioned Market State Bank as belonging to them."

After the filing of this answer the Market State Bank appeared and filed an interplea in the justice court, claiming title to the money held by the garnishee. In the judgment to which we have referred the justice found against the defendant bank on its interplea, and, as shown, rendered personal judgment against it as a defendant for the full amount of plaintiff's demand. Afterward and in proper time an affidavit for appeal was filed, in which the affiant, who was the agent of the appellant, made oath that "defendant's application for an appeal from the merits is not made for vexation and delay," etc. The appellant was not mentioned by name in this affidavit, nor referred to as interpleader, and this omission is the subject of an objection to the jurisdiction of the court over the cause which shall receive our attention in its proper place. The cause was tried in the circuit court without the aid of a jury, and judgment was rendered against both defendants for \$50.21, and it was further adjudged:

"That the sum of \$577.32 was and is in the hands of the First National Bank of Buchanan county as garnishee of the above defendants, the money and property of said defendants, and it is ordered and adjudged that the said \* \* \* garnishee pay to the clerk of this court or the sheriff of this county the said sum of \$50.21, the amount of said judgment, together with the costs herein," etc.

Just when or in what manner the original defendant was brought back into the case is not made clear, nor is it a fact of any consequence, in the view we have of the case. The Market State Bank alone appealed from this judgment, and we have no concern with the question of whether or not the judgment is valid as to the original defendant.

The controversy before us grew out of the sale of a carload of potatoes by the Varley-Wolter Company to plaintiff through the agency of a broker in St. Joseph. The sale was made at \$1.30 per bushel delivered on track at St. Joseph, and on March 28, 1912, the car, containing 530 bushels, of the gross value of \$689.00, was shipped by the vendor at Minneapolis and consigned to its own order at St. Joseph, with directions in the bill of lading to notify plaintiff and to "allow inspection." A draft was drawn by the vendor on plaintiff for \$689, and with bill of lading attached was sold to the Market State Bank for \$601, the sum that would be due the vendor after the payment at St. Joseph of the freight charges, which were estimated at \$88. The vendor had an account with the Market State Bank, and the proceeds of the sale of the draft, to wit, \$601, was credited to its checking account. The bank purchased the draft in the usual course of business and without the knowledge of any defect or deficiency in the goods described in the attached bill of lading. It appears it was customary for the bank in such transactions to buy drafts outright from its customers for the full amount of the proceeds, less the freight charges, and afterward to charge the exchange and collection expenses to the customer's account. After purchasing the draft and bill of lading, the Market State Bank forwarded them to the First National Bank at St. Joseph, with instructions to collect the draft and to pay the freight charges on the car out of its proceeds. In other words, the collecting bank was authorized to accept the amount of the freight bill paid by plaintiff as a payment upon the draft. The draft and bill of lading were at the St. Joseph bank on the arrival of the car. After being allowed to inspect the contents of the car, plaintiff paid the draft in full, obtained the attached bill of lading, and then received the property from the carrier. After removing it to his place of business, he presented a claim to the vendor for damages growing out of an alleged shortage, and of the rotten condition of some of the potatoes. The vendor rejected the claim, on the grounds that it was not well founded in fact, that the title to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

property had passed to the Market State Bank before the acceptance and payment of the draft by plaintiff, and that the vendor had no interest in the money attached in the hands of the garnishee.

[1] In support of the point that the circuit court acquired no jurisdiction over the cause, counsel for plaintiff say in their brief:

"The justice having rendered judgment against appellant as interpleader, and there being no appeal by appellant as interpleader from that judgment, the judgment of said justice against it as interpleader still remains in full force and effect"—citing *Fischer v. Anslyn*, 30 Mo. App. 316; *Urton v. Sherlock*, 61 Mo. 257; *Gray v. Dryden*, 79 Mo. 106; *Roberts v. Shepherd*, 96 Mo. App. 698, 70 S. W. 931.

These are cases holding, in substance, that a judgment rendered against two or more defendants in a justice court becomes a finality against one of such defendants who falls to appeal, whether or not an appeal be taken by the remaining defendants. That rule has no application to the point raised by plaintiff, which, in substance, is that the circuit court acquired no jurisdiction of the issues raised by the interplea of the appellant, since the affidavit failed to describe appellant as an interpleader. The only requirements of the statute relating to affidavits for appeal in justice courts (section 7570, Rev. Stat. 1909) are that:

"The party applying therefor, or some person for him, will make affidavit that the application for an appeal is not made for vexation or delay but because he believes the appellant is injured by the judgment of the justice, and stating whether such appeal is from the merits or from an order or judgment taxing costs."

It appears that the appellant was compelled in the justice court to take the dual role of defendant and interpleader—the latter voluntarily, and the former by compulsion. Plaintiff had appellant joined as defendant, and succeeded in procuring a personal judgment against it as the sole defendant. Certainly appellant had a right to appeal from that judgment, and was accurately described in the affidavit as the defendant. The appeal from that judgment on the merits conferred complete jurisdiction upon the circuit court over the whole case, including the issues raised by the interplea. In rendering personal judgment against appellant on the facts stated, the learned trial court must have proceeded upon the theory that the purchase of the draft with attached bill of lading, which, it is undisputed, was in good faith for a valuable consideration, did not confer upon appellant the rights of an innocent purchaser for value of a negotiable instrument, but rendered it liable as the assignee of the vendor to the vendee for damages resulting to the latter from the vendor's breach of contract.

[2] A rule in many jurisdictions, invoked by plaintiff, is that where a bank discounts a draft in advance of its acceptance, it is not a bona fide holder for value, unless it has funds in its hands which it releases or

falls to withhold from the drawer before its acceptance, and the mere fact that the bank gives the deposit account of the drawer credit for the purchase price of the draft will not establish a higher relationship than that of debtor and creditor, in instances where the drawer does not withdraw such proceeds before the acceptance of the draft. As is said in 7 Cyc. 929:

"A bank, by discounting negotiable paper, placing the same to the credit of the depositor, and honoring his checks or drafts, surrendering to him securities, or in some other manner making advances, and extending its credit, on the faith of such deposit, thereby becomes a holder for value. But the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligations or liabilities, is not sufficient."

See, also, *Bank v. Coal Co.*, 110 Mich. 447, 68 N. W. 232; *Bank v. Newell*, 71 Wis. 309, 37 N. W. 420; *Bank v. Green*, 130 Iowa, 384, 106 N. W. 942; *Morrison v. Bank*, 9 Okl. 697, 60 Pac. 273; *Bank v. Mailloux*, 27 S. D. 543, 132 N. W. 168; *Hamilton Machine Tool Co. v. Memphis Nat. Bank*, 84 Ohio St. 184, 95 N. E. 777; *Bank v. Reyburn* (C. C.) 163 Fed. 597.

But the general rule, as we shall show, is not applied in instances, such as the present, where the purchase by the bank is a draft with bill of lading attached. Nor does the rule we announced in *Bank v. White*, 66 Mo. App. 677, control the disposition of the case. In that case a consignee of lumber to be sold on commission discovered, after paying the freight, that the lumber was of inferior quality, and refused to accept a draft for the purchase price attached to the bill of lading, which had been assigned to a bank, which made an advance to the consignor on the faith of such bill of lading. In an action by the bank, founded on the claim that it was a purchaser for value, we held that the consignee of the lumber "was left with the same defenses as against plaintiff bank that he would have as against the lumber company," on the theory that "the assignment of the bill of lading operated as a symbolical delivery of the property covered by it," and thenceforth the assignee "occupied the same relation toward the property then in transit that the lumber company did before the bill of lading was transferred." The effect on the transaction of the negotiability of bills of lading under the statute (section 11956, Rev. Stat. 1909) was not discussed; but we do not find it necessary or expedient at this time to inquire into the soundness of that decision, since the rule it announces has no application to the present state of case, which is vitally different from that we had before us then. It may be conceded, *arguendo*, that where delivery of the property is made to the consignee, without his acceptance of a draft drawn by his vendor for the purchase price, the assignee of such draft acquires no greater rights against him than those possessed by

the assignor at the time of the assignment, and in a subsequent action to collect the draft the assignee may be successfully confronted with such defenses as the consignee could have interposed in a suit for the purchase price prosecuted by the assignor.

[3] In the present case delivery of the property was obtained by the consignee after and in virtue of his acceptance and payment of the draft, and the cause of action asserted by the consignee against the assignee of the draft is grounded, not alone upon the theory that the assignee was not in the position of an innocent purchaser for value of a negotiable bill of exchange, but in legal contemplation became an intermediate purchaser of the goods, and as such became liable to respond in damages to the consignee for defects in them to the same extent that the assignor would be liable. This position is not without the support of reported decisions in other jurisdictions (*Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679); but the weight of authority and the better reasons are opposed to the doctrine of those cases. In the case of *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515, the Supreme Court of the United States hold that in discounting commercial paper a bank does not guarantee the genuineness of a document attached to it as collateral security, and, of course, does not assume liability for the performance by the drawer of the contract of sale with his consignee, evidenced by the attached collateral.

"Bills of lading," say the court, "attached to drafts, \* \* \* are merely security for the payment of the drafts," and their attachment "imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid, the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper."

The Supreme Court of Iowa in *Tolerton v. Bank*, 112 Iowa, 706, 84 N. W. 931, 50 L. R. A. 777, held:

"It is a well-established rule of law that, after the holder of a negotiable draft with bill of lading attached has secured an acceptance of such draft from the drawee and consignee, he is unaffected by any equities originally existing between such consignee and the seller of the goods. In such a case the liability of the drawee becomes fixed to the payee."

Speaking of the Texas and North Carolina cases the court well say:

"These decisions proceed upon the theory that the assignee stands in all respects in the shoes of his assignor, and to this broad doctrine we cannot agree. While the rights of such an assignee are to be measured by those of the assignor, his liability is not necessarily the same"

—a well-drawn distinction, which very clearly differentiates the case we considered in *Bank v. White*, supra, from the one in hand.

The Supreme Court of Tennessee, in an exhaustive and convincing opinion (*Leonhardt v. Small*, 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. [N. S.] 887, 119 Am. St. Rep. 904), likewise repudiates the Texas and North Carolina doctrine, and holds that, after payment by the drawee and consignee of a draft with bill of lading attached, a bank which purchased the draft from the drawer is not liable to the consignee for the frauds or delinquencies of the drawer in the performance of his contract with the consignee. The court pertinently observes:

"It is a fact of common knowledge that a large part of the commercial business of the country is carried on through the medium of drafts, and that the immense crops of the South and West are marketed under contracts to draw for the purchase price with bills of lading attached. If the courts shall adopt the rule insisted upon by the complainants, and enforced by the decree of the Court of Chancery Appeals, it will result in destroying this convenient method of handling, moving, and paying for the crops of the country, for the banks will necessarily be compelled to refuse to buy drafts with bills of lading attached, or to handle them as collateral security or otherwise. Banks have neither the time nor the facilities to investigate the genuineness of bills of lading, or the contracts made between their customers with parties residing in other states, and to hold them responsible for the frauds and mistakes of shippers would utterly destroy the negotiability of drafts with bills of lading attached."

Other authorities of similar import are referred to in the cases we have reviewed and in notes to the case of *Finch v. Gregg*, supra, in 49 L. R. A. 679. Recently, in *Bank v. Milling Co.*, 163 Mo. App. 135, 145 S. W. 508, the Springfield Court of Appeals, speaking through Gray, J., held to the doctrine of the nonliability of the purchasing bank in such cases, and held that, where the bank paid for the draft by giving credit to the checking account of the drawer, its position after acceptance by the drawee was that of an innocent holder without notice, whether or not the drawer had checked against the deposit at the time of the drawee's acceptance.

We are satisfied with the soundness of this view, for the reasons stated in the excerpt we have copied from the opinion in *Leonhardt v. Small*, supra. The status of the purchasing bank should not be made to depend upon the fortuitous circumstance of the assignor checking against the proceeds deposited to his credit before the acceptance of the draft. The necessities and legitimate purposes of trade would seem to demand the rule which gives requisite certainty and stability to the position of banks which in good faith purchase commercial paper with bills of lading attached, in the laudable endeavor to facilitate the distribution of the products of labor through the channels of trade and commerce.

The learned trial judge erred in holding the bank personally liable for the alleged default of its assignor, and in refusing to enter judgment in its favor for the full amount

of the proceeds of the draft in the hands of the garnishee.

The judgment is reversed, and the cause remanded. All concur.

# GROUCH v. HEFFNER. (No. 11317.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

## 1. APPEAL AND ERROR (§ 637\*)—TIME FOR FILING—STATUTORY PROVISIONS.

Under Rev. St. 1909, § 2029, as amended by Laws 1911, p. 139, authorizing bills of exception to be filed at any time before the appellant shall be required to serve his abstract of the record, it was not ground for dismissing an appeal that the bill of exceptions was not filed within the time allowed by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829; Dec. Dig. § 637.\*]

## 2. APPEAL AND ERROR (§ 842\*)—REVIEW—QUESTIONS OF FACT.

In an action for injuries to a person struck by an automobile, where, though there was evidence that a street car had passed its usual stopping place, and stopped only for fear of becoming involved in the collision, and that the automobile driver gave ample warning of the automobile's approach, there was other evidence that no warning was given, and that the car stopped at or near its usual stopping place to allow plaintiff to get aboard, these were questions for the jury, and not for an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3318-3330; Dec. Dig. § 842.\*]

## 3. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS—OPERATION OF AUTOMOBILES.

Under the Motor Vehicle Statute (Laws 1911, p. 326) § 8, par. 2, providing that in approaching or passing a street car which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and if necessary for the safety of the public, bring his vehicle to a full stop, it was the duty of an automobile driver to slow down or stop when about to pass a street car, which had stopped to allow passengers to alight or embark, though his automobile was going no more than six miles an hour.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

## 4. APPEAL AND ERROR (§ 927\*)—REVIEW—DENIAL OF NONSUIT.

In passing upon the question whether plaintiff made out a case for the jury, the evidence must be considered in the light most favorable to him, where the jury's verdict is in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

## 5. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE.

Where a person looked for approaching automobiles while walking from the sidewalk to the street car tracks, he was not negligent as a matter of law in then devoting his attention to a street car and to his purpose of boarding it, instead of watching for automobiles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

## 6. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS—OPERATION OF AUTOMOBILES.

Under Motor Vehicle Statute (Laws 1911, p. 326) § 8, par. 2, the stopping of a street car at its usual place was sufficient to warn a chauffeur that a person might be on the street

at that point to board the car, and made it his duty to slow down and stop if necessary, though he did not see a person about to board the car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

## 7. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—OPERATION OF AUTOMOBILES.

Where an automobile driver turned to the left in passing a vehicle traveling in the same direction, and a standing automobile, and then turned back to the right, crossed street car tracks, and attempted to pass a car standing at a usual stopping place, without reducing his speed or giving warning, the jury were justified in finding that he was negligent, and that his negligence was the sole cause of an injury to a person struck by the automobile as he was passing around the car to board it, as it was for the jury to determine whether he exercised the highest degree of care that a very careful person would use under like or similar circumstances, as required by Motor Vehicle Statute (Laws 1911, p. 330) § 12, of persons operating automobiles on public roads, etc., or places much used for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by William Grouch against Mrs. O. A. Heffner. From a judgment for plaintiff, defendant appeals. Affirmed.

Lee B. Ewing, of Jefferson City, and Chas. E. Gilbert, of Nevada, Mo., for appellant. Scott & Bowker, of Nevada, Mo., for respondent.

TRIMBLE, J. While plaintiff was in the street attempting to board a street car he was knocked down and injured by a passing automobile. He sued for damages, and recovered judgment in the sum of \$450. Defendant has appealed.

The injury occurred in Cherry street in the city of Nevada. This street runs west from the depot to and along the south side of the public square. At the southeast corner of the Square, Cherry street is intersected at right angles by Cedar street running north and south. An electric street railway track lies in the center of Cherry street, with about 15 feet of space on each side of the track between it and the curb. About 10 o'clock in the morning of July 28, 1913, plaintiff was on the sidewalk in front of a store on the north side of Cherry street some 60 or 80 feet east of the east line of Cedar street. A street car was going east on Cherry and was approaching the place at or near the crossing on the east side of the street intersection, where stops were usually made to let off and take on passengers. Plaintiff wanted to catch the car and go east to the depot. He, therefore, walked west along the sidewalk on the north side of Cherry street for a distance of 12 or 15 feet, and then left the sidewalk and went out into the street in a southwest direction to the track in order to board the car. The street car stopped as plaintiff

reached the track, but as the entrance to the car was on the south side of the car at the front or east end, plaintiff could not board the car from his side, and therefore was about to cross the track in front of the standing street car in order to board it, when defendant's automobile coming west on Cherry struck him and knocked him down.

[1] Respondent has filed with his brief a motion to dismiss the appeal on the ground that the abstract shows no order of the trial court granting time for the filing of the bill of exceptions or an extension thereof, and that the abstract does not show the bill was filed within such time, if it was granted and extended. This defect would be fatal to appellant's appeal were it not for the amendment to section 2029, R. S. Mo. 1909, approved March 13, 1911, authorizing bills of exception to be filed "at any time before the appellant shall be required \* \* \* to serve his abstract of the record." Laws Mo. 1911, p. 139. The bill of exceptions was filed on May 14, 1914, and, under the above amendatory statute, it was properly filed whether within or without the time allowed by the trial court. *State v. Rogers*, 253 Mo. 390, 161 S. W. 770. The motion to dismiss must be, and is, overruled.

Paragraph 2 of section 8 of our Motor Vehicle Statute (Laws Mo. 1911, p. 327) provides that:

"In approaching or passing a car of a street railway, which has been stopped to allow passengers to alight or embark, the operation of every motor vehicle shall slow down, and if it be necessary for the safety of the public, he shall bring said vehicle to a full stop."

Said statute also provides that:

"Upon approaching a pedestrian, who is upon the traveled part of any highway and not upon a sidewalk, \* \* \* a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling."

The petition alleged negligence in that defendant did not obey the above requirements of the statute; also that under section 12 of said Motor Vehicle Statute it was the duty of defendant, at the much traveled place in question, to use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons on said streets, and that defendant did not use such care and was guilty of negligence, in that the driver failed to bring said automobile to a stop or to slow down as he approached said street car, or to give any signal of such approach, and failed to keep a vigilant lookout for the safety of persons who might be on the street, and that defendant saw, or by the exercise of care could have seen, plaintiff in time to have warned him but failed to do so.

[2-4] Defendant urges that no recovery is allowable because plaintiff failed to show any negligence on the part of defendant, and because the plaintiff's injury was the result of his own negligence in hurriedly going into the street with his eyes fixed on the street

car, without looking for an automobile, and thus came suddenly in front of the machine before the chauffeur could become aware of his presence or have time and opportunity to stop the automobile or avoid striking plaintiff. As a reason for defendant's failure to stop or slow down, or rather as a ground for contending that such failure was not negligence, defendant contends that the street car had already passed the stopping place where passengers were usually let off and taken aboard, and did not stop to allow plaintiff to get aboard, but stopped after plaintiff was about to be, or had been, struck, and stopped then only because the motorman saw the automobile was going to strike plaintiff and did not want the street car to become involved in the collision. There is no doubt but that a number of defendant's witnesses testify that the car was not stopped at the usual stopping place but was continuing on its way and had passed that point and stopped only for fear of becoming involved in the collision. But there is also evidence that the car stopped at or very near the usual stopping place; that it stopped to allow plaintiff to get aboard, and did so before plaintiff was struck. There is evidence tending to show that plaintiff was struck at a point about 40 feet east of the street intersection, and as the street cars are 40 feet in length and plaintiff was at or near the east end, about to go in front of it to enter the door on the south side, the car must have stopped at the usual place, if such evidence be true. There was also testimony that the car stopped about where it always stopped, that it stopped only once, and that plaintiff was on the north side at the east end of the car and was going to get on the car when the automobile struck him, knocked him down, and dragged him some 12 or 15 feet before it was stopped. There was further evidence to the effect that the automobile, in coming west along the north side of Cherry street before it reached the point of collision, turned out to the left to pass around an automobile standing near the curb on the north side, and that the moving automobile also turned still further to the left or south to pass a horse and buggy going in the same direction; that this turning out put the automobile south of the street car track until the buggy was passed, and the automobile was not far from the point where plaintiff was struck, when it again crossed the track in front of the street car to get on the north side, and in doing this struck the plaintiff; that the automobile was headed somewhat northwest instead of directly west when plaintiff was hit. Plaintiff's witnesses say the automobile was going "pretty fast," but were unable to give its speed in miles per hour. Defendant's evidence is that it was going slow, not over six miles per hour. At this rate it was going  $8\frac{2}{10}$  feet per second, and may have been going faster, since plain-

tiff was dragged for a distance after being struck. Of course, two seconds from the collision would be a short time for the chauffeur to stop the automobile in, if the plaintiff did not appear before the machine until the moment he was struck. But if he was at the track as the automobile came up, as he and his witnesses say he was, then the chauffeur had more than two seconds in which to prepare to stop. However, it is not material whether defendant's automobile was going more than six miles per hour, since that was fast enough to require the automobile to be slowed down or stopped when about to pass a street car which has stopped to allow passengers to alight or embark.

The petition not only counted upon this negligence but also on the fact that no signal was given of the automobile's approach. Now the evidence offered by plaintiff tends to prove that no warning nor signal of any kind was given. Defendant's evidence says that there was ample warning. In such state of the evidence the questions whether the car was stopped to take on or let off passengers, and whether a signal was given by the motor vehicle as it approached, are for the jury. It is not for us to decide. It is elementary that, in passing upon the question whether plaintiff has made out enough of a case to go to the jury, we must consider his evidence in the light most favorable to him when the jury's verdict has been in his favor. Appellant is mistaken in thinking the evidence is not conflicting upon these points. We have carefully gone over the record and find that there is substantial evidence to support the verdict.

"In cases of this kind—collisions upon the highway, where both parties have a right to be—there is generally a fair question for a jury, both on the questions of the negligence of the defendant and the contributory negligence of the plaintiff." *Wylar v. Ratican*, 150 Mo. App. 474, 131 S. W. 155; *Myer v. Lewis*, 43 Mo. App. 417.

[5-7] What has been said applies also to defendant's other contention that plaintiff walked suddenly into the way of the automobile and did not look out for his own safety. It is true, he says that while he was standing at the track he did not look for an automobile, but was devoting his attention to the work of boarding the street car, but he also says that as he left the sidewalk and walked to the track he looked and saw nothing, because the automobile was not then approaching. In *Bongner v. Ziegenhein*, 165 Mo. App. 328, loc. cit. 342, 147 S. W. 186, it is said:

"In those cases where injury is inflicted by a conveyance which may occupy one portion of the street at one time and some other portion at another time and the injured person is not forewarned as by the danger incident to car tracks, the matter of plaintiff's contributory negligence is usually for the jury."

It is true in this case the plaintiff was not going from the sidewalk to the street car, but

was going from the street car, from which he had alighted, to the curb. If he could rely upon the assurance that the street car had stopped at a place where it was safe for him to go to the curb, and was thereby in a different situation from the plaintiff in this case, who was going from the safety of the sidewalk into the traveled street on his own initiative, yet this difference is fully covered by the fact that he says he looked as he went toward the track and saw no automobile. If after he got to the track he did not continue to look out for a passing vehicle, but devoted his attention to the street car and to his purpose of boarding same, he certainly cannot be held to be guilty of contributory negligence as a matter of law. At that time he was rightfully in the street, and even if the chauffeur did not actually see plaintiff, yet the stopping of the street car at its usual place was sufficient to warn the chauffeur that a person might be on the street at that point to board the car, and hence it was the chauffeur's duty to slow down and stop if necessary to avoid striking a person who might be there. *Bongner v. Ziegenhein*, 165 Mo. App. 328, 147 S. W. 182. For the chauffeur to come up behind a buggy, and turn out to the left and to the south of the track in passing the buggy, and then turn back to the right, crossing the track and attempting to pass the street car without reducing speed or giving a warning, is undoubtedly sufficient grounds to justify a jury in saying he was negligent, and that such negligence was the sole cause of the injury. It is true, defendant and her witnesses testify that the injury was not brought about in that way. But the jury by its verdict has said that it was, and we must accept that finding. It is natural enough that when an exciting occurrence happens suddenly and unexpectedly different eyewitnesses will give different versions of the matter, and it is exceedingly difficult to tell where the truth is. But the solution of that question is left with the jury, as the final arbiters thereof, under our system of law. The care required of defendant was the highest degree of care that a very careful person would use under like or similar circumstances. *Laws Mo. 1911, § 8, p. 327*. The jury alone can decide whether he used that care.

Objection is made to plaintiff's instruction, but we perceive nothing wrong with it.

The judgment is affirmed. All concur.

EVERSOLE et al. v. HANNA. (No. 11265.)  
(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

1. SALES (§ 417\*)—REMEDIES OF BUYER—EVIDENCE.

In an action for breach of contract to sell plaintiff a certain quantity of pure milk each day, evidence held sufficient to warrant a finding that the impurity of the milk was caused

solely by the wrongful or negligent acts of the defendant and not by the acts of plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.\*]

## 2. SALES (§ 273\*)—WARRANTY—FITNESS FOR PURPOSE.

Where defendant sold a dairy route to plaintiffs and agreed to sell them a certain quantity of pure milk each day, knowing that it was to be sold to the customers, he impliedly warranted that the milk would be reasonably suitable for that purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.\*]

## 3. SALES (§ 288\*)—WARRANTIES—BREACH—WAIVER.

The fact that plaintiffs continued to accept milk from the defendant did not waive the breach of warranty that the milk should be pure, since they had the right either to rescind the contract or to keep the milk and recover the difference between its actual value and its value if it had been as warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.\*]

## 4. SALES (§ 430\*)—WARRANTIES—ACTIONS FOR BREACH—DEFENSES.

It was no defense to an action for breach of a contract to sell plaintiff pure milk that plaintiffs attempted to dispose of the unfit milk to their customers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1230, 1231; Dec. Dig. § 430.\*]

## 5. SALES (§ 442\*)—REMEDIES OF BUYER—BREACH OF WARRANTY—MEASURE OF DAMAGES.

The measure of damages for breach of warranty in a contract for the sale of milk is the difference between the market value of milk of the kind and quantity furnished and the market value of pure milk of the same quantity at the same time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.\*]

## 6. SALES (§ 418\*)—BREACH OF CONTRACT—EXCESSIVE DAMAGES.

Where defendant furnished to plaintiff, a dairyman, under a contract for the delivery of pure milk at an agreed price of 17½ cents per gallon, 40 gallons per day of impure milk for a period of 4 months, which milk was not worth more than 2 cents per gallon, and as a result of selling such milk plaintiff lost numerous customers, who had been taking a total of 15 gallons of milk daily, a verdict for \$500 damages was not excessive.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

Action by S. G. Eversole and another against Fred Hanna. Judgment for the plaintiffs, and defendant appeals. Affirmed.

J. E. Hefley, of St. Joseph, for appellant. B. G. Voorhees, of St. Joseph, for respondents.

JOHNSON, J. [1] This is an action for breach of a written contract entered into April 1, 1913, by the terms of which defendant, a dairyman, sold plaintiffs a dairy route in St. Joseph and certain personal property employed in the business for \$450, and agreed to sell plaintiffs "50 gallons of pure milk per day until March 1, 1914, at 17½ cents per

gallon." Plaintiffs paid \$300 on the purchase price and executed and delivered to defendant their promissory note for the remainder, due March 1, 1914, and secured by a chattel mortgage on the property. There were 85 customers on the route, and together they purchased about 35 gallons of milk daily, which was sold at the rate of 14 quarts for \$1. Plaintiffs lived on a little farm near the city limits and kept a few milch cows, from which they obtained four or five gallons of milk each day. After purchasing defendant's route they sold the milk they procured from their own cows in bottles, and that purchased from defendant was sold out of five and ten gallon cans. Defendant had a dairy farm in the country a mile or more from the residence of plaintiffs, and delivered to plaintiffs the milk from morning milkings, transferring it from his wagon to theirs just before the latter started on its morning trips to retail customers. Plaintiffs went to defendant's dairy for the milk procured in the evenings, a part of which they delivered the same evening to customers. They placed the cans containing the remainder, which was to be delivered the next morning, in a concrete basin, filled with water, to keep the milk cool and fresh. The basin was inclosed by a small frame building, the roof of which had been the roof of a privy, but had not been in such service for about five years. Pursuant to the contract defendant furnished plaintiffs 40 gallons of milk each day from April 1st to the 26th day of the following July, when he quit. At that time plaintiffs, who had agreed to pay at the end of each week for the milk procured during that week, had been unable to do so and were indebted to defendant in the sum of \$73, in addition to the chattel mortgage note. Defendant claims that he stopped furnishing milk on account of this indebtedness, but his testimony, as a whole, tends to corroborate the contention of plaintiffs that he quit, not because of the condition of the account, but because plaintiffs were complaining of the quality of the milk he was furnishing and of the losses it was causing them.

Witnesses introduced by both parties agree with one voice that the milk plaintiffs served their customers out of the five and ten gallon cans, and which they procured from defendant, was so poor in quality that many of the customers changed milkmen, and plaintiffs state they lost from that cause customers who had taken, in all, 15 gallons of milk daily. The milk was "stringy and ropy," of suspicious color and appearance, and some of the witnesses say it had an evil odor. Tests made by the authorities, acting under the pure food laws of the city, showed that it was deficient in butter fat and other solids and contained too much water. From some of the expert evidence it appears that the adulteration of milk with cold water will engender germ life, resulting in the condition

described by the witnesses as stringy andropy. Plaintiffs introduced evidence tending to show that defendant watered the milk he delivered to them, and that the sanitary conditions of his dairy were bad. On the other hand, defendant offered evidence which cast the blame on plaintiffs for the conditions which rendered the milk unwholesome and unmarketable. One fact is undisputed, and that is that the milk, when delivered by plaintiffs, was not fit for human consumption and had no value, except as food for swine, for which purpose it was worth not over two cents per gallon.

The breach of contract alleged, and upon which recovery was allowed, was the failure of defendant to furnish plaintiffs with pure milk. The court submitted that issue to the jury, and a verdict was returned for plaintiffs in the sum of \$500. The finding of the jury, thus expressed, that the impurity of the milk was caused solely by the willful or negligent wrong of defendant is found to be sustained by substantial evidence.

The defense that the pollution emanated from the old roof over the concrete basin is met by proof that the impurities were those which came from pouring cold water into milk, and that they did not appear in the milk kept overnight in the basin, but only in that transferred in the mornings from defendant's wagon to the wagon of plaintiffs and immediately thereafter delivered to the customers.

[2] There being substantial evidence in the case that the milk furnished by defendant to plaintiffs was impure, and therefore unsuitable for human consumption, the court did not err in overruling the demurrer to the evidence. Knowing at the time the contract was entered into that it was to be furnished for the special purpose of being resold to consumers, the defendant, in undertaking to furnish pure milk, warranted that that which he would furnish under the contract would be reasonably suitable for the purpose for which it was being purchased.

[3] The breach of the contract is well established, and we think counsel for defendant are wrong in their view that, in continuing to accept inferior milk, plaintiffs waived the breach. The rule is well established that, where goods delivered under a warranty that they are suitable for a special purpose are found to be defective, the vendee has the option of rescinding the sale and returning the goods to the vendor or of keeping them and requiring the vendor to respond in damages to the extent of the difference between the value of the goods, had they been of the quality contracted for, and their real value in their inferior condition. No waiver of quality may be implied from the mere retention of the inferior goods by the vendee. *St. Louis Brewing Ass'n v. McEnroe*, 80 Mo. App. 429; *New Birdsall Co. v. Keys*, 99 Mo. App. loc. cit.

463, 74 S. W. 12; *Branson v. Turner*, 77 Mo. 489.

[4] Plaintiffs deserve reprobation for the use they attempted to make of the impure milk, and have been severely punished in the loss of custom and of standing in their business, which their lack of humanity has entailed upon them. But their attempt to wrong others, which was born of the wrong of defendant, does not deprive them of the legal right to hold defendant to account for his breach of contract. The demurrer to the evidence was properly overruled.

[5] The instruction given by the court declared the law of the case and properly defined the measure of damages as "the difference, if any, between the market value of the milk of the kind, quality, and quantity furnished by defendant to plaintiffs from the 1st day of April, 1913, to the 26th day of July, 1913, and the market value of pure milk of the same quantity furnished by defendant from the 1st day of April, 1913, to the 26th day of July, 1913."

[6] There is no merit in the point of an excessive verdict.

The judgment is affirmed. All concur.

#### WILLIS v. CITY OF ST. JOSEPH. (No. 11270.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTIVE SIDEWALK—PERSONAL INJURIES—NEGLIGENCE—QUESTION FOR JURY.

Where, in a pedestrian's action for injuries from a fall due to the tilting of a block in a sidewalk, there was evidence that the defect had existed long enough to charge the city with notice, and that policemen had observed it, the question of the city's negligence was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTIVE SIDEWALK—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In a pedestrian's action for injuries from a fall due to the tilting of a block in a sidewalk on which plaintiff stepped on coming out of a shoeshop, the question whether plaintiff was contributorily negligent in not seeing and avoiding the defect was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 790\*)—DEFECTIVE SIDEWALK — NOTICE — KNOWLEDGE OF POLICEMAN.

A city is chargeable with a policeman's knowledge of the existence of a defect in a sidewalk, which causes injury to a pedestrian.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1645, 1646; Dec. Dig. § 790.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 763\*)—DEFECTIVE SIDEWALK—DUTY OF CITY.

A city owes to pedestrians a greater diligence in looking after the safety of streets which

are much traveled than those streets where the travel is light.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

**5. APPEAL AND ERROR (§ 1003\*)—VERDICT—CONCLUSIVENESS.**

Where, in a pedestrian's action against a city for injuries, there was substantial evidence to sustain plaintiff's contention that the injury was received on October 10th, as stated in the notice given to the city, as required by Rev. St. 1909, § 8863, a verdict for plaintiff could not be disturbed on appeal for fatal variance, as to the date of injury, between the proof and notice, though the preponderance of the evidence was in favor of defendant's contention that the injury was received on October 11th.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3933-3943; Dec. Dig. § 1003.\*]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

Action by Fernando Willis against the City of St. Joseph. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank B. Fulkerson, City Counselor, and L. E. Thompson and Herman Hess, Asst. City Counselors, all of St. Joseph, for appellant. R. C. Bell, of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff's action is for personal injury received on one of defendant's sidewalks, which he alleges was allowed to become dangerously out of repair. He obtained judgment in the circuit court.

[1, 2] The evidence tended to show that plaintiff stepped from the doorway of a shoe-shop onto the sidewalk, which at that place, about midway under the door, was in this condition: The walk was of granatoid laid in blocks, and one of these blocks had settled or sunk from 2½ to 3 inches. Plaintiff stepped on the edge of the higher block, when his foot turned, and he fell, breaking bones in his ankle. This condition had existed for a sufficient length of time to charge the city with notice, and there was evidence tending to show that the city policemen on their beats had observed it. We cannot say, as a matter of law, that this was not negligence in the city, nor can we say, as a matter of law, that plaintiff was guilty of negligence in not seeing and avoiding the defect. Both were questions for the jury.

[3] It is suggested that knowledge of the policemen would not affect the city. The contrary has been decided. *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108.

[4] Objection to instruction No. 2, for plaintiff, seems not well taken. It asserted the proposition that a city was required to use greater diligence in looking after the safety of its streets which were much traveled than those where the travel was light. The instruction is supported by *McKissick v. St. Louis*, 154 Mo. 538, 595, 55 S. W. 859; *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709.

[5] The statute (section 8863, R. S. 1909)

requires notice to the city, giving date and place of the injury received. The notice in this case was that the injury was received on the 10th of October, 1913, and defendant contends the evidence shows it to have been received on the 11th of that month, and therefore, under the authority of *Anthony v. City of St. Joseph*, 152 Mo. App. 180, 133 S. W. 371, there was a fatal variance requiring a judgment for the city. There was a preponderance of evidence in favor of defendant's insistence that the injury happened on the 11th, but there was some substantial evidence that it was on the 10th; and we must accept the verdict of the jury and the trial court's approval as final.

There is no error justifying a reversal, and the judgment is affirmed. All concur.

**JONES v. ORIENT INS. CO. (No. 11323.)**

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

**1. INSURANCE (§ 574\*)—ADJUSTMENT OF LOSS—VALIDITY OF AWARD—PARTIALITY OR OTHER MISCONDUCT.**

An award of appraisers appointed pursuant to the terms of an insurance policy may be disregarded, if the arbitrators are guilty of bad faith, partiality, or misconduct, substantially affecting the result.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.\*]

**2. FRAUD (§ 58\*)—EVIDENCE OF FRAUD—ACTS AND CONDUCT.**

Fraud or bad faith can rarely be proved by direct evidence, and must often be drawn as an inference from the acts and conduct of the persons charged therewith and from the necessary result of such misconduct.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.\*]

**3. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT.**

Where, in an action on an insurance policy, the question of partiality, bad faith, or fraud on the part of the appraisers appointed pursuant to the policy was submitted to the jury on substantial evidence, its verdict will be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**4. INSURANCE (§ 665\*)—ADJUSTMENT OF LOSS—FRAUD—SUFFICIENCY OF EVIDENCE.**

In an action on an insurance policy, providing for an appraisal by two appraisers, who were to select an umpire, to whom their differences were to be submitted, if they failed to agree, evidence as to the conduct of the appraiser appointed by the company, who, after a disagreement as to a single item, refused to permit the other appraiser to have anything to do with the appraisal, and substituted in his place the umpire, whose selection he had suggested, and who was apparently an unwilling, though passive, instrument in his hands, held to support a jury finding that his conduct prevented a fair and impartial appraisal.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

**5. APPEAL AND ERROR (§ 1170\*)—DISPOSITION OF CAUSE—AFFIRMANCE NOTWITHSTANDING ERRORS.**

In an action on an insurance policy on an automobile damaged by fire, the admission of evidence as to the value of the automobile before and after the fire was not reversible error, within Rev. St. 1909, § 2082, forbidding reversals, except for errors materially affecting the merits, though the policy fixed a different measure of damages, where the evidence showed such difference in value to be \$500, and plaintiff's experts testified to the amount of the loss in accordance with the theory of defendant as to the terms of the policy, and placed the loss at \$457.30, while the jury returned a verdict of \$425.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

**6. INSURANCE (§ 660\*)—ACTIONS—EVIDENCE—AMOUNT OF LOSS.**

In an action on an insurance policy on an automobile damaged by fire, which provided that the loss should not exceed the cost of repairing or replacing damaged parts with material of like kind and quality, where the evidence showed that the automobile was practically new, testimony as to the loss sustained was not objectionable because the witnesses estimated the cost of parts necessary to be replaced at the cost of new parts, without deduction for depreciation; the parts not being capable of being replaced, except by buying new parts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1695; Dec. Dig. § 660.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by L. C. Jones against the Orient Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fyke & Snider, of Kansas City, for appellant. Chas. E. Gilbert, of Nevada, Mo., for respondent.

TRIMBLE, J. Respondent sued on a policy of insurance covering an automobile which had been damaged by fire. The petition placed the damages at \$457.30. The answer admitted the fire, but set up that, under an appraisal and arbitration made by appraisers appointed pursuant to the terms of the policy, the damages had been appraised at \$205, by which respondent was bound, and an offer was made to allow judgment to be entered for that amount. The amended reply charged bad faith and misconduct on the part of the appraiser selected by the insurance company, whereby the award was rendered grossly inadequate, unfair, and incomplete, and that a fair and just appraisal was not had, and plaintiff, for that reason, ought not to be bound thereby.

The question of bad faith and misconduct were submitted to the jury, and they were told that if they found from the evidence that the said appraiser had acted in bad faith, and by his misconduct had prevented a fair and just appraisal of the loss, then plaintiff was not bound thereby, and in that event the jury should return a verdict for the amount they found from the evidence the automobile was damaged by the fire, other-

wise the jury should return a verdict for \$205, the amount of the appraisal. The jury returned a verdict for \$425, and the insurance company has appealed.

[1] An award may be disregarded if the arbitrators are guilty of bad faith, partiality, or misconduct, substantially affecting the result. 19 Cyc. 879; Insurance Co. of N. America v. Hegewald, 161 Ind. 631, loc. cit. 643, 66 N. E. 902; Fowble v. Phoenix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Ostrander on Insurance (2d Ed.) § 271. Appellant does not controvert this proposition, but contends that there was no evidence of any bad faith, partiality, or misconduct resulting in an unfair and unjust award.

[2,3] Fraud or bad faith can rarely be proved by direct evidence expressly asserting that fact. Many times it appears only as an inference to be drawn from the acts and conduct of the persons charged therewith and the necessary result of the misconduct charged and shown. The question of partiality, bad faith, or fraud having been submitted to the jury, its verdict must be sustained, if there is substantial evidence to support it.

[4] The terms of the policy provided that, in case the insured and the company could not agree upon the loss, the same should be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen should first select a competent and disinterested umpire; that the appraisers should then together estimate and appraise the loss, and, failing to agree, they should submit their differences to the umpire. The agreement for submission to appraisers provided that E. S. Weyand (selected by respondent Jones) and W. J. Hempy (selected by appellant) should appraise the loss, and further provided that "the said appraisers shall first select a competent and disinterested umpire who shall act with them in matters of difference only."

The two appraisers met in Nevada, Mo., and selected one Chas. Cress as the umpire on Monday, January 19, 1914. Hempy, the appraiser charged with bad faith and misconduct, was the one appointed by the company. He testified that he lived in Kansas City and was called on by the company to go to Nevada to act as appraiser; that it was not the first appraisal he had handled; that he had acted as appraiser in perhaps 25 cases, sometimes for the company and sometimes for the insured. He also testified that, on the Sunday before the day on which the umpire was appointed and the appraisal made, he went to Nevada and saw Cress, who afterwards became umpire, and told him he was down there in connection with the loss, but did not say anything to him about acting as arbitrator.

On Monday following, Hempy proposed to Weyand, the other appraiser, that Cress be appointed as umpire. This was done. Hem-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

py went and got Cress, and after the oaths as appraisers and umpire had been taken, the three went to the place where the damaged automobile was. As they drove up to the garage, Hempy said to Cress, "What is your charge to Ft. Scott?" and Cress replied, "\$10." Hempy said he was in a hurry to get over to Ft. Scott to catch a 2:15 train. It was then about 9 o'clock in the morning. Cress was running an automobile livery in Nevada, and Hempy's inquiry had reference to his charge for conveyance by automobile to Ft. Scott. They then looked at the automobile as it stood. The hood of the radiator was taken off, but otherwise the car was not taken apart, so that the intricate parts thereof could be inspected. The first item considered was the radiator. The two appraisers agreed upon the loss as to that. They then successively appraised and agreed upon the loss as to the wiring assembly, the spark plugs, the leather clutch, the hose and connection, the horn, and the fan belt. There is evidence tending to show that when they came to the fenders, which appraiser Weyand testified were burned and warped and the paint thereon blistered, Hempy said: "I will not allow anything on the fenders." To this Weyand replied: "I don't see why. The paint is ruined on them." Hempy replied: "Well, I will not allow him any on them. If you don't like it, we will call Mr. Cress in and you can step to one side. We will not agree on those fenders, and you have got nothing more to say. You can stand to one side. I have got no more business with you; me and Mr. Cress will settle this." Weyand further testified that he tried to show other damaged parts of the automobile which he and Hempy had not as yet examined, but Hempy told him to keep quiet; he had nothing to say. Weyand says that as much as a half dozen different times he tried to call Hempy's attention to different other damaged features about the automobile, but each time received the same response. There was evidence further tending to show that Hempy and the umpire Cress proceeded to make out a list of damaged articles, and, when they completed their appraisalment, Weyand wanted to know how much it came to, and Hempy told him it was none of his business. There was also evidence that the umpire Cress paid no attention to the articles Weyand claimed were damaged, saying he did not know whether he had a right to say what they were damaged, as he did not hardly know what he was there for. There was also evidence to the effect that, after Hempy and the umpire Cress had finished listing and making their appraisalment, Cress remarked that not enough damage had been allowed. To which Hempy replied that it was plenty; that he knew his business, for it was not the first car he had adjusted a loss on. The time taken in examining and making the appraisalment by Hempy and Cress did not exceed 30 minutes, after which they left and went to

Cress' garage; Weyand following them in. When he got inside, Cress was saying to Hempy, "That is not enough damage." Weyand then called Cress outside and told him if he thought it was not enough not to sign the award. Hempy came out and said: "Come on, Mr. Cress, come on; let's sign this; sign this up in a hurry." Cress and Hempy went back in, and Weyand followed, saying to Cress: "Charlie, if you say that is not enough, don't sign it." Hempy then said: "Sign it! Sign it! Sign it!" Cress then remarked: "Well, it is not enough. I guess I will have to sign it"—and placed his name to the award.

We think there was sufficient evidence from which the jury could find bad faith and misconduct on the part of Hempy which vitiated the award. Even if it be true, as contended by appellant, that an appraiser cannot remain in and conduct an appraisal for the purpose of accepting the result, if satisfactory, and then, merely because something in the procedure did not suit him, kick over the appraisalment, if the same is not as large as he expected, still such is not this case. Weyand was not allowed to make an appraisal if his testimony is to be believed, and we must accept his testimony as true, because the jury were the judges of that, and by their verdict have said it was true. He was forced out of the appraisalment by Hempy, who seems to have wanted to get rid of him as soon as possible and have substituted in his place the umpire Cress, whom he had seen and talked to beforehand, and whom he had suggested to Weyand for appointment as umpire. Weyand was forced out before it was known whether or not an agreement could be reached on other items of damage, and before it was finally known whether an agreement could be reached even on the fenders. The policy provided that the loss should be estimated by the two appraisers, and, if they failed to agree, their *differences* should be submitted to the umpire. The agreement for submission provided that the umpire should act with the appraisers "in matters of difference only." It was held in *Home Ins. Co. v. Schiffs' Sons*, 103 Md. 648, 64 Atl. 63, that in such case, if the appraisers agreed upon some of the items but disagreed as to others, this did not authorize the setting aside of one of the appraisers and the making of an award covering all the items, since that was not in accord with the terms of the submission, and that such procedure will vitiate the award. However this may be with reference to its application to this case, the evidence, if believed, is sufficient to show, or to authorize a jury to find, that Hempy was not acting in good faith in an honest attempt to fairly and impartially appraise the loss as a disinterested appraiser should have done. He not only refused to allow the other appraiser an opportunity to agree with him

upon various items of damage, but did not himself take a number of such items into consideration, or, if he did, refused to allow anything on them. Nor did he make any attempt, by a frank and conciliatory expression and exchange of views, to get to an agreement with his coappraiser, but, on the contrary, by his arbitrary, irritating, and insulting manner did all he could to drive the other appraiser from the work before them. His haste in rushing through in 30 minutes the work of appraising the loss upon the various damaged parts of an intricate machine, which plaintiff's two automobile experts testified could not be properly inspected without taking it apart so as to get at all of its mechanism, and which required all of three hours to perform; his arbitrary and unjustifiable conduct by which at the first opportunity, he thrust aside his coappraiser and substituted therefor the umpire, who seemed to have been an unwilling, though passive, instrument in his hands, so that the appraisal which they signed was nothing more than the expression of Hempy's will and not the honest judgment of both—all these things, if true, show, plainer than words, that Hempy was not a disinterested appraiser seeking to get at an honest estimate, which would be fair and just to both parties, but was acting solely in the interest of the insurance company. Even if he really thought the damage was no greater than \$205, and that his superior judgment should prevail, yet his unwarranted course of conduct was such as to prevent a fair and impartial appraisal, and the award which was signed was nothing more than a certificate of his arbitrary and partial judgment. This would at least constitute a legal fraud upon the respondent and vitiate the award. There was ample evidence to justify the jury in its finding.

[8] Complaint is made that reversible error was committed in allowing evidence to be given of the difference in value of the machine immediately before and after the fire; the claim being made that the policy created a different measure of damages. Even if this claim be true, we cannot see wherein the admission of such evidence would be grounds for reversal, if section 2082, R. S. Mo. 1909, is to be given any effect whatever. The evidence complained of showed that the difference in value was \$500. Plaintiff's experts, however, in testifying to the amount of the loss, did so in accordance with the theory of appellant as to the terms of the policy, and placed the loss, under that method, at \$457.30, and said that even then the car would not be in as good condition as it was before the fire. The jury returned a verdict of \$425. We cannot see wherein the appellant was injured by the evidence complained of, even if its admission was erroneous.

[8] Some objection is made to the way plaintiff's experts arrived at \$457.30 as the loss sustained, because they estimated the cost of certain parts necessary to be replaced at their cost when new, without deduction for depreciation. But the evidence showed the automobile was practically new, having been run very little. The policy provided that the loss should not exceed what it would cost the insured to repair or replace the same with material of like kind and quality. The respondent could not replace the articles, except by buying them new. Other objections are made, but they are without merit. The judgment is affirmed. All concur.

GERMAN-AMERICAN BANK v. CRAMERY.  
(No. 11226.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

1. APPEAL AND ERROR (§ 430\*)—DISMISSAL—  
FAILURE TO GIVE NOTICE—GOOD CAUSE.

Under Rev. St. 1909, § 2071, providing that if the notice of the suing out of a writ of error be not given, the writ shall be dismissed, unless good cause for such failure be shown, a showing that the notice was mailed to the chief counsel on the opposite side, although there was local counsel in the same place, in time to have reached him in due course of mail with three days to spare, but which notice was never received, discloses good cause for the failure to give notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174, 3126; Dec. Dig. § 430.\*]

2. EVIDENCE (§ 20\*) — JUDICIAL NOTICE —  
COURSE OF MAIL.

The court can take judicial notice that a letter mailed in Macon City on the fifth of the month should be delivered to the addressee in Bowling Green on the sixth or seventh of the same month.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.\*]

Error to Circuit Court, Macon County; Nat M. Shelton, Judge.

Action by the German-American Bank against George W. Cramery. Judgment for the defendant, and plaintiff brings error. Defendant's motion to dismiss the writ of error denied.

T. L. Anderson, of Hannibal, and R. S. Matthews & Son, of Macon, for plaintiff in error. Nat M. Lacy, of Macon, and Hostetter & Haley, of Bowling Green, for defendant in error.

ELLISON, P. J. Plaintiff's action was instituted on two promissory notes. The judgment in the trial court was for the defendant. Afterwards plaintiff appealed to this court and then dismissed the appeal, and on the 28th of January, 1914, sued out a writ of error returnable the 2d day of March thereafter. Defendant has filed a motion to dismiss the writ for failure to give him 20 days' notice before the return day, as required by section 2071, R. S. 1909. Plaintiff resists the motion.

The following is made to appear in affidavits of the attorneys in the cause: The suit was brought in Marion county, and the venue changed to Macon county, where it was tried. Defendant's chief counsel resided in Bowling Green, Pike county, perhaps 75 miles from Macon City, where plaintiff's attorneys reside. In addition to defendant's chief counsel, he had local counsel at Macon City. On the 5th of February, 1914, plaintiff's attorney mailed a written notice of suing out the writ of error to defendant's attorney at Bowling Green, accompanied by a letter, requesting him to inclose the same to the clerk of this court at Kansas City. Plaintiff's attorney supposed the notice was received and sent to the clerk as requested, but in fact the notice was never received by defendant's attorney. Being mailed on the 5th, we can judicially notice that, in regular course, it should have been in the hands of defendant's attorney on the next day, the 6th, or if, perchance, mailed at Macon too late on the 5th to arrive in Bowling Green and be distributed before the close of business hours the next day, it, at farthest, should have been received on the 7th, which would have been in time for the legal notice, with three days to spare.

The statute aforesaid, requires that, "if such notice be not served, the writ shall be dismissed, unless good cause for such failure be shown;" and we are of the opinion that the foregoing facts disclose a good cause. The motion to dismiss will therefore be overruled. Defendant, perhaps in reliance upon his motion, has not filed any briefs, and the cause will be continued to the next term, and in the meantime he may file briefs as though the case had been originally docketed for that term. The other Judges concur.

#### RATCLIFFE v. MISSOURI BENEFIT ASS'N. (No. 11247.)

(Kansas City Court of Appeals. Missouri.  
Nov. 2, 1914. Rehearing Denied  
Nov. 23, 1914.)

#### 1. INSURANCE (§ 84\*) — COMPENSATION OF AGENTS—SUFFICIENCY OF EVIDENCE.

In an action by an insurance solicitor for the balance claimed to be due on commissions earned, where defendant claimed that its written offer of commissions at a specified rate was orally modified before it was accepted by plaintiff, evidence held insufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.\*]

#### 2. CONTRACTS (§ 28\*)—OFFER AND ACCEPTANCE — MODIFICATION OF OFFER — BURDEN OF PROOF.

Where defendant made a written offer to plaintiff which was not accepted by him before a conversation took place at which defendant claimed that the written offer was modified, the burden is upon the plaintiff to prove that

defendant's offer at the time he accepted it was the same as the written offer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.\*]

#### Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by William Ratcliffe against the Missouri Benefit Association. Judgment for the plaintiff in the circuit court on appeal from a justice of the peace, and defendant appeals. Reversed.

Frost & Frost, of Plattsburg, and Martin E. Lawson, of Liberty, for appellant. D. B. Cross and R. H. Musser, both of Plattsburg, for respondent.

JOHNSON, J. Plaintiff sued in a justice court to recover a remainder due him for services rendered defendant under a contract of employment. Defendant does not deny that the services were rendered as alleged, but claims the agreed compensation was paid in full. Defendant is a corporation engaged in a small way in the life insurance business, with headquarters at Edgerton in Platte county. It issues policies for \$100, \$200, and \$500, respectively, the premiums payable monthly, and accepts such risks on the lives of children over five years of age. One of the witnesses speaks of the business as "burial insurance." Plaintiff was a solicitor employed by defendant for about one year under an agreement that he was to receive a salary of \$50 per month and a commission on each policy secured by him. The controversy which gave rise to this action is over the rate of commission plaintiff was to receive on each policy of \$100 or \$200 written on the life of a child between the ages of 5 and 15 years. Plaintiff contends that the agreed commission was 50 cents on each policy of that class, while defendant insists that it was 25 cents. It was agreed by the parties in the circuit court, where the cause was tried on appeal, that if the contract of employment fixed a rate as stated by plaintiff he is entitled to recover \$180 from defendant, and that if defendant's version of the contract is correct plaintiff has been paid in full for his services and is not entitled to recover in any sum. This issue was decided in favor of plaintiff in the circuit court, and defendant appealed. The principal contention of counsel for defendant is that the evidence most favorable to plaintiff does not tend to support his claim to the larger commission, and therefore that defendant's demurrer to the evidence should have been sustained.

[1] The employment of plaintiff began November 1, 1912. Two weeks or more before that date the president of the company visited plaintiff, who was at Wallace in Buchanan county, for the purpose of offering him employment. In the conversation that ensued the president told plaintiff the salary would

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be \$50 per month, and in addition the company would pay certain commissions, among which was a commission of 50 cents on each application for a \$100 or \$200 policy procured by plaintiff. This offer was "taken under advisement" by plaintiff, who went to Holden to transact some business. While there he wrote to defendant requesting that an offer be made in writing. Under date of October 22, 1912, defendant answered by letter stating the terms of its offer, including the payment of a commission of 50 cents on each \$100 and \$200 application. Plaintiff did not answer that letter, and on October 26th defendant wrote him another letter, as follows:

"We are getting out some new advertising matter, and making some material changes in our association, and it will be necessary for you to come to the office before beginning the work for our association, and Mr. McComas requests that you come to our office on Friday, November 1st, so that we can give you full instruction in reference to the work, and explain to you the changes that we have made. Hoping this will meet with your approval, we are," etc.

Plaintiff went to Edgerton in response to this letter and was informed that defendant had lowered the rate of premiums on \$100 and \$200 policies issued to children between 5 and 15 years of age, and the officers of defendant state they informed plaintiff that his commission on such applications would be 25 cents instead of 50 cents each, as stated in the letter of October 22d. Plaintiff states that his visit to the office, which covered practically the whole day, was occupied with a "rehearsal of the contract by which I was to work, and I got instructions how I was to appoint collectors and what they were to have." We quote excerpts from his cross-examination:

"Q. Now, when you were there Mr. Sturgis and Mr. McComas explained to you it was necessary to make a change in the rates because of a change in the rate of insurance, didn't they? A. Not on my part. Q. Did they say there, or did you say anything about what you were to get for writing children between 5 and 15? A. I don't remember; if they did, I don't remember it. Q. You are positive that they did not say that? A. No, sir; I didn't understand them to be talking to me at all, because I had my contract."

By the latter expression, "because I had my contract," plaintiff refers to defendant's letter of October 22d, which he regards as constituting the entire contract between him and defendant and in which the rate in question was fixed at 50 cents for each application.

On December 5th, following this interview, defendant wrote plaintiff inclosing a statement of the commission account in which the rate of commission on the applications sent in by plaintiff belonging to the class in dispute was stated as 25 cents, and a check was inclosed in settlement of the account. Plaintiff cashed the check and wrote defendant claiming that the settlement should have been on the higher rate and requesting a remittance to cover the difference. Defendant, un-

der date of December 16th, replied in a long letter repeating the oral agreement made at the office on November 1st, by which the rate was changed to 25 cents. Plaintiff did not reply to this letter and claims he did not receive it. He asserts that in the following February he visited the office and complained of not receiving the full commissions due him, and was told to "go ahead and get the business, we will pay you."

All of the monthly statements of commissions and accompanying remittances sent by defendant to plaintiff were on the basis of the lower rate. Plaintiff received these statements and cashed the checks without further protest, but, as he states, with the mental reservation that he accepted them "on account and not in full settlement." As to the conversation at the office in February, the president of defendant states that plaintiff, referring to the letter of October 22d, said, "You better take up this contract I have," to which the president replied:

"No, that isn't necessary, because we understand each other. You have your statement, and we understand each other all right."

We have not stated all the facts and circumstances in evidence, but those we have mentioned are enough to show that the misunderstanding between the parties sprang from the mistaken view of plaintiff that the letter of October 22d constituted the entire contract, that it became effective as a contract before the visit of plaintiff to defendant's office on November 1st, and was not modified by the conversation held on that occasion.

The letter, as clearly shown by its contents, was nothing more than an offer of employment, which could not ripen into a contract until its acceptance by plaintiff. His own testimony shows that he had not accepted the offer at the time he visited defendant's office in response to the letter of October 26th asking him to come and stating that important changes were being made of which it would be necessary to inform him. The contract therefore, consisted of the terms stated in the letter of October 22d as modified in the oral agreement which accompanied its first acceptance by plaintiff. In effect, the defendant said to plaintiff, "You have not accepted our written offer, and we renew it, with the exception that the rate of commission on applications for \$100 and \$200 policies on children between 5 and 15 years will be 25 cents instead of 50 cents as stated in that letter;" and plaintiff replied, "I will accept the offer in the letter as modified."

This is not an instance where a written contract is claimed to have been modified by a subsequent oral agreement. The rule in such cases is that:

"Where the parties vary the original terms of the agreement by substituting something else, for the whole or for particular parts of the agreement, there the substituted things become a part of the agreement, and the parts dispensed with are no longer any part of the agree-

ment." *Helm v. Wilson*, 4 Mo. 41, 28 Am. Dec. 336; *Woods v. Stephens*, 46 Mo. 555; *England v. Houser*, 163 Mo. App. 1, 145 S. W. 514.

[2] But this is a case where a written offer is orally modified before its acceptance, in which case the contract consists of the terms expressed in the offer as subsequently altered. Under the facts as disclosed by plaintiff himself, the burden was not on defendant to prove that the written offer had been subsequently changed by oral agreement, but was on plaintiff to show that at the time of his acceptance the terms of the final agreement allowed him the higher rate. His testimony on this point is most unsatisfactory, and when rightly analyzed amounts, not to a denial that defendant did tell him the rate of commission would be lowered to 25 cents, but to a belief on his part that the rate was unalterably fixed in the letter and would not be affected by the declaration of defendant of a purpose to change it. Considering the importance of the subject to him and the fact that he had been summoned to the office to receive advice of important changes, his statement on the witness stand that he did not remember whether or not anything was said about lowering the rate, "because I had my contract," is a substantial admission that the declaration of a change was made by defendant and that plaintiff thought he could ignore it and still claim the compensation provided in the written offer.

There is no substantial evidence of the existence of a contract for the higher rate, and it follows that the judgment must be reversed. All concur.

#### ROBINSON v. HAMMOND PACKING CO. (No. 11063.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

#### 1. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—PETITION.

Where the petition charged that plaintiff, while at work in defendant's hog-killing room, at the north end of which was a sewer full of scalding water, slipped and fell into the sewer, which was negligently left uncovered, defendant having allowed the floor to become slippery, the negligence charged is not the maintenance of the sewer, but the failure to protect and cover it while filled with scalding water.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

#### 2. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where an employé in the hog-killing room of a packing plant slipped and fell into an open sewer containing boiling water in which refuse was dumped, and he was a mature man and had been engaged there for some time, he must be held to have assumed the risk of injury, for a servant assumes the ordinary risks inherent in the nature of the business upon which he enters, so far as they are readily discernible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

#### 3. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where the sewer ordinarily contained only lukewarm water, but on the particular occasion when the servant slipped was filled with boiling water, the servant cannot be held, as a matter of law, to have assumed the risk of injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

#### 4. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—JURY QUESTION—VARIANCE.

Where plaintiff's petition charged that he slipped into a sewer at one end of defendant's hog-killing room, which was negligently left uncovered, proof that he stepped into the sewer at another point, where it was equipped with a cover, constitutes a fatal variance, and no recovery can be had for negligence in allowing the sewer to become filled with boiling water where no such negligence was pleaded.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Action by Manford D. Robinson against the Hammond Packing Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Samuel I. Motter and O. E. Shultz, both of St. Joseph, for appellant. Goldman & Liberman, of St. Joseph, and Broadbuss & Crow, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff was employed in the "hog-killing" room of defendant's packing house. In the floor was a drain or sewer about nine inches wide and eight inches deep. It ran the entire length of the room (about 75 feet) from north to south, and was used to carry the water, grease, scum, blood, and filth which necessarily fell upon the floor in the prosecution of the work. An overflow pipe from the plant's hot-water tank connected with this sewer at the south end, and hot water ran through the sewer to cleanse the same and to better cut the grease therein. It was also an outlet for the hot and cold water alternately used in cleaning the floor. The floor of this room, where hogs were killed, scalded, cleaned, and dressed would necessarily become wet, greasy, and slippery during the prosecution of the work. On the 16th of December, 1912, about 6 o'clock in the evening, plaintiff, while performing certain duties required of him in cleaning up after the day's killing had stopped, slipped on said floor, and his left foot went into the scalding water in the sewer and was injured. He brought this suit to recover damages.

[1] The petition alleged that the north end of the sewer, filled with scalding water, was uncovered and unprotected for a distance of 16 feet. The negligence charged was that the defendant "carelessly and negligently permitted the floor of the said hog-killing room to become covered with oily and greasy substances, so that plaintiff, while engaged in his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

usual course of employment and exercising due care for his safety, was caused to slip and fall at a point on the above-mentioned floor, near the sewer, and was made to fall into the said sewer, which was filled with scalding hot water, and was uncovered at that point," that defendant "knew, or should have known, that the sewer into which plaintiff fell was full of scalding hot water, and that the floor in the said hog-killing room was slippery and a dangerous place to work, on account of the oily and greasy substances on said floor, and that plaintiff or any other employé would be apt to fall on said floor, and would be apt to fall in said sewer, yet the defendants negligently and carelessly failed to provide said sewer with a cover, keep it covered, and to protect it." It is clear, therefore, that the negligence charged in the petition was not in permitting scalding water to be in the sewer, but in failing to provide the sewer with a cover, and in failing to keep it covered and protected while maintaining it full of hot water in a slippery floor. In other words, the petition alleges that defendant did not perform its duty of furnishing plaintiff with a reasonably safe place to work in that it negligently failed to cover the sewer. The answer was a general denial coupled with a plea of contributory negligence and assumption of risk.

There is no dispute over the fact that during the day, while the work of killing and cleaning is going on, the greater portion of the sewer (including that where plaintiff performed his duties of hoisting to the platform hogs that have rolled therefrom to the floor), was covered with a board fitted thereon. But plaintiff claims that at the north end of the sewer, for a distance of from five to eight feet, there was no covering and never had been any, and that in walking north alongside the sewer and on the west side thereof he came to this unprotected portion of the sewer, and while passing around a pile of apparatus at the foot of a post he stepped nearer the sewer, and his feet slipped on the greasy wet floor and his left foot went into the sewer. Although it was after killing had ceased for the day and the men were engaged in cleaning the room, plaintiff says they had not yet raised the cover, which was maintained over the sewer at all points except the few feet at the unprotected north end. Defendant claims, and offered testimony tending to prove, that it was necessary to take the cover off in order to clean the floor, that the cover was off and the men were engaged in cleansing the floor, and that, while the sewer was thus open, the plaintiff stepped into the sewer near the south end. At the close of plaintiff's testimony, and again at the close of all the testimony, the defendant demurred to the evidence, but was overruled. The jury returned a verdict for \$2,000 and defendant has appealed.

[2] It is urged by defendant that plaintiff

is not entitled to recover. This contention is based upon the fact that the injury was alleged to be due solely to the slippery floor and the failure to maintain a covering for the sewer. And defendant's point is that since the slippery condition of the floor is a necessary incident to the business of killing and dressing hogs, and the sewer was a method adopted by defendant to dispose of the waste and sewage of that department, and plaintiff was fully aware of the fact that it was open and unprotected, then plaintiff assumed the risk and cannot recover. Plaintiff was a mature man. He had had six or seven years' experience as an employé in packing houses. He had worked in the hog-killing room in question at various times before. He admitted having worked the last time in this room for at least a month prior to the accident, but would not say how much longer. His foreman says he had worked there for seven months before. Whatever the length of time, he admitted that he was perfectly familiar with the conditions in the room. It is also undisputed that the slippery condition of the floor was a necessary and unavoidable incident of the work carried on. Plaintiff also admits that he knew the northern portion of the sewer was uncovered, never had been covered, and that he had, prior to the accident, observed the sewer, and that while the south portion was covered, the northern portion was not. In fact, he admitted that the sewer had to be kept open at the north end in order that, at intervals, the hair from the scalded hogs, which came out on the floor and collected in the sewer, could be removed therefrom so as to prevent it from getting choked; but he says this opening need not have been more than 14 inches long, while defendant allowed it to be open and unprotected for a distance of from five to eight feet. He was well aware of this fact because he frequently removed the hair from the sewer at the north end, and could not help but know the extent of the opening, even if his knowledge of the room did not otherwise disclose it to him. So that there is no question but that he knew the extent of the opening, and the slipperiness of the floor.

The proof showed, further, that the sewer had to be in the floor in accordance with governmental regulations concerning cleanliness, and that in character and method of maintenance it was like all other sewers in hog-killing rooms. Plaintiff says, however, that the sewer in the cattle department was entirely covered. Whether it was necessary to have an opening in that sewer to remove the hair is not shown. Cattle are not scalded, but are skinned with the hair remaining on the hide, so that it may be no opening is required to be maintained as in the hog room.

A servant assumes the ordinary risks inherent in the nature of the business upon which he enters so far as they, at the time of entering the business, are known or should

be readily discernible by a person of his age and capacity, in the exercise of ordinary care. And where a business is obviously dangerous, and is conducted in a manner which is fully known to the servant at the outset, he assumes the risk of its conduct in that manner, although a safer method could have been adopted. 1 Shearm. and Redf. on Neg. (6th Ed.) § 207e.

"It is well settled that a servant assumes the risk of every defect of which he had actual or constructive notice when he accepted the employment so far as he comprehends, or ought to comprehend, the peril involved, *even though such defect was due to the master's personal negligence*, provided there was no express promise to remove the defect." 1 Shearm. and Redf. on Neg. (6th Ed.) § 209.

Where the conditions are constant and long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and dangers are obvious to the common understanding, and the employé is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question of assumption of risk becomes one of law for the decision of the court. *Patton v. Texas Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

Now, before we can uphold defendant's contention and debar plaintiff from any right of recovery on the ground of assumption of risk, we must say that that assumption appears as matter of law. There is no doubt but what the books are full of cases holding that a master may conduct his business in his own way and according to his own methods, and a servant who knows the hazards of that way and engaged in the service assumes the risk. *Saversnick v. Schwarzhild, etc., Co.*, 141 Mo. App. 509, 125 S. W. 1192; *Harrington v. Wabash Ry. Co.*, 104 Mo. App. 663, 78 S. W. 662. There are also many cases in which the appellate courts have held, as matter of law, that the plaintiff assumed the risk and therefore could not recover. Such, for example, is the case of *Disano v. New England Steam Brick Co.*, 20 R. I. 452, 40 Atl. 7. There a servant was employed in shoveling clay from a slippery platform into an unprotected opening. While so doing he slipped into the opening and was injured. It was held as matter of law that he had assumed the risk. A similar case, among many others, is the case of *Tinkham v. Sawyer*, 153 Mass. 485, 27 N. E. 6, where a plaintiff worked on a floor made slippery as a necessary and unavoidable incident of the work and, slipping thereon, thrust his arm into revolving machinery. He was held to have assumed the risk. But in all of these cases it will be noticed that, if the workman slipped, the danger of being injured by going into the machinery was apparent and certain.

[3] But in the case at bar, while the liability of slipping into the sewer was apparent, yet the *danger* arising therefrom was not ap-

parent unless the plaintiff knew it was likely to contain hot water. Now while it seems to be implied from the allegations of the petition that hot water was carried in the sewer as a part of the work, and the character of the business would seem to require hot water to be therein, yet the plaintiff says that he had never known the water in the sewer to be anything more than warm enough to be comfortable to the hands. And in other evidence it was shown that, although the sewer was connected with the hot-water overflow pipe, yet that water got cooler as it neared the north end of the sewer because it mingled with the cooler water coming from other parts of the plant and also with water falling on the floor of the room and finding its way to the sewer, and that it was only when there was a cessation of such cool water that the temperature of the water running in the sewer rose to burning heights. Plaintiff says he was accustomed to remove hair from the north end of this sewer with his hands, and that at all times the water was merely warm and pleasant. If, now, plaintiff did not know that the water in the sewer was likely to be scalding at times, and had no notice to the contrary, then he cannot be held to have assumed the risk. It might be that the scalding water would disclose itself by the steam that would arise, and thereby notify plaintiff that it was dangerously hot at times, but we are unwilling to say so as matter of law. The evidence does not disclose what the conditions of the atmosphere and temperature of the room were. The work may have been carried on, and doubtless was, in a hot, wet, and steamy atmosphere, so that the scalding condition of the water in the sewer would not disclose itself. Plaintiff swears he had never known of the water in the sewer being anything more than lukewarm and pleasant, and there is no indisputable showing that he had actual or constructive notice to the contrary. The question of assumption of risk, therefore, rests upon whether or not plaintiff had such notice that the water was likely to be dangerously hot. This being a question of fact for the jury, the question of assumption of risk becomes a question for the jury and not for us. Although the petition implies that the hot water was in the sewer as a part of the work, and therefore plaintiff would have notice of its heat, yet as there is evidence tending to show that he did not have such notice, we are unwilling to so construe his petition as to debar him from recovery on the ground that, as matter of law, he must be held to have assumed the risk.

On the other hand, it is doubtless because of the implication in the petition above noted that the defendant did not go into the question of plaintiff's knowledge of the likelihood of the sewer containing hot water. If plaintiff knew of the *danger* on account of the likelihood of the sewer containing hot water

then, even though he fell in at the unprotected north end, he cannot recover, since he knew it was uncovered and knew the extent to which it was not protected. In addition to this, plaintiff was walking north on the west side of the sewer, and on reaching this unprotected five feet he says he came to a post which had some articles piled at its base, and that he walked around this pile on the east and thereby stepped nearer to the edge of the sewer when he slipped. He admits that he could have gone west of the post and away from the sewer, but did not do so. He also says he could have gotten to the point on the platform, where he was intending to go, by going up the stairway on the east side near where he worked during the day and where the sewer was covered, instead of going north alongside the open part of the sewer to the stairway on the north side of the room; that it was a matter of taste which way was the better, but that he went this way as he had always done. This, however, if militating against a recovery, would not do so unless he knew of the danger arising from hot water in the sewer.

[4] Plaintiff's petition alleges that, on a floor that was negligently permitted to become greasy, he slipped near the north end of a sewer where it was negligently left open and unprotected. There was evidence, however, that he did not slip and fall into the sewer at the north end, but *stepped* into it at the south end, which was provided with a cover according to his own admission. Defendant, therefore, asked an instruction based on this evidence, telling the jury that if he attempted to cross said sewer at the south end and stepped into it at that point, he could not recover. This was refused, and it was not covered by any other instruction. The instruction should have been given. The petition alleged specific negligence and, if the injury happened the way defendant's witnesses say it did, there was a divergence between the allegation and the proof. It cannot be claimed that this variance is not fatal. The petition did not allege that it was negligent to have hot water in the sewer. On the contrary, as stated heretofore, the implication is that the hot water was rightfully there as a necessary part of the work to be accomplished.

The judgment is reversed, and the cause is remanded. All concur.

STUNDON v. DAHLENBERG. (No. 11257.)  
(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

1. PARTNERSHIP (§ 20\*)—CREATION OF RELATION.

After plaintiff had purchased wool and shipped it for resale one B. requested an opportunity to go in on the deal. Plaintiff agreed to allow him to participate upon payment of one-half of the purchase price. B. gave a check

which proved worthless. *Held*, that had B.'s check been good, the parties would have become partners in respect to the wool transaction, for a partnership may be organized for a single venture as well as for the conduct of a continuous business, and is defined as the contract of two or more competent persons to put their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, First and Second Series, Partnership.]

2. PARTNERSHIP (§ 218\*)—EXISTENCE—JURY QUESTION.

Where the undisputed facts show a partnership as a matter of law, the court may declare that a partnership exists without submitting that question to the jury.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 428-428; Dec. Dig. § 218.\*]

3. PARTNERSHIP (§ 19\*)—CREATION OF RELATION.

Where plaintiff agreed that another could become his partner in a venture upon payment of one-half of the money he had expended, and such third person gave plaintiff a worthless check, which was not accepted as absolute payment, the parties did not become partners among themselves.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 5; Dec. Dig. § 19.\*]

4. PARTNERSHIP (§ 29\*)—RIGHTS OF PERSONS DEALING WITH OSTENSIBLE PARTNERS.

Plaintiff purchased and shipped wool to defendant, which was tagged in plaintiff's name. Thereafter one B. requested permission to participate in the venture to which plaintiff agreed in case B. would pay one-half of the purchase price; it being understood that the proceeds should be sent to plaintiff's bank and thereafter divided. B. gave plaintiff a worthless check for his share in the venture, and then sought out defendant who, being informed that B. was a partner, paid B. for the wool. *Held*, that as the parties had not become partners among themselves and there was nothing except B.'s unsupported word that they were partners which would authorize defendant to pay him, plaintiff is not bound by the payment and may recover the purchase price despite the act of his alleged partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 30-33; Dec. Dig. § 29.\*]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Action by John Stundon, Junior, against George Dahlenberg, doing business under the name of the St. Joseph Wool Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Cook, Cummins & Dawson, of Maryville, for appellant. Culver & Phillip, of St. Joseph, for respondent.

TRIMBLE, J. This is a suit to recover the value of 3,615 pounds of wool shipped by plaintiff to defendant. The petition alleges the wool was shipped to defendant to be sold on commission; that defendant received the wool, but has refused to account for it. The answer admits the receipt of the wool, but says that defendant bought it from plain-

tiff's partner, who was joint owner of the wool, and that as defendant has paid said partner for it, there is nothing due plaintiff. After plaintiff's evidence had been introduced, a demurrer was offered which the court sustained, and a verdict for defendant was directed. Plaintiff has appealed.

Plaintiff is a live stock dealer and lives at Maryville. Defendant is in the wool business at St. Joseph. As presented by plaintiff's evidence, the facts are that plaintiff bought the wool and shipped it in his name from Maryville to defendant at St. Joseph. After it had been shipped thus in his name, a man by the name of Bradbury, who was with plaintiff at the time the wool was purchased and shipped, asked plaintiff to let him in on the deal, and agreed to pay plaintiff one-half of the cost of the wool, in return for which he was to have one-half of the proceeds derived from the sale of the wool. They agreed to this. Bradbury then gave plaintiff a check for one-half of the cost of the wool, and it was agreed that the proceeds derived from the sale of the wool was to be sent to plaintiff's bank at Maryville, at which time plaintiff would pay Bradbury half thereof, Bradbury saying he was satisfied plaintiff would be honest enough to pay him his half when the returns came back. Plaintiff immediately deposited Bradbury's check in the bank, and it was sent, in due course of business, to the bank on which it was drawn, but proved to be worthless. As soon as Bradbury gave his worthless check he went to St. Joseph and told defendant he was a partner owning an interest in the wool, whereupon defendant bought the wool of him, paying him therefor (after deducting freight) \$472.95, which was \$138.55 less than plaintiff had paid for it, and nearly a third less than the market price for it at that time. The moment Bradbury received the money he departed for parts unknown. When Bradbury's check was found to be worthless, plaintiff got in communication with defendant and learned that the latter had paid Bradbury the money for the wool. Defendant refused to pay anything further, and this suit was brought.

Plaintiff's contention is that the question of whether he and Bradbury were partners in the wool was for the jury and that the court should not have directed a verdict; that it is clearly shown by the evidence that Bradbury's interest in the venture was conditioned upon his paying one-half of the cost of the wool; that inasmuch as Bradbury's check was not received as absolute payment, no title passed to Bradbury, and he did not become a partner of plaintiff's, and therefore payment by defendant to Bradbury was not payment for the wool.

[1] We do not agree with plaintiff's other contention that, if Bradbury's check had been good, he would not have obtained a half interest in the wool but would only have

gotten a half interest in the proceeds. Clearly the subject of the purchase was the wool and the consequent right to a half interest in what the wool would bring. If Bradbury's check had been good, and something had happened to the wool whereby it could not have been sold or had been lost, certainly Bradbury could not have recovered the money paid on the ground that he was not interested in the wool, but had only bought an interest in the proceeds. So that, *if Bradbury's check had been good*, the facts disclosed by plaintiff's evidence would have constituted them partners in this particular wool venture.

"A partnership may be organized for a single adventure as well as for the conduct of a continuous business." 30 Cyc. 354.

"Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions." 3 Kent's Com. (14th Ed.) 24.

And this definition is said to be "most accurate and comprehensive." 30 Cyc. 349.

[2] Nor is it true, as seems to be claimed by plaintiff, that the question of partnership or no partnership is solely for the jury under any and all circumstances. We agree with defendant that if there is no dispute as to the facts and those facts are such as to constitute, in law, a partnership, then the court may properly declare a partnership to exist and direct a verdict which flows as a necessary legal consequence from that status. *Morgan v. Farrell*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282, loc. cit. 284; *Everitt v. Chapman*, 6 Conn. 347. In the present status of this case the facts are not in dispute. Therefore the question before us is: Are the facts sufficient in law to constitute Bradbury a partner of plaintiff?

[3] In answer to this it must be said that they are not sufficient to constitute them partners *as between themselves*. Clearly Bradbury's right to an interest in the venture depended upon his paying to plaintiff one-half the cost of the wool. There was no agreement on the part of Stundon, the plaintiff, to accept Bradbury's check as absolute payment for one-half of the wool. Indeed the presumption is that it was not, since the proceeds of the wool were to be returned to plaintiff's bank in Maryville and plaintiff was then to turn over one-half thereof to Bradbury. Certainly this was not to be done if Bradbury's check was worthless. The terms of plaintiff's sale of one-half interest to Bradbury was cash for which the latter gave a check which proved to be worthless. Consequently no title to, nor interest in, the wool passed from Stundon to Bradbury. *Hall v. Mo. Pac. Ry.*, 50 Mo. App. 179; *Johnson-Brinkman Com. Co. v. Central Bank of Kansas City*, 116 Mo. 558, loc. cit. 570, 22 S. W. 813, 38 Am. St. Rep. 615; *Wright v. Mississippi Valley Trust Co.*, 144 Mo. App. 640, 129 S. W. 407; *Strauss v. Hirsch*, 63 Mo. App.

95. And, therefore, Bradbury never became a partner of Stundon's *as between themselves*.

[4] But defendant contends that the above principle does not apply and is immaterial here for the reason that, as regards *outside parties* or the world, they were partners whether they were so as between themselves or not. And stress is laid on certain testimony which tends to show that there was a partnership as to third parties. But *the defendant knew nothing of these alleged facts*. There was nothing done by Stundon in the way of holding Bradbury out as a partner to defendant. Defendant had no knowledge whatever of any facts which justified him in thinking Bradbury was plaintiff's partner. On the contrary, defendant had enough to warn him that he ought to ascertain whether Bradbury was in fact a partner before paying him the money for the wool. It is true Stundon when he shipped the wool did not send defendant the bill of lading, but he put on the shipping tags, attached to the sacks of wool, his own name as the one from whom the wool was shipped, and defendant must have known, from the waybill in the hands of the railroad, who shipped the wool. Besides, defendant in giving his reason for not paying for the wool, discloses that he knew plaintiff, or at least some one beside Bradbury, was interested in the wool. It is also true that plaintiff told Bradbury to tell defendant to send the money to the bank at Maryville, but he says that this is all he told him. This did not authorize Bradbury to misrepresent the situation to defendant and draw the cash on the wool. Nor did it justify defendant in accepting Bradbury's unsupported word that he was a partner of Stundon's. Suppose, instead of merely telling Bradbury to tell defendant to send the money to plaintiff at Maryville, Stundon had sent a letter to defendant by Bradbury in which he had said:

"I bought some wool to day and shipped it to you in my name, but, after doing so, Bradbury wanted in on the deal, and I agreed to let him have a half interest on condition that he pay me half what the wool cost me. He has given me a check which I have deposited in the bank for collection, and I have told him to tell you to send the proceeds to me at Maryville."

This would not have justified defendant in paying Bradbury the money for the wool. Now, under the circumstances disclosed by the evidence, defendant had less grounds for paying Bradbury the money than if he had gotten such a letter from plaintiff. After receiving the wool knowing that it was shipped to him by Stundon, he takes the bare unsupported word of Bradbury that he is a partner and authorized to receive the money. What the relations were between defendant and Bradbury or the extent of their acquaintance with each other is not shown. Where he came from and whither he went no one knows. There were no prior relations existing between him and plaintiff which would

lead defendant to think all was right. In fact, the negligence of defendant in thus paying the money to Bradbury upon his bare unsupported word, when it was known the wool came from another, without making any effort to find out whether he was in fact a partner or not, is, so to speak, the proximate cause of plaintiff's loss. Plaintiff did nothing to warrant defendant in accepting Bradbury's statement. He did nothing to justify defendant in believing Bradbury was his partner. As he did nothing of this kind and as defendant voluntarily chose to accept Bradbury's word, plaintiff ought not to be barred from any relief as matter of law. Bradbury did not become plaintiff's partner for the reason that he never performed the condition on which he was to become such. He had no authority from plaintiff to represent to defendant that he was a partner. He did not tell defendant the truth about the matter. Consequently, as he was not in fact a partner and had no authority from plaintiff to say he was, plaintiff ought not to be bound by Bradbury's untruthful and unauthorized representations.

What has been said, of course, is in view of the evidence as presented and viewed in the most favorable light for plaintiff. What the evidence may disclose when thoroughly gone into on both sides of the case, and what are the inferences to be drawn therefrom will be for the triers of the facts when the case has been submitted to them. But under the plaintiff's evidence as presented, the defendant was not entitled to have a demurrer sustained.

The judgment is therefore reversed, and the cause remanded. All concur.

BILBY v. CHICAGO, B. & Q. R. CO.  
(No. 11052.)

(Kansas City Court of Appeals, Missouri.  
Nov. 2, 1914. Rehearing Denied  
Dec. 9, 1914.)

1. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—ACTIONS—EVIDENCE.

In an action against a railroad company for the death of hogs after delivery to the consignee, the question whether the consignee was negligent in immediately driving them home from the railroad pens where they could not be watered *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.\*]

2. CARRIERS (§ 212\*)—CARRIAGE OF LIVE STOCK—DELIVERY.

Where a shipment of hogs was unloaded and placed in the custody and under the control of the consignee, there was a delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 918, 919; Dec. Dig. § 212.\*]

3. CARRIERS (§ 86\*)—CARRIAGE OF GOODS—LIABILITY.

Ordinarily, where a carrier delivers the property in good condition to the consignee, it is relieved from further liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316-322; Dec. Dig. § 86.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**4. CARRIERS (§ 215\*)—CARRIAGE OF LIVE STOCK—DUTY OF CARRIER.**

In the transportation of live stock, the liability of the carrier is not restricted to losses during the time the stock is in his possession, but the carrier is liable for a loss occurring after delivery, if the cause of the loss began to operate while they were in his possession.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.\*]

**5. CARRIERS (§ 211\*)—CARRIAGE OF LIVE STOCK—CARE.**

A carrier of live stock, such as hogs, is bound to use every precaution to keep them from becoming overheated, and for that purpose should not only throw water over them, but should give them water to drink.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.\*]

**6. CARRIERS (§ 211\*)—CARRIAGE OF LIVE STOCK—DUTY OF CARRIER.**

It being the duty of a carrier to provide suitable facilities for the care of live stock at its station, a carrier which negligently failed to provide for the watering of stock in the pens at its station is liable, where hogs died because they could not be watered at the pens where they were delivered by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.\*]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Action by R. I. Bilby against the Chicago, Burlington & Quincy Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Shinabargar, Blagg & Ellison, of Maryville, and M. G. Roberts, of St. Joseph, for appellant. G. P. Wright and M. E. Ford, both of Maryville, for respondent.

**JOHNSON, J.** Plaintiff sued defendant in a justice court in Nodaway county to recover damages sustained in consequence of negligence of defendant in and about the transportation of 257 head of hogs from West Plains in Howell county to Quitman, a station on defendant's railroad in Nodaway county. The transportation was in the latter part of May, 1911, while the weather was very warm, and it is alleged in the statement filed in the justice court that 13 of the hogs died, and the others were injured, on account of the negligent failure of the carrier to give them sufficient water during the transportation and to provide proper facilities for watering them after they arrived at Quitman and were unloaded into the carrier's stock pens. The precise charge of negligence in the statement is:

"That while said hogs were in the care and custody of the defendant, said defendant, through its agents, servants, and employes, negligently and carelessly failed, neglected, and refused to water and care for said hogs, and negligently and carelessly failed, neglected, and refused to provide and furnish any water, or to provide any well or pump or any means whereby the plaintiff could water and care for his said hogs; that by reason thereof the said hogs were in a famished and dying condition at the time they were taken from said stock pens by the plaintiff," etc.

Plaintiff recovered judgment in the circuit court, where the cause was tried on appeal, and defendant appealed.

There is but little controversy over the material facts of the case. The hogs, occupying two cars, were carried from West Plains to Kansas City by the St. Louis & San Francisco Railroad Company and delivered to defendant, which carried them on to Quitman, a distance of more than 100 miles from Kansas City. The line of the initial carrier between West Plains and Kansas City makes a detour in Kansas and pursuant to the 28-hour rule of the national interstate commerce laws, the hogs were unloaded at Olathe, Kan., for feed, water, and rest. From Olathe on to Quitman, a distance of about 150 miles, the hogs were frequently drenched with water in the cars, but were given no water to drink except what they could lick up from the floor. They arrived and were unloaded at Quitman about 1 o'clock in the afternoon, undamaged, but hot and thirsty. Plaintiff and his assistants were there to receive them. The stock pens were in a low, hot place, and the hogs immediately began to suffer from heat and thirst. Defendant had a well at the station, but the pump was out of order, and plaintiff, unable to procure water for the hogs, and fearing they would die if left in the pens during the afternoon, proceeded to drive them to one of his farms three miles away. After they had traveled a mile or more the hogs, in the utmost distress, piled up in wayside ditches, and 13 died. The others, when they reached the farm, were much injured by their sufferings. Plaintiff states that he had complained, at times, to the station agent of the lack of water at the stock pens, and that the agent had promised to have the well put in proper condition for use.

Plaintiff took charge of the hogs when they were unloaded from the cars into the pens, and it is the contention of defendant that delivery was made to him at that time, and that no cause of action inured to him from the damages subsequently caused by the failure of defendant to provide suitable facilities for watering the hogs in the pens. Further, counsel for defendant insist that plaintiff's own negligence in not watering the hogs at a river a quarter of a mile from the stock pens, and crossed by the highway over which the hogs were driven, was the proximate cause of the injury. The river at this place was on land of plaintiff, and is spanned by a bridge over which the hogs were driven. The reason plaintiff and his witnesses gave in their testimony for not watering the hogs there was that it would have been impracticable, owing to the character of the banks and the surrounding vegetation, which would have caused the loss of many of the animals had an attempt been made to water them there.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the first instruction given at the request of plaintiff the jury were told—

"that if you find and believe from the evidence that on or about the \* \* \* day of May, 1911, the plaintiff, Bilby, shipped two car loads of hogs over the defendant's railroad to Quitman, Mo., and that said hogs were unloaded at that station and placed in defendant's stockyards; that the facilities for watering stock at said stockyards were so defective and insufficient that plaintiff was unable, by the exercise of reasonable efforts, to water said hogs, and that plaintiff used due care, caution, and diligence in caring for said hogs and procured water for them from other sources, as soon as he could; that as a direct result of plaintiff's inability to get water for the hogs at defendant's stockyards some of the hogs perished and others depreciated in value, and that the death of said hogs and the depreciation in value would not have occurred had the facilities for watering been such that the hogs could have been watered before leaving the defendant's stockyards, and that the said loss to plaintiff was caused by the defective and insufficient condition of defendant's watering facilities at said stockyards, and, if you further find that defendant's agents in charge of the station and yards knew of the condition of said well and watering facilities, or (by the exercise of reasonable care) might have known of it, for a sufficient length of time prior to the arrival of plaintiff's hogs to have enabled them, in the exercise of reasonable diligence, to have had the watering facilities in a reasonably good condition, then the finding should be for plaintiff, provided the jury further believe from the evidence that in the conditions and surroundings defendant, in the exercise of reasonable diligence, might have obtained a reasonably good supply of water and have provided reasonably good watering facilities."

The court on its own motion instructed the jury:

"If the jury find from the evidence that any of the hogs died or shrunk in weight because of careless or negligent driving of them by plaintiff, or his agents, or because of his failure to supply them with water when he might have done so by the exercise of the care and diligence of a reasonably prudent person in like situation or circumstances, then as to such hogs the jury should not allow or award to plaintiff any damages. If, under the circumstances revealed by the testimony, the jury believe that plaintiff, in removing or driving the hogs from the stockyards at the time and in the manner disclosed by the evidence, acted carelessly or imprudently and not with that degree of care which a prudent person, in like circumstances, would have exercised, and if the shrinkage in weight or death of any of the hogs, or both, was the result of plaintiff's said conduct, then plaintiff is not entitled to damage for injury to the hogs so resulting."

[1] The errors assigned in the brief of defendant are: First, that the court erred in overruling its demurrer to the evidence; and, second, that the first instruction of plaintiff is erroneous, for the reason that:

"It does not predicate a recovery on the allegation of the petition that the live stock were in the custody of the defendant, and assumes that there was a duty to feed and water the hogs regardless of whether they had been delivered to plaintiff and accepted by him."

The two main points advanced in support of the demurrer to the evidence are that no actionable negligence of defendant is shown; and that the proximate cause of plaintiff's loss was his own negligence. Speaking first

of the latter point, we think the court, in the instruction given on its own motion, properly submitted to the jury as an issue of fact the question of whether or not plaintiff exercised reasonable care in driving the hogs on a hot afternoon, instead of leaving them in the pens without water until night, and in driving them to the farm without water in preference to the risk of loss which his evidence shows he had good reason to anticipate would result had he attempted to water them at the river. We do not feel warranted in declaring as a matter of law that plaintiff, who has had extensive experience in the handling and care of live stock, and who was confronted with the problem of choosing between two evils, made not only an injudicious but a culpable choice.

[2-6] Passing to the issue of defendant's negligence, we agree with counsel for defendant that delivery of the hogs to plaintiff occurred when they were unloaded from the cars and placed in the custody and under the control of plaintiff. *Ratliff v. Railroad*, 118 Mo. App. loc. cit. 658, 94 S. W. 1005. And, further, we sanction the view that ordinarily where the carrier delivers the property in good order to the consignee at the place of delivery, it is relieved from further liability as a common carrier. 6 Cyc. 469. But in the transportation of live stock, the liability of the carrier is not restricted to losses occurring during the time the stock is in its possession.

"If the cause of a loss occurring after their delivery to the owner is a cause which began to operate while they were in the carrier's possession and is a cause for which it is responsible, it will be liable without regard to the time when the effects developed." 5 Am. & Eng. Encyc. of Law (2d Ed.) 446.

Live animals in transportation, especially hogs transported in hot weather, are perishable, and require care and attention to preserve them from injury, and it was the duty of defendant to provide proper facilities and means for the reasonable prevention of injury from overheating and thirst.

"The carrier, in addition to affording live stock food, water, and rest, is bound to take all such other precautions for their safe transportation as reasonable prudence would suggest. \* \* \* Where hogs are being carried and are in danger of becoming overheated, the carrier must throw water on them to prevent the danger." 6 Cyc. 437.

And in addition to throwing water on the hogs at reasonable intervals, it was the duty of defendant to give them water to drink to prevent injury from thirst. The hogs were given no drink after they left Olathe, were kept in the cars 10 or 12 hours, and were unloaded in the middle of a hot day at a place where defendant had negligently failed to keep a sufficient supply of water, and therefore under conditions that rendered it unsafe either to keep them in the stock pens until nightfall or to drive them to a place where they could be refreshed. The duty of a carrier to provide suitable facilities

for the care of live stock at its stations (Dunn v. Railway, 68 Mo. 268) was negligently violated by defendant in allowing its well at Quitman to become and remain useless. The evidence of plaintiff tends to show that the proximate cause of the injury was the cooperation of the negligent acts of failing to water the hogs en route, and of failing to provide facilities for watering them after they were unloaded. It is true no injury had been sustained at the time of delivery, and no loss would have occurred had plaintiff been able to procure water from the well. Neither act of negligence of itself would have produced the injury, but together they were the proximate cause, and the case falls under the rule that where the negligent cause began to operate before the end of the transportation, the carrier will be liable without regard to the time when the effect developed.

The demurrer to the evidence was properly overruled.

The objection to plaintiff's first instruction is not well taken. In the views we have expressed the fact of whether the actual loss began before or after delivery is immaterial, and it was not error in the instruction to predicate the right to recover on the hypothesis that negligence in failing to provide water at the pens was a proximate cause of the injury, since the loss could not have occurred without such negligence.

The judgment is affirmed. All concur.

#### BETHEL v. CITY OF ST. JOSEPH. (No. 11269.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 821\*)—ACTION—EVIDENCE—SUFFICIENCY.

In a suit against a municipality for injuries received by a cyclist in a fall on its streets, evidence of the municipality's negligence held sufficient to go to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

#### 2. DAMAGES (§ 216\*)—ASSESSMENT—INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE.

Where the petition, in a personal injury action, pleaded future pain and suffering, and the evidence showed that plaintiff's injuries would be likely to cause such pain and suffering, it was proper for the instructions to submit that question to the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 764\*) —STREETS—DUTY OF CARE TOWARD TRAVELERS.

A municipal corporation is bound to exercise ordinary care to keep its streets safe and convenient for ordinary travel, including the use of bicycles, but need not exercise greater care for cyclists than other travelers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1616-1620; Dec. Dig. § 764.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 822\*)—INJURIES TO PERSONS ON STREETS—ACTIONS—EVIDENCE—INSTRUCTIONS.

In an action for damages for injuries received while riding a bicycle on the streets of defendant city, an instruction given at the request of plaintiff charged that if the hole in the street which caused the accident was dangerous for persons traveling in vehicles, or on bicycles, verdict should be for plaintiff, etc. Held that, as the instruction might have been understood by the jury to impose a greater degree of care in favor of cyclists than other travelers, the instruction requested by the defendant city that it was bound to exercise no greater degree of care for cyclists than others should have been given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

Appeal from Circuit Court, Buchanan County; Charles H. Mayer, Judge.

Action by J. Earl Bethel, an infant, by his next friend, James G. Bethel, against the City of St. Joseph. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Duvall & Boyd, of St. Joseph, for appellant. Frank B. Fulkerson, L. E. Thompson, and Herman Hess, all of St. Joseph, for respondent.

TRIMBLE, J. Plaintiff, a boy about 16 years of age, was engaged in carrying parcels from a store to its various customers throughout the city of St. Joseph. He did this on a bicycle. On the 29th day of October, 1913, between 6 and 7 in the evening, he was going east on Felix street when his wheel ran into a defect in the street, throwing him to the ground and injuring him. By his next friend he brought this suit to recover damages.

[1] It is first contended that the city's demurrer to the evidence should have been sustained and the case taken from the jury. But this is clearly without merit. It was not dark, though dusk had fallen, so that, while plaintiff could see to go, yet the hole in the pavement could not be seen, and there were no lights to disclose or call attention to the defect. The boy did not know of the defect in the street, and was not shown to have been going in a careless manner or at a reckless speed. The defect in the street consisted of a sunken place about 3 feet across and from 4 to 6 inches in depth. (One witness testified to 4½ inches by actual measurement.) Defendant's witnesses say it was a mere depression and of much less depth. It had been allowed to remain in that condition for at least five years prior to the injury. The defect was shown to have caused the fall and injury. Hence there was undoubtedly a case for the jury.

[2] Plaintiff's instruction No. 4 is objected to because, in giving the measure of damages, it authorized the jury to take into consideration pain and anguish likely to be suffered in the future, if any. But this objection is

also without merit. The instruction is in an approved form, and the petition not only pleaded future pain and suffering, but there was sufficient evidence from which the jury could find that such suffering would reasonably follow. The injury was to the head, and the testimony was that such injuries are slow of recovery, and that, at the time of the trial, the plaintiff's head still hurt him, and other unfavorable conditions resulting from the fall were still present.

[3, 4] Plaintiff's instruction No. 3, which submitted the issuable facts upon which recovery depended, in submitting the question whether the defect rendered the street dangerous or not, did so in these words:

"If you further believe and find from the evidence that said hole or indentation in the pavement rendered said Felix street and said Twenty-First street at said point dangerous and not reasonably safe for persons traveling in or on vehicles or on bicycles upon, along, or over said streets," etc.

This told the jury that plaintiff could recover if the street was not reasonably safe either for ordinary vehicles or for bicycles. The city contended that this authorized the jury to find for plaintiff if they found that the street was dangerous to a bicycle, although they might believe that it was otherwise reasonably safe for travel in general. In other words, the city says that the jury might well infer from that instruction that the city must not only exercise ordinary care to see that its streets are reasonably safe for general traffic, but must also keep them reasonably free from such dangers as are peculiar to and liable to affect bicycles only. To prevent the jury from entertaining this idea, the city asked its instruction lettered A to the effect that "the city owes no greater duty to those riding bicycles upon its streets than it does to persons who may be passing along and over the same in another kind of vehicle," and that, if the street was "in such state of repair as to make it reasonably safe for those passing along and over the same in vehicles usually used by persons traveling thereon while they themselves were using ordinary care in so doing, then the verdict should be for the defendant city." This instruction A was refused, and its refusal is excepted to as error.

The point raised involves the principles to be observed in submitting to a jury the question whether a cyclist, under a given set of circumstances, can or cannot hold the city liable for a defect in the street. Must the city be required to keep its streets in any smoother or better condition for bicycle travel than for other modes? A small crack in the pavement, a sharp stone, a tack, a bit of glass, a piece of coal, or an insignificant slant in the street might be highly dangerous to a bicycle rider, but would not affect other modes of travel. It will not do to require the city to keep its streets in the smooth condition of a driving or racing track for bicycles. On the other hand, it may perhaps

be too strict a rule to enunciate the principle that a cyclist, under all circumstances, must take the road as he finds it, and thus become the insurer of his own safety. A bicycle is a vehicle, and as such is entitled to use the street. *North Chicago, etc., R. Co. v. Cosar*, 203 Ill. 608, 88 N. E. 88; *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307; *Lee v. City of Port Huron*, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308; *Thompson v. Dodge*, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533; *Taylor v. Union Traction Co.*, 184 Pa. 465, 40 Atl. 159, 47 L. R. A. 289. Being entitled to use the street, does the fact that it is a fragile machine of unstable equilibrium increase or lessen the obligation of the city with regard to its streets, or does that obligation remain the same as in other modes of travel? We think the obligation remains the same. The object to be secured in requiring the city to care for its streets "is the reasonable safety of travelers, considering the amount and kind of travel which may fairly be expected on the particular street." *Kelsey v. Glover*, 15 Vt. 708. The extent of the city's duty is to use ordinary care to keep its streets safe and convenient for ordinary travel. 2 Sherm. & Red. on Neg. (6th Ed.) § 367. And while it might seem that since a city must use ordinary care to keep its streets reasonably safe for ordinary travel, and since a bicycle has become a well-recognized and usual mode of travel, this would add to the burden of the city the duty of keeping the street free from things dangerous to bicycles alone, yet this does not follow by any means. The standard of care required is no higher. For while defects which would be harmless to other modes of travel are often exceedingly dangerous to a bicycle, yet, on the other hand, the bicycle occupies a much less space than other vehicles and can be turned in any direction much more easily. So that the apparent necessity for an increase of care caused by the increased danger to bicycles from defects otherwise harmless is fully balanced by the known ability of the bicycle to avoid them. The city ought not to be required to provide a roadway which would be safe for a vehicle, the construction of which renders it peculiarly susceptible to injury when a comparison of it with other vehicles shows that, owing to its compactness and mobility, it can much more easily avoid a dangerous place than can other vehicles. Note to 47 L. R. A. 289. A city is not bound to use reasonable care to keep its streets in reasonably safe condition with a special view to bicycles, but to keep them reasonably safe for travel in any general and usual mode, which, however, includes the use of bicycles. *Molway v. City of Chicago*, 239 Ill. 486, 88 N. E. 485, 23 L. R. A. (N. S.) 543, 16 Ann. Cas. 424. That is to say, if the streets of cities and towns "are reasonably

safe and convenient for travel generally, they are not liable for a failure to make special provisions, required only for the safety and convenience of persons using \* \* \* bicycles." *Molway v. Chicago*, 239 Ill. loc. cit. 489, 88 N. E. 486, 23 L. R. A. (N. S.) 543, 16 Ann. Cas. 424, citing *Doherty v. Inhabitants of Ayer*, 197 Mass. 241, 83 N. E. 677, 125 Am. St. Rep. 355, 14 L. R. A. (N. S.) 816.

Now if, under the instruction No. 3 submitted by plaintiff, the jury were liable to understand that the street must be kept reasonably safe with a special view to bicycles, then defendant's instruction A should have been given, since it would have tended at least to correct that view and give the jury to understand that the duty resting upon the city was not to maintain a street specially suitable for bicycles, but that its duty was only to use ordinary care to maintain its streets in a reasonably safe condition for general traffic in all the usual and ordinary modes of travel. It is true an instruction should not make a comparison between the different vehicles lawfully used by travelers on the streets, but we do not think instruction A does this. It merely tells the jury that the city does not have to maintain a better street for bicycles than it does for vehicles in general, and that, if the street was reasonably safe for vehicles in general and ordinary use, then the city had performed its duty.

In *Bills v. Salt Lake City*, 37 Utah, 507, loc. cit. 514, 109 Pac. 745, it was held that an instruction, which told the jury that the city owed no greater duty to one riding a bicycle to maintain its streets in a reasonably safe condition for travel thereon than to other travelers using other vehicles, was not a discrimination against the bicycle rider. The court remarked that it was true enough that comparisons should not be made between travelers, and that the true test is whether or not the city has used ordinary care to maintain its streets in a reasonably safe condition for travel, whether in one kind of a vehicle or another.

In 6 *McQuillin on Munic. Corp.* § 2759, it is said:

"The rules applying to bicycles and tricycles ridden on a street or sidewalk is that the rider cannot recover for injuries resulting from defects in the street or sidewalk if it was in proper condition for pedestrians (in case of a sidewalk) or ordinary vehicles (in case of the driveway)."

In 2 *Elliott on Roads and Streets* (3d Ed.) § 1119, it is said that some of the courts have held that a cyclist must take the street as he finds it, if it is reasonably safe and in a fit condition for ordinary vehicles, such as wagons and carriages, and that there is no liability for injuries to users of bicycles caused by reason of the way not being safe for them, so long as the street is reasonably safe

for ordinary travel with horses and wagons and carriages, citing *Leslie v. City of Grand Rapids*, 120 Mich. 28, 78 N. W. 885; *Richardson v. Danvers*, 176 Mass. 413, 57 N. E. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320. But the author, near the close of the section, says the true rule is that cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken upon such vehicles as bicycles. But, if their streets are reasonably safe and convenient for travel generally, they are not liable for a failure to make special provisions required only for the safety and convenience of those using bicycles, citing *Doherty v. Town of Ayer*, supra, and *Molway v. City of Chicago*, supra.

As plaintiff's instruction No. 3 did not define the city's duty as being merely to maintain the street in a reasonably safe condition for travel in general by means of all usual and ordinary vehicles, and not to make special provisions required only for the safety of those using bicycles, we think defendant's instruction A should have been given. In this way the jury would clearly understand the extent of the duty resting upon the city, and would not be liable to think that, because the vehicle was a bicycle, therefore a greater degree of care had to be exercised than if it had been some other. Plaintiff's instruction told the jury, without qualification, that, if the street was not reasonably safe for persons traveling on bicycles, then the city failed in its duty. But they should also have been told that this did not mean that the city had to guard against defects which would be dangerous only to bicycles and not to other methods of travel. This defendant's instruction sought to do, and for that reason it should not have been refused. There was considerable difference between the plaintiff's and the city's idea of the extent of the defect. According to the former it was one dangerous to any mode of travel, while according to the latter it was not a hole but a mere slight depression in the brick pavement, which might not be considered a danger to traffic in general at all. The judgment is reversed, and the cause is remanded. All concur.

## BAILEY et al. v. MISSOURI PAC. RY. CO. (No. 11303.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914.)

### 1. COMMERCE (§ 8\*)—EXCLUSIVENESS OF FEDERAL POWER—STATE LEGISLATION.

The Carmack amendment to the Hepburn Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]) excludes state laws and policies from the field of the liability of carriers growing out of interstate shipments.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.\*]

## 2. COURTS (§ 97\*)—RULES OF DECISION—FEDERAL COURTS.

The state court must follow decisions of the United States court in interstate commerce cases, recognizing the validity of reasonable stipulations in shipping contracts for the giving of notice of claims, whether supported by the consideration of a reduced rate or not, regarded by such courts as a mere regulation which the parties may incorporate as a part of their contract.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

## 3. CARRIERS (§ 159\*)—LIMITATION OF LIABILITY—CONSEQUENTIAL DAMAGES—"CLAIM FOR DELAY."

The provision in a bill of lading, issued in consideration of a reduced rate, that claims for loss, damage, or delay must be made in writing at the point of delivery or origin within four months after delivery, to make the carrier liable, was not limited to claims for damages to the goods shipped, but extended to damages from delay whereby apples, which the consignee intended to pack in the barrels shipped, could not be picked until after they were overripe and injured for storage purposes, since the term "claim for delay" was intended to be comprehensive, and to include all damages that might be reasonably anticipated to follow the failure to deliver the barrels within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.\*]

## 4. COMMERCE (§ 33\*)—"INTERSTATE COMMERCE"—BILLS OF LADING.

When a commodity has been delivered to a common carrier to be transported continuously to a point outside the state where received, it is "interstate commerce" thence forward, whether the shipment be made on a through bill of lading or upon a bill issued for transportation between intrastate points.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.\*]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeal from Circuit Court, Morgan County; J. G. Slate, Judge.

Action by S. P. Bailey and another against the Missouri Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

C. D. Corum, of St. Louis, for appellant. J. W. McClelland, of Versailles, R. M. Embry, of California, Mo., and R. M. Livesay, of Versailles, for respondents.

JOHNSON, J. Plaintiffs sued to recover damages resulting to them from an alleged negligent delay in the transportation of two car loads of apple barrels, which defendant received at Kansas City and undertook to carry to Versailles, Mo., and there to deliver to plaintiffs, the consignees. The barrels were purchased by plaintiffs from a manufacturer in Kansas City, Kan., and were loaded in two cars on a switch track which connected the factory with the line of the Terminal Railway Company, another common carrier. A "switch card," showing the destination of the cars, was tacked on each car by the shipper, and the Terminal Company

received the cars at the switch track where they were loaded, and switched them a mile or more to the yards of defendant in Kansas City, Mo., where they were received by defendant. The Terminal Company charged \$4 per car for this service. Defendant had promised to furnish a large car for the shipment, but, being unable to do so, provided two smaller cars instead, and paid the switching charges on one car and collected the charges on the other from the consignee as a part of the cost of transportation from the factory in Kansas City, Kan., to Versailles. If a single car had been furnished, as agreed, the switching charge of \$4 would have been added to the expense bill issued by defendant for the transportation.

Defendant issued a bill of lading to the shipper, made out on the form approved by the Interstate Commerce Commission, for the transportation of the cars from Kansas City, Mo., to Versailles. The barrels were properly designated in the bill as belonging to class D, for which the rate from Kansas City, Mo., to Versailles, in the schedules on file with the Interstate Commerce Commission, was 12 cents per 100 pounds. This was a reduced rate, since the schedules and approved form of bill of lading provided a higher rate for class D freight forwarded with the carrier's common-law liability unrestricted. The bill of lading provided:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

No claim was presented by plaintiffs to defendant, and this suit was not begun until more than four months had elapsed from the date of the delivery of the barrels.

[1] On the hypothesis that this was an interstate shipment, the failure of plaintiffs to present their claim to defendant in the time prescribed in the shipping contract is fatal to their case. The Carmack amendment to the Hepburn Act is construed by the Supreme Court of the United States to supersede and exclude state laws and juridical policies from the field of the liability of carriers growing out of interstate shipments. *Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Railway v. Harriman*, 227 U. S. loc. cit. 672, 33 Sup. Ct. 397, 57 L. Ed. 690.

[2] The decisions of the United States courts, which we are bound to follow in interstate commerce cases, recognize the validity of reasonable stipulations in shipping contracts for the giving of notice of claims, whether or not such agreement be supported by the consideration of a reduced rate. Such contractual limitations are regarded as a mere regulation which the parties have a right to incorporate as a part of their con-

tract. We are bound to accept and give effect to this interpretation of the contract, regardless of whether or not it coincides with the policy of the jurisprudence of this state which obtained before the subject of interstate commerce was placed under the exclusive control of the national laws. *Grain Co. v. Railway*, 177 Mo. App. 197, 164 S. W. 182; *Hamilton v. Railway*, 177 Mo. App. 151, 164 S. W. 248.

[3] But it is contended by plaintiffs that the limitation in question cannot be applied in the present case, for the reason that it refers only to claims for damages to the articles shipped, while the damages plaintiffs seek to recover were special and consequential, and not the result of any injury to the barrels, which arrived at Versailles in good order. In consequence of the delay the apples which plaintiffs intended to pack in the barrels could not be picked from the trees until after they had become overripe and seriously injured for storage purposes. In *Morrow v. Railroad*, 140 Mo. App. 200, 123 S. W. 1034, it was held by the Springfield Court of Appeals that a stipulation in a bill of lading that "all claims for damages must be reported by the consignee within 36 hours after he was notified of the arrival of the freight" referred only to loss or damage to the property shipped, and not to a claim for special damages. To the same effect was our decision in *Aull v. Railway*, 136 Mo. App. 291, 116 S. W. 1122. There is a vital difference between the provisions of the contracts in those cases and that now before us for interpretation, which expressly provides that claims resulting from delay, as well as those for loss and damage to the property shipped, fall within the purview of the contractual limitation. The term "claims for \* \* \* delay" obviously was intended to be comprehensive, and to include all damages that reasonably might be anticipated to follow a negligent breach of the carrier's duty to deliver the barrels within a reasonable time.

[4] It is earnestly argued by plaintiff, and with effect in the trial court, that the shipment in question was intrastate, not interstate, commerce. The court was induced to this conclusion by the fact that the bill of lading issued by defendant on its face provided only for the transportation of the cars between two points in this state. That fact is by no means conclusive. The barrels were loaded in the cars on the switch track in Kansas City, with the intention of delivering them there to the initial carrier (the Terminal Company) for continuous transportation to plaintiffs at Versailles. The rule may be considered as firmly established that, when a commodity has been delivered to a common carrier, to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches

thereto, and it is immaterial whether the shipment be made on a through bill of lading, or upon a bill or bills issued for transportation between intrastate points. *Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 527, 31 Sup. Ct. 279, 55 L. Ed. 310; *Commission Co. v. Worthington*, 225 U. S. 108, 32 Sup. Ct. 653, 56 L. Ed. 1004; *State v. Railway*, 31 Tex. Civ. App. 219, 71 S. W. 994; *Railway v. Grain Co.* (Tex. Civ. App.) 73 S. W. 845; *Railway Com. v. Railroad*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215.

In the case of *Kolkmeier v. Railroad*, 173 S. W. —, decided by this court at the present term, we recognized this rule, and our conclusion that the shipment there was intrastate commerce was based on the absence of an intention that the transportation, which originated in this state, should continue beyond Kansas City into an adjoining state.

The judgment is reversed. All concur.

### STATE v. RADER.

(Supreme Court of Missouri, Division No. 2.  
Nov. 24, 1914.)

#### LARCENY (§ 70\*)—PROSECUTION—INSTRUCTION—SUFFICIENCY.

An instruction that if accused advised, procured, or commanded another to steal, take, and carry away the goods and chattels of a third person, he should be convicted is bad because not requiring the jury to find that the goods were stolen and taken away with a felonious intent, which is an element of the offense of larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 182, 183, 185, 186; Dec. Dig. § 70.\*]

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Claude Rader was convicted of grand larceny, and he appeals. Reversed and remanded.

From a conviction in the circuit court of Boone county of the crime of grand larceny and a sentence therefor to imprisonment in the penitentiary for a term of two years, defendant, pursuant to the usual procedure, has appealed.

The facts presented by this record, and upon which this conviction is sought to be sustained, are unique. The defendant, at the time of the commission of the larceny alleged, was, and for some days prior thereto had been, confined in the calaboose of the town of Centralia upon the charge that he had illegally sold intoxicating liquor, so that his alibi was perfect, so far as concerns his actual presence at or participation in the alleged larceny. The indictment charged that the property stolen was feed, and that it consisted of eight sacks of oats, ten sacks of alfalfa meal, ten bales of alfalfa hay, two bushels of corn, and one bale of straw. The actual larceny of this property was accomplished by one William W. Bell, who was the principal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

witness for the state and, in fact, the only witness who gave any testimony in any way connecting defendant with this theft. According to the testimony of said Bell he had been employed by defendant to feed and care for a number of horses owned by defendant during the enforced absence arising from the imprisonment of the latter. Defendant's horses, some seven in number, together with one of Bell's horses, were in a barn at Centralia, which barn had been rented by defendant and was in his possession. After Bell had been in charge of defendant's barn and horses for some two or three days, the feed for this stock ran short; thereupon Bell says he went to the calaboose to confer with defendant about the situation, and informed defendant that the feed was almost gone. Bell further says that defendant asked him if he knew where any feed could be obtained, and that he (Bell) replied that he did not. Thereupon, says Bell, the below quoted conversation ensued between him and defendant. Defendant asked Bell:

"Do you know where this big barn is out here west of town of Mr. Lee Green's?" I said, 'I do not.' He said, 'Don't you know where that barn is out there?' I said, 'No.' He said 'Maybe you know it by the John Rutland's barn.' I said, 'Yes; I know where that is,' and he said, 'I saw Mr. Green hauling some alfalfa out there in the summer time.' He said, 'If you will go out there, I am satisfied you can get some feed out there. If there is any out there, get it and bring it in and I will pay you for it, and I will allow you on what you owe me—on a mare I bought. He said if I didn't want to take the wagon and team out there first, I could go and ride the pony out and find it. He said I might work a big brown horse with a big foot and an old sorrel horse with a bald face. I said all right, if I could find collars. I could not find a collar for the sorrel horse. I worked my grey horse and his brown horse after this feed."

Following the substance of the testimony of the witness Bell, but without further quoting his exact language, he said that he left the defendant's barn in Centralia between 12 and 1 o'clock, went out into the country near the edge of town to the barn of one W. L. Green, and there stole eight sacks of oats, ten bales (sic) of alfalfa meal, ten bales of alfalfa hay, two bushels of corn, and one bale of straw; that he loaded this feed on a one-horse wagon and drove the same into the defendant's barn (except for the loss of a portion thereof, which slipped from the wagon on the way), there unloaded it, and placed it in the hallway of said barn, and that near defendant's barn he broke the doubletree of his wagon. Bell further says that in the morning between 5 and 6 o'clock he went to the calaboose and again saw the defendant, told him fully what he had done, and that instructions were given him by the latter to unload and store the stolen feed and cover it with a tarpaulin, and to lock the doors of the barn and to fasten the windows with wire, all of which Bell did.

The witness Bell, confessedly the actual

thief, was arrested for the larceny in question at about 9 o'clock on the morning following the theft. At first, and for some several days, Bell, while admitting his own guilt, denied that defendant was in any wise connected with this larceny. Subsequently, and after a few days, he changed his story and said, as he did upon trial in his sworn testimony, that defendant had been the active mover in procuring his commission of this larceny.

The defendant, testifying for himself, while admitting that Bell had called on him at the calaboose at about 5:30 o'clock in the morning following the larceny and had then confessed to him the manner in which he had obtained the feed, yet contended that the larceny was without his prior knowledge, procurement, or consent, but that on the contrary he had given Bell the money with which to purchase feed and expected him to buy feed and not steal it. Defendant also testified that Bell was stealing this feed for himself, and intended to haul it to a barn out in the country, where Bell had some horses of his own, but that he had broken a doubletree while in the neighborhood of defendant's barn, which misfortune made necessary the unloading of the feed therein, and thus explained the presence of the feed in this barn.

The bad reputation of appellant for morality and truth and veracity was shown by the state. The state was also permitted to show that the constable and various other persons "suspicioned" from the beginning defendant's connection with this larceny. Since, however, no objection was made to this outrageous sort of evidence the point is not before us for review.

The actual confessed thief Bell was likewise indicted for this larceny, and entered a plea of guilty thereto, and was by the court paroled.

The above is deemed a sufficient statement of the facts as will serve to make clear the points discussed in the opinion here. These points will be further illuminated by such statement of facts as may become necessary in the opinion.

N. T. Gentry, of Columbia, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

FARIS, J. (after stating the facts as above). I. Instruction numbered 1, which defendant very insistently urges as erroneous, is as follows:

"The court instructs the jury that if you find and believe from the evidence, beyond a reasonable doubt, that at the county of Boone and state of Missouri, on or about the 24th day of November, 1913, one William Bell did unlawfully steal, take and carry away the goods and chattels of W. L. Green as charged in the first count of the information in this case, and if the jury further find from the evidence that the defendant prior to the stealing, taking and carrying away of the said goods and chattels advised,

procured, encouraged, counseled, or commanded the said William Bell to steal, take, and carry away the goods and chattels as aforesaid, and that said goods were of the value of \$30 or more, then you will find the defendant guilty under the first count of the information and assess his punishment at imprisonment in the penitentiary for a term not less than two years nor more than five years."

The gravamen of defendant's objection to the above instruction is (to express it in counsel's own language) that "it omits the all-important part of the definition of larceny, to wit, the words, 'with a felonious intent.'" The state contends, on the other hand, most insistently that the use of the word "steal" comports a wrongful and fraudulent taking, together with the felonious intent to convert the property in question to the use of the taker and to deprive the owner thereof permanently without his consent. Since the instruction in question uses the words "take and carry away," we need not, and we do not, take the latter words into consideration in this discussion. Concededly they would have been used in a good instruction just as they are used in this one. In other words, the state's position is that, since the word "steal," which is used in this instruction, ordinarily means and is generally understood as meaning by everybody, from the "college professor to the common laborer," to "take and carry away feloniously; to take without right or leave and with intent to keep wrongfully," there is neither verbal nor legal necessity, nor rhyme nor reason, in using the word "feloniously," or in further defining larceny, when once the word "steal" is used in an instruction in connection with the words "take and carry away," as here in this instruction. Bearing out their contention, learned counsel for the state call our attention to the meaning of the word "steal" in its plain and ordinary sense, as used in our statute, and as the same is defined by lexicographers as well as by the law writers and law dictionaries. It is defined, says counsel, by Webster's Unabridged Dictionary thus:

"To take and carry away feloniously, as the personal goods of another; to take without right or leave."

The most comprehensive definition which has been called to our attention is that found in the Century Dictionary and Cyclopedia, which defines the word "steal" to mean:

"To take feloniously; to take and carry away clandestinely and without leave or right; to appropriate to one's own use dishonestly or without right, permission, or authority."

So much is said to make clear and state fairly and sharply the respective contentions made.

Going back to the definition of the crime of larceny at common law, we find some little contrariety of definition, but in the main find that there must be a felonious, i. e., fraudulent, unlawful, and wrongful taking and carrying away of the personal property

of another, coupled with the intent to convert the property in question to the use of the taker without the owner's consent. For illustration Lord Coke defines it thus:

"Larceny by the common law is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another." 3 Coke's Inst. 107.

Mr. Wharton defines it thus:

"Larceny may be defined to be the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner without his consent." 1 Wharton, Crim. Law, § 862.

Chitty in his learned work on Criminal Law (3 Chitty's Crim. Law, 917) says:

"To constitute this offense [larceny], therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it [i. e., the personal property] to the offender's use."

Mr. East in his Pleas of the Crown (volume 2, p. 553) defines larceny to be:

"The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his [the taker's] own use, and to make them his own property, without the consent of the owner."

"But even this definition," says Prof. Greenleaf, "though admitted by Parke, B., to be the most complete of any, was thought by him to be defective in not stating what was the meaning of the word 'felonious' in that connection, which, he proceeded to say 'might be explained to mean that there is no color of right or excuse for the act,' adding that the intent must be to deprive the owner, not temporarily, but permanently, of his property." 3 Greenleaf's Ev. § 150.

To the same general trend are all of the other authorities, which purport to define the crime of larceny as it existed at common law. 2 Bishop's New Crim. Law, 758; 2 Roscoe's Crim. Ev. 816; 1 Hawkins, P. C. p. 142; Rex v. Hammon, 2 Leach, 1083.

It is the rule in this state by our solemn statute, as well as by all of the holdings of our courts, that the common law is in force, and that it shall be the only rule of decision, unless, and until it has been abrogated and changed by the statute itself. Section 8047, R. S. 1900; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673.

Turning to our statute which defines the crime of grand larceny, we find it to read, so far as pertinent here, thus:

"Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property or valuable thing whatsoever of the value of thirty dollars or more, \* \* \* belonging to another, shall be deemed guilty of grand larceny. \* \* \*" Section 4535, R. S. 1900.

It will be observed that the word "feloniously" is put by the lawmakers into (or to look at the matter from the angle of its common-law origin, left in) this statute as a part of the definition of grand larceny. Except in the above section defining grand larceny, and in sections 4530 and 4531, each of which defines larceny in connection with robbery in the first and second degrees, respectively, we

have not been able to find that the Legislature has left in any other criminal statute the word "feloniously" as a part of the definition of any other felony. Even in defining certain grand larcenies which are made such by reason of the special circumstances attending the commission thereof, the word "feloniously" is not used in our statutes; cf. section 4537 (theft of domestic fowls in the nighttime); section 4538 (theft from dwelling house, railroad cars, or the person of another); section 4541 (larceny by altering mark or brand, or by killing animals).

Prior to 1825 no attempt was made to define larceny. See Laws Dist. of La. § 13, p. 19 (1804); Laws Ter. of La. § 16, p. 213 (1808); Laws Ter. of La. § 9, p. 476 (1816). Punishment therefor was prescribed by law, but the elements which went to make up and which were required to describe and define this offense manifestly, therefore, remained as at common law. In 1825 the words "feloniously steal, take and carry away" first came into our statute, denouncing the theft of money, personal goods, and chattels. Laws of Mo. 1825, § 25, p. 286. Even then horse stealing was not so defined, and still stood (denounced by a separate section, viz., section 33, p. 289, Id.) as at common law. In 1835 the section denouncing the theft of horses, slaves, etc., was combined with that containing the words "feloniously steal, take and carry away," and which denounced grand larceny as to practically all other personal property. R. S. Mo. 1835, § 30, p. 177. Ever since 1825, therefore, the crime of grand larceny defined in said section 4535, R. S. 1909, has been defined uniformly (exceptions as to special offenses above noted excepted) by the use of the words "feloniously stealing, taking and carrying away." We have seen the necessity which existed at common law to use this word "feloniously" or its apt synonyms in defining larceny, and we see that while the Legislature had the power to relieve us from the necessity of so defining it, for some reason, sufficient to itself no doubt, it has not seen fit to do so. That we might or might not deem it wise to do so is beside the question; the fact remains that the word "feloniously" as a word of legal description has remained in our larceny statute for 90 years precisely as it formerly stood in a majority of the common-law definitions of this crime. The Legislature put this word—which upon some considerations may appear technical, useless, and tautological—into our statute, or to be more exact, left it therein, and it is for the Legislature to take it out. Uniformly almost, throughout the 90 years of the statute's existence in its present form (as to this point), this court has by its decisions required that instructions defining this crime make necessary the finding of a felonious intent. Touching this phase, Scott, J., in a very early case, said:

"It will thus be seen from what has been observed that there cannot be a larceny without

a felonious intent. That the taking the personal goods of another without this intent may be a trespass, but it cannot amount to larceny. The prisoner, then, might have done every act supposed by the instruction of the court without being guilty of a felony. The instruction defined a trespass, and not a larceny, and it was error to have told the jury that the commission of the acts mentioned in it rendered the prisoner guilty of larceny." Witt v. State, 9 Mo. loc. cit. 673.

Likewise, in the very late case of State v. Richmond, 228 Mo. loc. cit. 366, 128 S. W. 745, Gantt, J., said:

"But the first instruction of the court in this case was insufficient in that it did not require the jury to find that defendant feloniously took, stole, and carried away the mare mentioned in the information, nor did it require them to find that defendant took, stole, and carried away the mare with the felonious intent to convert the same to his own use without the consent of the owner, and therefore we think it falls short of the instruction in the Waller Case [174 Mo. 518, 74 S. W. 842]."

To the same effect, in substance, are the holdings in the cases of State v. Gray, 37 Mo. 463; State v. Shermer, 55 Mo. 83; State v. Moore, 101 Mo. 329, 14 S. W. 182; State v. Spiritus, 181 Mo. 24, 90 S. W. 459; State v. Fritchler, 54 Mo. 424; State v. Gresser, 19 Mo. 247; State v. Lackland, 136 Mo. 26, 37 S. W. 812; State v. Weatherman, 202 Mo. 6, 100 S. W. 482; State v. Rutherford, 152 Mo. 124, 53 S. W. 417; State v. Ware, 62 Mo. loc. cit. 602; State v. Campbell, 108 Mo. 611, 18 S. W. 1109; State v. Owen, 78 Mo. 371. Similar is the language of the various text-writers upon this subject. Kelley's Crim. Law & Prac. 657; 2 Bishop's New Crim. Law, 840; 4 Black Com. 232; 25 Cyc. 45, and cases cited.

The case is a close one upon the facts. The testimony of the guilty principal, if not well-nigh incredible, is at least subject to the very gravest suspicion. For while it leaves no doubt as to the guilt of Bell, who confessedly committed the larceny, it does, when viewed as a whole, leave huge doubts as to the guilt of defendant. In such case the jury ought to have been instructed touching the felonious intent of Bell at least, when he took the feed in question, and to this by a proper instruction should have been tacked the intent, the *animus furandi*, of defendant himself when, as alleged, he advised and counseled this theft. No authority anywhere can be found upholding this instruction. It is bad by all the decisions and by the text-books, in practically every jurisdiction where larceny is defined as our statute defines it or where the common law is in force. Therefore, though it be the passing fancy of the hour to rejoice more over the ninety and nine guilty, who, though *legally* convicted, are paroled, than over the one, of doubtful guilt *illegally* convicted, to whom our judgment gives a lawful trial, we must yet abide, as our official oaths enjoin, by the statutes and the Constitution as the Legislature and the people have ordained them.

II. The question as to the form of such an instruction now becomes pertinent. This is

a seriously debatable and a most puzzling problem. In a case involving larceny the offense should be defined. Manifestly this may be done either by a separate instruction, as was approved in the case of *State v. Gray*, 37 Mo. loc. cit. 464, or by appropriately incorporating an apt definition of larceny in the main instruction, as was done in the case of *State v. Yates*, 159 Mo. 525, 60 S. W. 1051. Ordinarily the words "felonious" and "feloniously" have no place in an instruction in a criminal case. *State v. Helton*, 234 Mo. 559, 137 S. W. 987; *State v. Cummings*, 206 Mo. loc. cit. 624, 105 S. W. 649; *State v. Scott*, 109 Mo. 226, 19 S. W. 89. Likewise, ordinarily, it is not necessary to define them. *State v. Barton*, 142 Mo. loc. cit. 455, 44 S. W. 239; *State v. Rowland*, 174 Mo. 373, 74 S. W. 622; *State v. Woodward*, 131 Mo. 369, 33 S. W. 14; *State v. Miller*, 159 Mo. 113, 60 S. W. 67; *State v. Cantlin*, 118 Mo. loc. cit. 111, 23 S. W. 1091. But we have seen that at common law all the definitions of larceny either contained the word "felonious" applied to the intent with which the property was taken, or conveyed by circumlocution and the use of synonymous words the idea that the taking was with a felonious intent. We have also seen that our statute since the year 1825 has contained as a part of the definition of grand larceny the word "feloniously." This former state of the common-law definition and the present state of our definition make it plain, by all of the rules of law and of statutory construction that since the word "feloniously" is left in our statute, it is there for some purpose, to wit, that by reason of it our statute retains so much of the common-law definition of larceny as is comported by this word. That the use then of the word "feloniously," or some synonymous words properly defining larceny, is required in an instruction in a prosecution for grand larceny, there is no chance for doubt. In so requiring, it is clear that larceny is an exception to the general rule which we note, supra, which says that the words "felonious" or "feloniously" need not be used in an instruction, and if used, they need not be defined. Even in prosecutions for robbery in the first degree, on all fours by analogy both in the respect that a larceny is committed ordinarily and that the statutes defining it likewise use the word "feloniously," we find no such invariable rule. On the contrary, the general rule is in robbery as in ordinary cases, that feloniously need not be used in the instruction, or, if used, that it need not be defined. *State v. Woodward*, supra; *State v. Cantlin*, supra; *State v. Rowland*, supra.

There is much contradiction of authority in the many reported cases in this state as to whether the specific word "feloniously" should be used in an instruction for grand larceny to define the intent with which the taking was accomplished, or whether synonymous words, aptly describing the intent as

we find it in a respectable number of the definitions of larceny at common law, would suffice. A small number of our cases apparently adhere half-heartedly to the latter rule (*State v. Moore*, 101 Mo. 328, 14 S. W. 182; *State v. Owen*, 78 Mo. 367; *State v. Weber*, 156 Mo. 249, 56 S. W. 729); the later cases succinctly and clearly (the late case of *State v. Ward*, 168 S. W. 940, and *State v. Yates*, 159 Mo. 525, 60 S. W. 1051, excepted) hold that the use of the specific word "feloniously" with reference to the intent is necessary (*State v. Weatherman*, 202 Mo. loc. cit. 9, 100 S. W. 482; *State v. Richmond*, 228 Mo. loc. cit. 366, 128 S. W. 744). So, also, did the very early cases. *Witt v. State*, 9 Mo. 673; *State v. Gray*, 37 Mo. 464. The case of *State v. Yates*, 159 Mo. 525, 60 S. W. 1051, squarely holds that it is not necessary to use the specific word "feloniously" if synonymous words are used. But one or the other of these methods must be followed in an instruction for grand larceny. The instruction here, we repeat, follows neither, and is therefore erroneous from any view. Having regard to many of the common-law definitions of larceny which omitted the word "felonious" and the variant holdings on this point and on analogous questions by this court, we conclude that an instruction for grand larceny ought to require the finding by the trial jury that the taking was with a felonious intent, but that the use of the specific words "felonious" or "feloniously" is not absolutely a prerequisite. This intent may be aptly defined by terms indicating the wrongful and fraudulent or criminal nature of the taking, coupled with words charging the taking as being without the owner's consent and with the fraudulent intent to convert the property to the use of the taker and to deprive the owner thereof permanently. *Bodee v. State*, 57 N. J. Law, 140, 30 Atl. 681; *State v. Slingerland*, 19 Nev. 135, 7 Pac. 280; *State v. Shepherd*, 63 Kan. 545, 66 Pac. 236; *State v. Yates*, 159 Mo. 525, 60 S. W. 1051; *State v. Spiritus*, 191 Mo. loc. cit. 36, 90 S. W. 459, 35 Cyc. 148, and cases cited.

III. Complaint is made that the jury was not required to find that the defendant in the alleged procuring of said Bell to commit the larceny charged acted with a felonious or criminal intent. We think this contention must be sustained. It should need no citation of authority to prove that if defendant did not intend that Bell should steal the feed, but intended, as defendant's theory of defense urges, that Bell should buy the feed, the issue of defendant's criminal intent should have been left to the jury under appropriate instructions. The defendant as an accessory before the fact merely was not liable for a crime committed by Bell which was contrary to or the result of an absolute or even a substantial departure from or disregard of defendant's instructions. Defendant, in what he said to Bell in counsel-

ing or commanding the crime, must have had a criminal (here since the crime was grand larceny, a felonious) intent, though he need not have intended the precise crime which was committed, since it is sufficient if the crime done by the principal is the probable consequence of the crime advised by the accessory, as if one hire another to burglarize a house and in so doing the principal kill the owner of the house.

IV. The complaint made that the second instruction is erroneous because it assumes that Bell stole the feed, without leaving this fact as an issue to be found by the jury, would ordinarily be well taken, but here the whole case rests on the sworn admission of Bell that he did steal this feed. No one denies it. Defendant does not controvert it, but in terms concedes it. It is not an issue, then, in the case. The issue is, Did defendant advise, procure, or command the commission of the admitted theft of Bell? We disallow this specific point, though again suggesting that the intent with which defendant counseled and advised said Bell must have been a felonious intent.

Other matters are complained of, but it is not likely that they will occur again, should the case be again tried, so we need not add to the length of these views by a discussion of them.

From what is said it follows that the case should be reversed and remanded, which is accordingly ordered.

WALKER, P. J., concurs in separate opinion. BROWN, J., concurs in result.

WALKER, P. J. That the case learning on the subject is in accord with the conclusion of my learned Brother that an instruction defining grand larceny should contain the words "with felonious intent" I do not question; but where, as in this case, the words "unlawfully steal, take, and carry away" are employed, the use of the omitted words of which complaint is made is not only redundant but tautological. The word "felony" simply designates crime in a general way, and larceny is but a specific designation of one of the many forms of felony; when, therefore, one is said to have unlawfully stolen, taken, and carried away a certain thing, the intent and the crime are indubitably declared, and nothing is added to the clearness or force of the charge by adding that the offense was committed with "felonious intent."

Bound in the throes of precedent, it may be, as is said by my learned Brother, necessary to use these words in the instruction, and, if so, I am impelled to say, what I have herein said, that the necessity of legislative action may be emphasized. I, therefore, concur in the result reached in the majority opinion.

# STATE v. CORRIGAN. (No. 18353.)

(Supreme Court of Missouri, Division No. 2.  
Nov. 24, 1914.)

## 1. CRIMINAL LAW (§ 829\*) — INSTRUCTIONS COVERED BY THOSE GIVEN.

On a trial for taking away a girl under 18 from her father for the purpose of prostitution, she testified that accused solicited her to go to her house, which was a house of prostitution, and told her where she could get car fare, that she later decided to go, and upon calling at the place mentioned was given car fare, whereupon she proceeded to accused's house. C. testified for accused that the prosecutrix asked her to go with her to a different house of prostitution, and that she refused, but induced the prosecutrix to go with her to accused's house. There was no evidence of any conspiracy or connection between accused and C. The court refused an instruction to find accused not guilty if the prosecutrix went to accused's house with C. under the circumstances and conditions testified to by her. *Held*, that, conceding that this instruction, though a vicious comment on the evidence, stated a proper matter of defense, which the court should have embodied in a proper instruction, such matter was sufficiently covered by an instruction to find accused not guilty, unless she took the prosecutrix away from her father for the purpose of prostitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

## 2. ABDUCTION (§ 1\*)—"TAKING AWAY"—ACTS CONSTITUTING.

Where the prosecutrix, while looking for work, met accused, who told her that she could go to her house of prostitution to work, and left car fare at a place mentioned, which the prosecutrix subsequently obtained, and thereupon went to accused's house, there was a sufficient "taking away" within Rev. St. 1909, § 4476, providing that every person who shall take away any female under 18 from her father for the purpose of prostitution shall be punished as therein provided, since it was not necessary that accused should use any force or exercise any physical control over the girl, that she should be with her personally when she left her home and went to the house of prostitution, or that persuasion, enticement, or inducement should be made or offered, or the means or money with which to go away furnished at the time the girl left home; it being sufficient that accused procured or caused her to go away by some persuasion, enticement, or inducement offered, exercised or held out to the girl, or by furnishing her the means or money with which to go away.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. § 1.\*]

## 3. CRIMINAL LAW (§ 1173\*)—HARMLESS ERROR—INSTRUCTIONS.

Where, on a trial for taking a girl under 18 away from her father for the purpose of prostitution, there was evidence that accused solicited the prosecutrix to enter her house of prostitution, and told her where car fare would be left for her, and that the girl subsequently obtained such car fare, and went to accused's house, the court's failure to tell the jury what would constitute a "taking away" within the statute did not prejudice accused, as such an instruction as the court might properly have given would have hurt rather than helped accused's case with the jury, which in the absence of any definition might have assumed that physical control and personal presence, and a present, as distinguished from a future, going away was necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3163; Dec. Dig. § 1173.\*]

#### 4. WITNESSES (§ 277\*)—CROSS-EXAMINATION—MATTERS NOT COVERED BY THE DIRECT EXAMINATION.

On a trial for taking a girl under 18 away from her father for the purpose of prostitution, cross-examination of accused as to whether she was running houses of prostitution other than that which the girl was induced to enter should not have been permitted, where this matter was not mentioned in her direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

#### 5. CRIMINAL LAW (§ 1170½\*)—HARMLESS ERROR—CROSS-EXAMINATION OF ACCUSED.

Where, on a trial for taking a girl under 18 away from her father for the purpose of prostitution, the girl testified that accused told her that she had a house of prostitution in J., accused was not harmed by permitting cross-examination as to this house while she was testifying as a witness, she having denied that she was running any such house, as she thus obtained the opportunity to deny the girl's testimony, and to rebut the inference which the jury might otherwise have drawn from her silence as to this matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

#### 6. ABDUCTION (§ 11\*)—EVIDENCE—CHARACTER OF FEMALE.

Where, on a trial for taking a girl under 18 away from her father for the purpose of prostitution, accused sought to show by the cross-examination of a physician that the girl had a revolting sexual disease before she went to accused's house of prostitution, and a witness for accused testified that the girl asked her to accompany her to a house of prostitution before she went to accused's house, there was such an attack on the girl's reputation for chastity as entitled the state to introduce evidence of good reputation.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. § 21; Dec. Dig. § 11.\*]

#### 7. ABDUCTION (§ 9\*)—CRIMINAL LAW (§ 365\*)—EVIDENCE—OTHER OFFENSES—RES GESTÆ.

On a trial for taking a girl under 18 away from her father for the purpose of prostitution, evidence that the girl was received in accused's house of prostitution, and sent to a room with a man who gave her money and had sexual intercourse with her was admissible to show the intent with which the taking away was accomplished, and evidence that the sexual intercourse was accomplished by force was a part of the res gestæ, and admissible.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 18, 19; Dec. Dig. § 9; Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.\*]

#### 8. CRIMINAL LAW (§ 365\*)—EVIDENCE—OTHER OFFENSES—RES GESTÆ.

Acts which are res gestæ are always admissible, even though they may show the commission by defendant of another crime or other crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Julia Corrigan was convicted of an offense, and she appeals. Affirmed.

From a conviction in the circuit court of the city of St. Louis of a violation of section 4476, and a sentence therefor to imprisonment in the penitentiary for a term of five years, defendant, after the usual motion for a new trial, has appealed.

The specific charge is that defendant took away one Rosa Routhiser, a female under the age of 18 years, from her father for the purpose of prostitution.

Such of the facts in the case as are necessary to understand the points raised by the appeal and discussed in the opinion are as follows: Rosa Routhiser (called hereafter, for brevity, the prosecutrix) resided with her parents in the city of St. Louis, and was at the time of the commission of the alleged offense not quite 15 years old. She had studied stenography, and in the latter part of November, 1912, while in the waiting room of Schaper Bros. in said city, was accosted by defendant, who asked her if she wanted a position. She replied in the affirmative, and added that she was willing to do almost anything. Defendant asked her thereupon what she meant, and prosecutrix replied that she was a stenographer looking for employment. Defendant then said to her, "If you are looking for employment, you can come out to my house to work," advising her that her house was in St. Charles, Mo., and that in order to reach there prosecutrix should take a Wellston car, get off at the end of the line, and go into a candy kitchen located there and say she was going to Julia Corrigan's house, and that car fare would thereupon be given to her. Prosecutrix did not, at the time, accept this offer, but within a few days thereafter, namely on Wednesday, December 4, 1912, she left her home, went downtown in the city of St. Louis, there took a Wellston car, rode to the end of the car line, made inquiry at the candy kitchen, where she received 25 cents from a Greek in charge of the store. She then took a car to St. Charles and went to the house of defendant, which the proof shows to have been, at the time, and since, and for a long time prior, a house of prostitution, wherein she was admitted by the defendant, who took her into a room, took her outer clothing off, put a short apron on her, and told her she must get used to everything, as defendant was later on going to send her to Jefferson City where she likewise had a house. In the house of defendant there were, besides prosecutrix, five or six other girls. This house contained a dance hall with benches about the wall and was furnished with an electric piano. In this hall, while prosecutrix remained at defendant's house, the girl inmates and divers men who came there, engaged in dancing. On Friday morning, December 6, 1912, following the advent into this house of prosecutrix, a roughly dressed man, partially drunk, and whose name is unknown, came to defendant's house and she sent him up to a bedroom. Defendant then sent prosecutrix up to this room, where the latter received \$2 from the man. Prosecutrix was then sent back to this room by the defendant, and the man therein threw prosecutrix upon the bed and had

forcible sexual intercourse with her. The details of this rape are shown in full and at length in the record. To the admission of these details, as well as to the fact of rape, defendant strenuously objected, and now makes serious contention that such admission is reversible error. From the intercourse had with this strange drunken man prosecutrix contracted a serious sexual disease, although some considerable effort was made upon the trial to show by a physician, one Dr. Fiegenbaum, who examined and prescribed for prosecutrix, that her infection with this disease could not have occurred at the time of her intercourse in the house of defendant, but that she must have been infected prior to her going to defendant's place. On the following day the mother and father of prosecutrix, having learned that she was at St. Charles in the house of defendant, went out there, found her and took her back home.

The testimony offered by the state as tending to prove that defendant's house was a house of prostitution both prior, at the time, and after prosecutrix went there, though denied by defendant, is abundant, and by palpable inference is admitted by defendant herself in her testimony. We need not therefore set out the details of proof showing such character of defendant's house.

One P. L. Rupp, a deputy sheriff, was offered by the state for the purpose of showing that defendant's house was being operated by her as a house of prostitution some two or three weeks subsequent to prosecutrix being taken from there. Objection was made by defendant to the competency of this proof, though the record discloses that all of the testimony given by said Rupp as to the character of defendant's house consisted in his stating that he, as deputy sheriff, "went there on January 8, 1913, with the intention of closing it." He does not state what sort of a house it was, nor does the record show whether he closed it or not, except in so far as his language quoted would indicate; and this language, by the most obvious inference, indicates that he did not close it.

Testimony on behalf of defendant shows that one Saminos, a Greek employed in the candy kitchen at the end of the car line, gave prosecutrix 25 cents to pay her car fare to St. Charles, and that this money had been left at the candy kitchen by defendant with instructions that it was to be given to a little girl who would call for it. The testimony of defendant diametrically contradicts that of prosecutrix as to the manner of and the inducements which led to the latter's going to the house of defendant, and tends to show that she went accompanied by another girl, one Lillian Cameron. The latter testified for defendant that she met prosecutrix downtown in St. Louis on the morning prosecutrix went to defendant's house; that prosecutrix told her she was going out on Lucas avenue

to become an inmate of one of the houses of prostitution, which the witness says were then situated on that street, and requested the said Lillian to accompany her. This the Cameron girl refused to do, but induced prosecutrix to go with her to the house of defendant at St. Charles. There was some corroboration from other witnesses, who ought to have been disinterested, that prosecutrix had gone to defendant's house with the Cameron girl, and had not, as prosecutrix herself swears, gone there alone. This, however, was for the jury, and since they evidently found contra, we need not follow it further.

Defendant, testifying for herself, denied that she ever saw prosecutrix until the latter came to her house in St. Charles on the morning of the 4th of December, accompanied, defendant swears, by the Cameron girl; that the two girls advised her that they would like to board with her for a week or two; defendant asked, "Who is this little girl?" referring to prosecutrix, and was told that her name was Ruth Roberts. Defendant then said that she didn't like to do anything like that, "*This little girl looks too young.*" Defendant also denied that her house was, or had ever been, a house of prostitution, or that she had ever been a sporting woman, or that she had ever sent prosecutrix to a room with any man, as shown by the state, or that any man had intercourse with prosecutrix while the latter was in defendant's house. In the cross-examination of defendant she was asked, over the objections and exceptions of her counsel, whether she had ever kept a house of prostitution in Jefferson City. She denied that she had ever done so, and contradicted in this behalf the testimony of prosecutrix and another witness. Defendant was also asked in her cross-examination if she had not kept a house of prostitution at Columbia, Mo. This she likewise denied, but to this question and answer neither an objection nor an exception was lodged.

In rebuttal the state, over the objections and exceptions of defendant, introduced testimony to show the good reputation of the prosecutrix for chastity and virtue. In the court's instructions he limited the probative effect of this evidence to a consideration thereof by the jury for the purpose of determining prosecutrix's credibility alone. Defendant asked the following instruction, to wit:

"The court instructs the jury that if they believe from the evidence in this cause that the witness, Rosa Routhiser, went out to St. Charles to the house of the defendant, Julia Corrigan, with Lillian Cameron, under the circumstances and conditions testified to by said Lillian Cameron, then they shall return a verdict finding the defendant not guilty."

This statement of the facts will, we think, serve to make clear such points as we find it necessary to discuss in the subjoined opinion.

Richard F. Ralph, of St. Louis, for appellant. John T. Barker, Atty. Gen., and Lee B. Ewing, Asst. Atty. Gen., for the State.

FARIS, J. (after stating the facts as above). Many reasons are urged upon us for the reversal of this case. In the last analysis we may tabulate these generally under three heads, with subdivisions thereof, viz.: Alleged error: (1) In refusing to give the instruction offered by defendant, which we have set out in the statement; (2) in failing to instruct on all of the law of the case; and (3) in the admission of testimony; (a) in the unwarranted cross-examination of defendant; (b) of the sheriff that the defendant ran a house of prostitution in January, 1913, at the identical house and place where prosecutrix was in December, 1912; (c) of the reputation of prosecutrix for chastity; and (d) of the details of the forcible sexual intercourse had with prosecutrix. Let us look at these in their order.

[1] I. It will be noted that, in substance, this refused instruction tells the jury that if they find that prosecutrix went to the house of defendant with the witness Lillian Cameron under the circumstances testified to by said Cameron woman, the verdict should be not guilty. The brief of learned counsel for defendant concedes, in effect, that this instruction as requested was not in proper form, but that the idea of it was a proper matter of defense, which it was the duty of the court to embody in a properly couched instruction to the jury. We think we may safely concede both this concession of fact and this contention of law. It was clearly a most vicious comment on the evidence in the form offered, but a complete defense if the jury believed it to be true. But had not the court in a converse sense already submitted the exact defensive thought of this instruction to the jury? We think that it had when it told the jury that, unless they found "that the defendant took Rosa Routhiser away from her father, Nathan Routhiser, for the purpose of prostitution as mentioned in this instruction, you will find her not guilty." Palpably, if defendant took her away, Lillian Cameron did not, and vice versa, for there was no proof in the record of any conspiracy, or connection, between the defendant and the Cameron girl till prosecutrix was in defendant's house. We are constrained to disallow this contention.

[2, 3] II. The specific error urged upon us touching the alleged defects in the instructions given by the court is that the court failed to define what constituted a "taking away" of prosecutrix for the purpose of prostitution, within the meaning of the statute. The pertinent language of the statute which defines and denounces this crime is:

"Every person who shall take away any female under the age of eighteen years from her father \* \* \* for the purpose of prostitution \* \* \* shall upon conviction thereof be

punished by imprisonment in the penitentiary not exceeding five years." Section 4476, R. S. 1909.

The language of the instruction No. 1 given by the court nisi, read upon this point, thus:

"If \* \* \* you believe and find from the evidence that \* \* \* the defendant, Julia Corrigan, did unlawfully and intentionally take one Rosa Routhiser away from her father, one Nathan Routhiser, for the purpose of prostitution, by having illicit intercourse with divers men," etc.

It will be seen that the instruction followed the language of the statute which defined the offense. Was it here required to go further and define the words which defined the offense? Reverting for a little more light to the facts in proof, we note that defendant at Schaper Bros. in St. Louis, late in November, 1912, met prosecutrix and asked her if she wanted a position; prosecutrix said she did, and was willing to do almost anything. Defendant inquired what her answer meant, and prosecutrix said to her she was a stenographer, looking for work. Defendant then said, "If you are looking for employment, you can come out to my house to work," and continuing gave prosecutrix information as to where the house of defendant was and how to reach it and offered to and did provide car fare for her by leaving, with a man in a candy kitchen at the end of the Wellston car line, 25 cents, to be given to prosecutrix when she asked for it. Prosecutrix, on December 4th following, left home, got the car fare left by defendant with the candy-kitchen man at the end of the car line, went to St. Charles and to the house of the defendant, and was received therein as an inmate. This evidence, in our opinion, fully met the requirements of the statute as to what constitutes a "taking away" within the purview thereof. Raising, without the necessity of again deciding (*State v. Miller*, 93 Mo. 263, 6 S. W. 57; *State v. Frank*, 103 Mo. 120, 15 S. W. 330; *State v. Murphy*, 118 Mo. 16, 25 S. W. 93), whether where an offense is defined by statute in words which are not technical and which are to be understood in their plain and ordinary meaning, the court nisi must yet define these words which define the offense, we are yet fully convinced that in no way was defendant's rights prejudiced by the failure of the court here to tell the jury that:

"In order to constitute a taking by the defendant under the law, it is not necessary that the defendant should have used any force or have exercised any physical control over the girl in taking her away, or have been personally with her at the time of her leaving, or have gone in person with her; it is sufficient if defendant procured or caused her to go away by any persuasion, enticement, or inducement offered, exercised, or held out by defendant to the girl, or by furnishing her the means or money with which to go away. It is not necessary that the persuasion, enticement, or inducement should have been made or offered, or the money or means furnished, at the time of the girl's leaving; but if the defendant, for the purposes charged, persuaded or enticed or offered inducements to the girl to leave her father, and fur-

nished her means with which to go away, and she did not go away at that time, but went away at a subsequent time, that such going away was caused by and was the result of the persuasion, enticement, or inducements offered or money or means furnished by the defendant, such facts would show a taking away within the meaning of the law." *State v. Bussey*, 58 Kan. 679, 50 Pac. 891.

If some such instruction as the above had been given for the state, we must needs have held it good upon the statute and the facts here, but we opine that the defendant would have objected strenuously to its being given. As the matter was left by the court, the jury might well have been led to believe that either physical control and personal presence and a present, as distinguished from a future, going away was an absolute prerequisite to conviction. Be all this as may be, we are not able to perceive wherein the omission of the court to define "taking away," as such taking away was shown by the proof here, harmed defendant. On the contrary, a proper definition running with the facts would, in our judgment, have hurt her case with the jury, and the failure to define these words might well have aided her case. It is of no legal force that the sequel shows that it did not help the case.

[4, 5] III. Which brings us to alleged error predicated upon the admission of incompetent evidence for the state. The first complaint made is that the state was allowed by the trial court to cross-examine the defendant, who took the stand in her own behalf, as to her running and having houses of prostitution in Columbia and in Jefferson City. Clearly this was not mentioned by her in her examination in chief. So it is error and presumptively hurtful to her case. Pretermittting the statutory permission to impeach a defendant who takes the stand "as any other witness in the case" (section 5242, R. S. 1909) and the well-settled means of impeachment by showing by the accused himself, practically always dehors his or her examination in chief, the fact that he or she has been convicted of some crime (*State v. Blitz*, 171 Mo. 530, 71 S. W. 1027), were these questions harmful to defendant here? We think not. She denied having such houses, or having had houses of prostitution in either Columbia or Jefferson City. The prosecutrix had already sworn that defendant told her that she had a house of this character in Jefferson City. These questions gave the defendant the opportunity to deny the testimony in this behalf of the prosecutrix and thus to blunt the force of any comment which the state might make in argument, and any inference which the jury might have drawn from defendant's silence. *State v. Larkin*, 250 Mo. 218, 157 S. W. 600, 46 L. R. A. (N. S.) 13. If defendant had admitted that she had, or had run, such a house in Jefferson City, a different case would be before us.

To the inquiry as to defendant's having a house of prostitution in Columbia, neither

objection was made nor exception saved by her, so we need not consider this.

IV. The deputy sheriff was permitted to swear, over defendant's objection, that as such officer he went to the said house of defendant in January, 1913, "with the intention of closing this house." He nowhere says whether he closed it or not; nor does he say what sort of house it was. For aught that appears to the contrary in this record, though he went for the purpose of closing it, the benevolent and beneficent character of it, upon a closer and more careful scrutiny, may have worked upon this officer in such wise as to have stayed his intention. At any rate his intention was stayed; inferentially, he did not close it, and he gives no reason for not doing so. Conceding that the mental attitudes and intentions of the sheriff and his deputies are in no way binding upon the defendant, and that the question was highly improper, we are still not able to see how she was hurt in any way by his answer. All presumptions of right, legal, and proper action being indulged in favor of the view that this officer did his duty, we are confronted then by the conclusion that if this house was in January, 1913, being operated by defendant as a house of prostitution, the officer would have closed it and would not, upon a more intimate examination, have abandoned his intention so to do. Being forbidden by the authorities to reverse a case for innocuous error, or error helpful and not hurtful to defendant, we disallow this specific contention. *State v. Thornhill*, 174 Mo. 364, 74 S. W. 832; *State v. Hunter*, 181 Mo. 316, 80 S. W. 955.

[6] V. Complaint is likewise lodged that evidence of the prior good reputation of prosecutrix for chastity was admitted by the court to bolster up her reputation, before the defendant had attacked it. If this were true upon the record, it is error, and we must reverse this case. But the record shows that while much evidence was offered by the state to bolster up prosecutrix's reputation, all such offerings were in rebuttal, and made after the defense had strenuously sought to show, by cross-examination of the witness Dr. Fiegenbaum, that prosecutrix, an unmarried girl, had contracted or must have had a revolting sexual disease before she went to the house of defendant; and likewise after the witness Lillian Cameron had sworn that prosecutrix had importuned her to go with prosecutrix to a house of prostitution on Lucas avenue in St. Louis and become an inmate thereof. Manifestly testimony of this character was just as surely and more seriously an attack upon the reputation of prosecutrix for chastity as would have been the offering of character witnesses to show her evil reputation in that behalf. In the light of such an attack the state in rebuttal was permitted to offer countervailing testimony of prosecutrix's good reputation.

State v. Speritus, 191 Mo. 24, 90 S. W. 459; State v. Jones, 191 Mo. 653, 90 S. W. 465; State v. Maggard, 250 Mo. 335, 157 S. W. 354. Both in reason and upon authority, this contention is not tenable upon the facts in this case.

[7, 8] VI. This brings us to the last and most serious contention of defendant, viz., that it was error, greatly harming defendant's case and accounting by patent inference for the extreme penalty of the law which the jury inflicted on her, to permit prosecutrix to relate before the jury the revolting and heinous details of the rape committed on her by the unknown drunken visitor at defendant's house. The point is a new one in this state. Going back as a basis for some of the things which we shall say, we observe that it is well settled that, under our statute defining this offense, the gravamen of the charge is the purpose or intent with which the "taking away" is accomplished. State v. Adams, 179 Mo. 334, 78 S. W. 588; State v. Richardson, 117 Mo. 586, 23 S. W. 769; State v. Knost, 207 Mo. 18, 105 S. W. 616; State v. Beverly, 201 Mo. 530, 100 S. W. 463; State v. Baldwin, 214 Mo. 308, 113 S. W. 1123. Intent is a hidden mental process, deducible in a criminal case especially, since the state may not use the defendant to prove it, from words or overt acts alone. We do not find here in this record, nor would we ordinarily expect to find in any record, any language of the defendant clearly stating or admitting that the intent in taking away a girl under the age of 18 years was for the purpose of prostitution. This intent, which the cases hold is the gist of the offense, must then of necessity be inferred or deduced from other facts or acts in proof, just as in a sense we reason in cases of circumstantial evidence alone. That prosecutrix was taken for the purpose of prostitution can in no way be more clearly or conclusively shown than by the fact that she was received into a house of prostitution, kept there by the defendant, and when occasion offered sent by the defendant to a room with a man who gave her money and had sexual intercourse with her. So far, and to the extent that *voluntary* sexual intercourse may be shown as an act from which the intent of prostitution may be deduced, we do not understand defendant as contending. The law to this extent is well settled at any rate. State v. Johnson, 115 Mo. 480, 22 S. W. 463; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149, 1 Cyc. 158. The admissibility of the fact of voluntary intercourse for the purpose of showing intent being thus settled by the ruled cases, does it lie in the mouth of defendant to object to the fact of that rape, or to the details thereof, however heinous, which it became necessary to perpetrate on the prosecutrix in order to accomplish that identical intercourse, for which defendant received the

price and for which she sent prosecutrix in unto the drunken man? We think not, and we know of no rule of law or logic which would so hold. This identical question was before the Court of Appeals of New York in the case of *Schnicker v. People*, 88 N. Y. 192, which was a case almost on all fours with the facts here. There it was held that the details of the force used in consummating the sexual acts were parts of the *res gestæ* and admissible against the defendant though done out of her immediate presence and not specifically commanded by defendant to be done. The point is akin to that which holds an accessory before the fact liable, when the principal, by instigation of an accessory, robs another and in that robbery, to accomplish it, commits murder. State v. Rader, 171 S. W. 46, decided at this term and not yet officially reported. So, while it is probable that a part of the extreme penalty visited upon defendant is attributable to the fact that the sexual intercourse with prosecutrix which defendant sent her in unto the drunken man to be consummated, and for which defendant received the price, was accomplished with force, this is but one of the misfortunes directly arising from her own criminal machinations, and is a part of the *res gestæ*. Acts which are *res gestæ* are always admissible, even though they may show the commission by defendant of another crime or other crimes. State v. Anderson, 252 Mo. 83, 158 S. W. 817. Therefore we disallow this contention.

Having thus examined all of the points made by defendant and finding neither in them nor in the record any reversible error, and being thoroughly convinced of the guilt of defendant, we affirm the case. Let this be done.

WALKER, P. J., and BROWN, J., concur.

RINGOLSKY v. MAUD L. MINING CO. et al.  
(No. 15673.)

(Supreme Court of Missouri. Nov. 17, 1914.  
Rehearing Denied Dec. 1, 1914.)

1. MINES AND MINERALS (§ 97\*)—PARTNERSHIP—EXISTENCE OF RELATION—BURDEN OF PROOF.

G. and T. were largely interested in certain mining properties, and plaintiff also had a small interest therein. G. contracted to sell his interests to plaintiff and T. for \$257,000, plaintiff to be paid for negotiating the sale, and plaintiff and T. agreed with certain New York parties, who were to advance the money with which to pay G., for the formation of a corporation to take over the properties, plaintiff to perform the legal services. T. was to have one-half the stock, and plaintiff and the New York parties each one-fourth. By a subsequent agreement the corporation was to have a capital stock of \$2,500,000 and was to issue bonds, of which G. was to receive \$100,000 and the New York parties the sums advanced by them. G. was also to receive \$100,000 in stock and a vendor's lien for \$57,000, while certain of the New York parties were to receive \$500,000 in

stock, and certain other of such parties stock to be taken out of the holdings of plaintiff and T. No stock was intended to be or was offered to outside parties. T. was not a party to this agreement when made and subsequently objected thereto, but joined in the agreement in reliance on G.'s statement that the stock received by him would be worth as much as what G. was receiving, and that he might take a part of G.'s bonds in exchange for stock; this understanding between G. and T. not being communicated to the other parties. G. and T. subsequently executed a declaration of trust, by which they joined their holdings of stock and bonds. It was plaintiff's claim that, by the agreement between G. and T., T. acquired a secret profit, for which he was bound to account to plaintiff as his partner, or to the corporation, of which he was a promoter. *Held*, that there was no general partnership between plaintiff and T., and, assuming that they were promoters, prima facie no partnership existed, and the burden was therefore on plaintiff to prove the fact of partnership.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 222; Dec. Dig. § 97.\*]

**2. MINES AND MINERALS (§ 106\*)—MINING CORPORATIONS—PROMOTERS—SECRET PROFITS—ACCOUNTING TO OTHER PROMOTERS.**

The rights of plaintiff and the other incorporators were fixed by the contract, and as they received the exact amount of stock representing the exact portion of the equity in the properties for which they had contracted, unaffected by the agreement between G. and T., neither they nor the company in their behalf could complain of the transaction, even assuming that T. was a promoter, and that, by the agreement with G., he acquired a greater interest than the interest given him by the contract, especially where there was no evidence that G. would have taken anything less than he had contracted for, except on his theory that T.'s stock was equal in value to what he was receiving.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 230; Dec. Dig. § 106.\*]

Lamm, C. J., and Bond, J., dissenting.

In Banc. Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by I. J. Ringolsky against the Maud L. Mining Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McReynolds & Halliburton, of Carthage, and New, Kennish & Krauthoff, of Kansas City, for appellants. Henry Russell Platt, of Chicago, Ill., and Spencer, Grayston & Spencer, of Joplin, for respondents.

**BLAIR, C.** Plaintiff appeals from a judgment for defendants in a suit to recover secret profits alleged to have been realized by defendant Tobias in connection with the sale of mines to a corporation, the defendant Red Top Zinc & Smelting Company. Upon grounds hereafter stated, other defendants are alleged to have become liable. The mining properties involved were the Maud L., the Cumberland, the Ada B., and the Oronogo, all in Jasper county.

In 1905 defendants Tobias and Gundling each owned a one-half interest in the first two, and Tobias owned one-fifth and Gundling and certain associates owned four-fifths

of the others. In May or June, 1905, plaintiff and Moe A. Isaacs jointly purchased a one-fifteenth interest in the Maud L. and Cumberland; Tobias and Gundling each retaining a seven-fifteenths interest therein. In May, 1905, these latter applied to plaintiff for a loan. Plaintiff proposed to form a corporation to take over the properties and borrow \$30,000; plaintiff offering to accept the corporation's note for \$5,000 and one-fourth of the capital stock for his services in securing the loan, urging that his connections were such that his name would give great prestige to the enterprise. This suggestion was not adopted. Gundling concluded to sell his interests, and July 9, 1905, offered them to Tobias and plaintiff for \$257,000; plaintiff to receive \$33,000 additional for his compensation in negotiating the sale. Plaintiff and Tobias agreed to buy, and a week later visited New York, and they and Moe Isaacs drew up a contract providing for the formation of a corporation to take over the mines. Isaacs agreed to advance the company \$50,000, holding the stock as security until Gundling was fully paid; plaintiff to perform all legal services and Tobias to transfer to the corporation his interests in the mines. It was agreed that Gundling should be paid \$257,000 for his interests and those of his associates in the Ada B. and Oronogo, and that Tobias should receive one-half and plaintiff and Isaacs each one-fourth of the issued stock.

Previous to the execution of this contract, plaintiff and Tobias signed an agreement and executed certain notes to secure Isaacs from loss in case he signed the contract, and to secure him for money advanced if he concluded not to sign it.

Plaintiff and Tobias returned to Missouri, and Gundling expressed no dissatisfaction with the contemplated arrangement. It did not modify the terms of the contract of July 10, 1905, in so far as it concerned Gundling.

Moe A. Isaacs and his associates sent an expert to Missouri, who examined the mines and reported thereon. His expenses were subsequently paid by plaintiff and Tobias. Concerning this plaintiff wrote Tobias:

"I note everything you say, and every sentiment and feeling expressed by you I coincide with and have felt myself. I think it was an outrageous proceeding to send an expert to Joplin at our expense at a cost of \$1,000, and when I see Moe he will find that things will have to be entirely changed or I will end the contract in New York. I am tired of the imposition and the entire situation."

In the same letter, dated July 28, 1905, plaintiff wrote:

"I will see that we have an opportunity to discuss everything before I undertake to make any changes in the agreements we made."

Installments falling due under the contract of July 10, 1905, aggregating \$50,000, were paid Gundling, Moe A. Isaacs and his New York associates advancing the money.

About the last of August, 1905, plaintiff

and Gundling visited New York. Associated with Moe A. Isaacs were Bendet Isaacs, Adolph Eliasberg, Morris Rosenwasser, and Harry Rosenwasser, and these and plaintiff and Gundling entered into an agreement August 20, 1905, which recited the fact that Gundling had contracted to sell the properties to plaintiff and Tobias for \$257,000; that all the parties (including Tobias) had become interested in financing the properties; that Gundling had been paid \$50,000, furnished by Moe A. Isaacs, the Rosenwassers, and Eliasberg; that it was then agreed plaintiff was to form a corporation, the Red Top Zinc & Smelting Company, with a capital stock of \$2,500,000, par value of shares \$1 each; that each of the four mines involved was to be incorporated, the stock to be held by the Red Top, etc., Company, and therefore it was agreed that: Moe A. Isaacs, the Rosenwassers, and Eliasberg were to pay Gundling an additional \$50,000, and for the \$100,000 paid were to receive \$100,000 in bonds and 500,000 shares of stock of the new company. Bendet Isaacs was to pay \$33,333.33 into the company's treasury and receive \$33,333.33 in bonds and 166,666 shares of stock, this stock to be given out of the holdings of plaintiff and Tobias. Seventy-five hundred dollars in cash was to be paid by the company to Moe A. Isaacs for the money he had invested in the mines; 500,000 shares of stock to remain in the treasury. For the additional \$157,000 due Gundling, he agreed to take \$100,000 in bonds and a vendor's lien for \$57,000 and 100,000 shares of stock, the bonds to be the first paid by the company, and Gundling to take \$57,000 from the earnings to pay off the vendor's lien.

The new company was to issue bonds for \$233,000, bearing 7 per cent. interest; no dividends to be paid until bonds were paid, and the \$57,000 secured by vendor's lien to be paid in advance of payment of the bonds, the new company to own a one-half interest in the Galena mines. There were other provisions which need not be set out.

This agreement was signed by all the persons named above, except Tobias, who was not present. Plaintiff wired Tobias, stating the salient features of the new agreement, and closing: "Wire if you can make contract embodying these terms generally." The following day the plaintiff received a telegram from Tobias asking if working capital would be furnished. Without further authority plaintiff signed the name of Elias Tobias to the agreement. Plaintiff did not see Tobias again until another meeting was had in New York in the latter part of September, and there is no evidence Tobias ratified plaintiff's action in signing the agreement for him.

On September 15th Tobias wrote plaintiff objecting to certain features of the agreement, particularly to the inclusion of the Galena property and to the fact that the dividends he was to get were to be small and postponed for some time. In this letter he

neither said he would nor that he would not accept the agreement as made, modified in the particulars mentioned. He complained he was "doing more than his part in the transaction."

At the meeting in New York September 29 and 30, 1905, Tobias made several objections to the written agreement. He demanded that the Galena mine be left out, that a note of his to Moe A. Isaacs be paid by the new company, objected to giving up part of his stock to Bendet Isaacs and to Gundling, and complained he was putting in unincumbered interests and getting only incumbered interests. He indicated he would not go further with the matter. It was finally agreed the Galena property should be omitted and that the company should pay the \$2,500 note. This left the matter of the transfer of part of Tobias' stock to Bendet Isaacs and Gundling. The negotiations seem to have been conducted at a series of conferences, in which sometimes all and at times only two or three participated. Gundling had been paid \$50,000 in cash and had paid this out. He became worried lest the position Tobias took would result in the abandonment of the whole undertaking, in which event he would have to repay the \$50,000, which he was not in a position to do. Gundling finally took Tobias aside and told him the situation he would be in if the matter was dropped, and stated he believed that, if it was closed up, the stock Tobias would get would be worth as much as the bonds he (Gundling) would get, and offered to permit Tobias to take a part of the bonds in exchange for a proportionate part of the stock Tobias would get. With the understanding he could do this if he desired, Tobias agreed to go on with the business. The matter was then closed up, practically on the contract basis, except in so far as the concessions to Tobias modified it. Nothing was said to the others, so far as the evidence shows, by Tobias or Gundling about the agreement they had made.

The net result was that the new company secured the full title to the four mines, subject to a vendor's lien for \$57,000 and a deed of trust securing bonds amounting to \$233,333, and had \$23,300 in the treasury. Gundling received \$100,000 in cash, \$100,000 in bonds, and 100,000 shares of stock. Tobias received 822,224 shares of stock and plaintiff 411,220 shares. Moe A. Isaacs, Bendet Isaacs, and Eliasberg each received \$33,333 in bonds and 166,666 shares of stock, and the two Rosenwassers received, jointly, a like portion, in accord with the contract. Subsequently Moe A. Isaacs negotiated the sale to Gundling of the \$66,666 in bonds held by the Rosenwassers and Eliasberg, retaining \$3,000 of them for his trouble. With these Gundling also acquired the stock of the vendors, amounting to 333,220 shares. These bonds were discounted \$10,000, and Gundling procured the money to buy by borrowing a

large sum from one Werner, using the \$57,000 vendor's lien as collateral.

About March, 1906, Gundling conceived the idea that plaintiff and Moe A. Isaacs were scheming for control of the company. April 6, 1906, there was drawn and signed a "declaration of trust," wherein it was stated Gundling and Tobias jointly owned the \$163,000 in bonds and 433,224 shares of stock Gundling had acquired and the 822,224 shares of stock issued to Tobias. This declaration was actually drawn, signed, and acknowledged April 6, 1906, but was dated August 5, 1905, for the purpose of indicating that Tobias became responsible for his one-half of certain indebtedness incurred by Gundling in connection with the various transactions prior to the actual execution of the instrument.

For one thing Gundling had paid out about \$135,000 in buying out his associates in the Ada B. and Oronogo mines and, it seems, to liquidate certain indebtedness of these properties. Other facts will be referred to in the opinion.

Plaintiff contends: (1) That he and Tobias were partners; or, if not, (2) that he and Tobias and Gundling were promoters, and that on either theory the judgment is wrong.

In the view taken of the case, it is unnecessary to discuss the question whether plaintiff can sue on the first theory in his individual capacity and on the second in a representative capacity in the same case and on a petition containing a single count. *Turner v. Markham*, 155 Cal. loc. cit. 569, 570, 102 Pac. 272.

The actual basis of plaintiff's claim is that Tobias' stock was worth less than the stock, bonds, and vendor's lien given Gundling, and consequently the agreement between the two resulted in a profit to Tobias, for which he must account either to plaintiff as his partner or to the corporation as one of its promoters. It is contended Gundling is liable by reason of having parted with Tobias' stock and bonds after notice of plaintiff's claim, and the Oronogo Circle is liable as a purchaser with notice. The other corporations are made defendants because their property may be affected, and the other individual defendants are the remaining incorporators of the Red Top Zinc & Smelting Company.

[1] 1. "Partnership is a matter of contract. A man cannot be made a partner against his will, by accident, or the conduct of others. He must agree to be a partner, or, as to outsiders, hold himself out as a partner to those who have trusted him as such." *Freeman v. Bloomfield*, 43 Mo. loc. cit. 392. There was no general partnership between plaintiff and Tobias (*Whitehill v. Schickle et al.*, 43 Mo. 537), and, even if it be assumed they were promoters, prima facie no partnership between them existed (10 Cyc. 271, 272). The burden is still on plaintiff to make out the fact of partnership by evidence.

If this was a partnership venture, it is

pertinent to inquire when the relation began. There is nothing in the agreement Tobias, plaintiff, and Isaacs signed constituting a partnership. Plaintiff was to form a corporation and get stock for his services. Tobias was to receive stock for his property he put in. Neither was to receive any part of the share of the other. Plaintiff was not of the opinion he had any right to bind Tobias when he wired him asking whether he could agree to the contract of August 29, 1905. His testimony indicates he signed Tobias' name to the agreement solely because he inferred from Tobias' reply telegram that permission was intended to be given—an inference it is not now contended can properly be drawn from that telegram.

Tobias repudiated portions, at least, of the contract of August 29, 1905. There is no evidence any claim was then made by plaintiff or any one else that Tobias was bound by plaintiff's act in signing his name to that contract. Nor does plaintiff now suggest that Tobias is or ever was interested in the stock he (plaintiff) received or the \$10,000 he got for it. True, plaintiff testified Tobias was his partner, and Tobias testified the contrary. The trial court did not find a partnership existed, and, on the evidence, we are not disposed to criticize the view it took.

[2] 2. It is contended Tobias was one of the promoters of the company formed; that his relation to his associates was consequently of a fiduciary character, and that his agreement with Gundling was violative of his obligation arising out of that relation in that it is asserted Gundling's stock, bonds, and vendor's lien were worth more than the stock offered Tobias, and that Gundling, therefore, received, under that agreement, less than the other six incorporators had contracted to give for his interests; that Tobias got the difference; and that this constituted a secret profit, for which he should account, and for which Gundling is chargeable on the theory that he had Tobias' interest in his possession with knowledge of the trust and, having parted with it, is liable for the amount of the profit Tobias is declared to have realized.

Let it be assumed that Tobias was in fact a promoter of the company, and that the interest he took under the agreement with Gundling was of greater value than the 822,224 shares of stock offered in the first place for his interest in the properties. Further, let the question of plaintiff's right to sue on behalf of the company, after having parted with his stock, be waived.

The contract of August 29, 1905, modifying the contract Tobias signed July 17, 1905, was never signed by Tobias, nor did he ratify plaintiff's act in signing for him. That contract fixed the value of Gundling's interest at \$257,000, and provided for paying him \$100,000 in money, \$100,000 in bonds, \$57,000 by vendor's lien and for the issuance to him of 100,000 shares (\$1 per share, par value) of

stock for his interest. Plaintiff contracted to accept 411,000 shares of stock for his services. Tobias (all the others had agreed) was to receive 822,224 shares of stock for his interests in the properties. The five other than plaintiff, Tobias, and Gundling were to receive bonds equaling in amount the cash each advanced, and in addition five shares of stock for each dollar thereof. For this stock they paid nothing. The stock represented the equity in the properties. There was neither intent to sell nor sale of stock to third persons. There were no subscribers, save the eight. Plaintiff's compensation was represented by the stock issued to him, and represented a fixed portion of the equity in the properties being acquired by the corporation at the prices stated in the contract. The bonuses in stock issued to Moe. A. and Benedict Isaacs, the two Rosenwassers, and Eliasberg were likewise issued on the basis of the equity resulting from incumbering the properties for \$290,000. The six incorporators, other than Tobias and Gundling, received the exact amount of stock they contracted for, and it represented the exact portion of the identical equity they had contracted it should represent.

The agreement between Tobias and Gundling did not affect the value of the stock of the six others in the smallest fraction. The contention made assumes, in fact, that if Gundling's interests had been acquired for less, and the value of the equity had been thereby proportionately increased, the amount of the bonds being reduced, the six named would have been awarded the same proportion of the equity, plaintiff for services and the others for stock bonuses. That is an assumption, in effect, that the six had some claim outside the contract itself. That is not true in fact or in law. So far as concerns the question before us, they contracted for designated portions of an equity the contract described, and each of the six received that for which he contracted. Neither can claim more. The agreement between Gundling and Tobias neither decreased nor increased the value of the equity, and consequently did not affect the other six.

There is no pretense there was any misrepresentation of the value of the properties. The evidence strongly tends to show that Tobias' unincumbered interests were worth as much as Gundling's actual interests (associates owning part of two mines), and therefore that Tobias neither gained nor lost by his agreement with Gundling, as Gundling asserted when the agreement was made. The present owner of the stock is defending in this case, and none of the original incorporators have any right to complain, even had they not all parted with their stock. Neither can the company, or plaintiff in its behalf, of the transaction. *Old Dominion v. Lewisohn*, 210 U. S. 206, 28 S. 52 L. Ed. 1025; *Milwaukee Cold*

*Storage Co. v. Dexter et al.*, 99 Wis. 215, 74 N. W. 976, 40 L. R. A. 837.

This is not a case in which promoters have deceived their fellow incorporators or subsequent subscribers by misrepresenting or concealing the price of property delivered to a corporation they were forming. There is no evidence Gundling would have accepted a dollar less than the \$257,000 he contracted for, or that he would have made the agreement he made with Tobias, except upon the theory that Tobias' stock equaled the value of what he (Gundling) was receiving—a view the evidence tends strongly to support when the outstanding interests Gundling was obligated to acquire and Tobias' assumption of one-half of this burden are considered. The \$63,000 in bonds and the stock accompanying them properly went into the declaration of trust as the substitute for the \$57,000 vendor's lien which was first included, but had been used by Gundling to acquire them.

3. The trial court did not apparently give great weight to the document whereby Isaacs, at plaintiff's instance, agreed to extend Gundling's notes for \$68,000 in consideration that he recognize certain rights of plaintiff. When plaintiff amplified this, in writing, to provide that Gundling should turn over one-half of Tobias' stock and bonds in his hands, plaintiff promptly refused to agree. When the document mentioned was signed, plaintiff was, and for months had been, Gundling's attorney, employed to oppose claims Tobias was making in connection with the declaration of trust, and which Gundling thought were inequitable and unjustifiable under that instrument. Plaintiff, several months after being engaged by Gundling as his attorney in this matter, advised Gundling that Tobias could not recover anything, but that he (plaintiff) could, as Tobias was his partner, and advised Gundling to turn over to him Tobias' stock and bonds. This Gundling and another of his lawyers testified he refused to agree to do. The trial court evidently believed them instead of believing plaintiff and Isaacs, and the record does not persuade us the trial court was wrong in this. The alleged "confession" of Gundling, in July, 1906, that Tobias had kept him informed of plaintiff's doings in connection with his transactions in the East has little of substance in it, was explained by Gundling as relating to matters after September, 1905, and on plaintiff's construction of it is inconsistent with his denial of all knowledge of the declaration of trust until November, 1906. Further it is of little consequence, unless plaintiff and Tobias were partners—a fact not made out on this record.

The judgment is affirmed.

BROWN, C., concurs.

PER CURIAM. This case coming into banc from division on a dissent on rehearing,

the opinion of BLAIR, C., is adopted as the opinion of the court.

WOODSON, GRAVES, BROWN, WALKER, and FARIS, JJ., concur. LAMM, C. J., and BOND, J., dissent.

**MUNYON v. HARTMAN.** (No. 16462.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**VENDOR AND PURCHASER (§ 129\*)—TITLE—ADMISSIONS OF RECORD.**

In a suit for specific performance of a contract to exchange land, in which the defense was plaintiff's defective title, the bringing of a suit by plaintiff in the same court and at the same term as the present suit, to quiet title to a portion of the land contracted for, is an admission of record of a defective title defeating the suit for specific performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244, 249; Dec. Dig. § 129.\*]

Appeal from Circuit Court, Linn County; Jno. P. Butler, Judge.

Suit for specific performance of a contract by Alfred Munyon against S. P. Hartman. From a decree for complainant, defendant appeals. Reversed, and cause remanded, with directions to dismiss the bill.

This suit was instituted in the circuit court of Linn county, by the plaintiff against the defendant, to specifically enforce a written contract for the exchange of a certain farm, subject to two certain deeds of trust for a residence, a homestead lot, in the city of Brookfield, all situated in said county. A trial was had before the chancellor, and after hearing all of the evidence a finding of the facts and a decree of the court were made and entered in favor of the plaintiff, from which, after taking the proper preliminary steps, the defendant duly appealed the cause to this court for review.

The pleadings need not be set out or commented upon, for the reason that they are not assailed in any manner; thereby the concession may be drawn that they are sufficiently specific and comprehensive to cover and present the issues of fact and propositions of law presented to this court for determination.

The substance of the contract may be briefly stated as follows: The plaintiff and defendant agreed that the former should exchange his farm, consisting of 260 acres, subject to two deeds of trust, one to secure a note of \$3,500 and the other for \$3,950, both of which the defendant agreed to assume; and the house and lot of the defendant situated in Brookfield was to be taken by the plaintiff in full exchange for his equity in the farm. The contract was dated September 23, 1908, and provided that each party should within 20 days from that date furnish an abstract of title to the property to be conveyed by him, showing a good title in him,

and if the abstract fails to show good title then such party should make such corrections as might be necessary for that purpose. The defendant was to pay to the plaintiff interest on the \$3,500 deed of trust from January 1, 1908, and on the \$3,950 deed of trust from September 23, 1908, until satisfied. The plaintiff was to deliver possession of the farm on January 1, 1909; and defendant was to deliver possession of the Brookfield property on same date, but was to pay rent thereon from October 1, 1908, to January 1, 1909, at \$50 per month. The defendant furnished the plaintiff with an abstract of title to his property within a few days after the contract was executed, but the plaintiff's abstract was not delivered until November 11, 1908, some 30 days after the expiration of the time it was to have been delivered under the terms of the contract. No objections, however, it seems, were made to the nondelivery of this abstract in time; and therefore that fact will receive no further consideration at our hands. No objection was made to the abstract furnished by the plaintiff, but the defendant, on December 18, 1908, made many written objections to the one furnished by the plaintiff. On January 1, 1909, the plaintiff met the defendant in Brookfield and tendered him a deed to the farm and the abstract which he had theretofore submitted to him for examination, but the defendant refused to accept the same on the ground that the abstract failed to show a good title, as required by the contract.

Without further ado, the plaintiff instituted this suit. If I correctly understand the record, it shows that some 112 different transfers of this property, or some portion thereof, had been made since the title thereto emanated from the United States. The contract of exchange and much other evidence were introduced. Counsel for defendant presented some 15 specific objections to various numbers of those transfers (each being represented by a number), and assigned those, as well as some 5 others, as grounds for a rehearing to the trial court, all of which were overruled, and a judgment specifically enforcing the contract in favor of the plaintiff was rendered, as before stated, also for \$750, for rent of the Brookfield property, etc., when all of the evidence, outside of the contract of exchange, tended to show that its monthly rent was only \$20 to \$22.50.

At the same term of the Linn county circuit court at which this suit was brought, the plaintiff also instituted a suit therein against Anna M. Langlie and ——— Langlie, her husband, the unknown heirs, devisees, grantors, and assignees of George M. Taylor, deceased, and the Marceline Coal Mining & Prospecting Company, a corporation, defendants, to quiet his title to certain portions (some 10 or 15 acres, the exact number not having been made clear) of the 260 acres of land in con-

trovery. The defendants in the latter suit, being nonresidents, were notified of the pendency of the suit by publication, the validity of which is challenged by counsel for defendants.

Bresnehen & West, of Brookfield, for appellant. C. C. Bigger, of Laclede, for respondent.

WOODSON, P. J. (after stating the facts as above). It is charged by the defendant that the plaintiff did not have a good title to the 260 acres of land he agreed to exchange with the defendant for his house and lot in Brookfield, and the evidence conclusively shows that said charge was true. Not only that, the plaintiff by the institution of the suit before mentioned to quiet his title to certain portions of said land is a solemn admission of record, in the same court in which this suit was brought, that he did not own a good and clear title to that entire 260 acres. This evidence and the admission of the plaintiff is a perfect bar to his right to a recovery in this case. *McQuary v. Missouri Land Co.*, 230 Mo. 342, loc. cit. 364, 130 S. W. 335; *Rector et al. v. Price*, 1 Mo. 373. The latter case is the leading case in this state regarding the legal proposition under consideration, and has been approved many times in subsequent adjudications. The facts of those cases are not nearly so strong in favor of the defendants' contention, as are the facts of this case. These views render it unnecessary to consider the numerous other legal propositions presented for determination, since this view of the case fully disposes of it.

For the reason stated, the judgment of the circuit court is reversed, and the cause remanded, with directions to dismiss the plaintiff's bill. All concur.

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PRIEST et al. v. McFARLAND et al.  
(No. 16456.)

(Supreme Court of Missouri. Nov. 17, 1914.  
Rehearing Denied Dec. 1, 1914.)

1. WILLS (§ 693\*)—POWER OF DISPOSITION—  
EXTENT—SALE OF LANDS—REMAINDER.

Where a will gave the residue of the testator's property to his wife for her life, with full power to sell and dispose of it, or any part thereof, and to convey good title upon the sale or other disposition of any or all of the property, and with remainder over to the children as to such property as the wife did not sell, the wife could sell the remainder in a part or all of the land, reserving to herself a life estate.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.\*]

2. WILLS (§ 88\*)—DISTINGUISHED FROM DEED—  
EXECUTION OF POWER.

Where a testator's widow was given a life estate with power to convey during her lifetime, a deed given by her, which conveyed the remainder, reserving a life estate to herself, and which stated that after the wife's death the deed should become absolute and vest the title to the estate in the grantees, was a present conveyance, and not one in the nature of a will,

since the last clause merely stated the legal effect of the present conveyance.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 208-217; Dec. Dig. § 88.\*]

Lamm, C. J., and Graves and Faris, JJ., dissenting.

In Banc. Appeal from Circuit Court, Lincoln County; James D. Barnett, Judge.

Action by Jane E. Priest and others against Abraham McFarland and others, to quiet title. Judgment for defendants, and plaintiffs appeal. Affirmed.

This action to quiet title to 220 acres of land was begun in 1907. The plaintiffs are some of the children and grandchildren of Walter McFarland, who died in 1871, the owner of the land sued for and considerable other lands, after making a will whereby his wife was made sole executrix. After giving \$1 each to seven of his children, and directing a payment of \$500 each to his two remaining children, the will contains the following clauses:

"4th. I give, devise and bequeath all the rest and remainder of my property, real, personal, mixed and of whatever kind to my beloved wife, Harriet McFarland, to be held, owned and enjoyed by her during her natural life with full power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with full power to give a good and perfect title upon sale or other disposition of any or all of my said property, hereby expressing the fullest confidence in my said wife in the management and control of my estate and of her carrying into execution fully all my desires in regard to it.

"5th. It is my will and desire that in the final distribution of my estate all my said children shall be made equal in the amounts which they shall receive therefrom, and that at the death of my said wife whatever of my property or its proceeds may remain undisposed of by my said wife, shall descend to and be divided between my said children in such proportions as will make the amounts which each of my said children shall receive from my estate to be equal in all respects excepting the sum of five hundred dollars to be paid as aforesaid to each of my said children, Mercy C. Glascock and William H. McFarland, making the whole amounts to be received by them respectively from my estate to be five hundred dollars in excess of the shares of the others of my said children."

The wife qualified as executrix and took charge of the personal estate amounting to \$3,931, and administered it. She also managed the real estate of about 720 acres of land. In 1883, she executed a warranty deed to defendants (two of her children) purporting to convey to them 220 acres whereon the family residence stood, for \$6,000 cash, but reserving to herself a life estate and providing that the fee should vest in said grantees at and after her death. The evidence tends to show that the grantees (defendants) paid off a deed of trust on the land in the sum of \$2,100 and certain indebtedness against their father's estate of about \$3,800; that they took possession of the property and accounted to their mother for its rents, and provided her with support and maintenance until her

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

death in 1906. After her death the real estate, except that mentioned in the deed to defendants, was vested in fee in the heirs of her husband. Some of these, the present plaintiffs, brought this action to set aside the deed made by the life tenant to the defendants. After a hearing before the circuit court sitting as a chancellor, the petition was dismissed, and plaintiffs duly perfected their appeal to this court.

Reuben F. Roy, of New London, and Ben E. Hulse, of Hannibal, for appellants. E. W. Nelson, Geo. A. Mahan, Albert R. Smith, and Dulany Mahan, all of Hannibal, and O. H. Avery, of Troy, for respondents.

BOND, J. (after stating the facts as above).

I. There is no proposition better settled than that where a life estate is expressly or impliedly created by will or deed, coupled with a superadded power of disposition in the life tenant and a remainder in fee if that power is not exercised, the limitation over will take full effect unless the power to dispose, given to the life tenant, has been exercised according to the strict terms in which it was bestowed. *Grace v. Perry*, 197 Mo. loc. cit. 562, 95 S. W. 875, 7 Ann. Cas. 948, and cases cited; *Armor v. Frey*, 226 Mo. loc. cit. 669, 126 S. W. 483; *Burnet v. Burnet*, 244 Mo. loc. cit. 505, 148 S. W. 872; *Tallent v. Fitzpatrick*, 253 Mo. loc. cit. 15, 161 S. W. 689.

In the case in hand there was no attempt, on the part of the tenant of the life estate, to dispose of the 720 acres devised in the will of her husband except as to the portion thereof consisting of 220 acres constituting the home place. The residue, consisting of 500 acres, upon the death of the life tenant vested in fee in the nine children or their descendants of the testator as remaindermen under the will. Hence the solitary question on this appeal is whether the deed of the life tenant to defendants cut off the rights of these remaindermen to the property described.

[1] The clause of the will under which the deed made to defendants recites it was made contains apt terms investing Harriet McFarland, the wife of the testator, with an estate for life in all of his land. The power given to her to alienate is couched in the following language:

"With full power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with full power to give a good and perfect title upon the sale or other disposition of any or all of my said property."

The will then recites the full confidence of the husband in the wife, and in the next paragraph expresses his desire, in the final disposition of his estate, that the children shall share alike, except that two of them shall receive a bonus of \$500, not to be accounted for. But his wishes in this or any other respect were necessarily subject to the action of his wife under the terms of the will investing her

with power to dispose of the property in which she was given a life estate. Those terms clearly and unmistakably show that she had "full power" of disposition, and that she was also given "full power to give a good and perfect title upon sale or other disposition of any or all of my said property," and that these powers were exercisable "absolutely and at her own discretion." It is perfectly evident in considering these terms that during her lifetime there was no restriction placed upon the manner, mode, or object for which the wife might dispose of the property. She was not restricted to a sale for a moneyed price, for the deed gave her "full power" to make a "perfect title by any other disposition," at her discretion, of the property devised. Neither was she restricted to a sale of the entire estate, including the remainder given her. There is nothing in the language of the will which permits such a view, nor would it be logical to say that she might dispose of the entire estate, but in so doing, could not reserve to herself a life estate. For the power to convey the whole title necessarily carries the power to dispose of any part or parcel of such title, upon the axiom that the whole is the sum of all its parts, and hence the power to transfer the whole necessarily includes the power to transfer any and all of its component parts. Undoubtedly the established law in this state is that the donee of a power, such as the one in review, can only exercise it in strict and exact compliance with the terms in which it is given. But the language of the will in this case expressly gave the life tenant the power to make a sale or "other disposition" of the property during her life. And while it may be conceded that these terms would not invest her with a power to have disposed of the property by will, yet their necessary significance did give her power to sell or otherwise dispose of the lands by a deed in present. Now this is what she did under the testimony in this case and in strict execution of the power given to her by the testator. Whether she got the full price of the land, as to which there was conflicting evidence, is immaterial to the efficacy of the conveyance by her within the scope of the power granted by the will. For as is shown, she was authorized, in selling or disposing, to act "*absolutely and at her own discretion*," which implies *ex vi termini* that the power to dispose was not dependent on the amount of the consideration. In other words, the testator made her his alter ego as to the method or mode of disposition of the property devised by any form of alienation other than a will.

Our conclusion is that the deed to the defendants was a valid execution of the superadded power of disposal given to the life tenant by the terms of the will.

[2] II. We are wholly unable to concur with the learned counsel for appellant that the deed to the defendants was not a present

conveyance, but was a mere attempt to convey the title by an instrument in the nature of the last will and testament. In *Terry v. Glover*, 235 Mo. loc. cit. 552, 139 S. W. 337, the rule is correctly stated that an instrument, to be valid as a deed, must be one of present conveyance. In that case the deed contained no words of present conveyance. Neither was it ever delivered, but it did contain this express recital, "This deed not to go into effect until after the death of the said George Glover." Beyond doubt such an instrument shows on its face that it was a mere attempt to make the will without the statutory requirements, and therefore void. Exactly the same recital was contained in the deed under review in *Givens v. Ott*, 222 Mo. loc. cit. 411, 121 S. W. 23, and also in the case of *Murphy v. Gabbert*, 166 Mo. loc. cit. 601, 66 S. W. 536, 89 Am. St. Rep. 733.

In the case of *Miller v. Holt*, 68 Mo. 584, the instrument was in form a will, it was never delivered, and the contention of the grantees that it was in legal effect a deed in present was necessarily overruled. None of these cases (cited by appellant) sustain the claim that the deed now under review was void as a testamentary disposition of the property and therefore not within the limits of the power delegated under the will, nor in compliance with the statutory power to make wills. This instrument expressly reserves a life estate in the grantor, and conveys at the same time, by words of present import, a vested remainder in the property to the grantees. It does not provide, as in the cases cited, that the conveyance made shall not be operative as its terms express. It merely recites that "at and after my death then," etc., "this deed shall become absolute and fully vest the title in fee in said second parties" (italics ours), which is what would necessarily follow as a matter of law from the fact that the deed reserved a present life estate in the grantor. With a life estate expressly retained the "title in fee" could not fully vest in the grantees until the expiration of the precedent estate. Being vested remaindermen, the grantees had a "present fixed right of future enjoyment" (4 Kent's Com. [14th Ed.] 203), and when the life estate lapsed became the owners *in fee*. It is evident that the effect of this language in the deed was simply to recite a legal consequence of the status of vested remaindermen. The delivery of this deed and its record when made and the provision therein for a life estate in the grantor also tend to show her intent that the conveyance should be, as it purported to be, a present one. *Sneathen v. Sneathen*, 104 Mo. loc. cit. 209, 16 S. W. 497, 24 Am. St. Rep. 326; *O'Day v. Meadows*, 194 Mo. loc. cit. 617-618-619, 92 S. W. 637, 112 Am. St. Rep. 542. A will is ambulatory and revocable by the maker; a deed, although the enjoyment of the estate may be postponed,

when once fully executed, can only be revoked by a stipulation reserved therein.

The deed in this case contained terms of present conveyance of the remainder. It was duly signed, acknowledged, delivered, and recorded, and contained no other recital as to the vesting of the fee than one in accordance with the principles of law applicable to the nature of the instrument. It was therefore an irrevocable contract of present conveyance, binding on the parties according to its terms, and it was neither in form nor essence a testamentary disposition, as defined by the law of the state.

It follows that the judgment herein is affirmed.

**PER CURIAM.** The foregoing opinion of BOND, J., Division No. 1, is adopted as the opinion of the court in banc. WOODSON, WALKER, and BOND, JJ., concur. BROWN, J., concurs in the result in a separate opinion. LAMM, C. J., and GRAVES and FARIS, JJ., dissent.

BROWN, J. I concur in the opinion of my Brother BOND in so far as it holds that, under the power conferred by the will of Walter McFarland, Sr., the widow was fully authorized to sell less than a fee-simple title in said testator's lands, and that her deed to Abraham McFarland and Walter McFarland, Jr., passed a vested remainder to those parties and was in form legal and valid. *Dewein v. Hooss*, 237 Mo. 23, 139 S. W. 195.

I am, however, convinced that the widow was not authorized by the will to give away the land of the testator. The evidence is conflicting as to whether there was a consideration paid by Abraham McFarland and Walter McFarland, Jr., for the deed which they received from the widow; and, not finding said evidence sufficient to warrant us in overturning the judgment of the circuit court, I concur in the result of the majority opinion affirming said judgment.

#### HUNT v. ST. LOUIS & S. F. R. CO. (No. 16016.)

(Supreme Court of Missouri. Dec. 1, 1914.)

#### 1. RAILROADS (§§ 387, 398\*) — INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for the death of plaintiff's husband, who was killed by a train which was exceeding the speed limit fixed by a city ordinance, evidence held to show that deceased had gone to sleep with his head on the rail, which was an act of the grossest negligence, without which the negligence of the company would not have caused the death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1296, 1314-1316, 1356, 1358-1363; Dec. Dig. §§ 387, 398.\*]

#### 2. RAILROADS (§ 387\*)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

While a railroad company violating an ordinance limiting the speed of its trains is guilty

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of negligence as a matter of law, contributory negligence of one injured on the track is a defense under the same rules as if the negligence were running the train at a speed which was excessive under the common law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1296, 1314-1316; Dec. Dig. § 387.]

Lamm, C. J., and Walker, J., dissenting.

In Banc. Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Action by Alice Hunt against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. F. Evans, of St. Louis, and Moses Whyback and A. P. Stewart, both of Cape Girardeau, for appellant. Edw. D. Hays and David B. Hays, both of Jackson, for respondent.

**BLAIR, C.** Plaintiff recovered judgment for \$3,000 as damages for the death of her husband, George Hunt, and defendant appealed. The petition contains two counts—one invoking the humanitarian doctrine and the other alleging that Hunt's death was due to defendant's negligence in violating an ordinance of the city of Cape Girardeau restricting the speed of trains to five miles per hour. The answer contained, among other things, a plea of contributory negligence. At the close of plaintiff's evidence, and again at the close of all the evidence in the case, defendant requested the trial court to direct the jury to find for it on both counts, and excepted to the refusal to do so. On the first count the jury expressly found for defendant, and thus denied plaintiff's right to recover on the humanitarian doctrine. The verdict was for plaintiff on the second count, and it is with that count alone we are now concerned. It is contended the evidence pertinent to the issues under the second count is not sufficient to support the verdict rendered thereon.

The relevant facts are as follows: Defendant operates a railroad passing through Cape Girardeau from north to south and entering the city at a point about 130 feet north of Sloan creek in that city, and an ordinance of the city was in force restricting the speed of trains to five miles per hour within the city limits. On the night he was killed, Hunt had been drinking, and about midnight started home, accompanied by two acquaintances. The three proceeded north across the railroad bridge over Sloan creek and thence along the track a few feet to a point where a cinder path led westwardly from the track, and there, about 20 or 30 minutes after midnight, Hunt's companions left the railroad and went to a brothel, where they spent the remainder of the night. When these men left him Hunt "started like

he was going on up the track home," and they supposed he did so, but gave him no further attention. One of them testified that just before they left him Hunt was "staggering to some extent," and was somewhat under the influence of liquor. About an hour and ten minutes thereafter one of defendant's trains struck and killed Hunt. The train ran 240 or 250 feet farther and stopped. Hunt's body was found very near the spot where his two companions left him, but on the west side of the track, a few feet north of a switch stand, his head lying very near the north end of the trestle which forms the north approach to defendant's bridge over Sloan creek. A bundle of clothing, probably a suit of overalls in which Hunt worked, lay five or six feet north of the body and between the rails. There was a little blood on the west rail, and there was a pool of blood west of the track at the point where Hunt's head rested after he was struck. The upper front quarter of the right side of the man's head was stricken or crushed off. There were no other wounds of any consequence on the body. There was no external evidence of previous violence. So far as plaintiff's evidence is concerned there was nothing to show the speed at which the train was running when it struck Hunt, unless it can be said to be inferable from the distance the train ran after striking him and the testimony that such a train, running ten miles an hour, could be stopped in about 150 or 300 feet. There was, however, no evidence for plaintiff tending to show whether the brakes were applied before, at the time, or after the engine struck Hunt.

For defendant the engineer who had charge of the train which killed Hunt testified that the track north of Sloan creek was straight for about 800 feet; that about 1:35 a. m. he rounded the curve and came out upon this tangent at the rate of 40 miles per hour; that when his engine reached a point about 700 feet from the north end of the bridge he saw what he suspected to be a man lying with his head on or near the west rail and near the north end of the bridge and immediately made every effort, consistent with the safety of his train, to stop, but was unable to do so, though he reduced the speed of the train so that it was running about 15 or 18 miles per hour when Hunt was struck; that Hunt was lying with his head on a bundle of clothing on or near the west rail, his head partly over the rail; that his face was upward and his body and feet extended westward and away from the track; that Hunt did not move at all, but lay prone until the step attached to the pilot, and about 4½ or 5 inches above the rail, struck him; that it was this step which inflicted the wound above described, and an examination thereafter disclosed that it was bent and had blood and hair upon it; that the force of

the blow turned the body somewhat and turned it partially around.

The violation of a valid and applicable city ordinance restricting the speed of trains is negligence per se, and substantial evidence of such violation, plus like evidence of a causal connection between such negligence and an injury, is sufficient to sustain a verdict against the violator, all issues being properly submitted, unless contributory negligence appears as a matter of law.

[1] In this case the position of the body after Hunt was struck, its nearness to the rail, the nature of the wound which caused his death, and the absence of other wounds save such scratches and bruises as were necessarily incident to his being hurled upon the cinders beside the track, demonstrate that Hunt must, when struck, have been lying with his head on or near the west rail of defendant's track, and must have been struck in some such manner as the engineer testified he was. The plaintiff's evidence shows that an examination of Hunt's head disclosed that the "skull was gone down on the forehead just above the eye, and the edge of the wound was just about the middle of the forehead, extending upward and backward, including the forward fourth of the right side"; to that extent "the skull was missing; it was cut off on the right side down to the eyebrow just about in the center, about one-fourth of the skull above the ear, not back of the ear to any extent; \* \* \* only a portion of the brain was there." It is inconceivable that a car or engine wheel could have thus crushed or cut a corner out of a man's skull, and it is impossible that Hunt could have been sitting or standing when he received the wound described without receiving others on his trunk and limbs, unless he stood beside the track and held his head out over it, an inference which would destroy plaintiff's case at once. There is no escape from the conclusion that Hunt was lying with his head against or upon the rail. There is evidence on plaintiff's part that he (Hunt) was in good health, and there is no intimation that he was subject to epilepsy or any other like ailment. Defendant offered some evidence that Hunt was dead before the engine struck him, but this could not aid plaintiff. The testimony by which defendant attempted to show that Hunt and one Fields were on bad terms was not sufficient to warrant an inference that Hunt had met with violence and had been placed on or near the track, particularly in view of the absence of any external evidences of violence save those naturally incident to the blow delivered by defendant's engine. If Hunt was awake and lying on or beside the track, there could be, of course, no recovery. The only theory there is really substantial evidence to support is that Hunt was asleep on or near the west rail of the track. Whether he was drunk or sober is, in that event, of no consequence. *Murphy v. Rail-*

*road*, 228 Mo. loc. cit. 82, 128 S. W. 481. It is settled law that "lying down upon a railroad track is obviously the grossest negligence, which nothing can well excuse" (2 *Shearman & Redfield*, Negl. [6th Ed.] § 480), and while the humanitarian doctrine applies to one who has thus exposed himself to injury, yet the jury in the case found against plaintiff on that theory, and it cannot be further considered. One who lies down and goes to sleep upon the track of a railway over which trains are likely to pass cannot possibly be said to do so in reliance upon the company's obligation to observe an ordinance limiting the speed of trains, and the cases cited in which persons were injured while lawfully relying upon such observance are not applicable. The negligence of the company in running its train in violation of the ordinance clearly would have resulted in no injury to Hunt except for his own contributory negligence in placing himself, in the night, upon the track. Whatever duty defendant owed persons walking upon the track, its violation of the speed ordinance was but simple negligence in the circumstances of this case, liability for which is subject to be defeated by the contributory negligence of the injured person.

[2] The closing paragraphs in the opinion in *Trigg v. Water, Light & Transit Co.*, 215 Mo. loc. cit. 544, 114 S. W. 972, 20 L. R. A. (N. S.) 987, lay down the rule applicable here. In that case no speed ordinance was violated, but it was contended the rate of speed was negligent under the common law. This difference does not affect the applicability to this case of the rule approved in that. A valid ordinance restricting the speed of trains simply makes a speed violative of it negligent as a matter of law; whereas, in the absence of such an ordinance, it is usually for the jury to say whether the rate was a negligent one, all the circumstances being considered. After the jury find, in the absence of such an ordinance, that a train was moving at a speed which in the circumstances was negligent, the effect of the negligent speed, so far as the question here involved is concerned, is exactly the same as if a speed ordinance had been violated.

The case last cited and that of *Sullivan v. Railway*, 117 Mo. loc. cit. 224, 23 S. W. 149, and cases cited, disclose that under the law this judgment must be reversed.

**BROWN, C., concurs.**

**PER CURIAM.** This cause coming into banc on a dissent, the foregoing opinion of **BLAIR, C.**, is adopted as the opinion of the court. All concur except **LAMM, C. J.**, who dissents in separate opinion, in which **WALKER, J.**, joins.

**LAMM, C. J.** Plaintiff sued in two counts for the negligent death of her husband.

The first is bottomed on the theory that

(because of the customary use of the place by footman—a bridge or trestle in Cape Girardeau where the defendant maintained a planked footway) it was the duty of defendant to keep an outlook there, but that it neglected its duty; that, decedent being exposed to peril there, defendant negligently struck and killed him by running a locomotive against him; that defendant's agents and servants in charge of its locomotive saw decedent in peril, or by the exercise of ordinary care might have seen him in peril, in time to have stopped the locomotive before striking him, but, negligently failing to keep an outlook, and, failing to stop, struck decedent and killed him. The train was running very fast, and the testimony tended to show that defendant did keep an outlook and did see decedent, and that though decedent was seen by the engineer lying on the rail the raise of 700 feet away, yet the locomotive, at its going rate of speed, could not be stopped in that distance. There was testimony that defendant did what it could to stop, and some from which a contrary conclusion was inferable, but the jury found for defendant on the first count, and plaintiff took no exception and no appeal. Therefore trial instructions and theories applicable only to that count fall out of the case.

The second count declared on a violation of a city ordinance forbidding a train speed in excess of five miles an hour within the limits of the city of Cape Girardeau and ascribes the death of decedent to a negligent violation of that ordinance. The jury found for plaintiff on the second count and assessed her damages at \$3,000, but our learned Commissioner reaches the conclusion that because the jury found for defendant on the first count, such verdict necessarily precludes a recovery on the second; accordingly the judgment is reversed outright without remanding the cause. I cannot agree that such conclusion is sound, and the object of this dissent is to state, in part, my reasons for that position.

I do not say there is no error in propositions of law put to the jury on plaintiff's behalf, or in those refused for defendant. I say nothing at all on that score. This for the reason that our learned Commissioner's opinion does not turn on any such question, and this includes the reasonableness of the ordinance (a much agitated point in appellant's brief). It lays such question out of view, and this dissent does as it does. In other words, if our Commissioner has fallen into error in reaching his conclusion, then other questions remain to be considered before affirmance. If not, then those other questions are not decisive, and to put them aside and reserve the propositions is well enough.

As premises to reason from, the following may be assumed:

(1) That the speed ordinance was proved as pleaded.

(2) That its flagrant violation was proved at the time and by the locomotive in question.

(3) That there was evidence conclusively showing that if the ordinance had not been violated, the accident would not have happened; for on this record decedent was seen by the engineer in a position of peril and (unconscious of it) more than 700 feet away, and if the ordinance had been obeyed, the locomotive, under existing circumstances of train equipment, weather and grade, could have been stopped in 50 feet. At its actual speed rate it could not be stopped (so the jury found in their verdict on the first count), and warning was unavailing because decedent was unconscious through sleep, sickness, or injury by foul means.

(4) That the locus in quo was in the corporate limits of Cape Girardeau sufficiently appears.

(5) That the locomotive killed decedent sufficiently appears; for that, though there was testimony directed to the theory that decedent was dead when struck by the locomotive, there was also evidence contra and the jury decided against defendant on the issue.

We have, then, a case where the death of a man directly results from the violation of a speed ordinance under circumstances where a duty to not kill him, if by ordinary care his death could be avoided, was imperative.

In determining liability or nonliability in the case put, we may put to one side some other issues, viz.:

First, the negligence or nonnegligence of decedent in putting himself in peril. This issue falls out of the case on appeal because, on testimony both ways, his nonnegligence was found by the jury on an issue put to them. Not only so, but admitting decedent's negligence in putting himself in peril an hour before his death, and staying in peril, then there is no principle of law allowing him to be killed, *when his peril is discovered and he is unconscious of it*, as here, if by ordinary care his death could have been avoided. This man obviously could not help himself and did not intend to try. No one who saw him could have two opinions on that. It was as plain as a pike staff. Alarms were idle. Stopping was the only thing that would save the unconscious man. In such case decedent was a brother of defendant, and defendant was that brother's keeper up to the full measure of ordinary care. I will recur to "ordinary care" further on, and the scope of it as it is given to me to see it.

Second, we may put to one side the duty to stop *at the rate defendant was running its locomotive*; for it could not stop, and the jury so decided when it found for defendant on the first count. If, then, ordinary care began only with discovery of peril (which I deny) we confront inability to stop and the case is at an end. But does that view broadly meet the demands of justice or put an end to the case on the second count, botched on negligent speed in violating the or-

dinance? So held our Commissioner, and at that point we part company.

Because, in the first place, to so hold results in the anomaly that the more the law is violated (i. e., the greater the speed and consequently inability to stop) the greater the immunity from liability for destroying life, an unthinkable proposition. It would be to encourage lawless speed, and the more lawless the better, a theory against all morals and ethics. It would be for the law to say: Break the law, break it flagrantly; for, behold, the more lawless the speed the more lawful the killing caused thereby, another unthinkable proposition. If we ever announce that doctrine we strike the life out of every speed ordinance in Missouri. To illustrate: The object of those ordinances is not only to save life and limb, but to make it possible to save life and limb. But we say: Run so fast in towns that you cannot stop where life and limb are likely to be or are in peril, and you are acquit of liability. How long would one of those ordinances be effective in creating a civil liability for negligence in the face of such ruling? A pestiferous syllogism it would be to announce: Ability to stop creates liability. Fast running creates inability to stop. Inability to stop creates immunity. Hence break the speed ordinance and be acquit.

Nor need we bother with the question of the duty to look out for decedent. The engineer *saw* him; that was one fact on which liability hinges. Closer home, he saw him in time to stop if he had been obeying the law. That was a remaining and necessary fact to fasten liability on defendant. Shall it be allowed to set up its servant's lawless act that it may escape liability and thereby profit by its own wrong? Thereto the maxims are abundant and cover every angle of the matter, for example: A man should not be benefited by his own wrongdoing. A right does not arise from a wrong. The law hateth wrong. No one can improve his condition by his own wrong. No one can take advantage of his own wrong. Any process of reasoning leading up to that conclusion must be unsound, because the conclusion is absurd. The right doctrine is: Good reasoning leads to correct results; if, then, the results be incorrect, the reasoning is bound to be unsound; for are not the general principles of the law the very perfection of reason?

In the second place, there is no complaint here of improper joinder of causes of action, or that the petition does not state a good cause of action in each count. If, now, plaintiff had sued in only one count, and that one for a breach of the ordinance, and had shown, as here, a causal connection between the death and a breach, she would have made a case, barring such contributory negligence by decedent as would be a joint proximate cause of his own death. How comes it, then, that with the first count eliminated by the

verdict of the jury, her second count by that token alone also fails? Does her case not stand precisely in that event as if she had not sued on her first count at all? I think so, and can allow no such potency to the verdict of acquittal on the first count as ascribed to it by the principal opinion, viz., that of striking down both counts and thereby killing two birds with one stone.

In the third place, defendant assigned 15 reasons for reversing the judgment. Observe what they were. The first four attacked the constitutionality of the new damage act; the fifth complains of the refusal of an instruction whereby the reasonableness of the speed ordinance was put to the jury; the sixth is by way of argument, to the effect that decedent went to sleep on the track without relying on a lawful train speed; the seventh argued the ordinance was habitually violated, and decedent knew that fact; the eighth puts the matter from the standpoint of a mutual fault; the ninth argues that the doctrine of the Trigg Case, 215 Mo. 521, 114 S. W. 972, 20 L. R. A. (N. S.) 987, and Ayers Case, 190 Mo. 228, 88 S. W. 608 (both distinguishable from this), applies; the tenth argues decedent willfully exposed himself to danger; the eleventh argues that drunkenness did not excuse him; the twelfth complains of an instruction on the burden of proving the issue of contributory negligence; the thirteenth is like unto the last above; the fourteenth complains of another instruction; the fifteenth complains of error in admitting evidence.

To my mind it is of stiff significance that in none of those grounds for reversal did veteran counsel make the point now made by our learned Commissioner. What *they* could not see with eyes brightened and freshened by the tears (I speak, of course, in figure only) of defeat, should *we* see? Why be astute to that end? Or, if we think we see it, are we not likely to see only a will o' the wisp? Under our rules they were not allowed to argue a point not made in their briefs. Shall we argue it for them?

In this connection I stress the proposition that the contributory negligence of decedent as a causal factor in his death was squarely put to the jury, and the fact was found against defendant. In that view of it, shall we say, on conflicting proof, as here, that decedent as a matter of law was guilty of such contributory negligence as destroys liability? One of defendant's theories was that it did not kill the man at all—that he was killed by some one else. That issue was put to the jury and was found for plaintiff. He may have been wounded by an enemy (and the proof made that not a wild speculation), but the locomotive on this record must be taken as the thing that killed him.

Recurring now to ordinary care, all must admit defendant owed it to decedent. It owed him, then, care according to circumstances. It owed him such care as an ordi-

narly reasonable, prudent man would exercise under the same, or similar circumstances. As suggested heretofore, the question is: When did ordinary care begin to operate as a factor? The principal opinion, it seems to me, acquits defendant if it used ordinary care in stopping after the peril was discovered. Is not that too close a view? Does not reason push it back of that? It began sooner. Ordinary care began with the rate of speed and required obedience to the law, so that ordinary care in stopping would have a chance to fill its due office. If, now, disobedience to the law make it impossible to stop, though ordinary care in the mere matter of stopping was used, shall defendant be absolved for carelessly putting it out of its power to stop? That would be, as heretofore said, an invaluable excuse for law-breaking. Nay, more, and most of all, it would be a suggestion to break the law and thereby escape liability and avoid duty. I think it would make of the law (not a rule of action, but) what some wise old Latin said of the nightingale, viz.: "Vox, et praeterea nihil," which a scholar tells me means, if liberally Englished, a voice, and nothing but a voice. In my opinion ordinary care in this case involved the concept of using ordinary care in speed so that ordinary care in stopping would result in attaining the benevolent purposes of the ordinance. These two phases of ordinary care belong in the case. They are, I submit, inseparable in logic and inseparable in common sense. They sit like "two kings of Brentford on one throne."

Wherefore I dissent, WALKER, J., joining me in so doing.

STATE ex rel. FRAZIER et al. v. SEIBEL, County Clerk. STATE ex rel. TEGETHOFF v. SAME. STATE ex rel. WERREMEYER v. SAME. (Nos. 18641, 18639, 18638.)

(Supreme Court of Missouri, Oct. 31 and Dec. 1, 1914.)

1. ELECTIONS (§§ 124, 147\*)—CANDIDATES—POLITICAL PARTIES—FUSION.

Political parties may legally fuse by nominating the same candidates, and to that end may fill vacancies on their tickets occurring after primary nominations; there being no enforceable law precluding a candidate of one party from being accepted as the candidate of another party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 116, 122; Dec. Dig. §§ 124, 147.\*]

2. ELECTIONS (§ 172\*)—NOMINATION—VACANCIES—AUTHORITY OF COUNTY CLERK—STATUTES.

Rev. St. 1909, § 5848, provides that, for the purpose of making nominations to fill vacancies on a ticket previously nominated, a majority of all the members-elect of a central committee shall be necessary, but a central committee shall not have power to delegate its authority to make nominations to any person, and any act consequent on any such delegation shall be void, nor shall any central committee have power to substitute, to fill any vacancy, the name of any person who is not

known to be of the same political party as the person for whom he is substituted. *Held*, that such section imposed no duty on a county clerk, and did not justify him in refusing to place candidates already running on a Democratic ticket as candidates of the Progressive party vice candidates of such party withdrawn, on the ground that such persons were not members of the Progressive party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 146; Dec. Dig. § 172.\*]

Woodson and Graves, JJ., dissenting.

In Banc. Mandamus by the State, on relation of George L. Frazier and William P. Morgan, also on relation of W. H. Tegethoff, and on relation of A. H. Werremeyer, against William J. Seibel, County Clerk of St. Louis County. Writ granted.

Albert Chandler, of St. Louis, and Wilfred Jones, of Maplewood, for relators. A. E. L. Gardner, of Clayton, for respondent.

PER CURIAM. Mandamus. Said three causes having been heard together on the same or equivalent pleadings and facts, it is ordered that absolute writs issue instant in each case granting the relief prayed. Opinion to follow in due course on assignment now made.

WOODSON and GRAVES, JJ., dissent in an opinion filed now by GRAVES, J.

LAMM, C. J. The three cases entitled as above are original proceedings in mandamus. They have a common purpose, were heard as one and decided as one by a per curiam handed down on October 31, 1914. If fresh justice is the sweetest, as Lord Bacon says it is, that per curiam filled the bill. It, inter alia, ordered that absolute writs issue and that an opinion follow. The opinion so ordered to follow follows, thus:

The object of the alternative writs was to cite Seibel, clerk of the county court of St. Louis county (who was either recalcitrant, or dubitante, or both), to show cause, if any he had, why the names of relators Frazier and Morgan should not be printed on the official ballot for use in the then approaching state election as candidates of the Progressive party for the offices of state Representative for the Second district and Judge of the county court for the First district in St. Louis county, respectively, in lieu of one Mars and one Gardner, who had resigned their primary nominations respectively for those offices on the Progressive party ticket; and have the same clerk show similar cause, if any he had, why the name of relator Tegethoff should not be printed upon the official ballot as the candidate of the Progressive party for the office of state Representative for the First representative district of said county in lieu of one Morton, who had resigned his primary nomination for that office on the Progressive party ticket;

and have the same clerk show similar cause, if any he had, why the name of A. H. Werremeyer should not be printed upon the same official ballot as candidate for the office of collector of revenue upon the Democratic ticket in lieu of one Gillick who had resigned his primary nomination for that office on the Democratic party ticket.

To those alternative writs, Seibel made return in the Werremeyer case which, by consent, stood as a return to the others, *mutatis mutandis*. In substance, so far as material here, the return was to the effect: That Werremeyer was nominated at the prior August primary as the candidate of the Progressive party for the office of collector of revenue, and Gillick was similarly nominated as the candidate for the same office on the Democratic ticket. That Werremeyer had not withdrawn as a candidate upon the Progressive ticket, but holds fast to that nomination, while at the same time endeavoring to get the nomination of another party and to have his name printed on the ticket of that other party by and through the resignation of Gillick and a resolution of the Democratic central committee of St. Louis county. That he (Werremeyer) was not known to respondent nor to said Democratic central committee, nor to the voters of said St. Louis county, to be a Democrat in belief nor as affiliated with the Democratic party, nor was he known to be of the same political belief or party as said Gillick; but, contra, was known to respondent, to said committee, and to said voters as a member of the Progressive party and as a believer in its principles. That the said action of the Democratic central committee (set forth in full in resolutions in the record) was contrary to the provisions of R. S. 1909, § 5848.

It seems that relators in the other causes were the regular nominees of the Democratic party, under circumstances outlined above, for the offices indicated hereinbefore, and sought nominations from the Progressive party and to be put on the Progressive party ticket by virtue of the resignations of the named candidates of the Progressive party for the offices in question, and to run on both tickets.

Relators filed a motion for judgment, and, on precedent, it is our view that the issue raised by such motion for judgment on the pleadings is one of law alone.

[1] On such record, no apparent useful purpose can be subserved by extended discussion, since the principles controlling the case have been lately announced by this court, thus: In *Nance v. Kearbey*, 251 Mo. 374, 158 S. W. 629, an election contest, decided in 1913, the validity of Kearbey's election for sheriff was questioned in part on the ground that his name improperly appeared on two tickets. We resolved the case against the contention of contestant, putting our ruling in main part on the doctrine of *State ex rel. v. Kortjohn et al.*, 246 Mo. 34, 150 S. W. 1060, decided in

1912. One phase of the *Nance-Kearbey Case* rode off on the assumption there was no existing statutory inhibition against two political parties doubling up their forces at an election and running the same candidates upon their two tickets if the coalition was regularly brought about. *Williams v. Dalrymple*, 132 Mo. 62, 33 S. W. 447. In 1913 the Legislature attempted a change in public policy in that particular. Laws 1913, p. 327. The new act prescribed a blanket ballot, containing, also an antifusion provision, whereby a candidate was denied the right to coquette with and embrace two nominations at the same time. Section 1, p. 327. Now, in *State ex rel. Schmoll v. Drabelle et al.*, Board of Election Commissioners of the City of St. Louis, 170 S. W. 485 (just handed down and not yet officially reported), it was held that this act of 1913 was not enacted in accordance with the safeguards and requirements of the Constitution. By that decision that act, apparently the only recognized barrier in the way of fusion on candidates, was struck to the ground and became the same as if it never had been. Hence, as to the law of the instant cases, the situation is precisely as it was when the *Nance-Kearbey Case* and the *Williams-Dalrymple Case* were ruled, namely, political parties were allowed to fuse by nominating the same candidates and, to that end, filling vacancies on their tickets occurring after primary nominations.

[2] It becomes evident, then, that on the authority of the cases cited, absolute writs were providently awarded unless there is something of substance in respondent's contention that section 5848, R. S. 1909, stands as a lion in the way. Attend to that section. It reads:

"The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the party. That for the purpose of making nominations to fill vacancies on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. That a central committee shall not have the power to delegate its authority to make nominations to any persons or number of persons, and that any act consequent upon any such delegation of authority shall be held to be null and void. That no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted."

We are of opinion that respondent county clerk, neither by name, office, nor intendment is within the purview of that section, hence has no call or right to invoke its provisions in showing cause in his return. That section laid no duty on him. It laid a duty on the central committee of the party. Whether a violation of that duty is to be corrected by electors at the polls when chance offers, or can be corrected by the courts in an appropriate and timely action, we need not decide. It is enough for us to hold that it will be time enough for county clerks to con-

stitute themselves judges of the delicate question of the political beliefs of candidates when the lawmakers say so, not before.

The next section of the statute (section 5849) prescribes a method of testing out objections to certificates of nomination—a method held preclusive in the Nance-Kearbey Case. It is not pretended in these cases that any steps were taken under section 5849 to obtain any relief provided for therein.

It is on such premises I am instructed by a majority of the Brethren to say that our absolute writs were awarded at the hearing by a per curiam, were served instantler, and became effective. All concur, except WOODSON and GRAVES, JJ., who dissent in an opinion by GRAVES, J., in which WOODSON, J., joins.

BROWN, J. (concurring). I concur in the views expressed in the majority opinion by our learned Chief Justice, but there is another issue tendered by respondent's return which should not be passed over in silence.

In said return it was asserted that relator Werremeyer was not entitled to have his name printed upon the ballots of the Democratic party because he had not paid the filing fee to the Democratic central committee, as required by section 5870, R. S. 1909. In response to this defense it was urged by our learned Attorney General that the failure of the relator to pay the filing fee is no defense in this case, because the law requiring such fee to be paid is in violation of section 9, art. 2, of our Constitution, which, among other things, ordains that "all elections shall be free and open." In this contention the Attorney General is correct.

The "free and open" clause of our Constitution is intended to have some application to both candidates and voters. With such restrictions as will demonstrate that a reasonable number of persons desire to vote for a candidate, he should be allowed to aspire to public office and submit his claims to the voters.

Sections 5860 and 5870 of our primary election law require candidates for public office to pay sums of money into the treasury of the political party on whose ticket they wish to be nominated before their names can appear upon the ballots of that party. To my mind such laws are against sound public policy. The state is friendly to all political parties, but upon no theory of honesty or fairness can it have a desire to promote the financial welfare of any political organization.

In a recent case of this character arising under the Constitution of Illinois (which is in almost the precise language of our own organic law so far as it pertains to elections), it was held by the highest appellate court of that state that a primary election law was void because it required candidates for office to pay sums of money into the public treas-

ury, thus putting a cash price on the right of a citizen to aspire to office. *People v. Board of Election Com'rs*, 221 Ill. loc. cit. 21, 23, 77 N. E. 321, 5 Ann. Cas. 562.

If our own primary law were as good as the one condemned by the highest court of Illinois I should hesitate to enter my protest against its enforcement, for it is well known that, if the money required by our law to be paid to political committees by candidates were paid into the public treasuries of the several counties and cities of our state, the cost of holding our biennial primary elections would be lifted from the shoulders of the taxpayers and placed upon the candidates, and thus the public treasuries would gain many thousands of dollars.

Just think of the great state of Missouri requiring the payment of sums of money (vast in the aggregate) to the treasurers of political parties to be used in promoting the election of persons who happen to be nominated, and, perchance, to be used in corrupting the electorate into voting for candidates who may or may not be worthy of the offices to which they aspire. Such a law is enough to make every honest man in our state hide his face with shame.

The primary election law we now have is obviously intended to help the party which is temporarily in the ascendancy. It no doubt helps the Republican party in St. Louis county, for by the election returns we see that the Republican candidates usually win in that particular county; consequently many persons will seek nominations on that ticket and pay money to the treasurer of the Republican committee of that county for the chance of being nominated. It helps the Democratic party in Monroe county, and probably helps the Progressive party in Mercer, but it hurts minority parties everywhere, because it discourages persons from becoming candidates upon the ticket of a minority party, however much their views may be in accord with its principles, and to that extent at least it impedes the "free and open" elections which are contemplated in our Constitution. Under the guise of law it takes money from candidates all over the state, which, if collected at all, should be paid into the public treasuries of the several counties and cities, thereby relieving taxpayers who have quite enough burdens to bear without carrying the expense of primary elections.

Entertaining these views, I hold that those provisions of our primary election law upon which respondent relies are invalid, and that our absolute writ of mandamus was properly issued.

GRAVES, J. I dissent from the order and judgment in this case awarding the peremptory writ of mandamus. Under the opinion of the majority of this court in *State ex rel. Schmoll v. Drabelle et al.* (just handed down), the writ should go, but I do not agree to that

opinion. By that opinion the act of 1913 prohibiting fusion of political parties was declared unconstitutional. In that my Brothers were wrong. By that opinion they emasculated from the Constitution one whole section thereof. Section 37 of article 4 of the Constitution clearly makes the Legislature the forum in which to determine the question as to whether or not all legal and constitutional steps have been taken in the passage of a bill. By this section the determination of this question is taken away from the courts. Grant it that section 31 of the same article requires that a majority of the members shall vote for a bill before it shall become a law, and that the names of those voting for and against it shall be spread of record, yet under section 37, *supra*, the legislative body determines for itself whether or not these things have been done in the passage of the bill. If such body says, by the signing of the bill in the presence of the body, without objection, that such things duly appear, that is the end of the matter, and this and no other court can go behind such solemn judgment of the legislative body.

Under this view of the law the antifusion statute is a valid and binding statute, and for that reason this writ of mandamus should be denied. *Vide* dissenting opinion in *State ex rel. Schmoll v. Drabelle et al.*, *supra*.

WOODSON, J., concurs in these views.

STATE *ex rel.* WARDE *et al.* v. McQUILLIN, Circuit Judge, *et al.* (No. 18390.)

(Supreme Court of Missouri. Dec. 1, 1914.)

1. PROHIBITION (§ 26\*)—MOTION FOR JUDGMENT ON PLEADINGS.

Where relators, seeking a writ of prohibition, move for judgment on the pleadings, the averments of the return are admitted to establish the facts.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 75; Dec. Dig. § 26.\*]

2. PROHIBITION (§ 9\*)—NATURE OF WRIT.

The writ of prohibition is an extraordinary one, and should not issue except to keep an inferior court within its jurisdiction.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 35; Dec. Dig. § 9.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Prohibition*.]

3. PROHIBITION (§ 10\*) — JURISDICTION, WANT OF.

An inferior tribunal's want of jurisdiction which would authorize the issuance of a writ of prohibition may exist with reference either to the subject-matter generally, to the parties to the suit, or to an excess of jurisdiction in the concrete case itself.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 37-56; Dec. Dig. § 10.\*]

4. PROHIBITION (§ 3\*)—GROUNDS FOR ISSUANCE OF WRIT—OTHER REMEDY.

The writ of prohibition is a discretionary remedy, and should be refused, where the ordi-

nary remedies of appeal, error, or certiorari are applicable.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

5. PROHIBITION (§ 11\*)—GROUNDS FOR ISSUANCE OF WRIT.

Where the trial court had jurisdiction of the parties and subject-matter of a suit for an injunction, and no demurrer to the petition had been urged, prohibition will not lie on the theory that the trial court which issued a preliminary injunction on the petition and answer was without jurisdiction because the petition did not state a cause of action; for not only may the error, if any, in the determination of the trial court be taken advantage of by appeal, but question of the sufficiency of the petition is yet to be disposed of by the trial court.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 36; Dec. Dig. § 11.\*]

Woodson, J., dissenting.

In Banc. Original application by the State of Missouri, on relation of George N. Warde and others, for a writ of prohibition against Eugene McQuillin, one of the judges of the circuit court of the city of St. Louis, and others. Preliminary writ quashed, and permanent writ denied.

O. J. Mudd and A. H. Jones, both of St. Louis, for relators. Milton B. Rosenheim, of St. Louis, and Jesse L. England, of Windsor, for respondents.

LAMM, C. J. [1] Defendants in an injunction suit pending in a division (to wit, respondent McQuillin's) of the St. Louis circuit court, as relators apply here by petition on August 14, 1914, for a writ prohibiting that court from proceeding further, and made the plaintiffs in said injunction suit parties respondent with Judge McQuillin. Presently, on that application, a preliminary rule issues in vacation to show cause. Presently respondents make return showing such cause as they had why our preliminary rule should not be made permanent. Thereupon relators file a motion for judgment on the pleadings. Thereby they insist that the preliminary rule should, as a matter of law, ripen into a permanent writ on the admissions and facts shown by the pleadings. Thereupon (without any evidence on, or determination of, controverted facts) the case is submitted on briefs and oral argument. Under such circumstances, the motion for judgment on the pleadings is a challenge, in legal effect, to the legal sufficiency of respondents' return. Hence it is from admissions and allegations of that return we must get the facts, if at all. *State ex rel. v. Shields*, Judge, 237 Mo. 333, 334, 141 S. W. 585. Attending thereto, the case is this:

In July, 1914, respondents Albrecht and Stage, as members and trustees of St. Louis Lodge No. 3, Loyal Order of Moose, joining with them a domestic corporation, designated as "St. Louis Lodge No. 3, Loyal Order of Moose," as plaintiffs, brought suit in the St. Louis circuit court against relators in the

instant case, to wit, Warde, Kiely, Stephens, Ripple, and the two named banks, the life of the bill being injunctive relief. Verified by affidavit, the substance and theory of the bill were that St. Louis Lodge No. 3, Loyal Order of Moose, hereinafter called "local lodge," is organized under the laws of this state as a domestic corporation having a fraternal, beneficiary character; that as such domestic corporation it owns valuable real estate in the city of St. Louis, improved by a clubhouse and outbuildings, said clubhouse containing billiard, pool, library, and lounging rooms, bowling alleys, "and other social features" to be "enjoyed" by the members of said corporation, which latter has a paid-up membership of over 2,100 souls in good standing, and certain named officers, among them three trustees (to wit, Albrecht, Stage, and Teasdale, the latter refusing to join as plaintiff); that while the title to the real estate is vested in the local lodge, the care, control, and custody of the personal property are in the named trustees, who have "sole jurisdiction" to invest the lodge moneys, handle trust funds, pay bills, and control the lodge property, the majority of said trustees having power to act. This local lodge had \$2,700 deposited in the two banks joined below as defendants and here as relators. The "furnishings" in the clubhouse were of the value of \$7,500. We infer that the foregoing bank deposits are covered by the term "surplus money of the lodge," including "sick benefits" and "funeral expense funds," and it was the duty of the said trustees as need called to invest said funds. Having further alleged that the money and personal property aforesaid are the property of the members of the local lodge, the bill goes on to aver that the said domestic corporation, the local lodge, had also received a "charter" from the "Supreme Lodge of the World, Loyal Order of Moose," a voluntary association of persons, authorizing it (said local lodge) to conduct such lodge in accordance with a ritual and form of government adopted by the supreme lodge; that on the 22d day of July, 1914, said supreme lodge, acting through defendant Warde (relator here) summarily, and without just cause or excuse, revoked the charter it had granted the domestic corporation, and thereupon proceeded to confiscate and take possession of its property, declaring the same to be forfeited to the supreme lodge; that thereupon said Warde, himself a nonresident of the state of Missouri, joining with him Stephens, Kiely, Ripple, relators here, and other persons unknown, by trespass wrongfully gained control of the clubhouse and the property of the local lodge, and by continuing their trespass with force and arms without warrant of law are holding possession and are denying to the members of said local lodge access to said premises, and using armed force in that behalf; that said trespassers are insolvent; that two of

them, Warde and Stephens, have wrongfully appropriated some of said funds in said banks, and are about to appropriate, and unless restrained will appropriate, the rest of them, so, as aforesaid, the sole and absolute property of the members of the local lodge. The bill avers, furthermore, that by such trespassing and force members of the local lodge are and will be deprived of their rights of ingress and egress to the lodge property; that the act of confiscation by the supreme lodge through Warde was arbitrary and capricious, and that the greater part of the members of the supreme lodge are not residents of the state; that there is no redress for such wrongful acts except through a court of equity.

The bill was filed, as said: (1) On behalf of the local lodge; (2) the controlling majority of the board of trustees, who sued not only as such but as members of the local lodge; and (3) on behalf of any other members who care to join and share the burdens and privileges arising therefrom. It prays for a temporary injunction enjoining defendants from trespassing upon the property and interfering with the entrance thereto of any of the members of the local lodge and from assuming control or taking jurisdiction of any of the moneys aforesaid, or of the personal property, and restraining said banks from paying over to defendants any such moneys. Thereupon, on due assignment to his division, Judge McQuillin issued an order citing defendants to show cause why a temporary injunction should not issue. Thereupon defendants, other than the banks (who stood mute below) came in and attempted to show cause why no preliminary injunction should issue. They filed no demurrer or answer to the bill, but they filed a paper called a "return," and verified this by affidavit. This "return" did not challenge the sufficiency of the bill as a pleading, neither specially nor generally, because of not stating facts sufficient to constitute a cause of action, but in substance it averred (this by way or in the nature of a denial) that the supreme lodge was a corporation under the laws of Indiana with power to sue and to be impleaded as such. It then set forth, broadly the purposes of the Indiana corporation as fraternal, benevolent, charitable, and educational, to assist needy members and their families and their widows and orphans, to encourage patriotism and obedience to the laws of their country, tolerance in religion, etc.; that the supreme lodge organized the named local lodge and granted it a charter in the terms provided by the constitution and laws of the supreme lodge for the government of local lodges. It then goes on to make certain admissions as to the ownership of the real property and the control of the personal property by the board of trustees of the local lodge, but avers that the local lodge was at all times subject to the jurisdiction and

bound by the laws of the supreme lodge; admits Warde has taken possession and holds possession and is using "whatever forces are necessary to repel invasions and to protect their said possession." It then sets forth certain sections of articles 8, 26, 16, and 10 of the laws and constitution of the supreme lodge, providing for the revocation and suspension of the charters of a local lodge whenever in "the opinion" of the supreme dictator (an officer of the supreme lodge) the "conditions warrant it," and showing that in case of such suspension or revocation the property of the local lodge is forfeited to the supreme lodge, and that said dictator or some member authorized by him is required to take possession of the property.

As further justification and excuse of the conduct of Warde and those he joined with himself in making and continuing the alleged trespasses, they, by way of said "return," went on to aver that the "dictator," under his authority as such, revoked the charter of the local lodge "in due course" and on such revocation authorized Warde to take possession of the property of the local lodge, and he did take possession and now holds it, with all such properties, moneys, etc., as the properties of the supreme lodge, and was so in such possession before the bill was filed; that the local lodge has no existence because of such forfeiture and confiscation and none of its members have any right to the possession, custody, or control of any of said property; that there is a "supreme forum" provided by the constitution and laws of the supreme lodge, to wit, a "court" authorized to hear and determine disputes between the supreme and local lodges or between any lodge and its members; that this *supreme forum* on "appeal" has jurisdiction of the controversy we have outlined, but that plaintiffs have taken no such appeal, wherefore it is the duty of defendants to hold the property subject to the direction of the supreme forum and of the supreme lodge; that the supreme lodge is not insolvent and now by its agents offers to enter its appearance and accept service if plaintiffs elect to sue out summons against it.

Such, in brief, is the showing made below to Chancellor McQuillin, in chambers, we assume, and before the return term, before answer, or demurrer. Presently he issued a temporary injunction, conditioned on the filing of a \$10,000 bond, restraining defendants until further order of the court from trespassing on the property in question or interfering with the entrance of the members of the local lodge and from disposing of or assuming control over the moneys of the local lodge, or of the property belonging to the lodge, or withdrawing such moneys from the banks named. The injunction bond was presently filed, and the order granting a temporary injunction was served upon defendants prior to the filing of the petition in this court in the instant case for prohibition.

The return in the instant case shows, not only the foregoing facts, but it goes on to challenge the validity of those provisions of the by-laws and constitution of supreme lodge under which relators here (defendants below) sought to justify the confiscation, forfeiture, and forcible seizure by trespass and retention by continuing trespasses and force of arms of the property of the local lodge and the personal property of the 2,100 members thereof, alleging that the confiscation was contrary to law and without due process of law; that the act of taking possession was an unlawful act, a trespass pure and simple, as was the forcible denial of access to the clubhouse and property by the members of the local lodge, for which grievances, it is alleged, there was no proper and adequate remedy at law, and which trespasses defendants below (relators here) threatened to repeat and continue; that respondent McQuillin had jurisdiction of the persons of defendants and of the class of cases to which this controversy belongs, to wit, the subject-matter, and that a writ of prohibition ought not to issue against him, thereby allowing prohibition to take the place and effect of appeal, error, or certiorari; that equity has jurisdiction also to avoid a multiplicity of suits, and because of the insolvency of the trespassers, and because two factions of a fraternal beneficiary association are claiming the real and personal property; and that, therefore, respondent McQuillin did not exceed his power as judge in taking jurisdiction, etc.

[2] It is on such a record we are called on to adjudge whether our permanent writ shall go prohibiting Judge McQuillin from entertaining further jurisdiction of the injunction suit. We have come to the conclusion our preliminary rule, improvidently made, stands to be quashed, and that a permanent writ must be denied; because:

(a) As a foreword it is not amiss to repeat some propositions often announced, but sometimes blinked, to wit:

(1) In the first place, a writ of prohibition will only go to keep an inferior court within the orbit of its jurisdiction. It is an *extraordinary* writ and no recourse must be had to it except where *ordinary* remedies are unavailing; the maxim being that in law we have recourse to what is extraordinary when the ordinary fails. "Recurrendum est ad," etc.

[3] (2) In the second place, lack of jurisdiction may exist with reference to subject-matter generally (e. g., the class to which the case belongs), or it may exist with reference to the parties to the suit, or it may exist with reference to excess of jurisdiction in the concrete case itself.

[4] (3) In the third place, the mere power to grant a writ of prohibition (or other extraordinary writ, barring quo warranto at the instance of the Attorney General) is not of so much importance in determining the question of writ or no writ as is the question

of the discretion of this court when it is called upon to exercise the power. The right and settled doctrine is that such discretion exists to be always reckoned with and steadily applied with wise circumspection.

(4) In the fourth place, from that right doctrine, another flows as a corollary, to wit, that in the congested state of our docket in appealed cases this court will wisely exercise a sound discretion in refusing to draw to itself jurisdiction *in the first instance* on prohibition to determine the merits of controversies lodged in circuit court, except on a clear showing of lack of jurisdiction as a matter of law as distinguished from matter of fact, and that ordinary remedies by appeal, error, or certiorari are absent.

If authority be needful or useful to sustain one or the other of those primary and basic propositions, such authority will be found in the pronouncements of one or the other of the following cases (some in one and some in the other): *State ex rel. v. Shelton*, 238 Mo. loc. cit. 292 et seq., 142 S. W. 417; *State ex rel. v. Sale*, 188 Mo. loc. cit. 496 et seq., 87 S. W. 967; *State ex rel. v. Stoble*, 194 Mo. loc. cit. 52, 92 S. W. 191; *State ex rel. v. Lucas*, 236 Mo. loc. cit. 32, 139 S. W. 348; *State ex rel. v. Shields*, 237 Mo. loc. cit. 334 et seq., 141 S. W. 585; *State ex rel. v. Robinson*, Judge (not yet officially reported), 168 S. W. 997 (vide closing remarks of opinion by Brown, J.); *State ex rel. v. Kansas City Gas Co.*, 254 Mo. loc. cit. 531, 163 S. W. 854; *State ex rel. v. Tracy*, 237 Mo. 109, 140 S. W. 888, 37 L. R. A. (N. S.) 448.

It is in the light of the foregoing guiding propositions this case must be ruled, if it is to be disposed of *secundum regulam*.

[5] (b) We shall assume on the record here that it goes without even saying that the circuit court had jurisdiction of (1) the parties and (2) the subject-matter, to wit, the issuing of a temporary injunction to be followed by a permanent one or by its dissolution on the application of equity principles to the facts ascertained on final hearing, in term, on answer, or on motion to dissolve, or on joint hearing on both. Now, according to all good doctrine, the presence of jurisdiction in those prime essentials is an insurmountable barrier to the issuance of our writ of prohibition, unless, peradventure, the circuit court was swelling its jurisdiction in the case beyond its prescribed channel, even as a stream by excess of water bursts its banks now and then. Vide cases, *supra*.

(c) With so much determined, we confront the question of an excess of jurisdiction in the concrete case. Attend to that view of it.

It is argued by learned counsel for relators that the bill for injunction did not state facts sufficient to constitute a cause of action in divers particulars; hence prohibition lies. We will not cumber this opinion by enumerating them, for they one and all may

be grouped together and held to amount to one, namely, either the bill was demurrable, or was subject to a motion to make more definite and certain what was obscurely alleged or only inferentially charged.

As to that we say: The sufficiency of the petition was not challenged by demurrer below. The court, so far as we can see, made no ruling on its sufficiency. How it might rule in due course is hidden in the womb of the future, and is discoverable only by the event, barring the occult vision of a seer, which latter we utterly disavow as a judicial attribute. It has been held in some cases, on the facts present in those cases, that if the sufficiency of the petition has been challenged in the circuit court and ruled adversely to demurrant, so that it was settled once for all that the trial court entertained an erroneous view in excess of its jurisdiction and was going to put it in force, the remedy by prohibition might be invoked. But, on such facts as we are now dealing with, there is a better doctrine applicable to this extraordinary remedy, one finding abundant place in our decisions, to the effect that the circuit court does not lose jurisdiction by mere error in ruling on a demurrer or otherwise when such error is correctable on appeal or writ of error. We need not pursue that line of thought because the record we are dealing with is no such record. In this case we are, in effect, asked to anticipate the ruling of the judge on the sufficiency of the bill, or on the facts, correct imaginary errors in his future rulings, and take over jurisdiction to ourselves, not only on the sufficiency of the bill, but on the merits as an intermediate step arresting the evolution of a case pending below. That we ought not to do this is, we think, well within the doctrine and reasoning of a line of cases. *State ex rel. v. McQuillin*, 256 Mo. loc. cit. 702 et seq., 165 S. W. 713; *State ex rel. v. McQuillin* (not yet officially reported) 168 S. W. 924. Says Bond, J., speaking acceptably for us all in the latter case:

"We must assume that the said court will conduct the proceedings before it according to correct principles of law and equity, and, if the hearing should disclose no matter for which relief could be given, it will be denied, or vice versa."

To the same purpose are the rationale and judgments in *State ex rel. v. Scarritt*, 128 Mo. loc. cit. 338, 30 S. W. 1026; *Schubach v. McDonald*, 179 Mo. loc. cit. 182, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; *State ex rel. v. Southern Ry. Co.*, 100 Mo. loc. cit. 60 et seq., 13 S. W. 398; *State ex rel. v. Gill*, Judge, 137 Mo. 681, 39 S. W. 276; *State ex rel. v. Gates*, 190 Mo. loc. cit. 553 et seq., 89 S. W. 881, 2 L. R. A. (N. S.) 152; *State ex rel. v. Stoble*, 194 Mo. loc. cit. 52, 92 S. W. 191; *State ex rel. v. McQuillin*, 256 Mo. loc. cit. 702 et seq., 165 S. W. 713.

On prohibition the determinative question here is not one of mere pleading below, where

pleadings are amendable (and often need amendment). It rises to the dignity of one of jurisdiction in the strictest sense. In that view of it, in the Schubach-McDonald Case, *supra*, are pertinent observations, viz.:

"The matter, therefore, compresses itself into the question whether or not a basic subject-matter, over which a court of equity has jurisdiction, was presented to the circuit court for adjudication by the injunction suits. That is, whether a matter was presented which that court has power to deal with, and not whether such a matter was inartificially or defectively presented. In other words, the question is one of jurisdiction and not of pleading, for if the court had jurisdiction over the subject-matter, it had the power to decide whether the pleadings were or were not properly drawn, and also to decide whether or not the plaintiff was entitled to the relief sought. If a court has the power to act, its jurisdiction is in no wise impaired by the consideration whether it acted in accordance with the law or erroneously. Given the jurisdiction, all else is a mere matter of error, to be corrected on appeal. Or, further illustrated, if the court has jurisdiction over the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action or the defective statement of a good cause of action, in no way affects the jurisdiction of the court."

So, in *State ex rel. v. Scarritt*, *supra*:

"The writ cannot rightly be employed to compel a judicial officer, having full jurisdiction over the parties and a cause, to steer his official course by the judgment of some other judge, or to substitute the opinion of another court for his own in dealing with topics committed by the law to his decision. In *re N. Y., etc., v. Steamship Co.* (1895), 155 U. S. 523 [15 Sup. Ct. 183, 39 L. Ed. 246]."

The questions learnedly discussed by counsel pro and con not only on the merits but on the sufficiency of the bill were all for disposition below in the first instance, and not for disposition here by a side stroke on prohibition. We have purposely avoided discussing them, so that we may not put the trial chancellor in leading strings when on some interlocutory step or on final hearing when all the facts are in, he comes to decide this or that one of them.

The premises considered, the preliminary rule is quashed and the permanent writ denied. It is so ordered. All concur, but WOODSON, J., who dissents.

#### BURNETT v. LAYMAN.

(Supreme Court of Tennessee. Nov. 28, 1914.)

##### 1. ABATEMENT AND REVIVAL (§ 72\*)—PERSONS IN WHOSE NAME ACTION MAY BE REVIVED.

Under Shannon's Code, § 4579, providing that a suit, which has abated by the death of either party, may be revived by or against the heir, personal representative, guardian, or assign, who may be legally entitled to decedent's place in the subject-matter of the litigation, where, after a judgment for defendant, in an action for malpractice, was affirmed by the Court of Civil Appeals, plaintiff died, his widow and next of kin had no interest in the subject-matter of the litigation, entitling her to have the cause revived in her name, and to prosecute

certiorari to the Supreme Court, as plaintiff's personal representative was his successor in interest, and the suit should have been revived in his name.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 377-402, 412-416; Dec. Dig. § 72.\*]

##### 2. ABATEMENT AND REVIVAL (§ 54\*)—DEATH OF PARTY—ACTIONS FOR MALPRACTICE.

Under Shannon's Code, § 4580, providing that no civil action, whether founded on wrongs or contracts, except actions for wrongs affecting the character of plaintiff, shall abate by the death of either party, but may be revived, and section 4579, providing that a suit which has abated by the death of either party may be revived by or against the person legally entitled to the decedent's place in the subject-matter of the litigation, an action for malpractice did not abate upon plaintiff's death from a cause other than the wrongful act of defendant; sections 4025-4029, relative to actions for death by wrongful act having no application.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 255-258, 261-270; Dec. Dig. § 54.\*]

##### Certiorari to Court of Civil Appeals.

Action by Marion P. Burnett against R. B. Layman. A judgment for defendant was affirmed by the Court of Civil Appeals, and Manda Burnett, widow and next of kin of the deceased plaintiff, petitions for certiorari. Petition dismissed, and defendant's petition for a reconsideration also dismissed.

W. F. Black, of Knoxville, for plaintiff.  
Frank Sanders, of Knoxville, for defendant.

FAW, J. On a former day of the present term of this court the petition of Manda Burnett, as "widow and next of kin" of Marion P. Burnett, the plaintiff below, for a writ of certiorari to the Court of Civil Appeals, was dismissed.

This suit was originally brought in the circuit court of Knox county to recover damages from R. B. Layman, a physician, for alleged malpractice. The circuit court directed a verdict for defendant, and entered judgment in his favor, and the Court of Civil Appeals affirmed that judgment. Subsequent to the entry of judgment in the Court of Civil Appeals, but during the same term of that court, the death of the plaintiff, Marion P. Burnett, was suggested and admitted, and the cause was revived in the name of Manda Burnett, "as widow and next of kin" of the deceased plaintiff.

[1] We held, at the time the dismissal of the petition was ordered, that we were precluded from a consideration of the merits of the case, because Manda Burnett, as widow and next of kin of the deceased, had no such interest in the subject-matter of the litigation as would entitle her to prosecute this suit.

[2] It was said in the memorandum opinion filed at that time that the suit did not abate upon the death of Marion P. Burnett, the plaintiff below, but survived by virtue of the provisions of section 2846 of the Code (Shan. Code, § 4569). We also said that the statutes

governing an action in case of *death by wrongful act* (Shan. Code, §§ 4025-4029) have no application to the present case, but that it falls within the terms of Shan. Code, § 4579, which provides that "suit abated by the death of either party, may be revived by or against the heir, personal representative, guardian, or assign, as the case may be, who may be legally entitled to the decedent's place in the subject-matter of the litigation," and that the personal representative is in the present case the successor in interest of the deceased plaintiff, or, in other words, the one "legally entitled to the decedent's place in the subject-matter of the litigation," and the suit should, therefore, have been revived in his name. And in support of our construction of Code, § 2846 (Shan. Code, § 4569), we cited *Daniel v. Coal Co.*, 105 Tenn. 470, 58 S. W. 859.

Since our former opinion was handed down, a petition has been filed on behalf of R. B. Layman, styled "petition of defendant for reconsideration of the opinion in this case," in which the petitioner therein does not complain of the judgment of this court dismissing the petition for certiorari filed by Manda Burnett, but asks for a reconsideration of that part of the opinion wherein it was held that the action brought by the plaintiff below did not die with him, but was subject to revivor in the name of the personal representative of said decedent.

It is insisted by petitioner Layman that the opinion of this court in the case of *Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1, overrules the earlier case of *Daniel v. Coal Co.*, supra, on the point that, by virtue of Shan. Code, § 4569, an action for personal injuries commenced in the lifetime of the injured person may, in the event of his death pending the suit, be revived in the name of the personal representative of such deceased plaintiff, though his death may have resulted from a cause other than the wrongful act of the defendant to the suit.

The case of *Posey v. Posey*, supra, was not called to our attention and was not considered in connection with our former opinion in this case. The case of *Daniel v. Coal Co.*, supra, is not cited in the opinion in *Posey v. Posey*, and there is no indication in the latter opinion of a purpose to overrule or modify the opinion in *Daniel v. Coal Co.*, in any respect. The case of *Posey v. Posey* was an inquisition of lunacy. In the county court the jury found that defendant was a person of unsound mind, and judgment was entered accordingly. The defendant thereupon appealed to the circuit court, where the judgment of the county court was reversed, and the petitioner appealed to this court. Pending the appeal to this court, the alleged lunatic died, and his death was suggested in this court, and a motion made here to revive the case against the administrator of the estate of the deceased. The administrator resisted

this motion, and entered a counter motion that the case be abated, on the ground that the cause of action did not survive the death of the defendant. It is stated in the opinion in that case that the sole question before the court was whether the suit could be revived for any purpose whatever—*it being conceded that, in so far as the mental condition of the deceased defendant was involved, his death put an end to that question*, but it was insisted that, as costs had accumulated in the progress of the cause, which, in the reversal of the case by the circuit court, had been adjudged against the petitioner and his sureties, they had a right to have the case revived, in order that they might have the judgment of this court upon the reversal ordered by the circuit judge. It was there sought to predicate the right to a revivor upon sections 4569 and 4575, Shannon's Code. Section 4569 is as follows, viz.:

"No civil action commenced, whether founded on wrongs or contracts, except actions, for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived."

And section 4575 provides:

"No appeal or writ of error in any cause or court shall abate by the death of either plaintiff or defendant, but may be revived by or against the heir, personal representative, or assign, under the foregoing rules."

It was urged that these sections were broad enough to cover the case, and should be so construed as to give the petitioner and his sureties an opportunity for a review of the judgment which taxed them with the costs of the cause. In response to this contention, this court said, viz.:

"Sections 4569 and 4575, relied on by petitioner, are parts of article 2 of chapter 7 of Shannon's Code. This chapter is entitled 'The Abatement of Actions.' Section 4568 constitutes article 1 of this chapter, and is in these words: 'Actions do not abate by death, marriage or other disability of either party, or by the transfer of any interest therein if the cause of action survives or continues.' Immediately following is article 2, entitled 'By Death of Parties,' and in this article are found the two sections relied upon in this motion to revive. We think all the sections of that article are to be construed in the light afforded by section 4568, just quoted, and whether the particular action survives or abates, in whatsoever court it may be, depends entirely upon whether the cause of action survives or continues. If the cause of action does not survive, then the suit abates. It is clear that the cause of action in the present case does not survive, and it follows, we think, necessarily, that this motion to revive is not well taken. The motion to abate is sustained."

In order to arrive at the meaning of the opinion in *Posey v. Posey*, above quoted, the point there in judgment should be kept in mind. It was conceded that, in so far as the mental condition of the deceased was involved, his death had put an end to that question, and this was, in effect, nothing less than a concession that the *cause of action* did not survive the death of the defendant, but died with him. This being true, the court prop-

erly held that, construing sections 4569 and 4575 in the light of section 4568, the former two sections did not have the effect to preserve, and authorize the revivor of, an "action commenced," or "appeal or writ of error in any cause or court," in any case where the cause of action was inherently incapable of survival, such as that there involved, viz., an inquisition of lunacy.

We do not think that the opinion in Posey's Case, when properly construed, is in conflict with the holding of *Daniel v. Coal Co.*, supra, or with our former holding in the present case of *Burnett v. Layman*. A re-examination of the question brought to our attention by the petition herein has confirmed us in the opinion formerly expressed. The petition will be dismissed, at the cost of petitioner.

### WILKEY et al. v. WILKEY.

(Supreme Court of Tennessee. Nov. 28, 1914.)

#### 1. HOMESTEAD (§ 141\*)—PERSONS ENTITLED—"HEAD OF FAMILY."

Where a husband and wife owned land as tenants by the entirety, the wife, after the husband's death, was entitled to a homestead exemption as against her debts incurred after the husband's death, since upon the death of the husband there was effected a change in the right of the possession awarded by the common law to the husband, and an estate absolute was vested in the wife, and she was the "head of a family" as to her estate, within the constitutional provision that a homestead in the possession of each head of a family shall be exempt during the life of the head of the family.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 261-270; Dec. Dig. § 141.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Head of Family*.]

#### 2. HUSBAND AND WIFE (§ 14\*)—TENANCY BY THE ENTIRETY—NATURE OF SURVIVOR'S INTEREST.

Upon the death of a husband, the wife holds land, which was vested in them as tenants by the entirety, as survivor in her own right, and not under or by inheritance from the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. § 14.\*]

#### 3. HOMESTEAD (§ 142\*)—PERSONS ENTITLED—MINOR CHILDREN.

Under the constitutional provision giving a homestead exemption to each head of a family, to inure to the benefit of the widow, and to be exempt during the minority of their children occupying the homestead, where a husband and wife owned land as tenants by the entirety, their minor children, after the death of the surviving wife, were entitled to a homestead exemption as against debts of the wife incurred after the husband's death, as the wife was the head of the family after the husband's death, and the minors on her death became immediate and complete beneficiaries of the constitutional provision.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 271-280; Dec. Dig. § 142.\*]

Certiorari to Court of Civil Appeals.

Action between Alta B. Wilkey and others and James H. Wilkey, administrator, involv-

ing a homestead right. A judgment adverse to the claimants was reversed by the Court of Civil Appeals, and the case was brought to the Supreme Court by petition for certiorari. Affirmed and remanded.

J. B. Swafford, of Dayton, for Alta B. Wilkey et al. B. G. McKenzie and W. L. Givens, both of Dayton, for James H. Wilkey.

WILLIAMS, J. [1] The question raised by the petition for certiorari in this cause is: Where title to realty is by deed vested in a husband and wife as tenants by entirety, and the husband dies, are the surviving wife and the minor children of both entitled to homestead as against the debts of the wife incurred after the husband's death?

We hold that such right exists.

Whatever may have been said of the soundness of the decision in *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. 142, 12 L. R. A. 514, to the effect that the husband is, during the life of both spouses, entitled to the homestead exemption against his creditors, we think it clear that upon the death of the husband there is effected a change in the right of possession, which the common law awarded to the husband (*Manufacturing Co. v. Collier*, 95 Tenn. 115, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. Rep. 921), and such a change, by enlargement, in "the properties of the person holding the originally granted estate," as that an estate absolute is found vested in the wife. In such estate, where the unshared title and complete user is thus first lodged in her, the wife, if deemed the head of a family, may be awarded the homestead exemption, as against her own debts, without the embarrassments encountered in *Jackson v. Shelton*, supra.

[2] The wife holds, after the termination of the tenancy by entirety for life, as survivor, and not under or by inheritance from her deceased spouse. *Taul v. Campbell*, 7 Yerg. (15 Tenn.) 330, 27 Am. Dec. 508. She takes the property as wife, in her own right, and not derivatively as widow. Therefore the exemption applies as against her own indebtedness so incurred.

On the death of the husband, the wife must be treated as the "head of a family," within the meaning of the constitutional provision for homestead, as to such estate, as she is held to be in respect of an estate in realty allotted to her as dower (*Ex parte Brien*, 2 Tenn. Ch. 83); or in respect to an estate in realty acquired by her after the husband's death (*Smith v. Wright*, 13 Tex. Civ. App. 480, 36 S. W. 324; *Pendergest v. Heekin*, 94 Ky. 384, 22 S. W. 605; notes to *Wike v. Garner*, 70 Am. St. Rep. 111; 21 Cyc. 469).

[3] The circuit judge determined the case against the minor children, as claimants following their mother's death, on the ground that there is no provision for children taking

homestead otherwise than derivatively from the father, and then through his widow, their mother, and cannot take here, because they claim under the mother as first taker.

The Constitution provides that "a homestead in the possession of each head of a family \* \* \* shall be exempt during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same," and creates a homestead right in the minors (*McCrae v. McCrae*, 103 Tenn. 719, 54 S. W. 979), subject to the qualifications in that case stated. And this though there be no widow at the death of "the head of the family." In the case at bar the wife was the head of the family, and the minors on her death became immediate and complete beneficiaries of the constitutional clause quoted. *McCrae v. McCrae*, *supra*.

It should be noted that the realty referred to is all that was owned at his death by husband and wife, or either, and is of value less than \$1,000.

The circuit judge denied to the claimants the right of homestead. That judgment was reversed by a divided bench in the Court of Civil Appeals. Agreeing with the result reached by the last-named court, we, for reasons stated by us, affirm the same, and remand the cause for further proceedings.

## CINCINNATI, N. O. & T. P. RY. CO. v. BONHAM.

(Supreme Court of Tennessee. Nov. 28, 1914.)

### 1. DEATH (§ 31\*)—INJURIES TO SERVANT—ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT—PERSONS ENTITLED TO MAINTAIN.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), giving to the personal representatives of employes killed while engaged in interstate commerce a right of action for the use of named beneficiaries, including the wife and children of the deceased, the widow and sole surviving heir of a deceased employe cannot in her own name maintain an action for his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.\*]

### 2. COMMERCE (§§ 8, 27\*)—INTERSTATE COMMERCE—PERSONS ENGAGED IN.

A signalman, whose duties were connected with electric signals controlling the operations of both intrastate and interstate trains, is engaged in interstate commerce, and where he was run down while discharging his duties, an action for his death must be prosecuted under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 5, 25; Dec. Dig. §§ 8, 27.\*]

### 3. APPEAL AND ERROR (§ 302\*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—SUFFICIENCY.

Where the defendant railroad company, in an action by the widow of an employe killed while engaged in interstate commerce, moved for a peremptory instruction and made the denial the ground of its motion for new trial, the railroad company's contention that under the federal Employers' Liability Act the action could only be maintained by the deceased's per-

sonal representative is sufficiently presented, for the courts must be presumed to be cognizant of the provisions of the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.\*]

### 4. APPEAL AND ERROR (§ 1175\*)—DETERMINATION—REVERSAL.

Where it appeared from the face of the record itself that plaintiff was not entitled to sue, a judgment for her must be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

### 5. APPEAL AND ERROR (§ 1175\*)—REVERSAL WITHOUT PREJUDICE.

A judgment recovered by the widow of an employe, killed while engaged in interstate commerce, must be reversed, where the action was instituted in her individual capacity; but it should be without prejudice to any rights the personal representative of the deceased may have under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

Certiorari to Court of Civil Appeals.

Action by Naomi Bonham against the Cincinnati, New Orleans & Texas Pacific Railway Company. A judgment for plaintiff was affirmed on appeal to the Court of Civil Appeals, and defendant brings certiorari. Reversed and remanded.

Davis, Staples & Jones, of Wartburg, for plaintiff. Wright & Jones, of Knoxville, and Wright & Morris, of Wartburg, for defendant.

BUCHANAN, J. Mrs. Naomi Bonham sued the railway company for damages. A jury in the circuit court found the issues in her favor, and assessed her damages at \$10,000, and judgment was rendered in her favor for that sum. The company moved for a new trial, but its motion was overruled, and it prosecuted an appeal to the Court of Civil Appeals. There the judgment of the circuit court was affirmed, and the case is before us on the petition for certiorari of the company and its assignment of errors.

Plaintiff's original declaration contained this averment in respect of the capacity and right upon which her suit was predicated:

"Plaintiff avers that she said T. F. Bonham left surviving him the plaintiff, Naomi Bonham, his wife, and who is now his widow and next of kin, and this suit is brought by plaintiff as the widow and next of kin of said T. F. Bonham, deceased, for her own use and benefit. Wherefore plaintiff sues the defendant company for \$25,000 damages, and demands a jury to try the issues."

In no other capacity and right than as above set out did the plaintiff by any averment of her original declaration predicate her right to recover a judgment against the defendant in this cause.

To the original declaration, the defendant railway company interposed its plea of the general issue, to wit:

"That it is not guilty of any of the matters, wrongs, and injuries in plaintiff's declaration alleged."

The plaintiff joined issue in short upon the defendant's plea.

Later in the progress of the cause, after leave of court had and obtained, the plaintiff filed an amended declaration, and in this declaration, in respect of the capacity and right in which the plaintiff sued, there is the same averment above copied from the original declaration, and upon no other right does plaintiff base her suit, and in no other capacity does she sue, in her amended declaration, than as set out above in her original declaration. To the amended declaration the railway company also interposed its plea of not guilty.

The damages claimed by plaintiff are averred to arise on account of the death of her husband, T. F. Bonham, which occurred on April 28, 1911, in Morgan county, Tenn., in tunnel No. 23, located between Glen Mary on the north and Nemo on the south, through which tunnel the railway company's track was laid, over which track its trains were operated. At the time of his death T. F. Bonham was in the employ of the railway company, discharging the duties of an electrical signalman; his duties being to keep in proper order and repair all of the electric signals between Glen Mary and Nemo stations on the railroad line of the railway company, defendant.

In plaintiff's original declaration she averred that on the 28th day of April, 1911, and for many years previous to that time, the defendant was and now is a foreign corporation, owning and operating a line of railroad or railway from Cincinnati, Ohio, through the states of Kentucky, Tennessee, Alabama, and Mississippi, to New Orleans, La.; said company being engaged in the transportation of freight trains and passenger trains loaded with freight and passengers from Cincinnati, Ohio, through the states of Kentucky, Tennessee, Alabama, and Mississippi, to New Orleans, in the state of Louisiana, as well as between all intermediate stations on said line of road between Cincinnati, Ohio, and New Orleans, La., said company being engaged in both interstate and intrastate commerce. Said line of railroad passed through Morgan county, Tenn., and defendant company has offices and agents in said Morgan county, Tenn., and defendant company runs trains of cars, both passenger cars and freight cars, over its said line of road and through Morgan county, Tenn.; said trains of cars running between Cincinnati, Ohio, and New Orleans, La., and being thus engaged in transporting both passengers and freight between these points, and between all intermediate stations on said road between these points, and said defendant company being thus engaged in both interstate and intrastate commerce, said trains of cars being under the control and management of conductors, engineers, brakemen, and firemen, employed by defendant company. Following the foregoing averment of the declaration, it proceeds to aver in

substance the fact that the interstate and intrastate trains of the company were regulated and governed by a system of electric signal stations established along the line of railway and used in directing and controlling the operation of the trains of cars of the railway company in the conduct of its interstate and intrastate business, and then in the declaration follows an averment of the facts attendant upon the death of plaintiff's husband, averred to have been due to the negligent operation of a train, on the date aforesaid, and while he was on the track of the defendant company, and engaged in the discharge of his duties as electrical signalman, whose duties, from the pleadings and evidence in the record, appear to have been as heretofore stated.

At the close of plaintiff's evidence, the railway company moved the court to peremptorily instruct the jury to return a verdict in favor of the defendant railway company. This motion the court overruled, to which action the railway company excepted, and thereupon the railway company declined to introduce any evidence, and the court charged the jury with the result already stated.

[1, 2] Among the assignments of error on behalf of the railway company in this court, the first raises the question that the railway company was entitled to the peremptory instruction in the trial court upon the ground that plaintiff, in the capacity and right in which she sued, was not entitled to maintain this suit, because under its facts it falls within the terms and provisions of an act relating to the liability of common carriers by railroads to their employes in certain cases, approved April 22, 1908 (35 Stat. 65, c. 149. U. S. Comp. St. 1913, §§ 8657-8665), because under that act the remedy which it gives is conferred alone upon the personal representative of the deceased employe for the use of the beneficiaries named in that act.

We think the insistence of the railway company is well made. In *American Railroad Co. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, the action was originally brought by persons falling within the class of beneficiaries under the act aforesaid and not by the personal representative of the deceased. The question that an action under the act of Congress could not be maintained by any person except the personal representative of the deceased was made by the railway company both by demurrer and by motion to dismiss the action and direct verdict in favor of the defendant, but that defense was overruled by the trial court, and its action in respect thereof came under review before the Supreme Court of the United States. Before that court it was urged on behalf of the plaintiffs that the action was properly brought in the name of the only persons for whose benefit any recovery could be had, but it was held by the court that the words of the act would not yield to such a liberal construction, that they were too clear to be other than strictly followed, that they (the

words of the statute) gave an action for damages to the person injured, or in case of his death to his or her personal representative; and said the court in its opinion:

"It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit of the surviving widow or husband and children. But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of Congress. To this purpose we must yield, even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action; but we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used."

The result reached by the court was a reversal of the judgment without prejudice to such rights as the personal representative might have.

Subsequent to the decision of the case last cited, there was decided by the same court *Missouri, Kansas & Texas Railroad Co. v. Sallie C. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, in which the action was commenced by Sallie C. Wulf in her individual capacity to recover damages sustained by reason of the death of her son, Fred S. Wulf, while in the discharge of his duties as an employé of a common carrier engaged in interstate commerce; the death resulting from the bursting of a boiler due to defects which she claimed were attributable to the negligence of the employer. Plaintiff, in that suit, averred that she was the mother of deceased, who was an unmarried man, and who left surviving him no wife or children; that his father was also dead at the time of the death of deceased, and that plaintiff was the sole heir and next of kin and beneficiary of the estate of deceased; that there had been no administration upon the estate of deceased. The defendant, by proper pleading, set up the defense that the cause of action on its facts fell within the terms of the federal Employers' Liability Act of 1908, and denied the right of plaintiff to maintain the action in the capacity in which she sued. Thereafter letters of administration were granted to Sallie C. Wulf upon the estate of Fred S. Wulf, and she was allowed in the trial court to amend her declaration, and to prosecute the suit as the personal representative of the deceased for her individual benefit, as well as in her individual capacity. Proper exception was taken by the defendant to the amendment, on the ground that the original plaintiff had not been made a party as administratrix at the time of the filing of the original petition, and on the further ground that, when she was made a party as administratrix, more than two years from the time the alleged cause of action accrued had elapsed, and therefore the cause

of action, if any, was barred by the limitation of two years prescribed by section 6 of the Employers' Liability Act. Upon this state of the record, in respect of the point in question, the court said:

"The argument for reversal rests wholly upon the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity, and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action; and that such an amendment could not lawfully be allowed, so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

"It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between her original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines, due to its negligence; and that, since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. R. Co.*) 223 U. S. 1, 53, 32 Sup. Ct. 169, 56 L. Ed. 327, 347, 38 L. R. A. (N. S.) 44. Therefore the pleader was not required to refer to the federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

"It is true that, under the federal statute, the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American R. Co. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within section 954, Rev. Stat. [U. S. Comp. St. 1913, § 1591].

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two-year limitation prescribed by section 6 of the Employers' Liability Act. The change was in form rather than in substance. *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. It introduced no new or different cause of action, nor did it set up any different state of facts as

to the ground of action, and therefore it related back to the beginning of the suit. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 603, 12 Sup. Ct. 905, 36 L. Ed. 829, 832; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 395, 17 Sup. Ct. 120, 41 L. Ed. 485, 486. See, also, *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 171, 177, 178; *Patillo v. Allen-West Commission Co.*, 65 C. C. A. 508, 131 Fed. 680; *Reardon v. Balakala Consol. Copper Co. (C. C.)* 193 Fed. 189. Reliance is placed by plaintiff in error upon *Union P. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983."

There was in the present case no amendment of the declaration, so as to enable us to sustain the right of action in this case under authority of the *Wulf Case*, supra. Clearly, then, the present case, as to the right of the plaintiff to maintain her suit in the character, capacity, and right in which she sued, must fall under and be governed by the authority of *American Railroad Co. v. Birch*, supra. There can be no doubt, upon the averments of plaintiff's pleadings and the facts as developed on the trial, but that plaintiff's husband, Bonham, was at the date of his death engaged in interstate commerce within the meaning of the *Employers' Liability Act*, as that act was construed by the Supreme Court of the United States in *Martin Pedersen v. Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. In that case, it appeared that the defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an ironworker employed by the defendant in the operation and repair of some of its bridges and tracks at or near Hoboken, N. J. In the afternoon of his injury, the plaintiff and another employé, acting under the direction of their foreman, were carrying from a tool car to a bridge known as the Duffield bridge some bolts or rivets, which were to be used by them that night, or very early the next morning, in repairing that bridge, the repairing to consist in taking out an existing girder and inserting a new one. The bridge could be only reached by passing over an intervening temporary bridge at James avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train of the approach of which its engineer negligently failed to give any warning. It was held by the majority of the court that, under the foregoing facts, the plaintiff in that case was engaged in interstate commerce within the meaning of the *Employers' Liability Act*, and the present case clearly falls within the authority of the *Pedersen Case*, supra.

[3-5] It is, however, insisted for the plaintiff in the present case that the question as to her right to maintain her action was

not made in the trial court by the motion for the peremptory instruction, and in aid of this insistence it is urged that the motion for a new trial made by the railway company does not specifically call the trial court's attention to the point now under consideration. This insistence, however, is well met by the language used in the opinion of the court in the *Wulf Case*, supra, where it is said:

"It is true, the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the *Employers' Liability Act*, and to know that, with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject"—citing cases already heretofore appearing in the quotation of this part of the opinion.

Therefore we think the question was made by the motion for a peremptory instruction, and was called to the attention of the trial court by the motion for a new trial, which complained of the action of the trial court in its failure to grant the peremptory instruction. Aside from all this, under the authority of *American R. Co. v. Birch*, supra, the record here presents a fatal lack of a party absolutely indispensable to the validity of the judgment, and of course it results that the judgment must be reversed, and the cause remanded to the circuit court of Morgan county; but, following the precedent laid down by the Supreme Court of the United States in *American R. Co. v. Birch*, supra, and the decision of that court in the *Wulf Case*, supra, the judgment in the present case is reversed, without prejudice to such rights as the personal representative of deceased may have.

#### SOUTHERN RY. CO. v. JENNINGS.

(Supreme Court of Tennessee. Nov. 28, 1914.)

##### 1. EMINENT DOMAIN (§ 288\*)—APPROPRIATION OF RAILROAD RIGHT OF WAY—ACTION FOR DAMAGES—LIMITATION OF ACTIONS.

Where a railroad company, instead of instituting condemnation proceedings, took a conveyance of land from the life tenant, the one-year period of limitations prescribed by Shannon's Code, § 1866, did not apply to an action brought by a remainderman to recover damages for the appropriation of such land; such section not applying where land is not taken in the exercise of the power of eminent domain.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 783-788; Dec. Dig. § 288.\*]

##### 2. EMINENT DOMAIN (§ 6\*)—"CONDEMNOR"—"APPROPRIATOR."

"Condemnor" and "appropriator" necessarily include, as parts of their meaning, one who subjects the lands of another; that is, in recognition that the lands are those of another than the condemnor, and that there is need that such be taken from such other and vested, as by way of compulsory sale, in the appropriator.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 24-50; Dec. Dig. § 6.\*]

For other definitions, see *Words and Phrases*, Appropriator.]

\*For other cases

see *Table of Cases*, Vol. 1, Table 1, under the word EMINENT, and under the word NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. REMAINDERS (§ 17\*)—LIMITATIONS—COMMENCEMENT OF PERIOD.

The seven-year statute of limitations will not run against the interest of a remainderman in land, during the existence of the life estate.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. §§ 12-17; Dec. Dig. § 17.\*]

### 4. EMINENT DOMAIN (§ 147\*)—APPROPRIATION OF LAND—MEASURE OF DAMAGES—RAILROAD RIGHT OF WAY.

Where a railroad company takes possession of land under a deed from the life tenant, the measure of damages recoverable by remaindermen for the company's appropriation of the land is the value of the land at the termination of the life estate rather than at the date of the taking.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 394-396; Dec. Dig. § 147.\*]

Appeal from Criminal and Law Court, Claiborne County; Xen Hicks, Judge.

Action by William Jennings against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. D. Smith, of Knoxville, and Montgomery & Montgomery and John P. Davis, all of Tazewell, for appellant. W. R. Henderson, of Knoxville, for appellee.

**WILLIAMS, J.** This suit was instituted by William Jennings to recover of the railway company damages for the appropriation of a strip of land originally occupied by its predecessor in title, the Morristown, Cumberland Gap & Ohio Railroad Company, as a right of way.

The company sued filed a plea setting forth that the land in question was taken by such predecessor under the power of eminent domain more than one year before the action was commenced, and that the right of action was barred.

Both the trial court and the Court of Civil Appeals ruled against the company on this defense, and it seeks here a review by the writ of certiorari.

[1] It appears that Jennings acquired title to the land in question under the will of his grandfather. This will devised to testator's son a life estate in the realty, with remainder over to the testator's grandsons, sons of the life tenant. William Jennings, one of the remaindermen, acquired the interests in remainder of his brothers.

In 1880 the life tenant undertook to convey by deed to the Morristown, Cumberland Gap & Ohio Railway Company a right of way for railroad purposes over the devised lands, and the company at once entered, constructed its track, and the same has been used ever since for railroad purposes.

The life tenant died in 1911, and the suit was brought shortly thereafter, November 8, 1911.

One of the methods prescribed by our statutes for compensation for the taking of private property by a railway company through the exercise of the power of eminent

domain is when the company, without previous institution of condemnation proceedings, enters upon and takes possession of property without a contract with or the consent of the owner. In such event the owner is given the right to sue for damages for the taking. Code (Shannon) § 1866.

The statute of limitation prescribed as a bar to such action for damages is as follows:

"The owners of land shall, in such cases, commence proceedings within twelve months after the land has been actually taken possession of, and the work of the proposed internal improvement begun," etc. Code (Shannon) § 1867.

The contention of the appellant railway company for error is that, when the company took possession of the strip of land in question for railroad purposes, it thereby appropriated the land as such, necessarily affecting the estate in remainder, and so far forth that the right of the owner of the remainder estate to sue for compensation began on the date of the taking and expired with the 12 months' period limited.

The fundamental error in this insistence we conceive to lie in its assumption that the company in respect to the land, at the time it was taken into possession by it, occupied the attitude of a condemnor pursuing the statutory right or mode. The land was originally taken by the company, not in the exercise of the granted power of eminent domain, but by virtue of a private contract with and conveyance from one who claimed to convey the entire title to and not a mere life estate in the right of way.

It is true that the conveyor was, in fact, only a tenant for life, but the company under his deed entered, claiming in nonrecognition and disregard of the title of the remaindermen. After so entering, the company must be taken to have held the land as its own.

A railway company may, as a person invested with the right of eminent domain, proceed in either of two ways: First, directly as a petitioner to have the land laid off and damages assessed; or, second, indirectly by entering and occupying, leaving the landowner to bring suit for damages, as above outlined.

[2] Whether the one or the other mode of taking is pursued, it is the same power that is exercised and an equivalent legal act—that of an empowered condemnor, who "may take the real estate of individuals" (Code, § 1844) as a "party seeking to appropriate such land" (section 1845). "Condemnor" and "appropriator" necessarily include, as parts of their meaning, one who subjects the lands of another as such; that is, in recognition that the lands are those of another than the condemnor, and that there is need that such be taken from such other and vested, as by way of compulsory sale, in the appropriator.

In the case of *Re Olean*, the Court of Appeals of New York dealt with this question

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the legal attitude of a condemnor, in that case a village which was endeavoring, in a street condemnation proceeding, to show a dedication of the land by the landowner to the village, Finch, J., said:

"I do not see how the village of Olean can raise the question of a dedication to the public use in this proceeding, for its very existence and prosecution necessarily involves an admission of the landowner's right and an inquiry into his damages resulting from a necessary taking of that right. \* \* \* The municipality waived any such claim, if it existed, by proceeding under the charter to condemn the landowner's right and to assess his damages for what was proposed to be taken from him. Manifestly the village conceded his right when it instituted a proceeding to take it away, and under a provision of the charter having no application, except where there is an owner other than the village, and whose title is to be divested. To say that there is not such owner, and that the easement sought to be condemned belongs to the municipal corporation by the act of the owner, is to deprive the proceeding of all foundation." 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640; *Re Yonkers*, 117 N. Y. 564, 23 N. E. 661; *Geneva v. Henson*, 195 N. Y. 455, 88 N. E. 1104; *Commonwealth v. Bisby*, 37 Kan. 253, 15 Pac. 241; *San José v. Reed*, 65 Cal. 242, 3 Pac. 806; *San José v. Freyschlag*, 56 Cal. 8; *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1012.

The principle underlying the cases compels a holding that, having maintained during the period it held the land the attitude of a claimant of the land as its own, the appellant company cannot invoke the protection of a statute which limits the time within which the owner may sue for compensation for a taking by a condemnor, or have imposed upon the owner the burden of a statute of limitation incorporated in and as a part of the eminent domain law, no reciprocal burden of which is to fall on the company, such as the enforced recognition of the title as not being its own, and of readiness to compensate the owner as involuntary vendor.

"The party seeking the condemnation concedes the right to compensation and is always willing, as a matter of fact, to pay a certain sum." *Lewis, Eminent Domain*, § 426.

Only the amount remains to be judicially ascertained, ordinarily.

Presumably the Legislature fixed the short period of limitation of one year because of this legal attitude of the condemnor. That statute is not, in essence, one that looks to adverse possession.

[3] The foundation of the company's holding was not any proceeding, or its equivalent, as above stated, to condemn or take under the statute, but a conveyance that was hostile to the right of plaintiff as remainderman. Manifestly, then, the company so claiming ownership can only, as against another title claimant, resort for repose to the seven years' statute of limitation relating to possession of realty, hostile in character.

That statute is not pleaded or relied on by the appellant company, nor could it be successfully, since it could not have run

against the remaindermen during the existence of the life estate. *Smith v. Cross*, 125 Tenn. (17 Cates) 160, 140 S. W. 1060, and cases cited.

The appellant company relies upon the case of *Shortle v. Terre Haute & I. R. Co.*, 131 Ind. 338, 30 N. E. 1084, which was a proceeding instituted by remaindermen to have damages assessed for property taken by a railroad company. It was there held that, by force of an express statutory provision in Indiana, an intervening life estate did not interfere with the right of remaindermen to sue for damages or prevent the statute of limitation running against the latter. It is to be noted that the railway company in that case entered in the right of a condemnor and not as a conveyee.

The appellee, Jennings, relies upon the case of *Webster v. Pittsburg, etc., R. Co.*, 78 Ohio, 90, 84 N. E. 592, 15 L. R. A. (N. S.) 1154, but in that case, also, the railroad company did not enter or hold under a deed; the court stating that "the railroad company took possession without contract and without appropriation;" and it was held that the tenancy for life prevented the statute's running against the remaindermen.

A case involving a taking and holding by a railway company of a right of way under a deed from a life tenant is that of *Smith v. Railway*, 88 Tenn. (4 Pickle) 611, 13 S. W. 128, where it was said that the possession by the railroad company would not be adverse to the remainderman until the termination of the life estate. The action there was by the remainderman to recover damages for the right of way taken.

We therefore hold that the appellant company cannot rely upon the one-year statute of limitation invoked by it.

[4] Under another assignment of error, the railway company insists that the measure of the appellee's recovery is the value of the land as of the date of its predecessor's original entry thereon. The decision of this point is governed by what is said above in relation to the rights of the remainderman. The right of action of the remainderman accrued at the termination of the life estate, and the value of the land and the amount of incidental damages could not be tested as of a date prior to the existence of the cause of action, and should be fixed as of the time that right arose.

Affirmed.

CHAMBERS et al. v. CHATTANOOGA UNION RY. CO. et al.

(Supreme Court of Tennessee. Dec. 2, 1914.)

1. INFANTS (§ 57\*)—CONTRACTS—DUTY TO DISAFFIRM.

Where it is uncertain whether an infant's contract benefits or prejudices her, and she marries while yet an infant, she should disaffirm

the contract within a reasonable time, if she desires to avoid it.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 136-148, 151; Dec. Dig. § 57.\*]

**2. INFANTS (§ 30\*)—DEED—DUTY TO DISAFFIRM.**

An infant's deed executed in consideration of a covenant of the grantee, which is void, under the statute of frauds because not capable of being performed within one year, being void because clearly to the infant's prejudice, need not be disaffirmed.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.\*]

**3. LIFE ESTATES (§ 8\*)—ADVERSE POSSESSION UNDER LIFE TENANT—REMAINDERS.**

The possession of a life tenant's grantee cannot become adverse to the remaindermen until after the death of the life tenant.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 24-28; Dec. Dig. § 8.\*]

**4. EMINENT DOMAIN (§ 303\*) — APPROPRIATION OF LAND—MEASURE OF DAMAGES.**

The damages recoverable by a remainderman from a railroad company for the appropriation of land under a deed from the life tenant, in which the remainderman joined while an infant, were properly assessed as of the date of the death of the life tenant, where the deed was void as to the remainderman.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 815-817; Dec. Dig. § 303.\*]

**5. EMINENT DOMAIN (§ 266\*)—REMEDIES OF OWNERS — APPROPRIATION OF LAND — REMAINDERMEN.**

While the chancery court has no jurisdiction of a proceeding brought solely for the condemnation of land for public improvements, or to administer the relief authorized in condemnation proceedings under Shannon's Code, § 1866, it may entertain a bill in equity by remaindermen to have their rights declared as against a deed from the life tenant, under which a railroad company claims title to its right of way, and may grant complete relief in respect thereto.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 694-696, 702, 703, 705; Dec. Dig. § 266.\*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by Grace Chambers and others against the Chattanooga Union Railway Company and others. From decree for defendants, plaintiffs appeal. Affirmed.

Finlay, Campbell & Coffey, of Chattanooga, for appellants. Shepherd, Fleming & Shepherd, of Chattanooga, for appellees.

NEIL, C. J. The case is one wherein Mary M. Thurman, the mother of complainants, being then the remainderman, joined with the life tenant in a conveyance of certain land to the railroad company for right of way while she was an infant and unmarried. This was in 1892. She was then 18 years of age. She married in 1894, being still under 21. She remained covert until 1905, when she died, leaving complainants her only heirs at law. The life tenant died in 1910. The present suit was brought a few months thereafter, 18 years after the mother of complainants made her deed. The consideration of that deed was as follows: That is, a verbal agreement on the part of the railway com-

pany to erect a depot on the land, to be known as Thurman Station, to build a spur track and maintain it for the sole use and benefit of the owners of the property; that the freight rates should not exceed \$8 per car to any point on the line; that not less than 16 passenger cars per day would pass and stop at said depot; that passengers would be received and discharged at that point; and that the spur track, depot, and passenger service should be maintained during the use of the right of way by the grantee or its successors. In fact, a small depot was erected, and a spur track laid, both of which were maintained for two or three years, and the passenger train service was rendered for about the same period. However, all were then discontinued, and have never since been resumed.

[1] The rule was long ago laid down:

"When the court can pronounce the contract to be to the infant's prejudice, it is void; when to his benefit, as for necessities, it is good; and, when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infants." *Swafford v. Ferguson*, 3 Lea (71 Tenn.) 292, 294 (31 Am. Rep. 639).

If the case stated falls under the third division of the rule, the bill must be dismissed, because although complainants' mother was an infant when she made the deed, and subsequently married while still an infant, it became her duty, although under coverture, to disaffirm within a reasonable time, since the disabilities of infancy and coverture cannot be tacked. *Lancaster v. Lancaster*, 13 Lea (81 Tenn.) 126, 131 et seq., an authority precisely in point. Mary M. Thurman lived 13 years after the execution of the deed, and this would be sufficient time from which to infer an affirmance. *Scott v. Buchanan*, 11 Humph. (58 Tenn.) 468.

[2] On the other hand, if the case falls under the first division of the rule, the result must be quite different. We are of the opinion that it should be so classed. A deed of an infant's land without consideration is void, not merely voidable. *Swafford v. Ferguson*, supra; *Robinson v. Coulter*, 6 Pick. (90 Tenn.), 705, 18 S. W. 250, 25 Am. St. Rep. 708. It is true that we cannot say the deed was wholly without consideration, but it was so nearly so that we can confidently affirm that it was to the infant's prejudice. The covenant of the railway company being verbal only, and not capable of being performed within one year, was void under the statute of frauds. Therefore there was no obligation on the part of the infant to disaffirm. In law, the deed was only that of the life tenant. The latter lived, as stated, until 1910, and the present complainants, the heirs of the infant, could not sue until that time.

[3-5] The status, then, was the railroad was in possession. As to complainants, the possession became adverse only on the death of the life tenant, and the damages were

properly assessed as of that date. We have no doubt they could have instituted proceedings in the circuit court under Shan. Code, § 1866, for damages in the customary way or for the appointment thereunder of a jury of view, and have had their rights adjudged accordingly. The course they pursued, however, was to come into chancery to have the deed declared void, and as incidental relief to have the damages assessed. The chancellor approved this practice, referred the matter to the master, and the damages have been assessed through a commission agreed on by the parties, on the report of which commission the master based his findings, and no exceptions were filed to the amount so found. It is said, however, that the chancery court had no jurisdiction of the subject-matter. It is true that court has no jurisdiction of a proceeding brought solely for the condemnation of land for public improvements, or to administer the relief provided by section 1866, supra, in lieu of regular condemnation proceedings, where the railway company has entered on the land without instituting such proceedings, and without the owner's consent; but the complainants had the right to file their bill in equity, as heirs of their mother (*Matherson v. Davis*, 2 Cold. 443; *Walton v. Gaines*, 94 Tenn. 420, 29 S. W. 458), to have their rights declared as against the deed under which defendant was claiming; and the court, having thus obtained jurisdiction, would not turn the parties away without settling the whole controversy and granting complete relief. The fact that a suit in equity was unnecessary, because complainants might have gone into the circuit court, would not change the matter. They could not enter and eject the railway company. It was material that they should obtain legal relief. The chancery court had power to interpret the clause in question, construe the deed in connection therewith, and to declare that the complainants, under such true construction, were not bound by the deed. Having obtained jurisdiction for this purpose, the court could go further and give complete relief, as stated.

The decree of the chancellor must be affirmed, with costs.

**HAMILTON NAT. BANK v. BREEDEN et al.** (Supreme Court of Tennessee. Nov. 28, 1914.)

**BILLS AND NOTES (§ 256\*)—INDORSER—DISCHARGE—EXTENSION OF TIME OF PAYMENT.**

At the maturity of notes given in renewal of other notes, the maker explained to the holder that a surety on the notes was ill, and that his signature to renewal notes could not then be obtained, and the holder accordingly accepted the sums required as discounts for renewals, on condition that the maker should get renewal notes properly signed by the surety as soon as his condition would permit. No new notes were signed by the maker and left with the holder. Held, that there was no agreement binding upon the holder to extend the time of payment, with-

in Negotiable Instruments Law (Acts 1896, c. 94) § 120, subd. 6, providing that a party secondarily liable is discharged by any agreement binding upon the holder to extend the time of payment, unless made with the assent of the party secondarily liable, or unless the right of recourse against him is expressly reserved, and the surety was not therefore discharged, since the holder agreed to permit renewals only on condition that the surety would sign the renewal notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 581-599; Dec. Dig. § 256.\*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by the Hamilton National Bank against A. B. Breeden and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Garvin & Cantrell, of Chattanooga, for Hamilton Nat. Bank. Sizer, Chambliss & Chambliss, of Chattanooga, for A. B. Breeden et al.

**WILLIAMS, J.** The bank filed a bill of complaint against Breeden and Cook to recover on three notes, one for the sum of \$500, another for the sum of \$2,000, and the third for the sum of \$1,000, which were executed by the Breeden Medicine Company, as maker, to the bank for money borrowed by that company; defendant Cook being treated for the purposes of this decision, as a surety thereon for a consideration paid by the company. Cook alone is contesting the payment of the notes; his contention being that the bank had made a binding agreement with the medicine company without his knowledge or consent, and without any express reservation of the right of recourse against him, whereby the time of payment was extended, and that he thereby was released.

The record discloses the facts pertinent to be: The notes in suit were remote renewals of the original notes of the series. It was the custom of the president of the maker company to go to the bank on maturity dates and renew the obligations, delivering renewal notes properly signed by Cook, but, when the said notes matured, the president, Breeden, explained to an assistant cashier of the bank, who had charge of that department of the business, that Cook was ill in a hospital and could not be seen in order to get his signature. It may be stated that the sums required as discount on the several notes were accepted, but on condition that the maker should get renewal notes properly signed by Cook so soon as his condition would permit. As this course had been pursued previously when Cook was absent from the city, the assistant cashier presumed that Cook would join in the execution of renewal notes as he had done on such former occasions. Accordingly, on the agreement that such renewals would be brought in, he accepted the discount sums, and without entering any credits of in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terest paid, on the notes, he attached to each a "discount tag," indicating that the respective notes were to mature on the future dates to which interest was paid, and entries were made on the bank's discount register, indicating that the notes in suit were "paid." However, the notes thus tagged were placed and carried in an "incomplete file" on the desk of the assistant cashier, awaiting the coming in of the renewal notes. They were kept separate from notes completed as to renewal. The entries appear to have been made in anticipation of the redemption of the promise to bring in regular renewals. No new notes were signed by the maker and lodged with the bank.

The Negotiable Instruments Law (Acts 1899, c. 94) in section 120 (6) provides that a party secondarily liable on a negotiable instrument is discharged:

"By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

We think the fundamental error in the contention of the surety, Cook, touching the transaction on maturity date, outlined above, is in premising that there was effective any "agreement binding upon the holder to extend the time of payment." Until such agreement is made, expressly or by implication, there does not come up for consideration the subsequent clause of the quoted section in respect to the effectuation of the surety's release, "unless the right of recourse against such party is expressly reserved." In other words, the express reservation of the right of recourse is to be conceived of as being incorporated as a dependent incident in and to the main agreement between the maker and the bank, binding upon the former, as holder, to extend or postpone.

By the terms of such main agreement in the pending case, there was to be no extension proper, and no renewals, except on condition that Cook would sign the renewal notes.

In the case of *Kuhlman v. Leavens*, Executor, 5 Okl. 562, 50 Pac. 171, interest on a note was paid in advance, with the understanding between the holder and the principal that the sureties would agree to an extension. The sureties had no knowledge of the arrangement, but it was held that the extension was in effect conditional on the assent of the sureties, and they were still bound by the contract. In the course of the opinion the court, citing *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377, said:

"If it is a conditional contract dependent upon the assent of the sureties, it will not release them, because, until their assent is given, it is not binding between holder and maker of the note, and consequently cannot prejudice the rights of the sureties."

The case of *Miller v. McCallen*, 69 Iowa, 681, 29 N. W. 942, is directly in point. In

that case, taking the distinction between extension and renewal, the court said:

"The facts appear to be that the plaintiffs are proprietors of the Lyon County Bank; that McCallen borrowed money at the bank, and gave the note in question, with Wagner as surety; that, some time after the note fell due, he went into the bank and paid the accrued interest on the note, and also signed another note, which it was expected Wagner would sign, as a renewal note, and at the same time he paid a certain amount as discount on the renewal note, but the old note was not surrendered, and was not to be surrendered unless Wagner signed the renewal note, which he never did. The plaintiff Miller testified that there was no agreement or conversation in regard to the extension of the note in suit. \* \* \* What was done, indeed, was inconsistent with the idea of the extension of the note. What was done was for the purpose of a renewal, which would have been entirely unnecessary, if there had been an agreement for an extension of the original note."

"The defendant contends that the payment of discount on the renewal note shows an extension of the original note, but it appears to us that he wholly misconceives the situation. Renewal did not take place, and for the reason that the renewal note was not fully executed. If renewal had taken place, the old note, of course, would have been discharged, and Wagner would have had no occasion to plead a release of himself by extension. The payment of discount on the renewal note was in anticipation that it would be fully executed and accepted in renewal."

In *Bank of Uniontown v. Mackey*, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 487, it appeared that the plaintiff bank had signified its willingness to take renewal notes of the parties who had executed the original notes, and, the surety being too sick to join in the execution of the new notes, the bank sent to the maker a statement of the interest for four months and a blank note to be executed by the maker and his surety when the latter should be able to do so. The interest was remitted and received; but the court, through Mr. Justice Gray, said:

"Such interest was paid by the principal and received by the plaintiff after the surety's death; the plaintiff at that time being ignorant of his death, and expecting that the principal would procure and deliver renewal notes as before proposed, and nothing being then said as to an agreement for an extension of time, or as to the effect of the payment of interest. No present agreement for an extension of time can be inferred from the mere payment of interest, under such circumstances. The necessary conclusion from the facts found is that the plaintiff never agreed to extend payment of the old notes, except upon receiving new ones signed by both makers, which were never given; and that the payment of interest has no effect upon the case, except, as admitted in the complaint, by way of deduction from the amount that the plaintiff is entitled to recover."

See, also, *Williams v. Martin*, 2 Duv. (Ky.) 491.

While the cases on the point are by no means numerous, they are clear to the effect that the surety is not released. The bank could have sued on the notes, now in suit, at any time within the period in contemplation for the renewals.

The case of *National Park Bank v. Koehler*, 204 N. Y. 174, 97 N. E. 468, relied upon by solicitors of the surety, is not pertinent,

since there it was an established fact that the holder and the maker of the note had made an agreement which was not conditional, and the question discussed was whether the terms of the agreement expressed a reservation of the creditor's rights against the indorser—the subsidiary phase which we have not to deal with.

The defendant relies on the case of *Union Bank v. McClung*, 9 Humph. 98, but manifestly that case is not in conflict with what is here decided; its holding being that an agreement to extend may be implied from the fact that interest is accepted by the payee. Here there was an express agreement contra.

The chancellor's decree made provision for the defendant surety receiving credit for the interest paid, as was done in *Bank of Uniontown v. Mackey*, supra; and that decree is affirmed.

**MCKAVEN v. CLANCY et al. (No. 208.)**  
(Supreme Court of Arkansas. Nov. 2, 1914.)  
**MUNICIPAL CORPORATIONS (§ 450\*)—IMPROVEMENT DISTRICT—ORGANIZATION—PUBLICATION OF ORDINANCE.**

Publication of an ordinance establishing an improvement district must be according to the statute, which is mandatory, and compliance with which is jurisdictional, so that, one of the lots not being included in the publication, though lots on both sides of it, and owned by the same parties, are included, the district is not created.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Walter McRaven against E. J. Clancy and others. Complaint dismissed, and plaintiff appeals. Reversed and remanded, with directions.

This suit was brought by a property owner within the limits of proposed improvement district No. 6, East Pulaski Heights addition. The undisputed facts are that 10 property owners of the proposed improvement district addressed to the city council of Pulaski Heights a petition praying that certain lots and blocks, including, among others, lots 10, 11, and 12 in block 13 of the town of Pulaski Heights, be created into an improvement district. An ordinance was passed by the city council granting the prayer of the petition and designating the district as No. 6. In the publication of said ordinance lot 11 in block 13 was omitted from the publication, although it was included in the original petition and in the ordinance. The plaintiff below brought this suit to restrain the commissioners from proceeding to make the improvement contemplated by the ordinance, setting up the above facts. The commissioners, admitting that the above facts were true, nevertheless claimed that the ordinance was valid for the following reasons:

"That lot 10 and the west half of lot 11, block 13, town of Pulaski Heights, is the property of F. B. T. Hollenberg, and that the east half of lot 11, block 13, is the property of Cravens Hollenberg Reid; that lot 10 and lot 12 were included in the said publication of the ordinance, and that these being in the same ownership as lot 11, was notice to each of the owners of lot 11 of the creation of said district, and was a sufficient compliance with the statute as to publication; that a second petition containing the signature of a majority in value of said district was signed by both Hollenberg and Reid, the owners of lot 11, block 13, and was notice to each of them of the creation of the district and the extent thereof."

The court, upon the above undisputed facts, found that the inclusion of lots 10 and 12, block 13, town of Pulaski Heights, in the publication of the ordinance was sufficient notice to the owners of lot 11 of the formation of said district, and that, inasmuch as the owners of lot 11 signed a second petition praying for the improvement, it was immaterial that lot 11 was not shown in the published ordinance, and that the statute relating to the publication of the ordinance had been sufficiently observed, and that the district had been validly organized, and entered a decree dismissing plaintiff's complaint for want of equity.

L. P. Biggs, of Little Rock, for appellant.  
J. B. Webster, of Little Rock, for appellees.

WOOD, J. (after stating the facts as above). In *Voss v. Reyburn*, 104 Ark. 298-301, 148 S. W. 510, 512, this court, following the decision in *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955, held that:

"The publication of the ordinance of the city council establishing the district as required by this statute is mandatory and essential to the creation of a local improvement district."

We further held that:

"The publication of this notice in the manner prescribed by the statute is jurisdictional, and the district is not created without it."

See *Norton v. Bacon*, 168 S. W. 1088.

The omission from the publication of one lot which was included in the petition and ordinance creating the district cannot be said to be an immaterial variance. The statute, being mandatory and jurisdictional, must be strictly complied with, and other notice than that contained in the statute of the passage of the ordinance is not sufficient, and cannot be substituted for the notice prescribed by the statute. It matters not, therefore, that the owners of the omitted lot had notice in some other way of the proposed creation of the district. The district was not created without the notice prescribed by the statute.

It follows that the court erred in dismissing the complaint, and the judgment is therefore reversed and the cause will be remanded, with directions to enter a decree perpetually enjoining the appellees from proceeding to make the proposed improvement under the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

supposed authority of the ordinance creating improvement district No. 6 of the town of Pulaski Heights.

### MOBBS v. STATE. (No. 237.)

(Supreme Court of Arkansas. Nov. 16, 1914.)

#### 1. LARCENY (§ 58\*)—CATTLE THEFT—IDENTIFICATION.

In a prosecution for cattle theft, evidence held to identify the animal butchered and sold by defendant as that taken from prosecutor.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 166; Dec. Dig. § 58.\*]

#### 2. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS—MODIFICATION.

Where the court gave full and accurate instructions on the presumption of innocence and on reasonable doubt, defendant was not prejudiced by a refusal to instruct that an indictment raised no presumption of guilt, and in modifying an instruction requested on the subject of reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

Appeal from Circuit Court, Sevier County; Jeff T. Cowling, Judge.

Frank Mobbs was convicted of grand larceny, and he appeals. Affirmed.

B. E. Isbell, of De Queen, for appellant. Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. The defendant was convicted of the crime of grand larceny in stealing a steer, the property of one Jim Pauley, in Little River county, where the case was tried.

[1] The principal contention, and the only one which gives us any serious concern, is that the evidence is insufficient to identify the animal alleged to have been stolen as the one which was found in the possession of the defendant. Pauley lived in Little River county, near Cero Gordo, and his cattle ran in the range near Little River. He missed the animal in the month of October, 1913, and defendant took an animal of the same description out of the Little River bottom some time in October and carried it across the river over into Sevier county and butchered it and sold it. Defendant admits that he took an animal out of that range, but claims that it was one he bought from one Fenton, who had cattle in the range. Pauley's steer was marked with "a crop and two splits in the left ear and an underslope and an overbit in the right ear," but was not branded. The Fenton steer, which the defendant claims to have bought from Fenton and carried out of the range, was marked with an overslope in the right ear and an underslope in the left ear, and was branded with an X-bar on the left hip.

The only witness, except the defendant himself, who attempted, with any degree of accuracy, to identify the steer which the de-

fendant took out of the range was a man named Pete Hall, who assisted the defendant in getting up the steer from the range. He testified concerning the brand on the steer, but his testimony is so vague and uncertain that we consider it of very little importance on that point. His testimony was sufficiently definite, however, to warrant the jury in finding from it that the steer was not branded, and therefore was not defendant's steer. That was only sufficient, however, to show that it was not defendant's steer, but was not sufficient to identify it as the Pauley steer. We are of the opinion, however, that the testimony of this witness, concerning the appearance or flesh marks of the animal, is sufficient to identify it as the one owned by Pauley. Pauley described the animal which he lost as "a white steer with some black spots on his neck, and his ears were black and his face was white." Another witness gave a similar description of the animal, and Pauley also testified that he was familiar with the cattle in that range, and that there was no other animal of that description running there. He stated that he looked after his cattle and saw them frequently in the range, and the jury were warranted in finding from his testimony that no other animal of that precise description was running in the range at the time. He testified that the animal was a little over three years old, and was of pretty good size for his age. The testimony of Hall was sufficient to identify the steer taken out of the range as the one owned by Pauley. The description of the animal as to flesh marks and color was unusual, and the animal was so striking in his appearance that the jury might have found that notwithstanding the failure of the state to identify the animal by the earmarks, and the uncertainty in that respect, the other description was sufficient to identify him, and warrant a finding that the steer which defendant took out of the range was the one owned by Pauley.

There is testimony to the effect that defendant carried the steer a circuitous route and butchered and sold it under circumstances which indicated stealth and raised a suspicion of guilt. In other words, since there was a finding that it was in fact Pauley's steer, the jury were warranted also in finding that the defendant took the animal out of the range with felonious intent to steal it.

[2] The other two assignments of error relate to the ruling of the court in refusing to instruct the jury to the effect that an indictment raised no presumption of guilt, and in modifying one of the instructions requested by the defendant on the subject of reasonable doubt. The court gave full and accurate instructions on the subject of presumption of innocence, and also on the subject of reasonable doubt, and there was no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prejudice in the rulings of the court, even if the instructions asked were found to be correct.

Judgment affirmed.

GIBBONS et al. v. WARD et al. (No. 217.)  
(Supreme Court of Arkansas. Nov. 2, 1914.)

1. WILLS (§ 775\*) — LAPSING OF DEVISE OR LEGACY.

A legacy or devise lapses, on the legatee or devisee dying before testator, except in the case provided by Kirby's Dig. § 8022, of a devise to a child or other descendant of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1987-2000; Dec. Dig. § 775.\*]

2. WILLS (§ 506\*)—CONSTRUCTION—"HEIRS."

There being nothing in the will indicating a contrary intention, the word "heirs" in a devise to M., "her heirs and assigns forever," will be construed in its technical sense, as one of limitation, and so not to prevent the devise lapsing on M. predeceasing testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.\*]

For other definitions, see Words and Phrases, First and Second Series, Heirs.]

3. WILLS (§ 199\*)—CODICIL—REVIVING LAPS-ED DEVISE.

A codicil, while a republication of the will, does not have the effect of reviving a devise, lapsed by reason of the death of the devisee; it, while mentioning her death, merely devising to another some of the property which had been devised to her, because of property which had been devised to the other having been sold by testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 498; Dec. Dig. § 199.\*]

4. WILLS (§ 199\*) — CODICIL — EFFECT ON LAPSED INTEREST IN RESIDUARY ESTATE.

A codicil, reciting the death of one of the residuary devisees, without any further disposition of the residue, manifests an unmistakable intention to give the whole residue to the surviving residuary devisees, preventing the lapsed interest therein becoming intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 498; Dec. Dig. § 199.\*]

Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

Controversy arising by intervention and cross-complaint in a mortgage foreclosure suit between Martha Gibbons and others and Fred D. Ward and others, involving the question whether a devise lapsed. From a decree holding that it did lapse, said Gibbons and others appeal. Affirmed.

Rector & Sawyer, of Hot Springs, for appellants. M. S. Cobb, of Hot Springs, for appellees.

KIRBY, J. This appeal calls for the construction of the last will of Jeremiah W. Skeif, who died in Hot Springs, Ark., Garland county, the owner of a considerable estate. The will was executed on the 24th day of June, 1902, and thereafter the testator added a codicil, of date the 29th day of March, 1907.

The first clause of the will reads:

"I, Jeremiah W. Skeif of Hot Springs, county of Garland, and state of Arkansas, declare this to be my last will hereby revoking all wills and testamentary papers at any time heretofore made by me.

"I. I direct all my just debts to be paid.

"II. I bequeath to my wife Mary E. Skeif, all my household goods, furniture and other effects which at the time of my death may be in or about my dwelling house."

In item III he gave a certain lot, described, to the use of his wife, Mary E. Skeif, during her life and after her death to Andrew Jackson Dalton, his heirs and assigns forever.

In item IV he devised another lot to the use of his wife, Mary E. Skeif, as in item III, for life and after her death to John H. Adams and his heirs and assigns forever. In item V he gave two other lots to the use of his wife, Mary E. Skeif, during her life and after her death to Jeremiah Brown, his heirs and assigns forever. In item VI he devised another lot to the use of his wife for life, and after her death to his two sisters, Isabel Phillips and Sallie M. Bohall, their heirs and assigns forever, in equal shares as tenants in common. Item VII devised another lot to the use of his wife for life and after her death to Jeremiah Demby, his heirs and assigns forever. Item VIII reads:

"I devise to my wife, Mary E. Skeif, her heirs and assigns forever, the following described property situated in the city of Hot Springs" \* \* \* [describing it], and I direct that my wife apply such part of the monthly income of the premises described in items III, IV, V, VI and VII, as shall be necessary to pay all taxes and assessments thereon, to keep and maintain reasonable insurance and all needful and necessary repairs; and in case of fire should destroy any part of said premises, that the insurance be applied to repair or rebuild the same.

"IX. I devise and bequeath all the residue of my real and personal estate, whatsoever and wheresoever unto the said Andrew Jackson Dalton, John Adams, Jeremiah Brown, Isabel Phillips, Sallie M. Bohall, Jeremiah Demby and Mary E. Skeif, their heirs, executors, administrators and assigns, according to the nature thereof, respectively, in equal shares, for their absolute use and benefit."

Fred D. Ward and Andrew Jackson Dalton were named executors of the will. The codicil reads:

"I Jeremiah W. Skeif aforesaid do declare this to be a codicil to my last will in addition to the said last will and as part thereof."

It then recites the fact that he has sold the property described in item III of the will, and "my said wife Mary E. Skeif being dead I give and bequeath the following premises situated in the city of Hot Springs, county of Garland, and state of Arkansas, to wit." Then follows the description of lot 3, block 7, of South Hot Springs and the west half of lot No. 4 and all of lot No. 5 in Orr's subdivision in 117, according to the official plat to Andrew Jackson Dalton, his heirs and assigns forever.

The will was probated and suit was brought

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against the executors, the devisees of the will, and the heirs of Mary E. Skeif, to foreclose a mortgage, upon certain after-acquired real estate not included in the will. Pending that suit there arose a contention between the devisees in the will and the heirs of Mary E. Skeif as to the ownership of the funds in the hands of the executors, and they filed an intervention and cross-complaint in said suit, making the devisees and her heirs parties, in which they allege that there is a disagreement as to the proper construction of said will as follows:

"It being claimed on the one hand that certain legacies and devises designated in said will in favor of Mary E. Skeif have descended to her heirs by reason of the death of the said Mary E. Skeif in the lifetime of the said Jeremiah W. Skeif, and on the other hand that said legacies and devises have lapsed and become residuary estate,"

—and ask for a proper construction of the will and directions as to how to distribute the estate. To their complaint separate answers were filed by the devisees and the heirs of Mary E. Skeif.

Mary E. Skeif, the wife of the testator, died during his lifetime, and he thereafter made a codicil to his will, in which he recited her death and made other disposition of some of the property that had been devised to her and her heirs.

[1, 2] In *Galloway v. Darby*, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782, the court considered the questions involved here, and in an exhaustive opinion held that a legacy or devise lapses when the legatee or devisee dies before the testator and becomes part of the residuary estate, passing under the clause of the will disposing of the residuum. It was there said: "The rule is established beyond controversy, except where changed by statute, that a legacy or devise lapses when the legatee or devisee dies before the testator," reciting also that the rule has been changed in this state by section 8022, Kirby's Digest, "in case of a devise to a child or other descendant of the testator," which does not lapse but vests "as if such devisee or legatee had survived the testator and died intestate." In that case the testatrix devised her property, making certain specific devises, giving one farm to a niece, Elizabeth Darby, and to her heirs and assigns in fee simple. She later made a codicil to the will, revoking a certain devise to a nephew and devising some of the property that had been devised to him in the clause revoked, to the same niece, Elizabeth Darby, and her heirs and assigns in fee simple. This devisee died during the life of the testatrix, and it was contended there, as here, that it was the intention of the testatrix to substitute the children and heirs of the devisee in her place in the event of her death before that of the testatrix, but the court held otherwise and, construing the word "heirs," said: "But words used in a will must be construed according

to the technical legal meaning, unless explanatory words in the context qualify them or give them another meaning, or unless the peculiar situation under which they are used indicates an intention to use them other than in a technical sense"—and continued quoting from *Johnson v. Knights of Honor*, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732, where the court was construing the same word: "It is a technical word. When used in any legal instrument and there is no context to explain it, as in this case, it should be understood and used in its legal and technical sense." See, also, *Myar v. Snow*, 49 Ark. 129, 4 S. W. 381; *Moody v. Walker*, 3 Ark. 147; *Underhill on Wills*, 436; 2 *Redfield on Wills*, 160; 2 *Jarman on Wills*, p. 1651; 2 *Washburn on Real Property*, 603. The devises were made in items 3, 4, 5, and 6, of the will to Mary E. Skeif during her life, and "after the death of my said wife I devise the said premises to ———," naming each different devisee, "his heirs and assigns forever." In item 8, the devise was to Mary E. Skeif, her heirs and assigns forever, and evidently intended to convey the entire or fee-simple estate. There are no inconsistent words used in this will that would indicate even that the testator did not mean to use the technical words in their usual and proper sense. They were evidently so used and intended to mark the extent of interest to be conveyed to the legatee or devisee, and are words of limitation merely, and we hold here, as in that case, that the devises to Mary E. Skeif, lapsed unless it was revived by the codicil reciting her death.

[3] The testator therein did not attempt a disposition of any of the estate to the heirs of Mary E. Skeif, but did devise certain property, that had been given to her in fee simple in clause 8 of the will, to one of the devisees to whom he had given a remainder in certain property in another clause of the will, after the death of his wife, which property had been sold by him. "A codicil is, in legal effect, a republication of the will, and the whole is to be construed together as if executed at the date of the codicil." 40 Cyc. 1221; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *Drayton v. Rose*, 7 Rich. Eq. (S. C.) 328, 64 Am. Dec. 731; page 621, Am. Digest.

40 Cyc. 1215, says:

"As a general rule revival or republication brings the will down to the date of republication and makes it speak as of that time."

There are, however, well-defined exceptions to the above rule. For instance, it is well settled that the republication does not revive a devise or legacy which has lapsed by the death of the devisee or legatee in the testator's lifetime. See, also, *Williams v. Ness*, 52 Pa. 326; *Campbell v. Jamison*, 8 Pa. 498; *Neal v. Hodges* (Tenn. Ch. App.) 48 S. W. 263.

This codicil, mentioning the wife's death, and disposing of some of the property that had been given to her in fee simple in clause 8, contained no words indicating an intent to substitute for her those who were to succeed to the property by the terms of the will after her death as devisee, and there are no qualifying words indicating that a technical meaning was not intended, nor any peculiar circumstances in connection with the words used that even tend to demonstrate that they were meant otherwise than in their technical sense. The republishing of the will by the execution of the codicil did not have effect to revive the devise which lapsed on account of the death of Mary E. Skeif, and became part of the residuary estate.

Counsel urge that the word "heirs" should be differently construed and held to be word of purchase and not limitation, within the authority of *Davis' Heirs v. Taul and Wife*, 6 Dana (Ky.) 51-54. That was a case where the testator, who had devised land to his son, William Davis, and his heirs and appointed him executor, after the son's death added a codicil to the will, in which he refers to the death of his son, and without making any other disposition of the land devised, appointed another executor in his stead, and the court held that the codicil was a republication of the will, and the whole of it must be construed together, and that the devise to the deceased son lapsed, but that his heirs took immediately under the will as purchasers; that the testator intended it, and it was construed to be, a devise to the heirs of his deceased son. Our statute (section 8022, Kirby's Digest), already referred to, prevents the lapse of a devise of the kind passed upon in the Kentucky case, providing that, whenever any estate shall be devised or bequeathed to a child or other descendant of the testator who shall die in the lifetime of the testator leaving a child or other descendant who will survive the testator, the legacy or devise shall not lapse, but shall vest in the surviving child or other descendant of such devisee or legatee as though such devisee or legatee had survived the testator and died intestate. Although there does not appear to have been any statute of Kentucky at the time of this decision with a provision of like kind, that court was doubtless moved to the construction of the will given by it out of the same consideration that prompted our Legislature to make the statute with the end in view to prevent the lapse of a devise or legacy to a child or other descendant of the testator dying in the testator's lifetime, in order that it should go on down the line from the testator to the child or other descendant of the devisee who survived the testator. We do not regard the case authority for a different construction of this will than that given it.

[4] It is further insisted that this construction of the will contravenes the well-known

rule that that construction should be adopted which will prevent the testator dying intestate as to any of his property. It is true that the testator is presumed to dispose of his entire estate, and it is to be borne in mind in the construction of wills that they are to be so interpreted as to avoid partial intestacy, unless the language compels a different construction. *Booe v. Vinson*, 104 Ark. 448, 149 S. W. 524; *Badgett v. Badgett*, 170 S. W. 484. In *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339, the court said:

"Another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may be reasonably given."

The authorities also hold:

"Where a lapse takes place in the gift of the residue either because the sole residuary beneficiary had predeceased the testator, or because of several residuary beneficiaries who take as tenants in common have died before him, the gift which lapses is not reabsorbed into the residue, but goes as intestate property, either to the heirs or the next of kin of the testator, according to the nature of the property." 1 *Underhill on Wills*, vol. 1, page 455; Page on *Wills*, 595, 832.

A general residuary clause will not dispose of the lapsed interest in a residuary estate. In *re Hoffman's Will*, 201 N. Y. 247, 94 N. E. 990. The presumption, however, that the testator intends to dispose of all his estate and not die intestate as to any part thereof does not, of course, authorize the making of a new will or the inclusion of property that cannot be brought within the terms of the one made. *Andrews v. Applegate*, 223 Ill. 535, 79 N. E. 176, 12 L. R. A. (N. S.) 661, 7 Ann. Cas. 126. Under this construction the specific devise to Mary E. Skeif and her heirs, as well as the devise in the residuary clause, lapsed, and, according to the authorities the lapsed devise of the residuary estate would become intestate property unless from the terms of the will an unmistakable intention appears that it shall not. The republication of the will by the codicil, reciting the death of Mary E. Skeif without changing the residuary clause as first written, and without any further disposition of the residue of the estate, manifests an unmistakable intention upon the part of the testator to give the whole of the residue of his estate to the other residuary devisees who were living at the time of his death. By the terms of the will he had already, by specific devises and by the general devise in the residuary clause to certain of them, made provision for all of his relatives whom he expected to share in the distribution of his estate or to succeed to any part thereof, and this evident purpose of the testator cannot be defeated by any rules of construction, which are only effective to arrive at the true intent of the maker of the will.

It follows that the heirs of Mary E. Skeif were not entitled, under the will, the devises to her and her heirs having lapsed, to any

portion of the testator's estate, and, the entire estate having been disposed of by the terms of the will, that his other heirs who were not provided for therein are likewise without any right to distribution. The decree of the chancellor was correct, and it is affirmed.

# ARKANSAS NATURAL GAS CO. v. LEE. (No. 238.)

(Supreme Court of Arkansas. Nov. 16, 1914.)

## 1. MASTER AND SERVANT (§ 302\*)—INJURIES TO SERVANT—ASSAULT BY OTHER SERVANTS—MASTER'S BUSINESS.

Where plaintiff, superintendent of defendant's telephone construction and the head of a different department of defendant's business, over which defendant's general superintendent, with authority over construction work, and B., his assistant, had no control and no authority to discharge plaintiff, was assaulted by B. pursuant to a conspiracy between him and the general superintendent to bring about plaintiff's resignation, acting in response to their personal impulses and not in the furtherance of defendant's business, defendant was not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.\*]

## 2. MASTER AND SERVANT (§ 188\*)—INJURIES TO SERVANT—SAFE PLACE.

Where it is the duty of a superior servant to furnish for the master a safe place in which the inferior servants are to work, if the superior steps aside from the performance of his master's duties and for his own purposes commits a wrongful act which injures a servant, the master is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 436; Dec. Dig. § 188.\*]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by T. B. Lee against the Arkansas Natural Gas Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Moore, Smith & Moore, of Little Rock, for appellant. Henry Berger, of Malvern, and Mehaffy, Reid & Mehaffy, of Little Rock, for appellee.

MCCULLOCH, C. J. The plaintiff, T. B. Lee, sues to recover compensation for personal injuries received while he was an employé of the defendant, Arkansas Natural Gas Company, and this is an appeal from a judgment in plaintiff's favor. Defendant was engaged in constructing a gas pipe line from the oil fields in Louisiana to the city of Little Rock, and plaintiff and one Bronsell were both employés of the defendant. Bronsell made an assault upon plaintiff at Hope, Ark., and inflicted serious personal injuries. Plaintiff was employed by the defendant as a superintendent of telephone construction, it being necessary, it seems, to operate a telephone along the line of construction of the gas pipe line, and plaintiff's department was a separate one from the construction department, in which Bronsell worked. The

defendant was a foreign corporation, and its business in Arkansas was in charge of one Dally, as general manager, who had general superintendence over all the business in the state, with sole authority to employ and discharge heads of departments. H. L. Snyder was general superintendent, with authority to look after the construction work, and Bronsell was his assistant. The evidence shows that Snyder or, in his absence, his assistant, Bronsell, had authority to call upon or to make requisition upon plaintiff, as the superintendent of the telephone department, for work in the latter's department in aid of the construction of the pipe line. Neither Snyder nor Bronsell had any further authority over the plaintiff. They did not employ him and had no authority to discharge him.

The assault by Bronsell on plaintiff occurred on January 8, 1912. The evidence warrants a conclusion that there was ill feeling between the two men, or rather that Bronsell harbored ill feeling against the plaintiff for some time prior to the time the assault was committed. They had a conversation over the telephone a few days prior to the day of the assault, in which, according to the evidence adduced by the plaintiff, Bronsell threatened plaintiff with personal violence. This conversation occurred on January 5th, while plaintiff was at Hot Springs and Bronsell at Malvern. On the night of January 7th, Snyder called the plaintiff over the telephone at Malvern and requested him to come to Hope to inspect the work being done there by Cook, the plaintiff's assistant. Pursuant to that request, plaintiff went to Hope on the 8th and found Snyder and Bronsell together in the company's office. There is evidence to the effect that a few moments before plaintiff entered the room a conversation between Snyder and Bronsell was overheard, in which they agreed that they would "get Lee down here and beat him up, and he will leave the service of the company," and that they would thus get rid of him. Plaintiff passed through the room and immediately went to the room where Cook, his assistant, was at work removing the telephone, and Bronsell followed him into the room and assaulted him. The evidence on the part of the plaintiff tends to show that the assault was unprovoked, and that very serious injuries were inflicted.

The court submitted the case to the jury upon the following instructions, given at the request of the plaintiff:

"1. You are instructed that an assault committed by an employé of a corporation in the course of his employment and for the purpose of advancing its interests and in pursuance of his agency is an act done within the scope of his employment for which such company will be liable, although it neither authorizes nor ratified such act, and if you find from the evidence in this case that H. L. Snyder and W. F. Bronsell were superintendent and assistant superintendent, respectively, in charge of the management of the business of the defendant com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

pany at its office at Hope, Ark., and as such had control and direction of the work and employment of the plaintiff, Lee, and that his employment in the service of the company was objectionable to them, or either of them, as not being conducive to the interests of the company, and in order to induce him, or intimidate him, into voluntarily quitting the employ of the company, they conspired together and inveigled him into the office of the superintendent of the company, and there they, or either of them, in pursuance of such common purpose of causing him to quit the employment of the company, assaulted and beat the said plaintiff, the defendant would be responsible therefor, and your verdict shall be for the plaintiff.

"2. You are instructed that an employer who puts an agent in a place of trust and responsibility or commits to him the management of his business is responsible when the agent or employé, acting within the scope of his authority, through lack of his judgment or discretion, or under the influence of passion, inflicts an unjustifiable assault upon another, even though he go beyond the strict line of his duty or authority.

"3. You are instructed that it is not necessary, in order to fix the liability of the defendant company, that Bronsell should, at the time of the injury, have been acting under the orders or directions of the company, or that the company should know that Bronsell was to do the particular act which produced the injury, if any, but it is sufficient if you find from the evidence that the act was within the scope of his employment, and, if so, the company is liable, though Bronsell acted willfully and in direct violation of his orders."

[1] It will be seen from these instructions that the theory of the plaintiff's counsel is that the defendant is liable because Snyder and Bronsell conspired together for the purpose of assaulting the plaintiff in order to force him out of the service of the company. This contention is, we think, wholly untenable, and according to the undisputed evidence in this case there is no liability fixed upon the company, either upon that or any other theory.

The principles of law upon which the master is responsible for injuries to his servant are elemental. Those applicable to the facts of this case have been stated in repeated decisions of this court.

In the case of *Sweeden v. Atkinson Improvement Co.*, 93 Ark. 397, 125 S. W. 439, 27 L. R. A. (N. S.) 124, we said:

"It will thus be seen that the test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was done while carrying out the object and purpose of the master's business; for if the act was done without authority and solely for purposes exclusively the servant's, then the master is not liable during such time that such act was done. During such time he stepped aside from his master's business and his master's employment, and for his act the master was not liable.

In *Railway v. Grant*, 75 Ark. 579, 88 S. W. 580, 1133, where a railway company was held liable for the tortious act of one of its servants in making an assault upon a third person, the court said:

"It is certain, however, that the agent must be engaged in the principal's business, and the tort must be committed while he is carrying out such business."

The principle is announced and illustrated in other cases. *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 92 S. W. 861, 4 L. R. A. (N. S.) 649, 113 Am. St. Rep. 180; *Railway Co. v. Wyatt*, 84 Ark. 193, 105 S. W. 72.

The controlling principle was stated by Judge Mitchell, speaking for the Supreme Court of Minnesota in the case of *Morier v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, as follows:

"Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. \* \* \* Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment."

Now, the undisputed evidence in this case is that neither Snyder nor Bronsell had any authority to discharge the plaintiff. They were in separate departments; and, while Snyder had authority to make requisition upon the plaintiff, as the head of the telephone department, and to call upon him to perform service in the aid of the general construction work, yet he had no general control over his movements or any authority to discharge him. Therefore a conspiracy to bring about an assault upon the plaintiff for the purpose of forcing him out of the service would be entirely beyond the scope of the authority either of Bronsell or Snyder. They were acting in response to their own personal impulses and not in any sense in furtherance of their employer's business. But even if Snyder had authority to discharge the plaintiff, we are still of the opinion that the assault upon the latter would have been outside the scope of that authority. It would not have been either within the actual or apparent scope of that authority; for if Snyder had the power of summary dismissal, it would not come apparently within his power to commit an unlawful act in order to compel, or induce the plaintiff to voluntarily resign.

It is not contended by learned counsel for plaintiff that the facts of this case tend to show any violation of the master's duty to furnish a safe place for its servants. In the first place, there is no testimony showing that there was any duty on the part of Snyder or Bronsell to furnish the plaintiff a safe place. He was the head of his own department, and was, at the time of the assault upon him, superintending the work of his own assistant.

[2] Moreover, the adjudged cases hold that

where there is a duty on the part of the superior servant to furnish for the master a safe place in which the inferior servants are to do their work, yet if the superior steps aside from the performance of his master's duties and for his own purposes commits a wrongful act which injures the servant, the master is not liable.

This principle is clearly recognized by this court in the recent case of *St. Louis & S. F. R. Co. v. Rie*, 110 Ark. 495, 163 S. W. 149, where we quoted with approval the following statement of the law laid down in a Texas case:

"For reasons of public policy, the law holds the master responsible for what the servant does, or omits, in conducting the master's business, because the master has voluntarily substituted for his personal management and supervision that of the servant. But the law also recognizes that the servant is still an independent and responsible being, with capacity, which the master cannot effect or control, to engage in projects of his own, and does not include in the responsibility laid upon the master liability for those acts of the servant which are but the exercise of his freedom about his own affairs. The fact that the servant, in pursuing his own business or pleasure, neglects, also, to perform some duty which rests upon the master may make the master responsible, if injury fall upon another as the consequence of that neglect; but that is a very different proposition from that maintained by plaintiffs, asserting liability for an injury resulting, not from the mere neglect, but from the positive personal wrong, of the servant. *Galveston, H. & S. A. Ry. Co. v. Currie* [100 Tex. 136, 96 S. W. 1073], 10 L. R. A. (N. S.) 367."

That principle is announced in many other cases. Mr. Labatt, in applying this rule to cases where a servant is injured by the assault of one of his superiors, has this to say:

"No liability, of course, can be imputed to the master in respect of an assault which had no relation whatever to the normal functions of the superior servant." 4 Labatt on Master & Servant, § 1466.

*Sullivan v. L. & N. R. Co.*, 115 Ky. 447, 74 S. W. 171, 103 Am. St. Rep. 330, was a case where the company's switching crew placed a torpedo on the track as a prank and to frighten an engineer and fireman as their locomotive passed over, and the court denied liability for the injury inflicted by the explosion, on the ground that the act of the foreman was not within the actual or apparent scope of his authority. In disposing of the case, the court said:

"The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead and for him. Obviously, if the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by the master with the authority to act in his stead in a given matter, the servant's action, or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of authority to support it. But where the servant steps aside from his employment and assumes to act, and does act, solely on his own account, in a matter which the master has no more connection with

than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it."

In the case of *Crelly v. M. & K. Telephone Co.*, 84 Kan. 19, 113 Pac. 386, 33 L. R. A. (N. S.) 328, the plaintiff was a telephone operator; and when she was about to quit the service of the company she was assaulted by the manager because she refused to sign a voucher for the amount due her for services. The court held that the company was not liable for the reason that the act was not done within the actual or apparent scope of the manager's authority, but solely for his own purposes or in accordance with the promptings of his own impulses.

The Supreme Court of Alabama, in a suit by a servant to recover damages for personal injuries received on account of the act of the superintendent, held that there was no liability, the facts being that the superintendent, in a spirit of fun, punched or pushed the employé, and by reason of such act on the part of the superintendent, the employé, who was very ticklish or nervous, threw his hand into a machine that was in operation. The court said:

"That, if Cunningham [the superintendent] was guilty of any negligence in the premises, it lay in this extraneous act the evidence shows beyond controversy. That this was not an act of superintendence we are entirely clear. That a negligent act, although committed by one intrusted with superintendence by the common employer, and while in the exercise of such superintendence, is not an act for which the employer is responsible when it is not an act of superintendence under the statute is clear upon reason, and is settled by the authorities." *Western Railway v. Milligan*, 135 Ala. 205, 33 South. 438, 93 Am. St. Rep. 31.

It therefore appears to us to be quite clear that, according to the undisputed evidence in this case, viewing it as reflected by plaintiff's own statement of the case, there is no liability on the part of the defendant for the wrongful act of its servants. The act was not within the actual nor apparent scope of the servant's authority, and did not constitute a violation, within the meaning of the law, of the master's duty to furnish a safe place to his servant.

The judgment is reversed, and the cause dismissed.

# ST. LOUIS, I. M. & S. RY. CO. v. SHARP. (No. 239.)

(Supreme Court of Arkansas. Nov. 16, 1914)

## 1. MASTER AND SERVANT (§ 256\*)—DEATH OF SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

Where decedent, a car repairer, was killed while making repairs on a freight car then being used in transporting interstate commerce, but temporarily on a siding to be repaired, and while plaintiff in her complaint did not expressly declare on the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), and did not allege that decedent was working on a car used in interstate commerce at the time of his death,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such fact was pleaded in the answer, and the case was tried under that statute, the rights of the parties must be determined in accordance therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.\*]

**2. MASTER AND SERVANT (§ 281\*)—DEATH OF SERVANT—CAR LABORERS—SAFETY RULE.**

In an action for death of a railroad car laborer, while engaged in repairing certain of its underneath appliances, by the car being struck by another car negligently pushed against it on the same track, evidence held to show an habitual disregard of the blue flag rule intended to protect car repairers, with the knowledge and acquiescence of those whose duty it was to enforce it and to report infractions of the rule, amounting to an abrogation thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

**3. MASTER AND SERVANT (§ 144\*)—DEATH OF SERVANT—RAILROADS—SAFETY RULE—ABROGATION.**

In order to constitute an abrogation of a rule promulgated by a railroad company for the safety of car repairers, acquiescence on the part of the railroad company, either in express terms or by silence after knowledge of habitual violation, must be shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. § 144.\*]

**4. MASTER AND SERVANT (§ 243\*)—DEATH OF SERVANT—RAILROAD CAR REPAIRERS—CONTRIBUTORY NEGLIGENCE—BLUE FLAG RULE—FAILURE TO COMPLY—ABROGATION.**

Where a blue flag rule adopted by a railroad company for the protection of car repairers had been abrogated by long disuse, to the knowledge of the railroad's superior servants, whose duty it was to enforce it, failure of a car repairer to comply with the rule by displaying flags at either end of the car on which he was working at the time it was struck by another car and he was killed did not constitute contributory negligence, so as to relieve the master from liability for his death resulting from the negligence of a switching crew in pushing another car against the one on which decedent was working, with knowledge that he was in a dangerous position under such car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.\*]

**5. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

Where a car repairer was killed under a car being used in interstate commerce, which he was repairing without protecting it by blue flags, as required by a rule of the company, an instruction that, notwithstanding the company had such a rule, still if it had been openly, continuously, and habitually disregarded for a number of years by defendant's employes to such an extent, down to the time of the injury, as to justify the belief that it had been abrogated by defendant, or its nonobservance acquiesced in, then decedent's failure to obey the rule would not of itself prevent a recovery, provided its nonobservance was known to defendant or had continued for such a long period as to justify a belief that defendant must have known or acquiesced therein, etc., was proper, under the federal Employers' Liability Act, providing that contributory negligence shall not be a defense, nor was the instruction objectionable as on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

**6. DEATH (§ 99\*)—DAMAGES—EXCESSIVENESS.**

In an action for death of a railroad car repairer earning 22½ cents an hour at the time, 35 years of age, healthy, industrious, and moral, by reason of the negligence of defendant's servants, a verdict awarding \$3,000 in favor of his estate and \$12,000 for the benefit of his widow and children held not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

Appeal from Circuit Court, Marion County; Geo. W. Reed, Judge.

Action by Clara Sharp, as administratrix of the estate of W. N. Sharp, deceased, against the St. Louis, Iron Mountain & Southern Railway, Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Decedent was a car repairer about 35 years old. At the time of his death he was a big, stout, healthy man, industrious and moral, and received 22½ cents an hour. He left a widow and two children, and administratrix recovered \$3,000 in favor of the estate and \$12,000 for the widow and children.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and McCaleb & Reeder, of Batesville, for appellant. Jones & Seawell, of Yellville, and Hamlin & Seawell, of Springfield, for appellee.

McCULLOCH, C. J. Plaintiff's intestate, W. N. Sharp, worked for defendant railroad company in the yards at Newport, Ark., as car inspector and repairer, and, while in the discharge of his duties, received personal injuries, from which death resulted on the following day. He was survived by his widow and two children, and this action was instituted by the widow, as administratrix of the estate, to recover damages resulting from decedent's injury and death. Sharp was working underneath a freight car, repairing an air pipe, called the train line, when a car kicked in on the same track by the switch crew ran against the car underneath which he was working and caused it to run over him and cut off one of his legs. The car which he was repairing was one used at the time in interstate commerce. It was consigned at Kansas City, Mo., to Tuckerman, Ark., and, when it arrived at Newport on the day before Sharp's injury, the defect was discovered, and it was left out of the train for repairs. Sharp and a fellow worker, named Ellen, composed the day shift of the car repairers who worked under a foreman; and, on the day the car was left at Newport, they did some work on it. That was Saturday afternoon, and the next morning, Sunday, the car was shifted to another position, and Sharp and his companion resumed their labors, when the injury occurred.

[1] The plaintiff does not, in her complaint, expressly declare upon the federal statute known as the "Employers' Liability Act." Nor does the complaint even contain an allegation that Sharp was engaged in work on

a car used in interstate commerce; but that fact is set forth in the answer, and the case was tried under the terms of that statute. The rights of the parties must therefore be determined by the terms of the federal statute. The plaintiff asked recovery in one count for the benefit of the estate, and the other for the benefit of the next of kin. But, under the terms of the federal statute, the recovery on both elements of damages must be for the benefit of the widow and next of kin, and can in this case be so treated. *St. Louis & S. F. Rd. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93.

[2] The alleged act of negligence relied on for recovery in the case is that of the members of the switch crew, who, it is charged, with knowledge that Sharp and his companion were at work there, negligently kicked the car in on the track and against the car beneath which they were at work. The contention of the defendant, on the other hand, is that there was a rule of the company requiring the car repairers to protect themselves by the use of blue flags which gave warning of their presence under cars; that deceased violated the rule by failure to put out flags; and that his own act of negligence was the sole cause of his injury. Plaintiff met this contention by attempting to prove that there was a uniform and habitual violation of the rule, within the knowledge of the officers and servants of the company whose duty it was to enforce it, which amounted to a total abrogation of the rule; that the customary method of work in the yards at Newport was that, when a car was placed in position or spotted on the side track for repairs, the members of the switch crew must refrain from running cars on the track until they receive notice that the repairs had been completed; and that in this instance the switch crew knew that this car had been placed there for repairs, but, without notice, kicked the car in on the side track against this car. The defendant established by proof the fact that it had promulgated a rule that "a blue flag by day and a blue light by night, at one or both ends of an engine, car, or train, indicates that workmen are under or about it," and that "workmen will display blue signals, and the same workmen are alone authorized to remove them." It was proved, also, that Sharp, when he took service with the company, about a year before his injury and death, signed a statement acknowledging receipt of a copy of the rule. The defendant also adduced testimony of numerous witnesses to the effect that the rule had never been disregarded or abrogated, and that the constant effort of the company was to enforce it. The plaintiff adduced testimony of numerous witnesses, men who worked in the yards at Newport, to the effect that this rule was always disregarded, and that the foremen of the car repairers, when frequently importuned to furnish the flags, expressly refused

to do so and instructed the repairers to disregard it. There were two switch crews—a day shift and a night shift—in charge of a foreman, and also two repair crews or shifts working under another foreman; and it was proved by affirmative testimony that the foreman of each of these crews knew of this habitual disregard of the rule and acquiesced in it, the proof being that some of them expressly declined to regard the rule and gave directions to the workmen to disregard it.

We think the testimony on the part of the plaintiff was sufficient to establish such an habitual disregard of the rule, with the knowledge and acquiescence of those whose duty it was to enforce it, or to report infractions of the rule, to amount to an abrogation of the rule. It is true the defendant introduced proof by uncontradicted testimony that a division master mechanic of the company visited Newport about six months before Sharp's injury for the purpose of giving instructions to the men upon the rules of safety, and impressed upon them the duty of observing this rule concerning the use of the flags by car repairers; but we do not understand the law to be that this absolved the company from the consequences of acquiescence, in other respects, in the general and habitual violation of the rule. The proof is sufficient to establish the abrogation of the rule within the period subsequent to the visit of the master mechanic. We do not mean to hold that the employes may establish a rule or custom for themselves, or abrogate a rule promulgated by the employer, over the protest of the employer; but we think the proof in this case is sufficient to show an acquiescence on the part of the employer.

[3] In order to constitute an abrogation of the rule, there must be acquiescence on the part of the employer, either in express terms or by silence after knowledge of habitual violation of the rule. The law on this subject has been fully discussed in other cases. *St. L., I. M. & S. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749; *St. L., I. M. & S. Ry. Co. v. Dupree*, 84 Ark. 377, 105 S. W. 878, 120 Am. St. Rep. 74; *St. L., I. M. & S. Ry. Co. v. Wirbel*, 108 Ark. 437, 158 S. W. 118.

In the *Caraway Case*, supra, we quoted with approval the following statement of the law from Mr. Labatt:

"A custom in violation of a rule, known and acquiesced in by the employer or his representatives, amounts to an abandonment of the rule, to the extent to which the custom infringes the rule. \* \* \* In other words, evidence that the rule in question was habitually violated to the knowledge of the employer is admissible for the purpose of repelling the inference which would otherwise be drawn, as a matter of law, when the violation is proved." 1 Labatt, § 232.

In the same case we said that:

"Knowledge of the company may be inferred from the notoriety of the habitual custom of the employes in disregarding the rule."

The *Dupree Case*, supra, was identical with this one in that it was a suit by a car re-

pairst on account of injuries received, and the company proved a rule the same as in this case, and the plaintiff undertook to show an abrogation of the rule. Following the law as stated in the Caraway Case, we said that:

"Where such rule is habitually violated, and such violation is known to or acquiesced in by the master, so that it amounts to an abandonment of the rule, then evidence of such habitual violation is admissible for the purpose of repelling the inference which would otherwise be drawn from the existence of the rule itself."

In another case (*El Dorado & Bastrop Railroad Co. v. Whatley*, 88 Ark. 20, 114 S. W. 234, 129 Am. St. Rep. 93), we cited with approval the following statement of the law by the Supreme Court of Alabama:

"Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent"—citing authorities. *Warden v. L. & N. R. Co.*, 94 Ala. 277, 10 South. 276, 14 L. R. A. 552.

The doctrine thus announced by the Alabama court has no application here, for it cannot be said, as a matter of law, that it is obviously dangerous for a repairer to go underneath a car without putting out danger signals, where, according to the custom among the workmen, he has reason to assume that he will be protected. Now, the proof in this case is: That the car was shifted to the place where Sharp was injured by the same switch crew that afterwards kicked the car in on this track. That a member of the switch crew had a conversation with Sharp a short while before he started to work on the car, in which conversation mention was made of the fact that work on the car was about to be done by Sharp and his coworker. And the jury had a right to find from the evidence that the members of the switch crew knew that Sharp and his companion were at work on the car at the time they kicked cars in on this side track. If that was true, and the rule requiring use of flags had been abrogated, it constituted an act of negligence on the part of the switch crew which rendered the company liable.

[4] We are not laying down the law to be that employes have the right to establish rules for the employer, or contrary to his directions; but we do say that where the testimony, as in this case, is sufficient to show an abrogation of the rule, it warrants the jury in finding that the employé was not guilty of negligence in failing to display flags, and that other employes, who knew, or had reason to believe, that he was under

the car, were guilty of an act of negligence which rendered the employer liable, under the doctrine of respondeat superior.

[5] The instructions given by the court at the request of the plaintiff are not in conflict with the views here expressed, and we think correctly submitted the issues to the jury. Timely objections were made by the defendant to each of the instructions given at the plaintiff's request, and exceptions were duly saved; but we deem it unnecessary to discuss those instructions in detail or to set them out, except one, which reads as follows:

"(2) Although you may find from the evidence that, at the time of the injury to W. N. Sharp, the defendant had in force a rule requiring its employes to display a blue flag or flags while performing work in its yards, still if you find from the evidence that for a number of years this rule had been openly, continuously, and habitually disregarded by the employes of defendant for such period and for such an extent during said time down to the date of said injury as to lead to and justify the belief that the rule had been abrogated by the company, or its nonobservance acquiesced in, then the failure to obey said rule by the said W. N. Sharp will not of itself prevent a recovery, provided that you find that the nonobservance of the rule was known to the defendant, or was for a long period and of so frequent occurrence as to cause you to believe that defendant must have known or acquiesced in its nonobservance; and in determining whether or not the rule has been abrogated, or its nonobservance acquiesced in by the company, you may take into consideration the period of time, the extent of openness with which the rule had been violated by the employes of the defendant, if you find from the evidence that the rule had been violated."

It will be noted that this instruction relates to the rule of the company, the alleged abrogation of it, and its effect upon the question of Sharp's contributory negligence. It is earnestly insisted that the language used amounts to an instruction upon the weight of the evidence, and tells the jury in effect that the act of Sharp in doing his work contrary to the rule did not constitute contributory negligence. We do not think the instruction is open to that objection, for the obvious purpose of the court, in giving this instruction, was to tell the jury that if the rule had been abrogated, with the knowledge and acquiescence of the company, its nonobservance by Sharp would not, as a matter of law, constitute contributory negligence. Other instructions, which submit the question of contributory negligence, make this view of it plain; and, if it was thought that any other construction would be placed upon it, there should have been a special objection. The instruction, however, based upon the terms of the federal statute, which controls in this case, was not technically incorrect, for under that statute contributory negligence does not bar a recovery, whether it be a violation of the rules or some other act of negligence. The statute provides that in such cases "the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages

shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." It will be observed that this instruction does not attempt to lay down any basis for measuring the negligence of the company or its other servants, but merely declares that the nonobservance of the rule will not of itself bar a recovery, provided the jury found that the rule had been abrogated. Notwithstanding the abrogation of the rule, it was a question for the jury to determine whether or not, under the particular circumstances, Sharp was guilty of contributory negligence; but this instruction does not take away from the jury the right to consider the conduct of Sharp for that purpose, and merely declares that the nonobservance of the rule will not of itself bar a recovery. We think that the instruction was technically correct, under the law as declared in the federal statute, and that there was no error in giving it.

The question of assumed risk is not, we think, involved in this case, since the jury has found that the rule promulgated by the company had been abrogated.

[6] There are other questions raised which we do not think of sufficient importance to discuss. It is urged that the verdict is excessive, but we think the testimony is abundant to sustain the amount of damages assessed by the jury.

The judgment is therefore affirmed.

# FT. SMITH LUMBER CO. v. SHACKLEFORD. (No. 240.)

(Supreme Court of Arkansas. Nov. 16, 1914.)

## 1. CORPORATIONS (§ 668\*)—ACTIONS—SERVICE OF PROCESS—STATUTORY PROVISIONS—"BRANCH OFFICE"—"OTHER PLACE OF BUSINESS."

Acts 1909, p. 293, providing that any corporation, which keeps or maintains in any of the counties a "branch office or other place of business," shall be subject to suits in any of the counties where it so keeps or maintains such office or place of business, and service on the agent in charge of the office or place of business is sufficient, provides a cumulative method of service in aid of the law declaring that service may be had on a corporation in the county where it is situated, or where it has its principal office or place of business, separate from the county in which the corporation is situated, or in the county where its chief officer resides, and the term "branch office" indicates the maintenance of an office tributary to the principal office, and designates a place maintained in a county where business is transacted similar to that where the principal office is situated, and the term "other place of business" refers to a place where the corporation is conducting a settled or established business, and designates a place where an established business is carried on regardless of whether the corporation has its principal or branch office situated there or not, and the agent in charge of a "branch office" must be one having authority to carry on the general business of the corporation, while an agent in charge of an "other place of business" may be limited and special and confined to the

particular business over which he has supervision.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

## 2. CORPORATIONS (§ 668\*)—ACTIONS—SERVICE OF PROCESS—STATUTORY PROVISIONS—"OTHER PLACE OF BUSINESS."

The agent of a lumber company in charge of its commissary store having on hand about \$4,000 worth of goods, situated in a county where it is engaged in logging, and where it maintains 70 or 80 portable houses and has employes earning about \$200 a week, is an agent in charge of an "other place of business" of the corporation, within Acts 1909, p. 293, so that service of process on him is sufficient, in an action against the corporation having its home office in another county.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

## 3. MASTER AND SERVANT (§ 277\*)—INJURY TO SERVANT—EXISTENCE OF RELATION OF MASTER AND SERVANT—EVIDENCE.

In an action for personal injuries, evidence held to sustain a finding that plaintiff was, at the time of the accident, an employé of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.\*]

## 4. MASTER AND SERVANT (§§ 286, 289\*)—INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a brakeman while between cars of a lumber company, evidence held to require submission to the jury of the issues of negligence and contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.\*]

## 5. WITNESSES (§ 389\*)—IMPEACHMENT—PROOF OF CONTRADICTION STATEMENTS.

Where, in an action for personal injuries, the issue was whether plaintiff was in the employ of defendant, a lumber company, or in the employ of a railroad company, and the secretary and manager of the lumber company testified that plaintiff, at the date of the accident, was in the employ of the railroad company operating trains over the road of the lumber company, and denied stating to a third person that the road was operated by the lumber company, the testimony of the third person, to the effect that the secretary and manager had so stated to him, was admissible as impeaching testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243-1245; Dec. Dig. § 389.\*]

## 6. WITNESSES (§ 268\*)—CROSS-EXAMINATION.

Where, in an action for injuries to a brakeman caught between cars in a train, the issue was whether plaintiff was in the employ of defendant, a lumber company, or in the employ of a railroad company, and the secretary and manager of the lumber company testified on direct examination that, at the time of the accident, the engines and track were operated by the railroad company, and that a sale thereof was not made to the lumber company until after the accident, and stated on cross-examination the amounts paid for the rails and locomotives, and also testified as to the assessment of the property of the lumber company for the year before the purchase and for the year of the purchase, a further cross-examination, relating to the assessments, and showing that the assessment for the year of the alleged purchase was only \$2,000 more than for the year preceding, was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

**7. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.**

Where an officer of a corporation, a defendant in an action, did not admit that he had filed or was responsible for an answer filed in a former action, but asserted that he did not remember that the answer was filed, and no attempt was made to controvert his testimony by exhibiting the answer, the corporation was not prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

**8. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.**

It is not error to refuse a requested charge sufficiently covered by the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**9. MASTER AND SERVANT (§ 141\*)—INJURY TO SERVANT—OBLIGATION OF MASTER.**

It is the duty of a master to make rules for the protection of his servants and to make those rules known to the servants, and there is no affirmative duty devolving on a servant to ascertain what the master's rules are.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.\*]

**10. TRIAL (§ 133\*)—IMPROPER REMARKS OF COUNSEL—CURING BY INSTRUCTIONS.**

The error in permitting improper remarks of counsel of the successful party is cured by instructions of the court not to consider the same and by the remarks of counsel himself in disclaiming any intention to discuss facts not disclosed in the record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

Appeal from Circuit Court, Perry County; Robt. J. Lea, Judge.

Action by Charles Shackelford against the Ft. Smith Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. L. Fitzhugh and Jas. B. McDonough, both of Ft. Smith, for appellant. Jones & Owens and Frank Pace, all of Little Rock, for appellee.

WOOD, J. Plaintiff filed a complaint against the Ft. Smith Lumber Company and the Central Railway Company of Arkansas in the Perry circuit court. Summons was issued and alleged to have been served upon each of the defendants in Perry county. The defendants appeared specially and moved to suppress the service. The court sustained the motion as to the Central Railway Company, but overruled same as to the Ft. Smith Lumber Company. The Ft. Smith Lumber Company, appellant here, excepted to the ruling of the court and reserved the issue as to the service in its answer. The cause was tried before a jury, and the verdict and judgment were in favor of the appellee in the sum of \$12,000, and this appeal has been duly prosecuted.

First. The appellant contends that there was no service. The return of the officer is as follows:

"I have this 8th day of January, 1914, duly served the within upon the Ft. Smith Lumber Company by delivering a copy of same to L. G. Elliott in Perry county, Ark., agent of the Ft. Smith Lumber Company, and in charge of its office and store and place of business in Perry county, Ark."

L. G. Elliott testified that he had been in charge of a commissary for the appellant since July, 1913, selling goods for the appellant. The goods were bought from the main office upon requisition from witness. He got a merchandise car once a week. The commissary was situated in two box movable cars about 50 feet long each. The cars were on a siding. Witness was clerk or salesman for the appellant. He had no office. Witness had been in the employ of the company since August, 1912, and they were running the commissary at that time. Before witness took charge of the commissary, he was the timekeeper, and his office, as timekeeper, was in the commissary. Appellant built an addition to the commissary, which is the office of the timekeeper; it is built onto the commissary cars. Appellant kept a general line of goods in the commissary, that would invoice on an average about \$4,000. Witness made daily reports to the general office or headquarters at Plainview, in Yell county, of the amount of business done. Witness reported to the timekeeper, turned over his cash and coupons to the timekeeper at night, and the timekeeper sent in the reports to the general office. The only report witness made in person to the company was a requisition for goods. As the company proceeded with its logging road into the forest, it followed it up with its camps and commissary. Witness had shipped out some cars of lumber for one J. Q. Allen, charging him \$10 per car. The money was received for the appellant. There were some oak logs shipped out in the latter part of the winter of 1913. Witness was told from the Plainview office to collect the charges for the shipment. He did so and entered it upon the books in favor of the Ft. Smith Lumber Company. Witness reported this transaction, in connection with the commissary, to the appellant company. Witness was promoted from timekeeper to manager of the store. Witness had general charge of the store. The timekeeper keeps the books. When witness was promoted to manager, the timekeeper became his bookkeeper; that is, he was the bookkeeper for the store or commissary, but was employed by the appellant. He reported to the Plainview office what witness reported to him to send to the company. Witness further stated that, in case the timekeeper was not there, he issued coupon books and attended to the business for him. Witness usually did all the clerking himself in the store, but sometimes the timekeeper would wait on customers. Witness did not sign the reports that he made to the timekeeper to be sent to the company. These

were signed by the timekeeper himself. Witness at one time had another party working for him in the store. Witness was responsible to the company for the management of the store. He was responsible to the company for the cash that he collected for goods sold until he turned it over to the timekeeper. The office that was built for the timekeeper was fastened to the commissary cars in such a way that it would have to be torn down before the cars could be moved. Witness' name appeared on the coupon books that were issued by him. The timekeeper's name appeared on the coupon books issued by him. The clerk that was at work for witness in the commissary was sent out from the office at Plainview.

It was shown that appellant had only one logging camp in Perry county, the one at Aplin. It consisted of something like 70 or 80 portable houses. The man in charge of the logging department had control over the employes of that department. The pay roll of the camp at Aplin was about \$200 a week. Those in the logging department made their reports to the timekeeper, and he sent these reports in to the main office.

[1, 2] Act 98 of the Acts of 1909, p. 233, provides as follows:

"Section 1. That from and after the passage of this act any and all foreign and domestic corporations who keep or maintain in any of the counties of this state a branch office or other place of business, shall be subject to suits in any of \* \* \* said counties where said corporation so keeps or maintains such office or place of business, and that service \* \* \* upon the agent, servant or employe in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this state held in the counties where said service of summons \* \* \* is had," etc.

Section 2 provides that the service provided for in the act would not repeal any other statute regulating service upon corporations in the state, but should be construed as cumulative and "in aid of the laws of the state now in force."

Prior to the passage of the act of 1909, service could be had upon a domestic corporation, like appellant, in the county where it was situated, or where it had its principal office or place of business (where these were separate from the county in which the corporation was situated), or in the county where its chief officer resided. The act of 1909 provides an additional and cumulative method of service "in aid of" the above method.

Considering the acts in pari materia, it is clear that the intention of the Legislature was to simplify the proceedings and to facilitate, in the most practical way, the obtaining of service on corporations.

The words "branch office" and "other place of business" are not synonymous, as contended by the learned counsel for appellant. The word "other" distinguishes the

term "place of business" from the term "branch office," and shows that the Legislature intended that wherever the corporation maintained a "place of business," whether they had or did not have also an office at the same place, service could be had upon the corporation by service upon the employe in charge of the business at that place.

In *Revere Rubber Co. v. Genesee Valley Blue Stone Co.*, 20 App. Div. 166, 46 N. Y. Supp. 989, it is said:

"The term 'office of a corporation' means its principal office within the state, or principal place of business within the state, if it has no principal office therein."

The word "branch," qualifying the word "office," in the statute under consideration, indicates that the office maintained was to be tributary to the principal office. See *Webster's Dictionary*, "branch." So, in the sense of the statute, the term "branch office" is used to designate a place maintained in the county where business is transacted similar to that where the principal office is situated.

The term "other place of business" refers to a place where the corporation is conducting a settled or established business. The term "branch office" refers to a place where the company may conduct its general business in the same way that it carries on its business at its principal office. But the term "other place of business" designates a place where an established business of the company is carried on regardless of whether the company has its principal or branch office situated there or not. The agent, servant, or employe in charge of a branch office, under the statute, must be one having authority to carry on the general business of the company. But not so as to the agent, servant, or employe in charge of the "other place of business." His authority may be only limited and special and confined to the particular business over which he has supervision. To be sure, the statute contemplates that there must be maintained a place where a well-defined line of business is carried on with an agent in charge of that business. Elliott was such an agent. He had charge of the business where the company maintained a place for conducting its commissary or store business. It was a settled business, so long as the company should be engaged in logging at Aplin in Perry county. The number of houses maintained at the company's camp, the number of employes, the amount of its pay roll, the extent of the stock of goods kept in its commissary, and the timekeeper's office in connection therewith, all indicate that the company was maintaining a place of business from which it was conducting a well-defined line of business, to wit, the sale of general merchandise, in connection also with its logging business. Elliott was the manager of this mercantile business. An agent competent to conduct such a business could be depended upon with reasonable certainty to apprise the corporation of the

service had upon him. It was the design of the Legislature that service could be had upon an agent of this character, and that, when so obtained, it should constitute service upon the corporation itself. The court, therefore, did not err in overruling appellant's motion to suppress the service.

Second. The complaint alleged that the appellee was in the employ of the appellant as brakeman on the 4th of September, 1912; that, while engaged in the discharge of his duty as brakeman, it was necessary for him to go between the standing cars and to use his foot to properly place the drawbars; that, while thus engaged, "the engineer on said train carelessly and negligently, without any warning whatsoever, backed its engine and cars down upon plaintiff, crushing his leg," etc. The appellant denied that the appellee was in the employ of appellant, and denied the allegations of negligence, and set up the defenses of assumed risk and contributory negligence.

Appellant contends that the court erred in not directing a verdict in its favor, for two reasons: (1) Because the evidence did not show that appellee was in the employ of the appellant at the time of his injury; and (2) that there was no proof of negligence.

[3] (a) The appellee testified that he was in the employ of the Ft. Smith Lumber Company on the 4th day of September, 1912, the day he was injured, working as a brakeman; that he was employed by one Covington, who was supposed to be the manager of the woods department of the appellant, in Perry county. Appellant paid him twice a month for his services. The checks on which he drew the cash at the store were signed for the appellant. Appellee never received checks from the Central Railway Company. The testimony of another witness also was to the effect that appellant "paid the men that operated the train over that road."

The above testimony was sufficient to warrant a finding that appellee was in the employ of appellant.

[4] (b) The testimony tended to show that the train crew was making up a train of logs, and, while engaged in doing this, it became necessary to couple a car onto the train. It was appellee's duty to make this coupling. One Cooper was engineer. Appellee testified, so far as it is necessary to set it out, on this issue as follows:

"Cooper approached something like right there about the same time I was. I was flagging him down. He stopped eight or ten feet from the car. I saw the drawbar would not couple like they should, is the reason I flagged him down. He stopped. I don't know whether he saw me or not, but I know he stopped. There is a loose motion in the drawbars. One opens this way and other that way. You have got to get them both in line before you can couple them. I grabbed the grabiron on the side of this car. He could see me all the time if he had been looking. I never went between the cars, because there were logs sticking out over the car, and I had to either walk around that log or crawl under it and lift this drawbar. It was

just as easy or convenient. There was not any danger to do it. That is the way I always look at it. If the train was standing still, I put my foot up there and push it over. I had hold of this grabiron and pushed this drawbar over with my foot. It sprung back, and I pushed it over again. The engine came back. The logs came together before the knuckles did, and tilted the car sideways, and the logs slipped back and came together enough to press my foot. It was the duty of the engineer to hold the train until he got a signal from me to move it back. I gave the engineer a stop signal only, gave him a back-up signal, and after that I flagged him down, and he stopped. I didn't give him any signal between that time and the time I got hurt."

Appellee further testified, in response to questions, that he gave the engineer a stop signal, and that, in response to that signal, the engineer stopped the train; that, up to the time appellee was hurt, he had not given the engineer any signal to back up.

There was other testimony to the effect that the engineer stopped the train.

The engineer testified to the effect that no signal was given him and that he did not stop the train from the time it left the switch until it coupled onto the car where appellee was injured; that he was going very slow. He was looking back towards the appellee, and saw him all the time until the car struck. He did not stop the cars before they struck, and got no signal from appellee to stop. If he did, he did not see it. He further testified that it was the duty of the appellee, under the rules of the company, when it became necessary to line up the drawbars, to flag down the train and cause it to come to a stop. He states that he was looking at the appellee until the cars bumped together, and that appellee was motioning him all the time, and that he was backing up in response to the signal of the appellee, but that the appellee did not signal him to stop at all.

The engineer was corroborated by Dr. Ballinger, who was on the engine at the time of the injury, to the effect that the engineer did not receive any signal from the appellee to stop the train, and that he did not stop the train before the cars came together. Another witness also testified that the train did not stop.

On the other hand, the fireman, who was on the engine at the time, corroborated the testimony of the appellee to the effect that the train came to a stop. The fireman did not see the appellee give the engineer the signal to stop, but was positive in his testimony that the train did stop.

Under the above testimony, the issues of negligence and contributory negligence were for the jury. There was a rule of the company to the effect that, in coupling cars, employes could not use their feet to push drawheads in line, but it would be a question for the jury as to whether an employe would be guilty of contributory negligence where he had caused the engine to come to a full stop before undertaking to align the draw-

heads with his foot. The jury might have found from the above testimony that the appellee, before he undertook to adjust the drawheads with his foot, signaled the engineer to stop the train; that the engineer, in obedience to this signal, did stop the train; and that the engineer saw the appellee go between the cars, and that he caused the train to start and back up upon the appellee before he had received any signal to do so, after bringing his engine to a full stop. The issues as to negligence and contributory negligence were therefore issues of fact and not of law.

[5] Third. On the issue as to whether or not appellee was in the employ of the appellant at the time he was injured, one C. W. Jones testified that he was the secretary and general manager of the appellant at that time, and that the appellee, on the 4th day of September, 1912 (the date of his injury), was in the employ of the Central Railway Company; that such company was operating the trains over the road of the Ft. Smith Lumber Company. The witness was asked whether or not he had, during the years 1912 and 1913, shipped stuff over his logging road for one John Q. Allen, and answered in the affirmative. He was asked this question:

"Q. Didn't you, in making an explanation to him as to why you charged him \$10 a car, tell him that you had to do it because that road was being operated by the Ft. Smith Lumber Company, and for that reason you had to charge him \$10 a car?"

—and answered, "No."

In rebuttal the appellee, over the objection of the appellant, asked witness John Q. Allen whether or not, during the years 1910, 1911, 1912, and 1913, he had shipped out stuff over the road of the Ft. Smith Lumber Company. He answered:

"Yes, I shipped lumber and staves and logs over their road."

The record then shows the following:

"Q. I will ask you if Mr. Jones told you, in making you a rate from the place where you loaded your stuff, that the logging road was being operated by the Ft. Smith Lumber Company, and for that reason he would have to charge you \$10 a car? Ans. The first hauling he did for me was from Nimrod, about six miles from where it is now. My recollection is he charged me \$7.50 a car from there; then I paid the rate over the Central of Arkansas extra. Q. Did he, in connection with that, tell you that this road was being operated by the Ft. Smith Lumber Company? Ans. Yes, I asked him what made him make two rates. He said one of them belonged to the Ft. Smith Lumber Company and one belonged to the other. Q. That was the logging road, and then the Central Railway Company of Arkansas upon the other road? Ans. Yes, he said it was two roads."

This testimony was competent. It tended to impeach the testimony of the witness Jones by showing that he had made contradictory statements, and by showing that he had made admissions which tended to prove that, at the time appellee received his injury, he was in the employ of the appellant instead of the Central Railway Company,

which admissions were in direct conflict with the testimony of Jones given at the trial.

[6] Fourth. The witness Jones, having testified on behalf of appellant that, at the time of appellee's injury, the engines and track were operated by the Central Railway Company, and that the sale of these was not made to the appellant until January or February, 1913, was asked, on cross-examination, what the appellant acquired from the Central Railway Company when appellant bought, and answered that the appellant bought the rails and locomotives. Witness was then asked what appellant gave for the rails, and testified, "Probably \$20,000 or \$25,000." Witness was then asked how much appellant gave for the engines, and answered, "Between \$12,000 and \$15,000;" that the appellant paid the Central Railway Company about \$40,000 for the rails and engines it purchased from it in February, 1913. Witness then testified, in answer to questions, that he assessed the property of appellant for the years 1912 and 1913. He was then handed assessment lists for 1912 and 1913, and, over the objection of appellant, was allowed to read the same. The assessment of appellant's tramroad for the year 1912 totaled the sum of \$31,725. The assessment of appellant's property, as shown by the list for 1913, which witness testified included the engines and steel, was \$33,510. Witness was then asked the following question:

"Will you explain to the jury why, in 1912, when this sale had not been made, you have an assessment there of \$31,725, and in 1913 you claim they bought the steel that was worth \$25,000 and the engines worth \$15,000, making about \$40,000, and your assessment for 1913 is only \$2,000 more than it was for the year 1912?"

Upon objection being made, the court announced that the testimony was only competent for the purpose of tending to show whose property it was at the time of the injury, and that he would admit the testimony with that explanation. The question was then repeated to the witness, and he stated that in 1912 the assessment was turned in to the tax commission for the engines and rails, and that the amount was turned in as the assessment for all of it; that he did not remember the exact valuation. The question was again repeated, and the witness was asked if he had any further explanation to offer, and answered, "Nothing further." The testimony was responsive to the examination in chief, and the questions were legitimate cross-examination, and the testimony adduced was competent and proper and should have gone to the jury for what it was worth as pertinent to the issue of who owned and operated the engines and cars at the time appellee was injured. The court expressly told the jury that the testimony was admitted only for the purpose of throwing light on that issue. The testimony was proper to be considered by the jury in determining the credibility of the witness Jones, taking into consideration the whole of his testimony.

[7] Fifth. The appellee, over the objection of appellant, endeavored to show by the witness Jones that, when a suit was pending in Yell county by the appellee against the appellant and the Central Railway Company jointly, he, as the secretary and manager of both companies, filed an answer for them in which he admitted that appellee was in the employ of appellant, and denied that he was in the employ of the Central Railway Company. The witness stated that the answer that was filed was filed by the attorneys. He stated that he did not remember what was in the answer; that there was an answer filed, but that he did not remember about the answer being as counsel for appellee stated. No prejudice resulted to appellant from the examination of this witness. The witness nowhere admitted that he filed or was responsible for the allegations of the answer in the former suit pending in Yell county, and he stated that he did not remember that the answer that was filed was as stated by the attorney for appellee. After this examination of the witness, no attempt was made by the appellee to controvert the testimony by exhibiting the answer filed in the former suit. Therefore no possible prejudice could have resulted to appellant from this endeavor on the part of counsel for the appellee to impeach the witness.

[8] Sixth. The instructions given at the instance of the appellee and the appellant fully and correctly covered the issues of negligence, contributory negligence, and assumed risk. These instructions followed closely the principles of law governing such cases, as they have been repeatedly announced by this court. No useful purpose, therefore, could be subserved by considering them in detail, and to do so would unnecessarily lengthen this opinion.

Such of the rejected prayers of the appellant as were correct, the court fully covered by the instructions which it gave both at the instance of the appellant and the appellee. For instance, appellant insists that the court erred in refusing its prayer No. 5, in which the appellant requested the court to tell the jury that, if the plaintiff was guilty of any want of care whereby he unnecessarily exposed himself to danger in attempting to make the coupling, he could not recover. This instruction was covered by prayer No. 3, given at appellant's request, which told the jury that, if the plaintiff was guilty of negligence contributing to his injury, he could not recover, and also in instructions 4 and 6 given at the instance of the appellee, in which contributory negligence was defined, and the jury were told that the appellee could not recover if he failed to exercise such care as a person of ordinary prudence would have exercised under similar circumstances.

[9] Again, appellant insists that the court erred in refusing its prayer No. 6, as follows:

"If you believe from the evidence that a rule prohibiting brakemen or other employes from using their foot in coupling cars was established, and if you further believe that this rule was known to the plaintiff, or by the exercise of ordinary care on his part could have been known, and if you further believe that plaintiff disregarded this rule and was injured on account thereof, then your verdict should be for the defendant."

The court gave appellant's prayer for instruction No. 7, which is as follows:

"If you believe from the evidence that a rule for the safety of its employes was established preventing such employes from using their feet or foot in coupling cars, and that the plaintiff violated same and was injured on account thereof, then the court instructs you that the plaintiff was guilty of negligence contributing to his own injury, and cannot recover."

True, that in appellant's prayer No. 6 the court was asked to express the rule that it was the duty of the appellee to exercise ordinary care on his part to ascertain the rule of the company. This principle is not expressed in instruction No. 7, which the court gave. But it is the duty of the master, as we understand the law, to make rules for the protection of the employes and to make those rules known to the employes. There is no affirmative duty devolving upon the employes to ascertain what the master's rules are. It is the duty of the master to make known to the employes such rules as he has made and published for their protection.

Other portions of the refused prayer No. 6 were fully covered by prayer No. 7, which the court gave.

Appellant objected to the refusal of the court to grant prayers offered by it relating to the credibility of witnesses, and insists that the court should have told the jury that, in considering the weight to be attached to the evidence of each witness, the jury should make the rules concerning the credibility of the witnesses "apply to the plaintiff as well as to each of the other witnesses." The court modified the instruction contained in this language so as to make it read, "Shall apply to each and all of the witnesses," and gave the instruction as thus modified. The court did not err in refusing the prayers as offered and in making the modification indicated.

The court, in its eighth instruction given at the instance of the appellee, correctly declared the law by which the jury were to be governed in determining the credibility of witnesses.

[10] Seventh. The alleged error of the court in permitting improper remarks of counsel was fully cured by the instructions of the court not to consider the same and by the remarks of the counsel himself in disclaiming any intention to discuss facts not disclosed in the record.

Upon the whole case, the record is free from error, and the judgment must therefore be affirmed.

**TALIAFERRO v. BOYD. (No. 241.)**

(Supreme Court of Arkansas. Nov. 16, 1914.)

**1. SPECIFIC PERFORMANCE (§ 53\*)—CONTRACTS ENFORCEABLE—FRAUDULENT MISREPRESENTATIONS.**

A material representation, to defeat specific performance of a contract induced thereby, need only be untrue in fact, so as to mislead the party to whom it is addressed, and the party making it need not know of its falsity, nor have any intent to deceive, provided the representation is relied on and is an immediate cause of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160-171½; Dec. Dig. § 53.\*]

**2. SPECIFIC PERFORMANCE (§ 53\*) — CONTRACTS ENFORCEABLE — FRAUDULENT MISREPRESENTATIONS.**

Where an owner of a hotel and lots on which it was situated represented to the purchaser that the property as fenced contained 1½ acres, while an irregular piece, comprising one-seventh of an acre within the inclosure, did not belong to the owner, the deficiency was material and sufficient to defeat specific performance by the owner; the purchaser being justified in relying on the representation as to the quantity and actually relying thereon.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160-171½; Dec. Dig. § 53.\*]

**3. SPECIFIC PERFORMANCE (§ 53\*)—CONTRACT ENFORCEABLE—FRAUDULENT MISREPRESENTATIONS—WAIVER.**

Where a purchaser of a hotel and lots on which it was situated negotiated for a sale of the property to a third person without knowing the deficiency of one-seventh of an acre in the quantity of the land represented by the vendor as 1½ acres, he did not thereby waive the misrepresentation as to quantity, but could rely thereon to defeat specific performance sought by the vendor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160-171½; Dec. Dig. § 53.\*]

Appeal from Cleveland Chancery Court; Jno. M. Elliott, Chancellor.

Suit by E. M. Taliaferro against Josephine Boyd. From decree of dismissal, plaintiff appeals. Affirmed.

E. M. Taliaferro instituted this action in the chancery court against Josephine Boyd, to compel specific performance of a contract for the exchange of real estate. The plaintiff Taliaferro testified on behalf of himself substantially as follows:

I formerly resided in the town of Rison, in Cleveland county, Ark., but now reside in the city of Seattle, in the state of Washington. In November, 1912, I came to Rison, Ark., where I owned a frame hotel, and while there George Tolson asked me if I wanted to swap my hotel property for property at Pine Bluff, Ark., owned by Mrs. Josephine Boyd. I first looked at her property, and in about a week came back to Rison, where Mrs. Boyd resided, and went to see her. After talking the matter over with her, she told me to see George Tolson, and any deal I could make with him would be all right with her. Mr. Tolson went with me to see the hotel property and Mrs. Wayne, who was running the hotel at the time. I showed him over the premises and showed him the land that belonged to the hotel and which I was to convey to Mrs. Boyd. On December 4, 1912, Mrs.

Boyd and I entered into a written contract whereby she agreed to convey to me one-fourth of a block of ground in the city of Pine Bluff belonging to her, and in exchange therefor I agreed to pay her \$225 and to convey to her my hotel property at Rison, including the lots, and all the fixtures and furniture and furnishings thereunto belonging.

The agreement further provided that, in case of the loss of the buildings on either place by fire before the trade was consummated, the contract should be void.

Mrs. Josephine Boyd, in her own behalf, testified:

George Tolson came to me and told me that Mr. Taliaferro had spoken to him about exchanging my Pine Bluff property for his hotel property at Rison. Mr. Tolson first looked at the property, and I talked with Mr. Taliaferro about it afterwards. Mr. Taliaferro represented that he had an acre and a half or two acres of ground, and, when I asked him if the fence around the property was on the line, he said that I would get all the fencing. He further represented to me that Mrs. Wayne, who was then running the hotel, was running after him for a lease, and that he was then renting it to her for \$30 per month. I suggested an exchange of insurance with Mr. Taliaferro, and told him I would not take the property unless I could carry good insurance on it, and asked him how much insurance he carried. He replied that he did not carry insurance on the hotel, as he did not think it paid him, but said that parties had been after him trying to get him to take out insurance on it. He did not tell me that the property could not be insured. I also asked him about the building of a brick hotel in the town of Rison, and he told me that he had traveled a good deal and did not see any town of the size of Rison with a brick hotel, and further stated that he had talked to Dr. Ackerman a few days before that time, and that Dr. Ackerman had told him that he was not going to build a brick hotel. On the next day after the contract was made, I went with Mr. Taliaferro and Mr. Tolson to look at the hotel property, and I spoke to Mrs. Wayne about leasing the hotel. She told me that she did not want to lease it. On that same visit I also found out that all the property within the inclosure did not belong to Mr. Taliaferro. Subsequently I went to see some agents about insuring the property, and was informed by them that no insurance from a reputable company could be had upon the hotel. After that the property was surveyed, and it was ascertained to contain 1½ acres, and the survey also showed that there was one-seventh of an acre within the inclosure that did not belong to the hotel.

Mrs. Boyd also testified that she believed the statements and representations made by Taliaferro and relied upon them at the time she entered the contract with him; and that she refused to carry out the contract when she ascertained that they were not true.

George Tolson testified that, when Mr. Taliaferro showed him the property, he represented that there was 1½ or 2 acres of the land that went with the hotel; that, as he went into the hotel to examine it, he saw where the fences were on the north side of the property, and after they got to the other side of the house he asked Taliaferro if all the property within the fences belonged to the hotel, and that Taliaferro, with a

wave of the hand, replied that it did; that at that time, however, they could not see the fence on the north side of the house, but that he understood that Taliaferro referred to the whole inclosure as belonging to him; and that when the land was surveyed it was ascertained that 62 feet on the front, which ran back in an irregular shape on the north side of the house, did not belong to Taliaferro.

Other witnesses for the defendant testified that no insurance on the property could be procured from a reliable insurance company; and it was also shown that, in a short time after the contract was made, Dr. Ackerman began the erection of a brick hotel, and that Mrs. Wayne had a lease from him on the proposed building.

The plaintiff in rebuttal testified that he had been solicited by insurance agents to take out insurance on the property, and that they represented reliable companies, and that, at the time he made the contract with Mrs. Boyd, he did not know that Dr. Ackerman contemplated building a brick hotel in the town of Rison.

The chancellor found in favor of the defendant, and dismissed the complaint for want of equity; and the plaintiff has appealed.

Pitt Holmes, of Rison, and Crawford & Hooker, of Pine Bluff, for appellant. Creed Caldwell, of Pine Bluff, for appellee.

HART, J. (after stating the facts as above). [1] Mr. Pomeroy, in discussing the requisites of a misrepresentation as a defense to the enforcement of specific performance of contracts, says:

"In setting up a material misrepresentation to defeat the specific performance of a contract, the element of a scienter, of knowledge, of belief with or without reasonable grounds, or of intent is wholly unnecessary and immaterial. So far as this most essential element of a fraudulent misrepresentation is concerned, it is sufficient to defeat a specific performance that the statement is actually untrue, so as to mislead the party to whom it is addressed. The party making it need not know of its falsity, nor have any intent to deceive; nor does his belief in its truth make any difference. With respect to its effect upon the specific performance of a contract, a party making a statement as true, however honestly, for the purpose of influencing the conduct of the other party, is bound to know that it is true, and must stand or fall by his representation. The point upon which the defense turns is the fact of the other party having been misled by a misrepresentation calculated to mislead him, and not the existence of a design to thus mislead." Pomeroy's Equity Jurisprudence (3d Ed.) § 889.

And in the next section the same author said:

"Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the represen-

tation and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction. It is not necessary that the false representation should be the sole inducement; others may concur with it in influencing the party. Where several representations have been made, and one of them is false, the court has no means of determining, as was well said by Lord Cranworth, that this very one did not turn the scale." Pomeroy's Equity Jurisprudence (3d Ed.) § 890.

This principle of law was recognized by this court in the case of *Yeates v. Pryor*, 11 Ark. 58.

[2] In the case before us the evidence shows that Mr. Taliaferro represented to Mrs. Boyd that the property around the hotel comprised  $1\frac{1}{2}$  or 2 acres, and also stated that all the property within the fences around the hotel belonged to him and was included in the exchange of lands. It afterwards developed that an irregular piece of land on the north side of the house, 62 feet in width on the front end and comprising one-seventh of an acre, did not belong to the hotel and was not described in the deed.

It is true that Mr. Tolson testified that when Taliaferro, with a wave of the hand, said that all of the land within the fences belonged to the hotel, they could not see the fences on the north side of the house; but, inasmuch as they had already seen that portion of the property, he understood that in making that representation he referred to all the property within the inclosure.

Mrs. Boyd testified that she believed these representations to be true when she executed the contract for the exchange of lands, and that, if she had not believed them to be true, she would not have executed the contract.

In the case of *Yeates v. Pryor*, supra, the court said that, where a deficit of the quantity of land was so small and unimportant as not to materially affect the interests of the parties, a specific execution of the contract would be granted; but that there could be no doubt that the deficit in the quantity sold may be of such a nature and extent as to relieve the defendant from specific performance of the contract.

In the instant case the contract was not for the sale of acreage property, but was of town lots, upon which there was situated a hotel. The shortage consisted in an irregular shaped strip of land on the north side of the hotel, with a frontage of 62 feet. The deficiency, under these circumstances, was material. It cannot be said under these circumstances, that the deficiency is so slight, as compared with the whole quantity of land to be conveyed, as not to be material. *Allen v. Kirk*, 219 Pa. 574, 69 Atl. 50.

[3] The evidence tends to show that, on the day after the contract was made, Dr. Robinson applied to Mrs. Boyd to purchase the property, and she, thinking that he offered her \$2,750 for it, agreed to accept it. It turned out, however, that she misunderstood him,

and that he offered her only \$2,250 for the property, and she refused this offer. Mrs. Boyd stated, however, that, at the time she was negotiating with Dr. Robinson, she did not know that there was a deficiency in the quantity of land, and therefore it cannot be said that she waived the misrepresentation.

Under these facts, as stated in the record, we are of the opinion that Mrs. Boyd was justified in relying upon the representation as to the quantity of land to be deeded to her, and that she did rely upon the representations made by the plaintiff, and that on that account, the property being city lots, the variation was a material one.

The decree will be affirmed.

### HOLMAN et al. v. STATE. (No. 242.)

(Supreme Court of Arkansas. Nov. 16, 1914.)

#### 1. JURY (§ 131\*)—IMPLIED BIAS—SERVICE ON GRAND JURY.

Under Kirby's Dig. § 2363, providing that a challenge for "implied bias" may be taken for having served on the grand jury which found the indictment, and in view of statutory provisions as to challenge for actual bias, the court's examination of a juror who had served on such grand jury as if he had been challenged for actual bias, and its finding of competency, was erroneous, since from his service on the grand jury he was conclusively presumed incompetent, and it was not within the court's province to determine whether he was without actual bias.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 181.\*]

#### 2. CRIMINAL LAW (§ 1166½\*)—HARMLESS ERROR—RULES AS TO JURORS.

Where defendant had exhausted his peremptory challenges before the completion of the jury, the error necessitated a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3113-3123; Dec. Dig. § 1166½.\*]

Appeal from Circuit Court, Randolph County; Jno. W. Meeks, Judge.

Less Holman and Zeke Collins were convicted of grand larceny, and they appeal. Reversed, and remanded for new trial.

C. H. Henderson and Witt & Schoonover, all of Pocahontas, for appellants. W. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

KIRBY, J. Appellants were indicted for grand larceny, alleged to have been committed by stealing a hog, the property of one Ed Denton. They were found guilty, and from the judgment of conviction appealed.

[1] The cause was tried at the July, 1914, term of the circuit court, and Levi Cravens was summoned as a special venireman, and stated upon his voir dire that he had been a member of the grand jury which returned the indictment upon which the defendants were upon trial; that he was a member of the grand jury when the indictment was

found, and present in court when it was returned, but did not recall the testimony before that body, and did not have an opinion, and had never expressed an opinion, as to the guilt or innocence of the defendants. The defendants thereupon challenged the said juror for implied bias, because he had served on the grand jury which found the indictment. The court declared the juror competent, over defendants' objections and exceptions, and he was accepted by the state, and the defendants challenged him peremptorily. In the selection of the jury defendants exhausted all their peremptory challenges, and were forced to take one W. H. Bennett as a juror, whom they desired to excuse after their peremptory challenges were exhausted. The court's action in declaring the juror competent and compelling them to challenge him peremptorily is insisted upon as error for reversal.

Our statute provides as particular causes for challenge of jurors actual and implied bias, and that a challenge for implied bias may be taken for "having served on the grand jury which found the indictment, or on the coroner's jury which inquired into the death of the party whose death is the subject of the indictment." Section 2363, Kirby's Digest. The court examined the juror as though he had been challenged for actual bias and declared him competent. It committed error in so doing. When the examination disclosed that the juror had served on the grand jury which found the indictment under which defendants were being tried, such service was a cause for challenge for implied bias; the proposed juror being, under the statute, conclusively presumed incompetent to try the case. In other words, it is not a question within the province of the trial court to determine the state of mind of the proposed juror, to ascertain whether or not he can try the case impartially and without prejudice to the substantial rights of the party challenging him, when he is shown to have served on the grand jury which found the indictment. The lawmaking power determined that. See, also, 24 Cyc. 27; 12 Am. & Eng. Enc. of Law, 352; 31 American Digest Cent. col. 603; Greenwood v. State, 34 Tex. 334.

[2] The defendants having exhausted their peremptory challenges before the completion of the jury, the said error necessitates a reversal of the case. Caldwell v. State, 69 Ark. 322, 63 S. W. 59; York v. State, 91 Ark. 582, 121 S. W. 1070, 18 Ann. Cas. 344; Langford v. State, 98 Ark. 327, 135 S. W. 805.

The other errors complained of are not noticed, as they may not occur upon the trial anew.

For the error committed, the judgment is reversed, and the cause remanded for new trial.

**HARNWELL et al. v. WHITE et al.**  
(No. 181.)

(Supreme Court of Arkansas. Oct. 19, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 304\*)—PUBLIC IMPROVEMENTS—PETITION.**

Property owners have the right to and must designate in their petition the kind of improvement desired, and the municipal authorities cannot order an improvement of a different character.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 811-816; Dec. Dig. § 304.\*]

**2. MUNICIPAL CORPORATIONS (§ 450\*)—PUBLIC IMPROVEMENTS—PETITION.**

It is a necessary prerequisite to the establishment of an improvement district that a majority in value of the real property owners within the district shall petition for such improvement, designating its nature.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

**3. MUNICIPAL CORPORATIONS (§ 450\*)—PUBLIC IMPROVEMENTS—DISTRICTS.**

Kirby's Dig. § 5683, providing that no local assessment shall in one year exceed 20 per cent. of the value of the real property within an improvement district, is intended to protect the taxpayers, and, where a proposed improvement would require a greater assessment, a city cannot, under a petition for a whole improvement, create a district for the construction of part of the improvement or create numerous districts for the construction of the improvement by piecemeal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

**4. MUNICIPAL CORPORATIONS (§§ 488, 489\*)—IMPROVEMENTS — ASSESSMENT — EQUITABLE ESTOPPEL.**

Where a property owner who was interested in the construction of a proposed improvement, the cost of which exceeded the statutory limit, executed an agreement obligating herself to pay the assessments, which were uncollectible because in excess of the statutory limit, in consideration of a bonding company buying the bonds for the improvement, she is estopped thereafter to set up the invalidity of the assessments or of the improvement districts levying them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.\*]

**5. MUNICIPAL CORPORATIONS (§ 450\*)—IMPROVEMENT DISTRICTS—DE FACTO EXISTENCE.**

Improvement districts, though not organized in accordance with the petition, having constructed the improvements, have a de facto existence and may sue, though created to defeat the law limiting local assessments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

**6. MUNICIPAL CORPORATIONS (§§ 488, 489\*)—IMPROVEMENTS — ASSESSMENT — EQUITABLE ESTOPPEL.**

Where a property owner benefited by a local improvement, the cost of which was in excess of the statutory limit, agreed to pay assessments in excess of the statutory limit as a consideration for the sale of the bonds for the improvement, such agreement, while estopping her from denying the validity of the assessment is limited to the assessment, and, in case of de-

fault, neither the statutory penalty nor attorneys' fees can be recovered.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.\*]

Appeal from Pulaski Chancery Court; E. Martineau, Chancellor.

Action by O. E. White and others against Louise B. Harnwell and others. From the judgment, defendants appeal. Reversed and remanded, with directions.

Twelve suits were brought by the commissioners of improvement districts Nos. 1, 2, 3, and 4 of Pulaski Heights, to subject certain lots, the property of Louise B. Harnwell, to the payment of the assessments and liens for improvement taxes in said districts.

After appellant's demurrer, motion to consolidate the causes and motion to dismiss were overruled. She answered, admitting the ownership of the lots, and challenging the validity of the district because the petition praying for it did not contain the majority in value of the owners of real property in the district, because the ordinance creating it was not legally passed, and because the cost of the improvement exceeded the 20 per centum of the assessed valuation of the realty in the districts, and because all the districts were organized for the purpose of making but the one improvement.

From the testimony and stipulations it appears that the petition asking for the improvement was signed by the required number of property owners, residents of the district, but that neither of them was signed by the appellant. The petition asked for the creation of improvement district No. 1, Pulaski Heights, "for the purpose of grading, curbing, guttering, and macadamizing the streets within the town of Pulaski Heights," and described in the petition. The commissioners or board of improvement were appointed and reported that they had organized by electing a chairman and—

"that they have had estimates made of the expense of grading, curbing, guttering, and macadamizing the streets in said district, and they find the expense of doing all these things will exceed the limit allowed by law to be expended by the commissioners of this improvement district. They therefore recommend that the work to be done by this improvement be limited to the grading of the streets in said district; each to be graded 60 feet wide. They have caused estimates of such grading to be made, and hereby report that the estimated cost of said grading will be the sum of \$5,200.

"[Signed] O. E. White, Chairman.  
T. J. Mahoney.  
H. F. Auten."

An ordinance was then passed fixing the assessment for improvement district No. 1 for the purpose only of grading the streets in said district. The council authorized the formation of districts Nos. 2 for the purpose of curbing and guttering the streets after they were graded, 3 for macadamizing the streets, and 4 to build sidewalks along the streets of the district. The ordinances cre-

ating all the districts progressed simultaneously; same commissioners and the same assessors were appointed for each of the districts; and, so far as it appears from the record, they were all organized by the council upon the original petition for the organization of improvement district No. 1, upon which the board of improvement had reported that the contemplated improvement exceeded the 20 per centum of the assessed valuation of the property included, and recommended that the improvement therein be limited to grading the streets the width of 60 feet. This was done after a mass meeting of the citizens had been held and had insisted with the commissioners first appointed that all the improvements should be made, and requested that they insist upon it before the council, which was done. The council, it appears, also passed an ordinance appropriating certain sums of moneys of the town to aid in the improvement. After the different improvements had been undertaken, the question of the legality of the districts arose, and the commissioners were not able to dispose of the bonds or borrow money for making the improvements. They then prepared the following instrument, one of which was executed by the appellant:

"Know all men by these presents, that whereas, improvement districts Nos. 1, 2, 3, and 4, in the town of Pulaski Heights, for grading, curbing, guttering and macadamizing streets and building concrete sidewalks and laying street crossings, respectively, in a certain district in said town, said district having been created and the benefits to the lands therein assessed and said work begun and partially completed, and two of the annual assessments have been paid, and in order to complete said improvements it is necessary for said districts to borrow money and issue bonds, not exceeding, however, four thousand five hundred dollars (\$4,500) for each district, or eighteen thousand (\$18,000) for all four districts combined; and whereas, a question has been raised as to the legality of a part of said assessments, and it has been found impossible to sell said bonds unless the property owners waive said question and guarantee the payment of their several assessments and 25 per cent. thereof additional, and the Union Trust Company, trustee, having proposed to take said bonds secured by a pledge of all assessments in said districts, provided the above-mentioned waiver and guarantee is given: Now, therefore, the undersigned, Mrs. Louise B. Harnwell being the owner of lots 1, 2, 3, 9, 10, 11 in block 11, East Pulaski Heights addition, and 4, 5, 6, and 8 in block 8 Pulaski Heights addition to the city of Little Rock, assessed in said improvement districts 1, 2, 3, and 4 of the town of Pulaski Heights for said improvements in consideration of the Union Trust Company of Little Rock, trustee, buying or negotiating the sale of said bonds, and the benefits to be received by said property from said improvements, do agree to pay assessments thereon to the collector of said districts, when due, not to exceed in the aggregate the sum of \$350, except as hereinafter provided, and waive the question of the illegality of said assessments and of the lien thereof upon said property, up to, but not exceeding, that amount. We further agree, in case said assessments collected in said districts numbered 1, 2, 3, and 4 shall not be sufficient to pay said bonds, interest, and costs of collection, if any, that we will pay the Union Trust Company, trustee, or its assigns, such additional

sum as is needed to pay said bonds, interest, and costs, not to exceed \$87.50, being 25 per cent. of the total assessment of benefits to said land, said sum to be a lien on the land described herein, of the same grade as an assessment for local improvements. It is understood that the limit of this guaranty, lien, and waiver is \$437.50, to be paid in annual installments at the rate now assessed.

"Witness our hands this 28th day of September, 1908. Mrs. Louise B. Harnwell."

The commissioners succeeded in procuring the loan or selling the bonds, and the improvements were completed. Appellant paid all assessments against her property from the organization of the districts in 1906 until those due for the year 1913, for the collection of which these suits have been brought. The chancellor rendered a decree in favor of the commissioners of the district for the assessment, and ordered the property sold, and from the decree this appeal comes.

C. P. Harnwell, of Little Rock, for appellants. Terry, Downie & Streepey, of Little Rock, for appellees.

KIRBY, J. (after stating the facts as above). The requisite number of property owners petitioned for the establishment of the improvement district, specifying the purpose thereof, and a majority in value of the owners of real property within the district petitioned the council, asking that the improvement be made, and designating the nature of it, for the purpose of "grading, curbing, guttering, and macadamizing the streets included in the district," and the commissioners or board of improvement for the district were appointed. It was by the commissioners' report disclosed that the improvements could not be made within the limit of 20 per centum of the value of the real property in the district. Thereupon the character of the improvement was changed, and the four districts organized, three of them for the purpose of making each a portion of the improvement petitioned for, and the fourth for making sidewalks; all upon the original petition asking for the single improvement and specifying it.

[1] The property owners have the right to and must designate in their petition the kind of improvement desired to be made, and the city or town council is without power to establish a district upon the petition praying for the establishment of an improvement different from that asked or prayed for in said petitions.

[2, 3] And it is a necessary prerequisite to the establishment of any improvement district that a majority in value of the real property owners within such district shall petition for such improvement, designating the nature of it, and the law also provides that no single improvement shall be undertaken which alone will exceed in cost 20 per centum of the value of the real property within such district, as shown by the last

county assessment. Section 5683, Kirby's Digest.

"Its purpose is to prevent improvement districts from undertaking any work which will cost more than one-fifth of the assessed value of the property therein," and "whether the improvement can be made within this limit as to cost can and must be ascertained at the outset. \* \* \* The cost being ascertained, its comparison with the value of the real property in the district, as shown by the last county assessment, will disclose whether it exceeds 20 per centum of that value, and, if it does, the improvement should not be undertaken, unless the plans can be so changed as to reduce the cost within the statutory limit." *Kirst v. Improvement District*, 86 Ark. 21, 109 S. W. 533.

In *McDonnell v. Improvement District*, 97 Ark. 341, 133 S. W. 1128, the court said:

"These sections of the statute [referring also to section 5716, Kirby's Digest] relate entirely to the matter of assessments, and the limitation is placed thereon as a protection to property owners against excessive assessments. It is obvious that the Legislature meant only to limit the amount which can be assessed against the real property in the district."

Neither does the city or town council have authority to establish an improvement district for a purpose substantially at variance with the one prayed for, nor can the commissioners in the construction of the improvement depart materially from the one designated in the petition praying for and the ordinance establishing the district. *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234; *Kraft v. Smothers*, 103 Ark. 260, 146 S. W. 505.

After the commissioners reported that the improvement prayed for and designated could not be constructed within the cost of 20 per centum of the assessed value of the real property within the district, as limited by the statute, it should have been abandoned, and the council was without authority to authorize the establishment of a district for the purpose of making only a part of the improvement prayed for in the original petition that contemplated the entire improvement designated should be made, and certainly without authority to create other districts upon such petition for the purpose of constructing different portions of the improvement prayed for and designated in the original petition. It was the evident purpose of the statute to permit those desiring improvements made to designate the nature of the improvements to be undertaken for which the district should be organized; that the whole improvement should be seen from the beginning; and that the cost of it should not exceed the amount fixed by the statute. The manifest intention of the law authorizing those who desire their property assessed for the purpose of making a designated public improvement and limiting the cost of such single improvement for their protection, as well as of all those who are required to pay, whether the improvement is desired by them or not, cannot be evaded by splitting the entire improvement prayed for by the petitioners into separate sections or portions, and

authorizing and establishing districts for the making of each portion, that the single improvement undertaken by each may be within the cost limited by law. All the ordinances for the establishment of the different districts were without authority and void, and likewise the action of the commissioners thereunder. It is contended, however, that appellant is estopped to dispute the validity of the different improvement districts and escape the payment of the assessment levied therein on account of having received the benefits of the different improvements already constructed, and because of the instrument executed by her after the legality of the districts were questioned, waiving all irregularities in their formation and guaranteeing the payment of all of the assessments levied for the construction of the different improvements. We do not agree with this contention. Improvement districts are creatures of the law and cannot be created by consent, waiver, estoppel, nor agreement of the property owners. They are governmental agencies, deriving their powers directly from the Legislature, and can exercise no powers, perform no duties, nor incur any liabilities, except by authority conferred upon them expressly by statute. *Sewer District v. Moreland*, 94 Ark. 381, 127 S. W. 460, 21 Ann. Cas. 957; *Lewis v. Reiff et al.*, 169 S. W. 1184.

The property owner has the right to rely upon the protection afforded him by statute and to expect the organization of improvement districts in cities and towns and the levy and collection of assessments against his property in accordance with and as provided by law, and he is not estopped to deny the validity of any assessment against his property, where the improvement district has failed to secure the power to make the levy in not complying with the terms of the statute authorizing its creation, as in this case. Here the defects complained of are not mere irregularities in the exercise of powers conferred upon the district, but consist of failure on the part of the board of improvement to secure the power to make the improvement through the necessary prerequisite, the petition of the majority in value of the property owners of the district, and the appellant is not estopped to challenge the power of the district and the validity of the assessment because she has stood passively by and seen the improvement go on and paid all prior assessments levied against her property. *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234.

Those interested in the collection of the assessment as compensation for the work done in making the improvements cannot be said to have relied upon her acquiescence in the creation of the district, since they knew, in making the contracts with the board of improvement, that they were dealing with a governmental agency without powers, except as expressly conferred by statute, and whose

authority they were bound to know. Neither was she estopped to deny the authority of the district, nor the validity of the assessments by reason of the execution of the said waiver and guaranty, since improvement districts are not created nor liabilities for assessments fixed by estoppel, as already said. By the terms of this agreement or equitable mortgage, she at most bound herself to the payment of the future assessments, specifying them in the amount limited therein, with a lien against her property to secure the payment, and the extent of her liability is fixed by the instrument executed. When the improvement was constructed or finished and the moneys expended therefor upon the faith of her agreement, her right to successfully challenge the validity of the assessments levied by the district does not release her from the terms of this agreement nor relieve her from the payment of the amounts as agreed upon therein, but her failure to pay as and when agreed only subjects her property to the payment of the amount agreed to be paid and the usual cost for proceeding against it in the collection, and does not include any penalties or attorney's fees; there being no agreement to pay them. In other words, her liability is fixed by the terms of the agreement and mortgage executed by her, and not by the statute relating to the collection of different assessments in improvement districts. This instrument was before the court, and the agreement was to pay the collector of the district necessarily for the district, which is controlled by the board of improvement, that it might discharge its obligations to those who had furnished the money for the improvement, the bondholders, whose trustee is also mentioned therein, and the said board of improvement or commissioners would have authority to bring suit thereon; the contract to pay the collector being virtually one in the name of the improvement district which they represent, for the benefit of those to whom the money after its collection will go.

It follows that the court erred in its decree, which is reversed, and the causes remanded, with directions to consolidate the suits and to render judgment against the appellant herein for such sums of money as are due under the terms of the mortgage agreement, with the foreclosure of the lien and the cost only of one suit for that purpose.

#### Concurring Opinion.

MCCULLOCH, C. J. I agree entirely with the conclusion reached in this case by the majority of the judges, but I do not share with them all the view expressed in the opinion. I think the order of reversal, with directions to consolidate the different cases against appellant and render decree for the amount of assessments due without penalty or attorneys' fees, is correct. The opinion states, however, in the most emphatic lan-

guage, that this result cannot be obtained on the ground of estoppel, and the rule is laid down broadly that the owner of property in a district illegally organized cannot estop himself to dispute the validity of such organization. That is the part of the opinion which I do not agree to, and I think that the decision reversing the case is wrong, unless it can be put on the doctrine of estoppel.

[4] Indeed, I am unable to discover any other tangible grounds in the opinion. The instrument executed by appellant and others is not a mortgage, and, if it was so treated, the parties in interest were not before the court, unless it be held that there was a de facto organization of the district which authorizes the commissioners thereof to sue. I do not view with favor any rule which applies the doctrine of estoppel to mere silence of a property owner with respect to the illegality of an improvement district; but where, as in this case, one or more property owners have done some affirmative act which induces persons to spend their money or surrender substantial rights on the faith of that conduct, there is no reason why the doctrine of estoppel should not apply. In the present case there was such an affirmative act of the highest character, for appellant, by a solemn contract, expressly agreed that she would not contest the validity of the district but would pay the assessments, and the bonds of the district were sold and the proceeds thereof used in constructing the improvement upon the faith of that agreement.

I think the authorities cited in appellee's brief abundantly sustain the doctrine of estoppel as applicable in a case of this sort; and in the case of *Matthews v. Kimball*, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547, all of the judges (both those constituting the majority and the dissenting judges) agreed that the doctrine of estoppel would apply to one who had done some affirmative act in inducing the formation of the district.

[5, 6] In *Whipple v. Tuxworth*, 81 Ark. 391, 99 S. W. 86, this court held that there may be a de facto improvement district without de jure existence, and that such organization could sue and be sued; and the court applied the general doctrine that "a corporation de facto may sue and be sued, and, as a rule, may do whatever a corporation de jure can do, and no one but the state can call its existence in question." That was the same district which was declared void on account of jurisdictional defects in *Board of Improvement v. Cotter*, 71 Ark. 556, 76 S. W. 552. Of course, the court did not hold that a property owner could not dispute the validity of his assessment on account of the illegality of the district, but decided that an illegally formed district had a de facto existence which authorized it to sue.

Now in this case, as in the one cited, the district had a de facto existence, and the board of commissioners had the right to sue;

and appellant has, by her express agreement, estopped herself to deny the validity of her assessment. But the estoppel is limited by the express terms of the agreement. Appellant only agreed to pay the assessments. She did not agree to pay any penalty or attorney's fees. And no one was injured by her conduct, except to the extent of the assessments which she expressly obligated herself to pay. No one had any vested interest in the statutory penalty and attorney's fees, and those items cannot be enforced on the doctrine of estoppel. The equities of the case are completely satisfied by compelling the plaintiff to make good her obligation, and this the court has done in its order of reversal.

Mr. Justice SMITH shares with me these views.

#### On Motion to Modify the Opinion.

MCCULLOCH, C. J. The majority of the court now approve the concurring opinion. It thus becomes the law of the case, and to that extent the original opinion is modified. The decree of the chancery court is therefore reversed, and the cause is remanded, with directions to consolidate the actions against appellant and render a decree against her for the amount of the assessment and costs of one action, without penalty or attorney's fees.

HART and KIRBY, JJ., adhere to the views expressed in the original opinion, and therefore concur in the judgment, but not in the opinion of the court as it now stands.

#### PETTY v. LYONS. (No. 5.)

(Supreme Court of Arkansas. Nov. 23, 1914.)  
WEIGHTS AND MEASURES (§ 8\*)—RIGHT OF PUBLIC WEAIGHERS TO FEES.

Acts 1905, p. 703, makes it a misdemeanor for persons other than the cotton weigher to weigh cotton, where the weigher shall have a convenient place for the performance of his duty and a pair of scales tested as provided by law. Acts 1907, p. 562, amending the act of 1905, provides that a fee of 10 cents a bale, shall be paid for the weighing of cotton. Kirby's Dig. §§ 8003-8005, provides that the clerk of the county court shall procure standard weights, tested by the secretary of state. *Held*, that where a cotton weigher was unable to procure standard weights, owing to the default of the secretary of state and the clerk of the county court, he was not entitled to the fee fixed by law for weighing cotton; the purpose of the act being to prevent fraud in the sale of cotton by weighing it on scales officially correct, and the weighing of cotton on scales not so tested was not a compliance.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Polk County; Jeff T. Cowling, Judge.

Action by C. B. Lyons against G. W. Petty. From judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

J. I. Alley, of Mena, for appellant. E. J. Lundy, of Mena, for appellee.

KIRBY, J. C. B. Lyons, the appellee, brought suit in the justice court against G. W. Petty for \$33.40, alleged to be due him for weighing 334 bales of cotton at 10 cents a bale in 1913, purchased by said Petty at Mena, in Polk county. Petty denied any liability. Upon the trial in the circuit court the testimony shows that C. B. Lyons, the duly elected cotton weigher for said county, in 1912, after taking the oath of office and making bond, called on the county clerk to have his scales tested. He stated that the clerk tested them; that he used the scales in 1912, and from the 3d to 15th of November, 1913, weighed 334 bales of cotton, which were purchased by C. W. Petty; and that Petty had refused to pay the fees therefor. The clerk of the county had not procured a set of weights and measures and had them sealed by the secretary of state; the secretary having informed him that he was not supplied with the apparatus for making any such tests and sealing of scales. He thereupon borrowed some test weights from the county clerk of Sevier county, and tested the weigher's scales, but did not make certificate of such test. He did not know whether the weight procured of the Sevier county clerk and used in making the test was correct or not. The appellee stated that the weights marked on the bales of cotton by the weigher were very different from weights given by the consignee to whom he shipped the cotton. Each party asked for a directed verdict, and the court directed the jury to find for the cotton weigher, and from its judgment appellant brings this appeal.

It is insisted for reversal that the official weigher was not entitled to fees for weighing the cotton, not having provided for the purpose and used scales properly tested and shown to be correct as required by law, and that the court erred in not directing a verdict in his favor. The special act (No. 284 of the Acts of 1905) providing for the election of cotton weighers for this and other counties was declared constitutional in *Petty v. State*, 102 Ark. 170, 143 S. W. 1067, where it was held that a person who weighed cotton upon his own scales, or by any other person than the cotton weigher in the town where that official was engaged in weighing cotton, was guilty of a misdemeanor under the terms of the act. The law, as amended by Act 243 of the Acts of 1907, provides that the cotton weigher or any deputy appointed shall receive as compensation for his services 10 cents for each bale of cotton weighed, to be paid by the purchaser. It also provides (section 4 of the act of 1905) that after his election the weigher shall prepare a convenient place for the performance of his duty and shall keep a pair of scales, which shall

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be tested as is now provided by law, and shall weigh without unnecessary delay all cotton sold or marketed at his place of business. The law fixes the standard for weights in this state, and provides that the clerk of the county court of each county shall procure as soon as practicable at the expense of the county a complete set of weights, which shall conform to the standard in the office of secretary of state, that the secretary of state shall procure a seal or stamp, with the letters "S. A.," with which he shall seal all weights and measures which are found to be correct upon comparison with the standard in his office, and such weights, after being sealed, shall be a lawful standard for the county by which they are procured, and the several clerks of the county courts shall seal all weights and measures that shall be presented to them for that purpose which correspond with the county standard. Sections 8003-8005, Kirby's Digest.

The appellee cotton weigher provided his scales and demanded that the county clerk test and seal them in accordance with law, and was informed that it could not be done, because the county had no standard; the secretary of state not having complied with the law in furnishing it. The county clerk of Polk county thereupon procured from the clerk of an adjoining county a test weight, and made a test of the weigher's scales, not knowing whether the test borrowed was correct and conformed to the standard or not. It was the purpose of the law to prevent fraud in the weighing of cotton and such other merchandise, commodities, and articles of commerce as are required to be weighed by the public weigher; and it therefore required said official to provide himself with the standard weights for use in performing his official duty. The officer attempted to comply with the requirements of the law, and failed to do so through no fault of his own, but because other officials, over whom he had no control, to whom the duties were intrusted to provide the standard for and make the test of his scales, and seal them, failed to perform their duty. This fact does not excuse his failure, however, to provide himself with a pair of scales tested as the law requires; and, not having done so, he was not entitled to the fees provided by the act. When he weighed the cotton with scales not officially tested and sealed, the purpose of the law was in no wise met or fulfilled; and whether the cause of his failure be the fault of his own or some one else, the condition is not remedied. When the law that requires him to provide correct scales officially tested and sealed made it a misdemeanor for any other person to weigh any cotton sold or marketed in the town or village where the weigher or his deputy kept scales and was acting in an official capacity, it certainly did not intend to permit him to weigh

cotton and charge the fee provided for upon scales that were not properly tested and known to be correct. In some jurisdictions all sales made of the commodities required to be weighed upon tested and sealed scales are void if they are weighed otherwise, and the statutory penalties are insured. 30 Am. & Eng. Enc. 459; *Miller v. Post*, 1 Allen (Mass.) 434; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299; *Sawyer v. Smith*, 109 Mass. 220.

We do not deem it necessary or profitable to enter into a construction of the expression "as soon as practicable" in section 8003, Kirby's Digest, requiring the clerk of the county court to provide a set of weights or a standard for the county, since the law has been in force from 1859. It would be a liberal construction indeed that would excuse the failure to test the weigher's scales in 1913, by holding that the clerk had procured the standard for making the test in 1914, which was "as soon as practicable" after the passage of the law requiring it, and that the public weigher was therefore not sooner required to use properly tested scales in the performance of his duties.

The court erred in not directing a verdict in favor of the appellant, and the judgment is reversed, and the cause dismissed.

#### COTHAM v. MORRIS et al. (No. 154.)

(Supreme Court of Arkansas. Oct. 12, 1914.)  
LIMITATION OF ACTIONS (§ 24\*)—ORAL CONTRACT—ADMINISTRATOR'S SALE—CONSIDERATION—PURCHASER'S OBLIGATION TO PAY—"CONTRACT NOT IN WRITING."

The obligation of a purchaser at an administrator's sale of real property to pay the price arising from his acceptance of the administrator's deed reciting the consideration is a "contract not in writing," and therefore barred by the three-year statute of limitations (Kirby's Dig. § 5064, subd. 1).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.\*]

Appeal from Garland Chancery Court; Jethro P. Henderson, Chancellor.

Action by C. T. Cotham, as administrator of the estate of John D. Ware, deceased, against J. M. Lucy, as executor, and John B. Morris, as sole legatee under the will of Edward Fitzgerald, deceased. Judgment for defendants and plaintiff appeals. Affirmed.

Jas. E. Hogue, of Hot Springs, for appellant.

MCCULLOCH, C. J. Appellant's intestate, John D. Ware, owned a tract or lot of real estate in the city of Hot Springs, on which a building was situated, and mortgaged the same to Edward Fitzgerald to secure a debt of \$2,800, which he owed to the latter.

The mortgage debt was not paid, and on February 16, 1902, the administrator present-

ed his petition to the probate court of Garland county, praying for an order authorizing him to sell said property. The administrator recited in his petition the damaged and dilapidated condition of the house on the property, and also recited the fact of the existence of the mortgage to Fitzgerald, and stated the amount, which then, with interest, aggregated the sum of \$3,008.60. The petition did not pray for a sale merely of the equity of redemption, but of the whole property. The order of sale is not in the record, but it appears to be conceded that the order of the court gave general directions to the administrator to sell the entire property, and not merely the equity of redemption.

The contention in this case is, however, that the effect of the sale was merely to dispose of the equity of redemption. The sale was regularly advertised by the administrator, and Fitzgerald bid the amount of his mortgage debt, and the property was stricken off to him as the purchaser. At the next term of the probate court, in May, 1902, the administrator reported his proceedings, with respect to the sale, to the probate court, referring to the fact that Fitzgerald had bid the amount of his mortgage debt, and asked leave of the court to permit him to balance off the mortgage debt against the price bid for the land. No order of confirmation appears on the record, but the administrator executed a deed to Fitzgerald, reciting the sale to the latter and the payment of the purchase price, receipt of which was duly acknowledged. It appears that the records of Garland county have been destroyed or mutilated by fire, and it is not clear that there was any order of confirmation entered upon the record until after commencement of this suit.

Appellant first instituted this suit in December, 1905, attacking the validity of the sale, but by a subsequent amendment the attack on the validity of the sale was abandoned, and the suit was converted into one against Fitzgerald to recover the amount of the latter's bid and to have a lien declared upon the property upon the theory that the sale amounted only to a sale of the equity of redemption, and that the purchaser took the property subject to the mortgage debt, and that the administrator had no right to allow the bid of the purchaser to be credited in extinguishment of the mortgage debt. The defendant, Edward Fitzgerald, died during the pendency of the suit, and the cause was revived in the name of his executor and sole devisee under his will. The decree of the court was in favor of the defendants, and the plaintiff appealed.

Among other defenses set forth in the answer, the defendants pleaded the three-year statute of limitation; and, as the disposition of that plea is decisive of the case, other defenses need not be referred to. The sole purpose of this suit is to collect the amount

of the purchaser's bid; the attack upon the validity of the sale being, as before stated, abandoned. It is neither alleged nor proved that Fitzgerald, the purchaser, ever executed a note or written obligation of any kind to pay the amount of the bid. On the contrary, it affirmatively appears from the report of the administrator to the probate court that the purchaser claimed the right to credit the amount of his bid upon his mortgage debt and thereby extinguish it. Therefore the suit is not upon a written obligation, but upon a contract, either expressed or implied, not in writing. The statute reads that "all actions founded upon any contract or liability, expressed or implied, not in writing," shall be commenced within three years after the cause of action shall accrue, and not after. Subdivision 1, § 5064, Kirby's Digest. The cause of action set forth in the complaint falls clearly within this statute, and is barred by limitation.

It will be observed that the statute includes implied as well as expressed contracts, and it is unnecessary to decide whether the bid of the purchaser constituted, under the circumstances, an express or an implied contract to pay the amount of the bid, for in either even the suit was not instituted within three years, and is barred. *Dismukes v. Halpern*, 47 Ark. 317, 1 S. W. 554; *Richardson v. Bales*, 66 Ark. 452, 51 S. W. 321.

Learned counsel for appellant rely on the case of *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836, 134 Am. St. Rep. 60, as sustaining the contention that, inasmuch as the deed recites the amount of the consideration, the acceptance of it constituted an implied contract to pay the obligation imposed by law, and that it amounted to a promise to perform a written contract, which is not within the statute quoted above. In that case this court was dealing with a written contract of a kind not required to be in writing, and it was said that "such a contract is valid if one of the parties signs it and the other acquiesces therein," and in the opinion the following is added:

"And in a great many jurisdictions it is held that a deed poll, when accepted by the grantee, becomes the mutual contract of the parties, and the promise of the grantee, therein provided for, is not a verbal one, so as to be governed by the statute of limitation respecting verbal contracts; but that the acceptance of the deed by the grantee makes it a written contract, and the obligations created by it are evidenced by a writing and governed by the provisions of the statute of limitation respecting written instruments."

That statement was unnecessary to a decision of the case, for the reason that a deed poll was not involved in the case, and the court found in favor of the party who signed the contract as to the facts. The language used is directly contrary to the decision of this court in *Dismukes v. Halpern*, supra, though no mention was made of that case. That was a case where a partition of lands

of the decedent between the widow and heirs was had under an order of the probate court, and the commissioners reported that some of the heirs should make payments of money to adjust the differences and value in the lands allotted to them, respectively. The deeds executed by the commissioners recited those agreements, and the court held that the acceptance of the deeds amounted to an election to perform the conditions, and was binding notwithstanding the deeds were not signed by the obligors. But, in disposing of the question of the statute of limitation, the court said:

"The terms of the contract are found in the commissioner's deed, but the only obligation upon Daniels to comply with those terms is implied from his acceptance of the deed. It was not the deed that created the charge upon the land, because the probate court could not invest the commissioners with that authority. The assent of Daniels is what gives validity to the charge, and, as this assent creates an implied liability only, the three-year statute governs."

We adhere to the doctrine announced in *Dismukes v. Halpern*, and, to the extent that the language in *Parker v. Carter* conflicts with it, that language is disapproved. With possibly one exception, there is only one authority which goes to the extent of holding that an implied promise to pay a consideration named in a deed and recited as paid is in effect a contract in writing, and that is the case of *Fowlkes v. Lea*, 84 Miss. 509, 36 South. 1036, 68 L. R. A. 925, 2 Ann. Cas. 466. That case was decided by a divided court, and the dissenting opinion is in line with our decision in *Dismukes v. Halpern*, *supra*.

The decree of the chancellor was therefore correct, and the same is in all things affirmed.

# ST. LOUIS, I. M. & S. RY. CO. v. McMICHAEL. (No. 177.)

(Supreme Court of Arkansas. Oct. 19, 1914.)

## 1. EVIDENCE (§ 558\*)—EXPERTS—CROSS-EXAMINATION—INTEREST.

Where witnesses testified for defendant railroad company, as expert engineers, as to the distance in which a train could be stopped, the court properly permitted plaintiff to ask them on cross-examination whether they had not been frequently called by defendant and other railroad companies to testify as experts, as bearing on their interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.\*]

## 2. APPEAL AND ERROR (§ 971\*)—WITNESSES—CROSS-EXAMINATION—EXTENT—DISCRETION—REVIEW.

The extent to which cross-examination on a collateral issue shall be permitted is largely in the discretion of the presiding judge, the exercise of which is not ground for reversal, unless it plainly appears that the discretion has been abused, to the prejudice of the objecting party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.\*]

## 3. EVIDENCE (§ 150\*)—RELEVANCY—EXPERIMENTS.

Evidence as to experiments, made after the injury, to test the accuracy of the testimony of witnesses to the occurrence, is admissible, if the experiments were made under conditions substantially the same as at the time of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 439; Dec. Dig. § 150.\*]

## 4. EVIDENCE (§ 150\*)—EXPERIMENTS—SIMILARITY OF CONDITIONS.

Plaintiff, while waiting for a passenger train on which he desired to take passage, sat on the edge of the platform, and, bending forward, went to sleep. While sitting in this position, he was struck by the train, which passed the platform at a speed of 35 or 40 miles per hour. The engineer testified that he saw the object on the platform, but did not think it was a man until he got within 450 feet of it, when he immediately did everything possible to avoid the accident, but was unable to stop the train in time to avoid striking plaintiff, or in less than 550 feet. Tests were subsequently made which corroborated the engineer as to the distance at which a person on an approaching train in the position of the engineer could make out that a figure in plaintiff's position was a man, whereupon plaintiff introduced evidence of other experiments, in which a man was seated on the platform in the position that plaintiff was in when struck, and witnesses testified that, walking on the track, they could make out the figure was a man and see his hands at 1,089 feet. There was also evidence that a person on an engine in the position of the engineer, after becoming accustomed to the motion of the engine, though traveling at 35 miles an hour, could distinguish objects on or near the track as readily as a person on the track. *Held*, that the conditions surrounding plaintiff's experiments were sufficiently similar to those existing at the time of the accident to justify the court in admitting the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 439; Dec. Dig. § 150.\*]

## 5. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL—DEDUCTION FROM EVIDENCE.

Where an engineer, operating a passenger train, did not see plaintiff sitting on a station platform asleep in time to avoid striking him, and the track was straight for several miles, the day bright, and there was no obstruction to the engineer's vision, a remark of plaintiff's counsel in argument that "the old engineer was blind" was a proper deduction from the evidence, and not objectionable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.\*]

## 6. CARRIERS (§ 321\*)—INJURY TO PASSENGER—PERSONS ON STATION PLATFORM—INSTRUCTIONS.

Where, in an action for injuries to a passenger, while sitting asleep on the edge of a station platform, waiting for his train, by being struck by it as it passed, the court charged that, before plaintiff could recover, the jury must find that defendant's employees saw, or by exercising ordinary care could have seen, plaintiff in danger in time to have saved him, such charge was equivalent to requiring that the jury must find that defendant's employees saw, or by ordinary care could have seen, that plaintiff was a human being, and therefore in a perilous position, in time to have avoided injuring him, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

**7. TRIAL (§ 260\*)—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.**

It is not error to refuse a requested charge which is covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**8. DAMAGES (§ 95\*)—PERSONAL INJURIES—MEASURE OF DAMAGE.**

The measure of damages for personal injury is fair and just compensation for the injury, with reference to the pecuniary and other losses which plaintiff has sustained by the injury, in determining which the jury should consider plaintiff's age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, personal expenses for treatment, rate of wages, earning power, and probable increase or diminution of that power with the lapse of time, pain and suffering, present and future, and mental anguish on account of disfigurement of his person, if any.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.\*]

**9. DAMAGES (§ 226\*)—PERSONAL INJURIES—PRESENT VALUE.**

A jury in an action for injuries, having found the just compensation for damage of every character which plaintiff has sustained by his injuries, should reduce such amount to its present value, and return their verdict for that amount.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 568-573; Dec. Dig. § 226.\*]

**10. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

Defendant, in an action for personal injuries, was not prejudiced by the overruling of its objection to an instruction for failure to require that the jury reduce the compensation to which they found plaintiff entitled to its present value, where plaintiff's counsel, after stating the amount which he calculated, from the evidence, plaintiff had lost by his diminished earning power, told the jury that they should reduce that sum to its present value, and determine what plaintiff's loss was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

**11. CARRIERS (§ 320\*)—INJURIES TO PASSENGERS—QUESTION FOR JURY.**

In an action for injuries to a passenger, while sitting on a station platform asleep, by being struck by the train as it passed the station without stopping, evidence held to require submission of a question of the carrier's negligence in failing to discover plaintiff's peril and stop the train before striking him to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

**12. DAMAGES (§ 226\*)—PERSONAL INJURIES—EARNING CAPACITY.**

Where plaintiff, a man 28 years of age and receiving \$65 per month and expenses, was in line for promotion, evidence that it was possible in course of time for him to make \$1,680 a year did not justify the computation of the present value of his loss of earning capacity by reason of the amputation of both legs on the basis of such higher sum.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 568-573; Dec. Dig. § 226.\*]

**13. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.**

Plaintiff, a telegraph and telephone line foreman, 28 years of age and earning \$65 per month, but in line for promotion where he might earn as much as \$140 per month, was struck

by one of defendant's trains while he was sitting on a station platform asleep, waiting for the train. Both of his legs were cut off below the knees, and he was otherwise permanently disabled, disfigured, and injured. He was taken to a hospital, where his legs were amputated just below the knees, and four weeks after he suffered a second operation, and then a third, on both legs. After he was brought home, his legs ached all the time, necessitating medical attention, and thereafter one leg was again opened and pieces of loose bone taken out, and plaintiff himself cut out little pieces of bone that worked out of the flesh of his limbs, which the physicians failed to find. He testified that his limbs hurt him all the time, that he could not rest, was nervous, and that his feet hurt as though there was a burning in the bottom of his foot. He also had paid out about \$175 for medicines and medical attention. Held, that a verdict allowing plaintiff \$35,000 was excessive, and should be reduced to \$25,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Independence County; R. E. Jeffery, Judge.

Action by J. A. McMichael against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Appellee sued the appellant for personal injuries. He alleged, in part, as follows: That on the 18th day of March, 1913, he was at George's Spur, a station on defendant's railroad, for the purpose of boarding one of defendant's trains, due at that station near 12 o'clock, noon, going east, and that defendant's servants and employes operating said train ran same over him, cutting off his legs below the knees, and otherwise injuring and damaging him, by reason whereof he was permanently disabled, disfigured, and injured; that he was caused to suffer great mental and physical pain and loss of time, had been compelled to hire physicians and surgeons and buy medicines, and will be compelled in the future to suffer mental and physical pain and loss of time, hire physicians and surgeons, and buy medicines, all to his damage in the sum of \$75,000; that the plaintiff's injuries and damages were caused by the carelessness and negligence of the defendant's servants and employes operating the train aforesaid, in their failure to keep a constant lookout for persons upon the track, or to avoid injuring him after discovering his dangerous position; that if such lookout had been kept they could have discovered plaintiff's peril, and could have prevented injuring him by the exercise of ordinary care, etc. The answer of the defendant denied the allegations of negligence and damages, and set up the defenses of contributory negligence and assumed risk.

The testimony of the plaintiff tended to show that at the time he was hurt he was 28 years old. He was injured at George's Spur, a station on defendant's road, on the 18th of March, 1913. At the time he was injured he was in the employ of the Southwestern Tele-

graph & Telephone Company as foreman of the construction department, and his work was that of general repair of the lines. He had been in the employ of the company 10 or 12 years, and had been working in the capacity of foreman 4 or 5 years; had been working under the directions of one Mr. Burke, who was district plant chief. On the day before the injury he had done a hard day's work, and on that night went to Augusta, from which place he expected to go to do some work the next day near George's Spur. The night of the day before his injury he got only about 2 hours' sleep. He went to work early the next morning. He left his work at noon, and went to George's Spur, a flag station on defendant's road, for the purpose of boarding a train to Augusta to get his dinner. There was nothing at George's Spur but a little platform 8x10. He was expecting to take defendant's train from Little Rock to Memphis, which ordinarily passed the Spur at about 12:30. He was sitting on the platform, about 2 or 2½ feet from the track, with his feet on the ends of the ties, 8 or 10 inches from the rail. He was tired, sleepy, and worn out, and dropped off to sleep, leaning over toward the track with his face in his hands (he indicated the position to the jury). The next thing he knew was the next morning, about 7 o'clock, when they carried him into the operating room at Little Rock. He could just remember going into the operating room, and passed away; did not remember anything until the next evening about 5:30; then he passed off again, and did not remember anything until 3 or 4 days afterwards. He felt the lick on the right side of his head when he was hit, but did not know what it was. When he became conscious there was a big scar down his face, and a big scar on his right arm, and both his legs were off. When he finally became conscious of what had occurred to him, he had the headache. His legs and his arm and shoulder hurt him. His right arm felt like it was dead. There was a second operation on the left leg, four weeks after the first operation; then there was another operation on both legs. He suffered greatly in the hospital and after they brought him to his home at Newport; his legs ached all the time, necessitating his having medical attention. A doctor at Newport operated on him again—opened up his leg and took out four or five bones. He himself cut out little pieces of bone that were working out of the flesh of his limbs, which the doctor did not take out.

He testified that his limbs hurt him all the time, aching and burning. Some nights he could not rest; was nervous; would wake up. Sometimes he would attempt to get off the bed, and think that he had both feet, and nearly fall off the side of the bed. His feet hurt something like there was a hurting in the bottom of his foot. His method of locomotion was a rolling chair. He did not go to town

often; he felt like people were looking at him. Before he was injured he had been under his chief, Mr. Burke, about 3½ years, and had taken vacation during that time amounting to about 4 days. He was getting \$65 a month and his expenses. He had paid out \$175 for medicines and medical attention. The track approaching George's Spur from Bald Knob, in the direction from which the train came, was perfectly straight for a distance of 6 or 8 miles. There was nothing that could have obstructed the view of the track there. The train was coming from the west, and going east.

Witness Burke testified that he was in the employ of the Southwestern Telegraph & Telephone Company as district plant chief. McMichael worked under him. With reference to industry, his character was the best that a man could have in every respect. He was sober, and was competent in every line of his work, and was in line of promotion. If he had been promoted, he would run up just as high as he worked himself up to be—up as high as superintendent, if he could do that. Witness' position was next to that of superintendent. If McMichael got a job as foreman, he was in line of promotion for witness' position. Witness' position paid \$115 and expenses per month, which was gradually increased each year to \$150. McMichael's wages were to have been raised in the near future to \$70 per month, if witness' recommendation went through. Other witnesses testified to the same effect as to McMichael's character for industry and sobriety.

The engineer who was on the train that injured McMichael testified that he had been a locomotive engineer for over 30 years. When approaching George's Spur on the day of the injury, at the usual distance, he sounded the station whistle. He got no signal to stop. There was no one on the platform, and no one in sight to signal the train to stop. Consequently he did not slacken the speed of the train. On approaching the station at George's Spur, he noticed an object which resembled something like a sack at a distance, and looked like feed or something on the platform. He never took his eyes off it. When he got within 450 feet of the object, he saw that it was a man. It was a man who was in a sitting posture, with his head down so low that you could not distinguish it as a human being on the platform. As soon as he saw that it was a man, he shut off steam, applied the brakes in emergency, pulled the whistle, opened his sand, and did everything that could be done to stop; that, seeing and realizing that it was a man in a dangerous place, he gave a continuous blast of the whistle. The man never moved as long as he was in the engineer's vision. The train consisted of five cars. The engine and baggage car ran by him, and the front end of the first coach stopped at McMichael. The witness demonstrated before the jury the

position in which he saw McMichael on the platform. He was sitting about the middle of the platform, with his feet down straight, not on the rail, but down by the ties. His head was bowed down on his knees, just as low as it could be, so that you could not see his head at all. At about 700 or 800 feet he saw an object there which looked like a sack, like something like feed had been left there on the platform. He ran past him about 130 feet. The track was straight from the Bald Knob end of the line for 10 miles. He was running between 35 and 38 miles an hour when he first saw the object. He was keeping a constant lookout, and could see from his side as well as the fireman could see from his side. Witness' eyesight was good, and it was a bright clear day. It was impossible for witness to stop the train in the space after he discovered that the object on the platform was a man. Witness, in his place on the engine, was about 5 feet above the track. McMichael was in such position that witness did not see his hands; he had them hid. The equipment of the train was in first-class working order. After discovering that the object was a man, witness stopped the train in about 580 feet. He had been running on that line something like 3 weeks when he struck McMichael. There was a slow board close to the Spur, with the word "Slow" on it, which is a sign to slow up for the draw-bridge, but not to slow up at the point where the board was.

The testimony of the fireman tended to corroborate the engineer as to the position of McMichael and as to the efforts that were used to stop the train. The fireman stated that he noticed the object on the platform; that he was putting in coal between 400 and 500 feet from George's Spur. The engineer sounded the alarm whistle. He finished his fire and then raised up, probably a distance of 150 or 200 feet from the platform, when he noticed the object on the platform. He rang the bell, and the engineer did everything he could with the whistle, but still the object did not move. Everything was done that could be done to stop the train.

The testimony of the conductor, brakeman, and other witnesses tended to corroborate the testimony of the engineer as to the efforts that were made to stop the train. A passenger on the train testified that it was an unusually sudden stop.

The appellant introduced the testimony of witnesses who made tests under substantially, if not precisely, similar conditions to those existing on the day of the injury, on one occasion with the same engine and the same number of cars, and on another occasion with an engine of same type, the same engineer, with a man placed on the platform in the same position in which McMichael was described as being in on the day of his injury. The train was running at practically the same rate of speed, and witnesses, who were

not employes of the company, were placed in the cab on both the fireman's and the engineer's side, who kept a constant lookout in the direction of the platform at George's Spur, and the place was marked from where they could first discover that the object was a man. These witnesses corroborated the testimony of the engineer, showing the distance at which it was first possible to discover that the object, occupying the identical position that McMichael was described as being in, was a human being, and also the distance in which it was possible to stop the train, using the same efforts as on the day of the injury.

Two of these witnesses were introduced as expert engineers, to show that the tests were made under precisely the same conditions that the train was being operated on the day of the injury, and to testify with reference to the distance at which and the time in which a train could be stopped under the conditions described. On cross-examination these witnesses were asked questions to the following purport: If they were not used frequently and principally as expert witnesses by the railway company, and they were asked particularly as to other cases in which they had testified, and whether they had not testified for other railroads in Arkansas. The witnesses answered the questions to the effect that they had been used frequently as experts, and that they had testified as such in various other cases, and for other railroads in that capacity. The appellant objected to these questions, and the answers thereto. The court, in ruling upon the objections, stated:

"This can only be considered, gentlemen, in arriving at what interest the witnesses might have in the case, if any."

Witness Neal, who was introduced to testify in regard to the test that was made which he witnessed, in his direct examination said, in answer to questions propounded by counsel for appellant, that he had occupied various official positions in Jackson county, to wit: That he was first deputy sheriff two years; that he was elected circuit clerk, and served four years; that he was then elected sheriff, and served four years, and went out of office a year ago as sheriff. On cross-examination, by counsel for the appellee, he was asked the following question: "Now, Mr. Neal, you told us about being an officer down yonder in Jackson county; you were defeated this last time, weren't you?" and answered, "Yes, sir." The appellant objected to the question and the answer, and the court overruled its objections, and appellant duly excepted.

In rebuttal, appellee, over the objection of appellant, introduced witnesses who made observations to ascertain how far a man could be seen sitting on the platform at George's Spur in the position appellee was in at the time of his injury. One of these witnesses testified as follows:

"There was a man sitting upon the platform with his feet out towards the railroad. We went back towards Bald Knob to make the observation. We went 363 steps, or 1,089 feet, to the edge of the trestle. The man was sitting sort o' in this position (indicating), and when I was at this trestle I could see very distinctly that it was a man. I could even see his hands."

Another witness testified:

"The man was sitting on the edge of the platform, facing the track, in about this position (indicating). We walked up as far as the trestle, 383 steps. I turned around to see if I could see anything on the platform. I could tell very readily that it was a man. I could see his hand."

Another testified:

"The man was sitting on the edge of the platform facing the track, in about this position (indicating). We walked up as far as the trestle, 383 steps. I turned around to see if I could see anything on the platform. I could tell very readily that it was a man. I could see his hand—that is, the hand next to me—very clearly."

Another witness stated:

"I was there last Friday for the purpose of looking over the condition of that place. There was a gentleman sitting on the platform there in a stooping position. When we got to a point 1,000 or 1,100 feet from the man on the platform, I could very readily distinguish the form of a man thereon. You could still see the man at a distance of between 2,000 and 2,206 feet, but not so plain as from the other end of the bridge."

Another witness testified that he sat on the platform while they made the picture. He says:

"I got in the same position, supposed to be, that the man was that got hurt. I remained in an inclining position during the time the people were taking the observations from a distance up the track."

Two of these witnesses testified that they had been passenger engineers for many years; that a person who had ridden on an engine for a number of years, and who had become accustomed to the motion of the engine, could see as well from the engine, running at a speed of between 35 and 40 miles an hour, as he could if he was standing or walking on the ground. One of these witnesses testified that when one was on an engine—

"he was in an elevated position, and could see more clearly than a person down on the track. He could see an object in the distance plainer on the engine than he could walking."

These last two witnesses, over the objection of appellant, also testified that a train going at the rate of 35 miles an hour could be stopped in an emergency in a space of between 500 and 600 feet.

At the request of the plaintiff, the court gave the following instruction:

"(2) If you believe from the preponderance of the evidence that the plaintiff was upon the tracks of the defendant, and in a perilous position, and that the agents and servants of the railroad company in charge of the train, whose duty it was to keep a lookout for persons and property upon the track, saw the plaintiff in said perilous position in time to have avoided injuring him, by the exercise of ordinary care, or that said agents and servants of defendant, by keeping a constant lookout, could have seen the plaintiff upon the track and discovered his

perilous position in time to have avoided injuring him by the exercise of ordinary care, and failed to exercise such ordinary care to protect the plaintiff from danger and injured him, then you will find for the plaintiff, and assess his damages at such a sum as you believe that he is entitled to under all the evidence in the case."

Appellant duly objected to the granting of the above prayer on five specific grounds, and duly excepted to the ruling of the court in giving the prayer.

The court also gave the following instruction:

"(3) If you find for the plaintiff, you will assess his damages at such a sum that will compensate him for the bodily injury sustained, if any, the physical pain and mental anguish suffered and endured by him in the past, if any, by reason of the said injury, the effect of the injuries on his health, according to the degree and probable duration of the same, if any, his loss of time, if any, and his pecuniary loss from his diminished capacity for earning money through life, if any, and the amount of money expended for medicine and medical attention, if any, and from these, as proven from the evidence, assess such damages as will compensate him for the injuries received."

The appellant objected to this instruction—

"because it ignored the reduction to the present value of the matters that are mentioned therein."

The record shows that the court requested—

"the attorneys for the defendant to offer any instruction that they might want given upon the matter of the sum that might be awarded to the plaintiff by reason of his inability to labor being reduced to its present value, whereupon the defendant states that it has already offered objection to the instruction upon the measure of damages requested by the plaintiff for the specific reason that the instruction on the measure of damages ignores a reduction to a present value."

The appellant asked the court to instruct the jury as follows:

"(1) You are instructed that under the law and the evidence in this case your verdict will be for the defendant."

The court refused said prayer, and the appellant saved exceptions.

Appellant also presented the following prayer for instruction:

"(15) If you believe from the evidence in this case that defendant's employes kept a constant lookout as required by law, and after they discovered that the plaintiff was a human being, and that he was in a perilous position, used ordinary care to prevent the injury to him, then it would be your duty to find for the defendant."

The court also refused this request for instruction, and appellant saved exceptions.

Defendant's third request, which the court gave, referred to in the opinion, was as follows:

"(3) You are instructed that, before you would be authorized to find for the plaintiff, you must find, first, that he was injured by reason of the neglect of the employes of the railroad company to keep a constant lookout; and, second, that, had such lookout been kept, the employes of defendant company could have discovered that plaintiff was in actual danger or peril of injury in time to have prevented injuring him by the exercise of reasonable care after discovering such peril."

The record shows that one of the attorneys for the plaintiff, in his closing argument, made the following remarks:

"Talk to me about not being negligent; I think that old engineer [Mr. Hill] is blind, is really what I believe about it, if you want to know how I feel about it. Of course, he denies it; said he was just wearing spectacles to cure the headache. You know that didn't have anything to do with that."

The jury returned a verdict for \$35,000. Appellant filed a motion for a new trial, setting up various grounds reserved in its bill of exceptions to the rulings of the court, and, among others, that the verdict was excessive, and that the court erred in not directing a verdict in favor of the appellant. The motion for a new trial was overruled. Judgment was entered in favor of the plaintiff for \$35,000, from which this appeal has been duly prosecuted.

The authorities with reference to the admissibility of evidence concerning experiments, cited by appellant and referred to in the opinion, are as follows: *Chicago City Ry. Co. v. Brecher*, 112 Ill. App. 106; *C. & E. I. R. Co. v. Crose*, 113 Ill. App. 547; *La Porte Carriage Co. v. Sullender* (Ind. App.) 71 N. E. 922; *Seibert v. McManus*, 104 La. 404, 29 South. 108; *Lasitry v. Olympia*, 61 Wash. 651, 112 Pac. 752; *Merchants' L. & T. Co. v. Houcher*, 115 Ill. App. 101; *Chicago Folding Box Co. v. Schallawitz*, 118 Ill. App. 9; *Louisville Ry. Co. v. Hoskins* (Ky.) 88 S. W. 1087; *Krueger v. Brenham Furn. Mfg. Co.*, 38 Tex. Civ. App. 398, 85 S. W. 1156; *Halverson v. Seattle El. Co.*, 35 Wash. 600, 77 Pac. 1058; *Zimmer v. Fox R. V. E. R. Co.*, 123 Wis. 643, 101 N. W. 1099; *De Loach Mill Co. v. Iron Co.*, 2 Ga. App. 493, 58 S. E. 790; *Chicago, St. L. & P. Ry. Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357; *Lake Erie, etc., Ry. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *M., K. & T. Ry. Co. v. Dunbar*, 49 Tex. Civ. App. 12, 108 S. W. 500; *Riggs v. Railroad*, 216 Mo. 304, 115 S. W. 969; *Leonard v. So. Pac. Ry. Co.*, 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221; *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 243, 29 South. 646; *Hawks v. Charlemont*, 110 Mass. 110; *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283; *Leonard v. So. Pac. Co.*, 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221; *Upthegrove v. Chic. G. West. Ry. Co.*, 154 Ill. App. 460; *Graney v. St. Louis, I. M. & S. Ry. Co.*, 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633; *Green v. L. I. R. Co.*, 131 App. Div. 277, 115 N. Y. Supp. 590; *Chicago & A. Ry. Co. v. Logie*, 47 Ill. App. 292; *Ala. G. So. Ry. Co. v. Burgess*, 114 Ala. 587, 22 South. 169; *Burg v. Chicago, etc., Ry. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419; *Byers v. Railroad Co.*, 94 Tenn. 345, 29 S. W. 128; 17 Cyc. 285.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, S. D. Campbell, of Newport, and McCaleb & Reeder, of Batesville, for appellant. Norwood & Grant and Frank Pace, all of Little Rock, and M. M. Stuckey, of Newport, for appellee.

WOOD, J. (after stating the facts as above). We will discuss the questions in the order in which they are presented in the brief of counsel for appellant.

[1] 1. There was no prejudicial error in permitting the counsel for appellee to ask certain witnesses, who had been introduced as expert engineers to testify with reference to the distance in which a train could be stopped, whether or not they had frequently been called by appellant and other railway companies to testify as experts. The court announced that this cross-examination would be allowed to show the interest of the witnesses. It is manifest that the court permitted the cross-examination for the purpose of testing the credibility of the witnesses; and, in the mind of a reasonable man, no prejudicial inference could be drawn from the fact that the witnesses were frequently called by the appellant and other railroad companies to testify in the capacity of experts. The questions were within the bounds of legitimate cross-examination. At least, it was within the sound discretion of the court to permit the questions to be asked and answered, and there was no abuse of the court's discretion.

[2] The extent to which a cross-examination should go on collateral facts is largely within the discretion of the presiding judge, and is not a matter for reversal, unless it plainly appears that the discretion has been abused to the prejudice of the party objecting. *St. L., I. M. & S. Ry. Co. v. Kelley*, 61 Ark. 52, 31 S. W. 884. The fact that expert witnesses were frequently called to testify in that capacity would certainly afford no reason for discrediting their testimony, and no reasonable mind could draw, on that account, an unfavorable inference against the party for whom they were called to testify.

2. The testimony of the engineer and fireman on behalf of appellant tended to show that they were keeping a constant lookout, and that they did not discover that the appellee was a human being at a sufficient distance from where he was sitting on the platform near the appellant's railway track to have stopped the train in time to avoid injuring him; that they did everything within their power after discovering that appellee was a human being to stop the train and were unable to do so. Appellant introduced witnesses who had made tests under essentially the same conditions, whose testimony tended to corroborate the testimony of the appellant's engineer and fireman. The testimony of these witnesses tended to show that it was between 500 and 600 feet from where appellee was situated to where he could have been first discovered as a human being by those on an engine running at the speed of 35 or 40 miles an hour. It was shown on behalf of the appellant that it would take from 850 to 1,050 feet to stop a train going at a speed of 35 miles an hour on a level track and everything favorable.

[3] Appellee, in rebuttal, over the objection of appellant, was permitted to introduce the testimony of witnesses to the effect that they went upon the ground, and that at a point on the track considerably over 1,000 feet from where appellee was sitting at the time of his injury they could see a man sitting in a position described by them. The appellant contends that this testimony was incompetent, for the reason that the conditions under which appellee's witnesses made their observations were not substantially or essentially the same as were the conditions under which appellee was injured. The authorities are unanimous in holding that experiments made after the injury occurred, to test the accuracy or inaccuracy of the testimony of witnesses to the occurrence, must be made under conditions that are substantially or essentially the same as were the conditions at the time of the occurrence, in order to render such experiments competent. See numerous authorities cited by learned counsel for appellant.

[4] We are of the opinion that the court did not err in holding that the conditions under which the experiments were made by the witnesses on behalf of the appellee were substantially the same. It is true that the witnesses who made these observations were not on an engine moving at a speed of 35 or 40 miles an hour, but there was testimony of expert passenger engineers to the effect that one accustomed to the movements of an engine could see a man as plainly from an engine going 35 or 40 miles per hour as one standing or walking on the track. This testimony, although contradicted by expert passenger engineers testifying for appellant, was nevertheless sufficient to render the testimony of the witnesses for appellee competent, so far as the essential similarity of viewpoints was concerned. The court heard the engineer describe, and saw him demonstrate before the jury, the position of appellee when he was injured, and heard the appellee describe the position in which he was sitting and saw him demonstrate that position before the jury. The court also heard the testimony of the witness, describing the position in which they placed a man on the platform, supposed to be the position in which appellee was placed at the time he was injured. The witness who, in the experiments, was placed in the position to represent the position in which appellee was placed at the time of his injury, states:

"I got in the same position, supposed to be, that the man was that got hurt. I remained in a reclining position during the time the people were taking the observations from a distance up the track."

We must assume, therefore, that the court, by admitting the testimony objected to, found that these positions were substantially the same. The record shows that the attitudes of the witnesses making the experiments and of the appellee at the time of his

injury were demonstrated before the court and jury. These attitudes cannot be shown here, and, indulging every presumption in favor of the ruling of the trial court, we must hold that the court found that the position of the witness who, in the experiment, was intended to represent appellee's position, was essentially the same as that appellee had at the time of his injury, as described and demonstrated by the engineer and appellee before the jury. There is nothing in the record to show that these positions were not essentially the same. The court, therefore, did not err in admitting the testimony of the witnesses who made the experiments on behalf of the appellee.

[5] 3. The remark of the attorney for the appellee, in his closing argument, to the effect that he thought "that the old engineer was blind," was but an expression of his opinion, and not improper. He had the right to draw such deduction, stating it as his own conclusion, from the evidence, however far-fetched it may have been. The jury, as sensible men, could not have been prejudiced against appellant on account of this argument. The jury heard the testimony of the engineer and the other witnesses, and knew whether the attorney's conclusion was correct or not. It was a statement of the attorney's belief from the evidence that "the old engineer was blind," and not a statement that such was a fact.

4. The issue of negligence was whether or not the employes of appellant were exercising ordinary care in keeping the constant lookout required by the statute, and whether, in the exercise of such care, they discovered or should have discovered that appellee was a human being, and therefore in a perilous position, in time to have avoided injuring him. The court correctly instructed the jury on this issue. Instruction No. 2, set forth in the statement, and instruction No. 3, given at the request of appellant (reporter set forth in note), correctly defined the issue under the evidence. In these instructions both sides had the law defined covering the phases of the testimony tending to prove their respective contentions.

[6] Instruction No. 2 was not open to the specific objection which appellant contends it made to it by its request for instruction No. 15, which the court refused. Because, when the court told the jury that, before they could find for the appellee, they must find that the employes of the appellant, by exercising ordinary care, saw or could have seen appellee in a perilous position in time to have avoided injuring him, this was tantamount to telling them that they must find that the employes of appellant, by exercising ordinary care, saw or could have seen that appellee was a human being, and therefore in a perilous position, in time to have avoided injuring him, etc. Appellee, so far as the duties of the employes of appellant

were concerned, was not in a perilous position until they discovered or could have discovered that he was a human being. Therefore telling the jury that they must find that the employes saw or could have seen that appellee was in a perilous position before they could return a verdict in his favor was equivalent to telling them that they must find that the employes saw or could have seen that he was a human being and in a perilous position, etc.

[7] Instruction No. 3, given at the instance of appellant, uses substantially the same language in presenting the contention of appellant as that set forth in instruction No. 2, given at the instance of appellee. The court did not err therefore in granting appellee's prayer for instruction No. 2, and in refusing appellant's prayer No. 15. Even though appellant's prayer No. 15 was correct, it was not error to refuse it, because it was fully covered by the instructions which the court gave. *St. L. S. W. Ry. Co. v. Leflar*, 104 Ark. 528, 149 S. W. 530; *St. L., I. M. & S. Ry. Co. v. Aiken*, 100 Ark. 437, 140 S. W. 693; *St. L., I. M. & S. Ry. Co. v. Clements*, 93 Ark. 15, 123 S. W. 783; *St. L., I. M. & S. Ry. Co. v. Garner*, 90 Ark. 19, 117 S. W. 763.

[8] 5. The measure of damages is what the jury may find from the evidence to be a fair and just compensation with reference to the pecuniary and other losses which appellee has sustained by reason of his injuries. In determining this the jury should take into consideration his age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, personal expenses for treatment, rate of wages, earning power, and probable increase or diminution of that power with the lapse of time, pain and suffering which he has endured and shall continue to endure, and mental anguish on account of the disfigurement of his person.

[9] All these are proper elements for the consideration of the jury in determining the amount of his compensation. The jury, in determining the amount that shall represent the present compensation to the plaintiff for all damages of every character which he has sustained by reason of the injuries, should reduce whatever amount they found to be due the plaintiff to its present value and return their verdict for that amount. See *Sutherland on Damages*, vol. 4, c. 36, §§ 1241 to 1252, inclusive. See, also, *St. L., I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 560, 31 S. W. 571; *St. L., I. M. & S. Ry. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911. Mr. Sutherland says that the material inquiries in regard to the pecuniary loss on account of diminution of earning power are as follows:

"What is a pecuniary equivalent for this loss per year, and how long will it continue? The answer to them must be chiefly found in the nature of the injury, the age and general health of the injured party, and his antecedent earning capacity, as indicated by his qualifications and the character of his business or calling. In

respect to years to come the recovery will be like payment in advance, and the amount should be reduced to its present worth"—citing *Fulsome v. Concord*, 46 Vt. 135; *The William Branfoot* (D. C.) 48 Fed. 914.

[10] It follows that when appellant objected to appellee's prayer No. 3, on the measure of damages, for the specific reason that "it ignored the reduction to the present value of the matters that are mentioned in it," the court should have told the jury that the amount found by them should be reduced to its present value. But when the whole record on the subject is considered, as set forth in the statement, we are of the opinion that there was no prejudicial error to appellant in the court's failure to so tell the jury. The court requested counsel who made the specific objection to the instruction "to offer any instruction that they might want given upon the matter of the sum that might be awarded to the plaintiff by reason of his inability to labor being reduced to its present worth." Then the record shows that the attorney who made the closing argument for the appellee, after stating the amount which he calculated from the evidence that the plaintiff had lost by reason of his diminution in earning power, said that "the jury should reduce this to its present value to determine what his loss is." This shows that the appellee, through his counsel, interpreted the court's instruction to mean that the amount found by them must be reduced to its present value. As the appellee was only insisting on the present value of the loss that would accrue to him in the future by reason of his diminished earning power, the jury were not justified in awarding him a greater sum than such amount when reduced to its present value.

[11] 6. The court did not err in refusing appellant's instruction No. 1, directing the jury to return a verdict in its favor. The issue of negligence, under the evidence, was one of fact for the jury. The evidence was sufficient on that issue to sustain the verdict.

7. The verdict is excessive. Counsel for the appellee, in his closing argument, said:

"It will be \$28,860 that he has lost by reason of the fact that he will never work again. That amount the jury should reduce to its present value, to determine what his loss is."

It is probable, from the amount of the verdict, that the jury misunderstood the suggestion of counsel that the amount should be reduced to its present worth, and instead allowed appellee for his earning power the full sum of \$28,860. Seven hundred and eighty dollars, the amount he was earning per annum, multiplied by 36.7 years, his expectancy, would equal \$28,626. If the jury fixed upon \$780 as the sum which appellant would have received for 36.7 years, had he lived, then this amount, reduced to its present value, would have equalled \$15,249.

[12] This amount is according to the figures presented by appellant's counsel, and

appellee's counsel concede that these figures are correct upon the basis of a loss of \$780 per annum; but appellee contends that the jury could have and should have found that appellee's earning power should have been calculated on a basis of \$1,680 per annum, or \$140 per month, instead of \$780 per annum, or \$65 per month, the amount that he was receiving at the time of his injury.

[13] While the testimony shows that appellee was efficient in his work and was in the line of promotion, the jury would not have been justified in increasing the salary that he was receiving at the time of his injury, to wit, \$780 a year, to the sum of \$1,680 a year. That was an increase out of all proportion to what the evidence would justify as his probable increase of earning power, and such an estimate would ignore all contingencies of sickness and probable failure to secure promotion and employment. These the jury would have to consider, and counterbalance against the probability of promotion and continuous employment for the full period. That estimate, also, would leave out of consideration the fact that appellee, although deprived of his lower limbs below the knees, was not shown to have been totally disabled from securing some kinds of remunerative employment. Even at an annual income of \$1,680 as wages, without deduction, for the full period of appellee's expectancy, the sum reduced to its present value would have been \$27,370. That would have left \$7,636 for the other elements of damage.

The appellee is horribly maimed. He has suffered intensely, and will continue to suffer as long as he lives. There is no fixed standard of value for the physical pain and suffering and the mental anguish which he has endured and must endure. These are not susceptible of adequate measurement, for no price has been nor can be set upon human limbs. No normal person would endure the physical pain consequent upon the loss of his legs, and the mental anguish caused by such disfigurement, for all the gold in the world. But the law affords to one who has been thus injured through the negligence of another just and reasonable compensation. It is the peculiar province of the jury to determine from the evidence what the damages by way of compensation should be. But when the jury has named the amount, it is at last for the courts to say whether this amount exceeds the bounds of reasonable compensation as the law prescribes. While it is impossible for this court to know precisely the elements that entered into the minds of the jury in arriving at a verdict of \$35,000, it is certain that this amount far exceeds the sum that the jury should have allowed as covering all the elements proper to be considered by them, when fixed according to the correct rule of giving appellee present compensation for all the damages which he has and will sustain.

In our opinion a judgment in the sum of \$25,000 will fully compensate him for all damages growing out of his injuries.

The judgment of the lower court will be modified, and affirmed for this sum.

# KANSAS CITY SOUTHERN RY. CO. v. ARMSTRONG. (No. 189.)

(Supreme Court of Arkansas. Oct. 26, 1914.)

RELEASE (§ 34\*)—VALIDITY—CONCLUSIVENESS.

Plaintiff, an intelligent young woman, having been injured in a railroad collision, but, believing that her injuries were trifling, two days thereafter settled with defendant's claim agent for a nominal sum and executed a release. *Held* that, the settlement not having been induced by any trick or fraud, plaintiff was bound by it and could not recover for alleged permanent injuries which subsequently developed and of which neither party had any knowledge at the time of the settlement.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 82; Dec. Dig. § 34.\*]

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

Action by Susie Armstrong against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Pole McPhetrige, of Mena, and Jas. B. McDonough, of Ft. Smith, for appellant. H. A. King and J. I. Alley, both of Mena, and Steel, Lake & Head, of Texarkana, for appellee.

MCCULLOCH, C. J. The plaintiff claims to have received bodily injuries on account of a collision of two trains while she was a passenger on one of the defendant's trains, and she instituted this suit to recover compensation for such injuries. The defendant, among other defenses, pleaded a release in writing alleged to have been executed by the plaintiff, whereby she agreed and did accept the sum of \$10 in money in settlement of all of her claims against said defendant company for injuries. The trial of the case resulted in a judgment in favor of the plaintiff for the sum of \$2,500, and the defendant has appealed to this court.

The injury occurred on June 17, 1911, while plaintiff was a passenger on a local passenger train going south from Mena to Wickes. The train collided with a freight train, and plaintiff testified that from the shock of the impact she was thrown forward, first to one side and then to another, and was jerked back into the aisle over the seat which she was occupying, and that her head struck on the back of the next seat and then the floor. This occurred on the night of June 17th, which was on Saturday; and, after the passengers had debarked from the train, they were carried back to Mena; at least, the plaintiff was carried back to that place, where she stayed at one of the hotels of that city.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

She remained at Mena until about noon on Sunday, and then went to Wickes on another train, reaching there in the afternoon, and she spent the night there. She lived about three miles out in the country from Wickes, and the next morning walked out to her home in company with another young lady. The release was executed early Monday morning, June 19th, before the plaintiff started to her home in the country. Said release reads as follows:

"Know all men by these presents: That, whereas, the undersigned Miss Susie Armstrong, claims to have been injured by the Kansas City Southern Railway Company or their agents and claims that the said railway company is liable for said injuries, but the said railway company hereby expressly denies that it is in any way liable for said alleged injuries; and, whereas, it is nevertheless the desire of both said Susie Armstrong and said railway company to compromise and settle any and all controversies and claims which the said Susie Armstrong has, or may have or claims to have, or may claim to have against the said railway company, because of, or growing out of said alleged injuries: Now, therefore, in consideration of the sum of ten dollars (\$10) in hand paid to the undersigned the receipt of which is hereby acknowledged, the aforesaid controversies and claims are hereby compromised and settled and the undersigned does expressly release and forever discharge the said the Kansas City Southern Railway Company and its officers and agents and all other persons from and all liability which the undersigned has, or may have, or claim or may claim to have arising or growing out of or connected with any injury received by the undersigned on or about the 17th day of June, A. D. 1911, at or near Hatfield in the state of Arkansas and hereby acknowledges full satisfaction thereof and therefor. I understand that I am settling all claims against the K. C. S. Ry. Co. In testimony whereof, witness my hand and seal this 19th day of June, A. D. 1911."

The plaintiff testified at the trial of the case that she thought her injuries were only trifling ones, being slight bruises about the head and neck, and that when she executed the release she did so reluctantly and without any knowledge or belief that she had received any substantial injuries. She testified that the internal injuries, for which she claims compensation, were developed later; and she introduced physicians whose testimony tended to show that she had received such injuries, which would probably be permanent. This was contradicted by testimony introduced by the defendant, but that issue has been settled by the verdict of the jury.

The alleged settlement covered by the release was negotiated by the claim agent of defendant company. He appeared at the hotel in Mena where appellee was stopping Sunday morning; and, after being introduced to her, inquired whether or not she was injured in the collision and offered to settle for any such injuries. She replied that she had received no injuries except slight bruises and did not make any claim against the company. The agent then asked her if she had not been put to some expense and inconvenience for which she was entitled to compensation, and she disclaimed having any such

inconvenience or expense except her hotel bill, and the agent proposed to pay the hotel bill, and did so. This is the narrative of what occurred at the hotel on Sunday as given by the claim agent and the proprietor of the hotel, who was a witness. The plaintiff herself gives no account of what occurred at the hotel. She mentions, however, that the claim agent had paid her hotel bill at Mena, and she gives a narrative in detail as to what occurred at Wickes the next morning when she executed the release. She states that the agent came to the hotel at Wickes where she was stopping, and that the following occurred:

"I came out of the door of the hotel, and he spoke—says, 'Good morning,' and then the next thing he said he wanted to give me \$10, and I asked him why he wanted to give me \$10, and he said, 'Well, to pay for inconvenience and delays that you have been put to on account of this wreck.' I knew that would be my expenses all right. The hotel bill had already been paid at the Antlers Hotel. I hadn't really lost any time. I wasn't teaching at the time, so I knew \$10 would be ample to pay what I had lost of time, and inconvenience I had been put to; so I signed that release accepting that \$10 on that ground."

She stated further that she did not know that the release covered anything except compensation for inconvenience and expense on account of the delay, and that the release was not read over to her, but that the agent told her that that was all it covered. She admitted, however, that at the suggestion or dictation of the agent she wrote into the release the following concluding words, "I understand that I am settling all claims against the K. C. S. Ry. Co."

It will be observed that the release contract in express terms refers to the occasion on which the plaintiff's claim for physical injuries is based and covers all claims which she had or could have had growing out of or connected with any injury received by her on that occasion. In other words, the contract, in the most complete terms, contains a covenant for a settlement of all claims in consideration of \$10, which was paid. The question is therefore presented whether there is anything in the evidence which affords the plaintiff any escape from the binding force of her contract, and whether the evidence warranted a submission of that issue to the jury. We think that under the uncontradicted evidence in this case the plaintiff is bound by the contract and that the court should not have submitted the case to the jury. This is not a case where the plaintiff is shown to have been mentally incapacitated from entering into the contract, as in *St. L., I. M. & S. Ry. Co. v. Brown*, 73 Ark. 42, 83 S. W. 332, 3 Ann. Cas. 573; *Bearden v. St. L., I. M. & S. Ry. Co.*, 103 Ark. 341, 148 S. W. 861; or *St. L., I. M. & S. Ry. Co. v. Reilly*, 110 Ark. 182, 161 S. W. 1052. Nor is it a case where there was fraudulent representations as to the contents of the written instrument, or any trick or subterfuge whereby the papers

were substituted so as to induce the contracting party to execute it, as in *Hot Springs Railroad Co. v. McMillan*, 76 Ark. 88, 88 S. W. 846; *St. L., I. M. & S. Ry. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884. Neither is this a case where the injured person executed the release in reliance upon the superior knowledge of the physician or surgeon of the company as to the extent of the injuries, as in *St. L., I. M. & S. Ry. Co. v. Hambright*, 87 Ark. 614, 113 S. W. 803. The parties having deliberately contracted with each other for a settlement of the unliquidated claim, they are both bound by the contract; and, in the absence of fraud in the particulars indicated above in the decided cases, neither of the parties can be permitted to introduce testimony to show that the release was only partial.

Speaking of the conclusive effect of a release in the case of *Cherokee Construction Co. v. Prairie Creek Coal Mining Co.*, 102 Ark. 428, 144 S. W. 927, we said:

"The lease or instrument in question was something more than a mere receipt. It was the final embodiment in writing of the agreement between the parties. It is a comprehensive discharge, not only of the differences between the parties, but of all matters between them. The natural meaning of the language used is broad enough to cover everything connected with the first lease. To permit the plaintiff to show by parol proof that it was not so intended would be to contradict or explain away the instrument, which is contrary to the established rule of law as established by the previous decisions of this court."

The fact that neither of the parties knew that the plaintiff had received internal injuries, of which she now complains, does not alter in the least the above-announced principle. They were expressly contracting with reference to injuries received on a certain occasion, the claim was unliquidated, and the contract shows that the parties intended to settle all matters between them relating to that incident. Neither party knew of these injuries, but the defendant was expressly contracting against any such contingency as an unexpected claim arising, and it is unimportant that there was a mutual mistake as to the extent of the injuries unless the plaintiff relied and had the right to rely upon the superior knowledge of the other contracting party as to the extent of the injury. There is no such element as that in this case. The only attempt on the part of the plaintiff to show fraud is that the claim agent followed her up for the purpose of inducing her to make a settlement, and that he stated to her that the release only related to the matter of compensation for inconvenience and expense of the delay. She says, too, that she was in a nervous state and now feels that she was not in a condition at that time to make a settlement. The testimony does not, however, justify a submission of any of those issues to the jury; for, according to the undisputed testimony, she wrote into the release the positive state-

ment that it covered all claims against the company. She was an intelligent young woman, a school teacher, and her testimony shows that she understands the nature of the language used. Her statement that she did not then and does not now understand that the language mentioned has any other meaning than that to be drawn from its plain letter can afford no just grounds for setting aside her contract. She was and is of sufficient intelligence to understand it, and the conclusive presumption is that she did understand it. The settlement was made two days after the injury occurred, and the evidence showed that plaintiff was accompanied by one of her friends and that she was not laboring under any mental disability. She was up and going about on Sunday, the day intervening between the dates of the injury and the settlement, and immediately after she made the settlement she walked from Wickes out to her home three miles in the country.

The settlement was an improvident and unnecessary one, but the plaintiff entered into it in full possession of her senses and without the perpetration of any trick or fraud on the part of the claim agent that would justify the courts in disregarding the contract. Therefore the plaintiff is bound by it.

The evidence on this issue being undisputed as to material points, and being insufficient to sustain a verdict, the judgment will be reversed and the cause dismissed. It is so ordered.

MARTIN et al. v. CONNER et al. (No. 3.)  
(Supreme Court of Arkansas. Nov. 23, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 329\*)  
—SALE—HOMESTEAD—ABANDONMENT BY WIDOW.

Abandonment of the homestead by the widow of deceased does not affect the rights of the minor children, so as to permit its sale for payment of deceased's debts during the minority of any of his children.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1052, 1059, 1342, 1350-1364; Dec. Dig. § 329.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 329\*)  
—SALE—HOMESTEAD.

The administrator's sale, for payment of deceased's debts, of a tract of land, a portion of which constituted his homestead, being made during minority of some of his children, is void, and it is immaterial that it had been assigned to the widow as dower.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1052, 1059, 1342, 1350-1364; Dec. Dig. § 329.\*]

3. LIMITATION OF ACTIONS (§ 73\*)—JUDICIAL SALES—MARRIED WOMEN.

One is not relieved from the bar of the five-year statute of limitations relating to judicial sales because she is a married woman; there being no saving clause therein in favor of married women.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 390-412; Dec. Dig. § 73.\*]

#### 4. LIMITATION OF ACTIONS (§ 72\*)—RECOVERY OF HOMESTEAD—ACTION BY HEIRS.

The right of action of heirs of deceased to recover of purchasers at the administrator's sale, the land sold being deceased's homestead, cannot accrue during the minority of children of deceased.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390-398; Dec. Dig. § 72.\*]

#### 5. LIMITATION OF ACTIONS (§ 44\*)—STATUTES APPLICABLE—RECOVERY OF LAND.

The five-year statute of limitations from date of judicial sale in which to bring action against the purchasers has no application to action by the heirs of deceased for land sold at his administrator's sale, the land having previously been allotted to his widow as dower, the sale being inoperative as to her dower, and the heirs not being entitled to assert their right to the land till after death of the doweress, which was after expiration of the five years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220-230, 232; Dec. Dig. § 44.\*]

#### 6. LIMITATION OF ACTIONS (§ 73\*)—RECOVERY OF LAND—MARRIED WOMEN.

The seven-year statute of limitations, Kirby's Dig. § 5056, for an action for land, by an express saving clause in favor of married women, extends their right till three years after discovery.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 399-412; Dec. Dig. § 73.\*]

Appeal from Randolph Chancery Court; Geo. T. Humphries, Chancellor.

Suit by L. R. Martin and others against V. E. Conner and others. From an adverse decree, plaintiffs appeal. Affirmed.

Appellants brought suit to quiet their title to 8 acres of land, the northwest quarter, and 20 acres off of the southwest quarter, section 4, township 20 north, range 1 east, in Randolph county. These lands were conveyed to James Martin by a patent in 1837, who died in 1862, intestate. An administrator of his estate procured an order of sale from the probate court for said lands for the payment of debts on the 18th day of January, 1897, and they were duly sold thereunder, and purchased by A. W. and J. N. Martin, for \$465. The sale was duly reported and confirmed; a deed ordered and executed, conveying the title to the purchasers. On the 26th day of December, 1890, said grantees, by their joint deed, conveyed the lands to Mrs. E. C. West, who died intestate, the owner thereof, and leaving her surviving the plaintiffs, her only heirs at law.

It was alleged that there was no one in actual possession of the lands, and that V. E. Conner and the other appellees claimed some interest in the lands adverse to them, the nature of which was unknown, and prayed that the title be quieted. Certain of the defendants claimed title to portions of the lands by tax deeds, which were declared void. V. E. Conner denied the material allegations of the complaint, and alleged that James Martin was her father, and at the time of his death was occupying 160 acres of the

land in controversy, as his homestead, the exact description thereof being unknown to her, and that he left surviving him his widow, who afterwards married one Davis West, and several minor children; that the probate sale of the lands to A. W. and J. N. Martin was void, and void for the further reason that it occurred more than 16 years after his death. She claimed title to an undivided one-fourth interest in the lands by descent from her said father, and also by virtue of a tax sale.

The plaintiffs denied the allegations of the cross-complaint, alleged that E. C. Martin, widow, if she had any homestead right, had abandoned it long before the probate sale, and pleaded the five-year statute of limitations, applicable to judicial sales.

It appears from the testimony that the lands had been in the actual possession of no one since the year 1890; that James Martin was the owner thereof, and resided upon part of the lands with his family at the time of his death in 1862, and left surviving him his widow, Ellen C., who afterwards married Davis West, and his children V. E. Conner, A. W., J. N., Robert, J. F., and James, Jr.; that the plaintiffs and defendant V. E. Conner, are children and only heirs of James Martin, deceased; that his widow, Ellen C. West, died intestate in 1904, leaving the plaintiffs, her only heirs; that V. E. Conner was a stepdaughter of said Ellen C. West.

On the chancery court record of Randolph county, there appears recorded a decree rendered in October, 1870, wherein V. E. Conner et al. were plaintiffs, and Ellen C. Martin, as widow of James Martin, deceased, and as administrator of his estate, and the said A. W. and J. N. and James, Jr., were defendants, partitioning among said widow and all the heirs of the said decedent all his land. This decree also recited there were enough personal assets with which to pay the decedent's debts.

The final decree of partition shows that the lands in controversy were allotted to the widow, Ellen C., as her dower interest in said estate, and nowhere in that proceeding was any claim made or intimation thereof of any homestead interest in the lands by the widow or any of the children. An administrator de bonis non was appointed, who procured an order of the probate court of the county to sell the lands in controversy for the payment of the debts probated against this estate, and they were duly sold and conveyed to A. W. and J. N. Martin, for \$465, the sale being regularly made, and duly confirmed and deed duly executed, and said A. W. and J. N. Martin in December, 1890, conveyed the lands to Ellen West by warranty deed. At the time of the probate sale two of the children of the decedent, J. F. and James, Jr., were minors, 20 and 18 years of age, respectively. V. E. Conner was covert

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at the time of her father's death, and has ever since remained so.

The widow, Ellen C. Martin, first administered on the estate in 1863, and it was in course of administration till January 15, 1890; and the administrator's settlement shows the sale of the lands, the charge against himself for the purchase price thereof, and the disbursements upon the probated claims.

The court found that some part of the lands in controversy constituted the homestead of James Martin at the time of his death, the proof not showing what portion thereof; that the lands were regularly sold by the administrator of the estate for the payment of duly probated claims, and the amount received therefor applied to the payment of the debts; that the sale occurred more than 16 years after decedent's death, and while the widow and two of the minor children were living; that the sale was void for want of jurisdiction in the probate court to make the order; and that the plaintiffs and V. E. Conner were the only heirs of the decedent, and the plaintiffs were entitled to three-fourths of the lands in controversy, and the said V. E. Conner to one-fourth by inheritance; that the tax sales were void, and decreed accordingly; and from this decree the plaintiffs appealed.

S. A. D. Eaton, of Pochahontas, for appellants.

KIRBY, J. (after stating the facts as above). It is insisted, first, that the court erred in declaring the administrator's sale of the lands void, and that in any event appellee is barred from claiming them by the statute of limitations applying to judicial sales. The lands were acquired by James Martin from the government by patent in 1837, and he resided with his family upon them at the time of his death in 1862. He left surviving him his widow, Ellen C., who afterwards married Davis West, and some minor children, two of whom, J. F. and James, Jr., were 20 and 18 years of age, respectively, at the time A. W. and J. N. Martin purchased the lands at the administrator's sale for the payment of debts. The chancellor found, and the agreed statement of facts shows, that some part of the land constituted the homestead of James Martin at the time of his death. It also appears that the chancery court in October, 1870, in a suit wherein V. E. Conner et al. were plaintiffs, and Ellen C. Martin, as widow of James Martin, deceased, and administrator of his estate, and said A. W. and J. N. were defendants, partitioned the lands of said decedent's estate among all his heirs and allotted these lands to the widow as dower.

In *Chambers v. Saille*, Adm'r, 29 Ark. 412, the court in discussing the homestead law of 1852 (Acts 1852-53, p. 9) said:

"The legal effect of the act, as held by this court in *Norris et al. v. Kidd*, 28 Ark. 485, is to

create no new estate, but to protect the occupant of the land in the use and occupancy of the land so set apart as a homestead during the time of such occupancy, but if abandoned by removal or death, leaving neither wife nor children to succeed to his rights, the rights of the judgment creditor will be fully restored."

[1] The abandonment of the homestead by the mother could in no wise affect the homestead rights of the minor children. *Booth v. Goodwin*, 29 Ark. 635.

"The effect of the homestead act was to suspend the rights of the creditor until the child or children became of age and are presumed to be capable of taking care of and supporting themselves, at which time, and not before, the rights of creditors to satisfaction out of the estate may be asserted." *Booth v. Goodwin*, supra.

[2] The sale by the administrator de bonis non, for the payment of the debts of the land, a portion of which constituted the homestead of the decedent during the minority of two of his children, was void, therefore, and had no effect to convey the title to the purchasers thereat, who of course conveyed none to Ellen C. West by their warranty deed in 1890.

It is true these lands were assigned or allotted to the widow as dower, but her taking of them as such was not necessarily inconsistent with her homestead right, and no act of hers, as already said, could operate as an abandonment of the homestead that would affect the rights of the minors. The law provides that the widow shall remain and possess the chief dwelling house of her deceased husband, together with the farm thereto attached, until her dower is assigned, and that in the assignments of dower it shall be the duty of the commissioners to so lay off the dower in the lands that the usual dwelling of the husband and family shall be included therein. She can, of course have the dower laid off and allotted on any part of the lands of the deceased, whether it includes the dwelling or not. Sections 2704-2706, Kirby's Digest; *Horton v. Hilliard*, 58 Ark. 298, 24 S. W. 242.

[3-6] The fact that appellee is a married woman would not relieve her from the bar of the five-year statute of limitations relating to judicial sales, if it was applicable to this case, since there is no saving clause to married women therein. Her right of action could not have accrued against the purchasers or their assigns until the coming of age of the minors; within the authority of *Griffin v. Dunn*, 79 Ark. 408, 96 S. W. 190, she would still have two years of the statutory period allowing a reasonable opportunity in which to assert it, but notwithstanding this, the said sale occurred after the allotment of the lands to the widow as dower, and although it was inoperative so far as her dower was concerned (*Shell v. Young*, 78 Ark. 481, 95 S. W. 798), still appellee could not have asserted her right to the lands until the death of the doweress which occurred in 1904, long after the five years allowed

persons by the statute from the date of the judicial sale in which to bring actions against the purchasers or their assigns expired. Her right not having accrued within the five years from the date of said sale, that statute has no application. *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; *Griffin v. Dunn*, supra. Being a married woman at and from the time of her father's death to now she was not bound to assert her right sooner, there being a saving clause for married women in the seven-years statute of limitations. *Kirby's Dig.* § 5056. She was entitled to one-fourth of the lands by inheritance from her father, as the chancellor found.

And there being no error in the record, the decree is affirmed.

### SPENCER & CO. v. BANK OF HICKORY RIDGE. (No. 9.)

(Supreme Court of Arkansas. Nov. 23, 1914.)

#### 1. BANKS AND BANKING (§ 148\*) — DRAFT WITH FORGED BILLS OF LADING ATTACHED—PAYMENT BY DRAWEE—LIABILITY OF BANK.

Where dealers, having agreed to honor a draft on condition that bills of lading be attached thereto, state this fact in response to the inquiry of a bank to which the draft is presented for payment with forged bills of lading attached, and subsequently pay to the bank the amount of the draft, acting on their own opinion as to the validity of the bills of lading and not on any express or implied representation of the bank, they cannot recover from the bank the amount so paid.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.\*]

#### 2. BANKS AND BANKING (§ 148\*) — DRAFT WITH FORGED BILLS OF LADING ATTACHED—PAYMENT—ACTION OF DRAWEE—LACHES.

That the drawees of a draft with forged bills of lading attached did not notify the bank of the forgery until about 30 days after they had paid the bank the amount of the draft could not prevent them from recovering such payment from the bank, where they gave notice to the bank immediately on discovering the forgery.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.\*]

#### 3. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTION.

In an action by drawees against a bank to which they had paid the amount of a draft with forged bills of lading attached, error in instructing, without evidence to show delay, that plaintiffs could not recover if they delayed an unusual time in notifying defendant of the forgery after discovering same was ground for reversal, where it could not be determined that the jury did not base their verdict thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Hart and Kirby, JJ., dissenting.

Appeal from Circuit Court, Cross County; W. J. Driver, Judge.

Action by Spencer & Co. against the Bank of Hickory Ridge. From judgment for de-

fendant, plaintiff appeals. Reversed and remanded.

Appellants sued to recover \$718.07, the amount of a certain draft which had been drawn on and paid by them. To this draft there was attached bills of lading for three car loads of corn, which bills of lading proved to be forgeries, and appellants testified that the circumstances under which they paid the draft were as follows: That one F. F. Farrin called at the offices of appellants, Spencer & Co., in the city of Jonesboro late in January or early in February, 1912, and stated that the purpose of his visit was to buy some corn with the shuck on, but they were unable to agree on the price, and Farrin stated that he thought he could do better by going to Southern Illinois, and that he returned again to their office early in February and said that he had bought ten cars at 44 cents per bushel, f. o. b. points in Southern Illinois, and offered to sell Spencer & Co. four of these cars at 46 cents per bushel; Farrin said that his brother was in Illinois and would attend to loading out the corn. This offer was accepted, and it was agreed that Farrin should draw on them for 75 per cent. of the invoice value of the corn, and that if Spencer & Co. decided to ship any of this corn to a prepay station, Farrin should prepay the freight and add the freight charges to the draft, and that after the corn was delivered and unloaded they were to pay him the 25 per cent. balance. H. J. Spencer, of this firm, testified that he next saw Farrin about the middle of February, and was asked by him if the corn had been received, and he was told that it had not been. That Farrin stated he had heard from his brother in Illinois, and was satisfied the corn had been loaded out, but that he would telegraph his brother right away and ascertain the cause of the delay. That after a short absence Farrin returned to their office, and stated that he had just heard from his brother, who had misunderstood the shipping directions, and that his brother had mailed the bills of lading to Hickory Ridge, instead of to Jonesboro, the explanation being made that Farrin was at Hickory Ridge when he wired the shipping directions, which had been given him by Spencer & Co. Farrin stated that he would go to Hickory Ridge and get these bills of lading, and as it was about train time, he left at once for that purpose. That later in the day, about the time when Farrin would have arrived at Hickory Ridge, there was a telephone call from that place, which proved to be from a Mr. Thompson, the cashier of the appellee bank, and in the conversation which ensued Mr. Thompson stated that Farrin was present and had certain bills of lading and wanted to draw on Spencer & Co. The witness further testified that he talked with both Mr. Thompson and Mr. Farrin, and that one or the other of them gave the car

numbers and the weights of the corn, but he was not certain which of them gave him this information, but that it was Mr. Thompson who asked about the money, and that Thompson said, in effect, that Farrin wanted to draw for this money, and Thompson asked if the draft would be paid, and that Thompson was told that Spencer & Co. did not owe Farrin any money, but had bought some corn from him and would pay the draft if the amounts were correct and if the draft was attached to the bills of lading. That during the conversation with Thompson they took down the weight of each car and the number of pounds of corn, and figured so as to have it correct, and that they did this while they held him on the wire. They had to estimate the amount of freight charges, but as nearly as they could tell the draft was made out for the correct amount, providing the corn had been shipped, and, having made this calculation, they told Mr. Thompson that they would honor the drafts if they were attached to the bills of lading for the three cars of corn. This draft was drawn by Farrin in favor of the Bank of Hickory Ridge on Spencer & Co., at Jonesboro, Ark., and attached to it were three Cotton Belt bills of lading, dated at Gale, Ill., February 8, 1913, signed by E. L. Smith, agent for that railroad. The bill of lading was in the usual form, and showed Spencer & Co. to be both the consignor and consignee. The other two bills of lading were the same except the difference in car numbers and weights. The draft was indorsed by the Bank of Hickory Ridge, by W. A. Thompson, cashier, but the bills of lading were not indorsed. There was nothing about the bills of lading to indicate that they were forgeries, and he admitted that if they had been presented to him personally by Farrin, he would have paid the attached draft. S. C. Spencer, the other member of the firm of Spencer & Co., testified, and substantially corroborated the testimony of H. J. Spencer; and it was shown by them that they sold the corn in the usual course of their business to customers residing at Little Rock and other points, and that they had no notice of the fact that the bills of lading were forged until these customers complained of the nondelivery of the corn. Whereupon they proceeded to investigate, and found that Gale was not a station upon the line of the Cotton Belt Railroad, and that no corn had been shipped by Farrin from that point, and that the bills of lading were consequently worthless. This information was obtained on the 14th of March, and Spencer & Co. immediately wrote the Bank of Hickory Ridge advising them of that fact and requesting the bank to refund the money which had been paid on this draft. The bank declined to pay this money, and this suit resulted.

Mr. Thompson, the bank cashier, testified: That he had only a slight acquaintance with Farrin, who had opened a small account with

his bank, and that when Farrin arrived at Hickory Ridge he called on the bank and asked that the bank cash a draft which he had drawn on Spencer & Co., with bills of lading attached, but that this request was refused, whereupon Mr. Thompson stated that he would take the draft for collection, and that he would pay the money when notified by his correspondent at Jonesboro of the collection of the draft; but Farrin stated that this was not satisfactory, as he wanted the money at once. That thereupon Farrin called Spencer & Co. and had a conversation with them about the payment of this draft, a portion of which was heard by witness. That Farrin outlined to Spencer & Co. what he wanted, and described the bills of lading, and spoke to them about paying the draft, and that after Farrin finished his conversation, he was called to the phone and talked with Spencer & Co. himself. Spencer & Co. understood what Farrin wanted before he talked with them at all, and he was assured by them that they would pay the drafts. That he told Spencer & Co. that Farrin wanted the money on these drafts that day, and he asked them if they would protect the bank if it would pay Farrin the money, and he was told that they would do so, and, on the strength of this statement, he paid Farrin the money. That no charge was made for cashing the draft, and the bank was not interested in the transaction. That witness knew Spencer & Co. to be reliable and responsible, and upon their assurance that they would protect the bank in the transaction, they let Farrin have the money, and that he did let Farrin have the money that day, and has not seen him since, and that it was nearly a month before he heard anything further about the transaction, and that the bank would not have advanced Farrin the money on the bills of lading but for Spencer & Co.'s statement that they would protect the bank in doing so. A. H. Evans, who was in charge of the telephone office at Hickory Ridge, testified and substantially corroborated Mr. Thompson. This witness testified that Farrin came into the telephone office and talked with Spencer & Co. about 10 minutes before Thompson came in, but that Thompson came in before Farrin had finished his conversation, and that Farrin figured out the amount of the corn, and told Spencer & Co. the amount for which he wished to draw. That the side phone was out of commission, and the conversation occurred over the switch, and he heard that end of the conversation between Thompson and Spencer & Co., and heard Thompson inquire, "Will you protect us?" and inferred from the remainder of the conversation that an affirmative reply was given.

At the conclusion of the evidence the court gave various instructions which were as favorable to appellants as they could ask, and the correctness of none of which is seriously

questioned, except that appellants strongly insist that a verdict should have been directed in their favor, and except that the court erred in giving the instruction numbered 6, which reads as follows:

"No. 6. In this case, even if you should find that the bills of lading are a forgery, yet, if you further find that plaintiffs after discovering such forgery, delayed an unusual time in giving notice of such fact to defendant, it will be your duty to find for defendant."

E. L. Westbrooke, of Jonesboro, for appellant. Killough & Lines, of Wynne, and Lamb, Caraway & Wheatley, of Jonesboro, for appellee.

SMITH, J. (after stating the facts as above). The case of *La Fayette v. Merchants' Bank*, 73 Ark. 561, 84 S. W. 700, 68 L. R. A. 231, 108 Am. St. Rep. 71, is similar in many respects to the case at bar. There the facts were that one Whitlock had an agreement with the plaintiffs, *La Fayette & Bro.*, by which *La Fayette & Bro.* agreed to pay drafts drawn by Whitlock on them for the purchase price of cattle, provided that a bill of sale, signed by the vendor, conveying the cattle to *La Fayette & Bro.*, should be indorsed on the back of the draft as security for the payment of the draft. To enable Whitlock to have these drafts, with bills of sale in proper form, blank drafts, with bills of sale printed on the back, with spaces for description of cattle purchased and for the signature of the owner, were prepared and given to Whitlock. The intention was that he should buy these cattle in the Indian Territory, where he lived and where the firm of *La Fayette & Bro.* was in business. He afterwards drew drafts in favor of certain persons living within the territory, and, without their knowledge or consent, indorsed their names on the backs of the drafts, and signed their names to the bills of sale on the backs of the drafts, and then delivered the drafts to the Merchants' Bank of Ft. Smith, which paid him full value therefor. The bank indorsed the drafts and sent them to a bank at Muskogee, Ind. T., which presented them to *La Fayette & Bro.* for payment, and they paid them. Neither the Merchants' Bank nor *La Fayette & Bro.* had any notice of the forgery, and both supposed that it was a legitimate transaction on the part of Whitlock. On the discovery of the fraud, *La Fayette & Bro.* demanded that the bank repay the money, and upon its refusal to do so they brought this action to recover. In that case it was said that, as a general rule, money paid under a mistake of fact could be recovered; that the right of recovery proceeds upon the theory that *La Fayette & Bro.* had paid out money which they were under no obligation to pay and which the party to whom it was paid had no right to receive or to retain, and that the law, therefore, raised an implied promise to refund this money. It was there said that the reasons which permit a recovery are eq-

uitable in their nature, and that the rule does not apply in any case where it would be unjust or inequitable to compel the return of the money. In discussing the rule of the law merchant as applicable to the facts there stated, it was said:

"But no such reason exists in this case. When this draft was presented to the plaintiffs for payment, it had the indorsement of the defendant bank upon it, as well as the indorsement of the name of the payee and his signature to the bill of sale on the back of the draft. The plaintiffs had the right to suppose that the bank had taken proper precaution to ascertain that these signatures were genuine. The presentation of the draft for payment under such circumstances was in effect a representation on the part of the bank either that it had paid or that it would pay to the payee, or to his order, the amount named in the draft, and that his signature, both to the bill of sale and indorsed on the draft, was genuine. Under these circumstances the plaintiffs paid over the money to the collecting bank, acting as the agent of the defendant in making the collection, and it seems to us that the equities are in favor of the plaintiffs, and that a recovery should be allowed, unless there is some rule of law that forbids it.

"Now, there is an exception to the rule permitting a recovery of money paid under a mistake of fact in the case of a drawee paying a draft or check upon which the name of the drawer has been forged. The reason for the exception is said to be that the drawee should know the signature of the drawer, and that he is guilty of carelessness in paying a check where the drawer's name has been forged, and that, as between him and an innocent holder, no recovery should be allowed. Defendant contends that the exception applies also where the name of the drawer is genuine, and where the drawer has himself forged the signature of the payee. There is authority to support that position. The Supreme Court of the United States so declared the law in an opinion delivered by Chief Justice Taney. The court said that 'the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring to the contrary in a suit brought against him by the holder.' *Hortsmann v. Henshaw*, 11 How. 177 [13 L. Ed. 653]; *Bigelow on Bills and Notes*, 568.

"But, though there are cases that seem to hold to the contrary (*Merchants' Bank v. Bank of Commonwealth*, 139 Mass. 513 [2 N. E. 89]; *Northampton Bank v. Smith*, 169 Mass. 281 [47 N. E. 1009, 61 Am. St. Rep. 283]), still we may admit that the rule declared by Chief Justice Taney is correct in cases where there is nothing on the draft to give notice that the drawee does not pay out of funds of the drawer in his hands. But that is not the case here. The bill of sale on the back of the draft was notice to every one taking it that the drawee was paying, or would pay, not upon the funds of the drawer in his hands, but out of his own funds, upon the belief that there was a valid bill of sale and a transfer of the property described therein. The form of the draft was notice to the bank that the drawee would not pay unless the bill of sale and the signature thereto were genuine, and it should have taken the usual precautions to ascertain that they were genuine before parting with its money. It obtained this money, not by presenting the drafts alone, but by presenting them in connection with these forged bills of sale. The drawee was ignorant of the forgery, and the case, as we think, comes within the general rule that one who has paid money under a mistake of fact may recover it. *Northampton Bank v. Smith*, 169 Mass. 281 [47 N. E. 1009, 61 Am. St. Rep. 283]; *Merchants' Bank v. Bank of Common-*

wealth, 139 Mass. 513 [2 N. E. 891; *Star Fire Ins. Co. v. New Hampshire Bank*, 60 N. H. 442; *Carpenter v. Bank*, 123 Mass. 66.]

[1] Appellants say the case just quoted from should control here, and that upon the authority of that case a verdict should have been directed in their favor. But we think this case is distinguishable from that one on the facts. It is true, as stated in that opinion, that, in the usual course of business the drawee has the right to suppose that the collecting bank has taken proper precautions to ascertain the genuineness of the signatures upon which it expects to make the collection, and that, in the usual course of business, the presentation of the draft for payment is, in effect, a representation upon the part of the bank of the genuineness of such signatures, but here the jury might have found, if the statement of Thompson was accepted, that he knew nothing about the transaction which was consummated by the draft, and that he had made no inquiry as to the genuineness of these bills of lading, and that Spencer & Co. did not rely, and had no right to rely, upon any representation, either expressed or implied, by Thompson that the bills of lading were genuine. But, upon the contrary, the jury might have found from the evidence that Spencer & Co. acted upon their own knowledge and upon their own opinion of the validity of these bills of lading, and that they had no right to assume that Thompson had made any inquiry upon that subject, and that they had assured Thompson that they would pay this draft when it was presented to them with the bills of lading, then in Farrin's possession, attached. Of course, Spencer's evidence is to the effect that he agreed to honor the draft only upon the condition that there should be attached to it, when presented, bills of lading for three car loads of corn, and that there were no bills of lading attached when the draft was presented.

[2, 3] We should affirm this case but for the action of the court in giving the sixth instruction set out above, which we think was prejudicial under the issues made. It was shown without dispute that neither appellants nor appellee knew anything about the invalidity of these bills of lading until about the 14th of March, on which day appellants promptly wrote appellee, advising it of that fact. This would certainly not be such delay as would defeat recovery if appellants were otherwise entitled to recover. It is urged, however, that this instruction was not prejudicial, because the jury must necessarily have found that there was no delay in notifying the bank. But we cannot say that this is true. Upon the contrary, appellee argues here, as was no doubt done before the jury, that there was unnecessary delay in discovering the fact of the forgery; that appellants could have ascertained in 30 minutes a fact which they did not learn for near-

ly 30 days, by a simple inquiry at the railroad office in the city of Jonesboro.

For the error in giving this instruction, the judgment is reversed and the cause remanded.

HART, J. (dissenting). The undisputed facts in this case bring it squarely within the doctrine announced in *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. There the court held:

"(1) The acceptor of a bill of exchange discounted by a bank with a bill of lading attached which the acceptor and the bank regard as genuine at the time of the acceptance, but which turns out to be a forgery, is bound to pay the bill to the bank at maturity.

"(2) The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration upon which it was made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer."

In that case the facts were precisely similar to the facts in the case at bar, and Mr. Justice Field, speaking for the court, said:

"Under these circumstances, it is not surprising that, when the drafts on the merchants in Milwaukee were presented for discount, the bank made no inquiry as to the genuineness of the bills of lading attached to them. A bank in discounting commercial paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn, as in the present case, are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills, 'for collection,' created no responsibility on the part of the bank; it implied no guaranty that the bills of lading were genuine; it imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid, the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn."

To the same effect, see *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. Ed. 366.

In the case of *Varney v. Monroe National Bank*, 119 La. 943, 44 South. 753, 13 L. R. A. (N. S.) 337, a draft was discounted with a bill of lading attached. It was genuine, and was drawn on plaintiff with his authorization, and was paid by him. The bill of lading was a forgery. Plaintiff sued the defendant to return the amount on the ground that it was paid in error, and that the defendant was liable for the error. The court held that what mistake there was was plaintiff's, for trusting the dishonest drawer of the draft, who annexed to it a forged bill of lading.

In the case of *Exchange National Bank v. Cole*, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, 21 Ann. Cas. 934, we announced the policy that the decisions of the Supreme Court of the United States should be accepted as controlling in matters relating to com-

mercial law where there is no statutory rule or decision of this court to the contrary. This course tends to make uniformity in the decisions of such questions.

I do not think the principles decided in the case of *La Fayette v. Merchants' Bank*, 73 Ark. 561, 84 S. W. 700, 68 L. R. A. 231, 108 Am. St. Rep. 71, are opposed to the decisions above referred to; but, on the contrary, I think the principles of law there announced are recognized. The facts in the case of *La Fayette v. Merchants' Bank* are essentially different from the facts in the case before us. There *La Fayette* and brother, dealers in live stock, entered into an agreement with one Whitlock by which, under certain conditions, they were to advance money for the purchase of cattle. They prepared and had printed a blank form of draft to be drawn on them for the price of the cattle, and provided that on the back of the draft there should be a blank for a bill of sale conveying the cattle to *La Fayette* and brother. Thus it will be seen that there was a printed form of draft and bill of sale on the back of it, and all that Whitlock had to do was to fill in the name of the payee and the amount of money in the face of the draft and a description of the cattle in the printed bill of sale. Whitlock forged the name of the payee in the draft, and also forged a bill of sale from him and forged the indorsement of the name of the vendor on the draft. The court laid stress on these facts, and held that, under the circumstances, the form of the draft was notice to the bank that the drawee would not pay unless the bill of sale and the signatures thereto were genuine, and held that the lower court erred in directing a verdict for the *Merchants' Bank*, which had discounted the draft.

In the case before us the draft was genuine. The drawer wrote it out in the bank at the time it was discounted. The bill of lading for the corn was then attached to it. *Spencer & Co.* fully understood that there was no corn connected with the bill of exchange except that supposed to be covered by the bill of lading. In the conversation over the telephone with the cashier of the bank they told him they would pay the drafts if the amounts were correct and if the drafts were attached to the bills of lading. During the transaction they took down the weight of each car and the number of pounds of corn and figured it out so as to have the amount of corn correct. Their only concern was that the amount of corn in the bill of lading should be correct.

After a careful examination I do not find any fact or circumstance which indicated that the bank had any notice that the bill of lading was not genuine. The bills of lading were on the blank form used by the railroad company. It is true that a subsequent investigation showed that the place from

which the corn purported to be shipped was not on the line of the railroad company, but there is no fact or circumstance in evidence that the bank knew of this fact, and I do not think a jury might have inferred that the bank had any warning whatever that the bill of lading was not genuine. Therefore I think the court should have directed a verdict in favor of the bank, based upon the well-settled rule that the consideration in a bill of exchange, as between the drawer and the drawee, does not affect the rights of a bona fide indorser for value.

KIRBY, J., concurs.

## WELLS FARGO & CO. EXPRESS v. W. B. BAKER LUMBER CO. (No. 193.)

(Supreme Court of Arkansas. Oct. 26, 1914.)

### 1. EVIDENCE (§ 183\*)—SECONDARY EVIDENCE—FOUNDATION.

Secondary evidence of the contents of letters written by plaintiff to another is not admissible, where the only foundation was that the plaintiff kept no copy of the letters and that the replies thereto had been lost, but it was not shown that the letters were not in the possession of the addressee nor that they could not be procured for the trial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 605-637; Dec. Dig. § 183.\*]

### 2. TRIAL (§ 115\*)—ARGUMENT—EXTRACTS FROM DEPOSITIONS.

Where there was no serious dispute between counsel as to the testimony contained in a deposition, the trial court did not abuse its discretion to control the trial by refusing to permit defendant's attorney to read portions of the deposition in the course of his argument.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 279-283, 295, 298; Dec. Dig. § 115.\*]

### 3. TRIAL (§ 29\*)—MISCONDUCT OF JURY—REMARKS.

Nor was it error for the court in his ruling on that question to remark that the evidence of witnesses was introduced but once in his court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.\*]

### 4. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICATION TO CASE.

Where the undisputed evidence showed that the consignee of an express package was located outside the delivery limits established by the express company, an instruction that, if the company accepted the package for transportation and delivery to the consignee, it was its duty to transport and deliver it with reasonable dispatch, was misleading, since its duty under the circumstances was only to transport and give reasonable notice of arrival.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

### 5. TRIAL (§ 145\*)—INSTRUCTIONS—UNDISPUTED FACTS.

Where the undisputed evidence showed that the consignee of an express package was located outside the delivery limits fixed by the company, it was prejudicial error to refuse a requested instruction to find that fact for the company and to submit the question to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.\*]

**6. CARRIERS (§ 105\*)—CARRIAGE OF GOODS—DELAY—SPECIAL DAMAGES.**

Where a complaint for delay by an express company in delivering repairs for plaintiff's saw-mill alleged as special damage only the loss of profits and the pay of the men while the mill was idle, it was error to admit evidence and allow recovery for depreciation of the logs on hand during the idleness of the mill.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.\*]

**7. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

In an action for delay in the delivery of an express package, where there was evidence tending to show that the company notified the consignee of the arrival of the package, but that when an officer of the consignee called to inquire about it the agent in charge told him that it had not arrived, it was error to instruct that the act of the agent rendered the company liable for any damages accruing thereafter, since it was a question for the jury, and not for the court, whether the agent was charged with knowledge that the package was on hand so that his act was negligence on the part of the company.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

Appeal from Circuit Court, Cleburne County; Geo. W. Reed, Judge.

Action by the W. B. Baker Lumber Company against Wells Fargo & Company Express. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

See, also, 107 Ark. 415, 155 S. W. 122.

This was a suit by the appellee against the appellant for special damages growing out of the alleged negligent failure of the appellant to promptly deliver a certain piece of machinery. It was alleged in the complaint that the plaintiff, appellee here, delivered to defendant, the appellant, a planer cylinder, which was an indispensable part of the machinery used by the plaintiff in the operation of its lumber mill, to be transported to the Harrison Foundry Company, at Harrison, Ark.; that plaintiff paid the defendant a greater charge for the transportation in order to secure prompt delivery of the same; that plaintiff at the time notified the defendant that the piece of machinery was necessary in the operation of its mill; that the defendant undertook to deliver the planer cylinder to said foundry company with due and reasonable dispatch and with full knowledge that any delay in the prompt and reasonable diligence in the delivery of said planer cylinder would damage plaintiff; that the defendant should have delivered the piece of machinery on the morning of August 28, 1911, but carelessly and negligently failed to do so for 14 days, to the damage of plaintiff in the sum of \$2,900, which represents the rental value or earning power of the mill and the expense of holding the employes and payment of their wages during such time and the loss of orders and customers; that, had the defendant promptly delivered the piece of machinery to the foundry company, the company

would have promptly repaired and returned the same to the plaintiff, and the loss and damage would not have occurred.

The defendant admitted that the plaintiff delivered to it the planer cylinder for transportation, as alleged, and paid the price charged for such transportation. It denied specifically the allegations as to notice of special damages, and the allegations of negligence, and denied that any damages occurred. The defendant alleged that it received the planer cylinder for transportation on the 27th of August, 1911, and promptly transported the cylinder to Harrison, where it was received on the morning of the 28th of August, 1911; that defendant thereupon immediately notified the Harrison Foundry Company, the consignee, that said cylinder was in its office and requested the consignee to call for the same, which it failed to do; that the consignee foundry company was situated outside the delivery limits of the defendant, which the consignee well knew.

The testimony on behalf of the plaintiff tended to show that on Sunday, the 27th of August, 1911, it delivered to the defendant, at Heber Springs, Ark., what is called a planer cylinder, a portion of the machinery used in the operation of its planing mill; that it was a necessary part of the machinery for operating the mill. When appellee's agent delivered the planer cylinder to appellant's agent for transportation, he told the agent that he desired to send same by express in order to hasten its transportation. He notified appellant's agent that the mill would have to shut down until the cylinder got back and that he wanted it back by Tuesday morning; that it was 14 days before the planer cylinder was back in the mill, and the mill was idle during that time.

Testimony was introduced to the effect that some time in August the Harrison Foundry Company received letters from appellee advising the foundry company that appellee contemplated shipping to it the planer cylinder to be repaired. The appellant objected to this testimony, whereupon the appellee introduced witnesses who were members and employes of appellee, who testified that letters were written by the appellee to the foundry company with reference to the repair of the machinery, and also sent several telegrams; that appellee did not keep a copy of the letters; and that if any replies to this correspondence were received from the foundry company they did not know where they were; had made a search for them in the files, but had not found them.

The attorney for the appellee also testified that he had been unable to find the original letter that the appellee claimed it wrote to the Harrison Foundry Company asking where the casting was. The appellant objected specifically to the testimony in regard to this correspondence for the reason that the cor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

respondence itself was the best evidence, and that the foundation had not been laid for the secondary evidence.

A witness, who was the agent of the foundry company at Harrison, testified that he had received a letter from appellee in regard to the repair of the piece of machinery; he stated that he replied to the letter and advised the appellee as to how long it would take to repair the same. The next information the witness had about the planer cylinder was when he got a letter from appellee asking why it had not been shipped back. Witness then went to the express office and inquired about the piece of machinery, and was told by the daughter of the express agent, who was working in the office, that the machinery was not there. Witness went to the express office and made this inquiry after receiving the letter inquiring as to why the machinery had not been shipped back. Witness also received a telegram from appellee asking why the repairs were not made and requesting that the planer cylinder be shipped back. When witness received that telegram, he telephoned to the express company and told them that if the thing showed up to ship it back without delivering it. They did not tell witness at that time that the cylinder was at Harrison; they said they would ship it back. Witness received another telegram from the appellee on the night of the 8th of September, to which the witness replied at the time. The next day witness went to inquire about the cylinder, to see whether they had shipped it back, and while he was there Miss Flynn, who was the daughter of the agent, said there was a shipment there for the foundry company, and asked witness to come and look at it. She showed witness a return shipment from Marshall. While witness was there the express deliveryman came in and asked witness when he was going to take that piece of machinery. Witness looked at the piece of machinery. It weighed about 30 pounds. He paid the charges for the return shipment, and nothing more was said. The express company did not notify the foundry company before this that the cylinder was at Harrison that witness knew of. The foundry company never received a postal card or anything else notifying the foundry company that the machinery was at Harrison. The planer cylinder was delivered at the foundry on the 12th of September and was repaired in about 3½ hours and returned to the appellee the same day. If the foundry company had received it on any of the days it was in appellant's express office, it would have been repaired promptly and returned to the appellee lumber company.

It was proven that the foundry company was about a quarter of a mile from the depot, and within the corporate limits of Harrison. It was about a half mile from the depot to the express office. The foundry was outside of appellant's delivery limits. It

was shown that packages were always taken to the express office from the station. The express company did not deliver articles off of the square. The foundry company had tried to have articles delivered at its foundry, but the express company would not deliver them.

It was shown that the mill was shut down 13 or 14 days by reason of the absence of the planer cylinder. In about two weeks after the machinery had been sent to Harrison, one of appellee's agents went there to locate it. He went to the express office, and they told him they had a piece of machinery back there, that they did not know whose it was or where it came from. Appellee's agent then had the planer cylinder delivered to the foundry company, and it was fixed and sent back that day. When witness went to the express office and found the piece of casting, there was no tag of any kind on it or anything fastened to it.

There was testimony introduced, over the objection of appellant, tending to show that the earning capacity of the mill was \$100 per day. When it was in operation it employed about 15 or 20 men who were paid from \$1 to \$2.50 per day. The pay roll was \$35 or \$40 a day. The employees were kept on hand during the time the mill was shut down in order to have them when work was resumed, and they were paid their wages during the interval of 14 or 15 days that the mill was shut down.

The appellee was permitted to show, over the objection of appellant, that somewhere between 130,000 and 150,000 feet of lumber was stacked on the yard and turned blue and black; that this was caused by the mill not being in operation; that the damage to this lumber was \$5 per 1,000 feet.

The testimony on behalf of the appellant tended to show that it received the planer cylinder at the railway station at Harrison on the morning of August 28th. It was taken from the station to the express office uptown about 7 or 8 o'clock. Appellant notified the foundry company that the casting was there, shipped by the appellee to the foundry company from Heber Springs. The agent of the foundry company stated that he would send a drayman for it but did not do so.

There was other evidence on behalf of the appellant tending to show that it notified the foundry company that the casting was on hand as soon as the same was received by appellant at Harrison, and tending to rebut the testimony of the appellee on the issue of negligence.

Among others, the court granted appellee's prayers for instructions as follows:

"(1) I charge you that if you find from a preponderance of the testimony in this case that the plaintiff delivered to the defendant's agent at Heber, on the 27th day of August, 1911, for transportation and delivery to the Harrison Foundry Company at Harrison, Ark., and that such agent accepted the same, then it became the duty of the defendant company to transport

and deliver same with reasonable dispatch and promptness; and if you find that the plaintiff at the time notified such agent of defendant that the absence of the machinery would result in the closing down of the mill until its return, and the agent of defendant accepted same with such knowledge, then the defendant would be chargeable with special damages if it failed to promptly transport and deliver same within reasonable time according to the rules of the company."

"(3) I further charge you that even though you should find the rules of the company only required it to notify the foundry company of the presence of the machinery because of their place of business being outside the delivery limits, and should further find that the driver of the company did tell the foundry company's man on the day it was received of its presence, still if you further find from a preponderance of the testimony that, when the foundry received a letter from the plaintiff, he then went and inquired and was informed by the agent of the defendant that no such machinery was there, and thereby a delivery was prevented, you will find for the plaintiff such damages as you may find, if any, that resulted to plaintiff thereafter."

Defendant objected and duly excepted to the giving of these prayers for instructions.

The appellant, among others, requested the following prayer for instruction:

"(3) You are instructed that the undisputed proof in this case is that the place of business of the Harrison Foundry Company, the consignee, was outside of the delivery limits of the defendant express company, and upon that issue of fact the court instructs you to find for the defendant."

The court refused the foregoing prayer for instruction, and appellant duly saved its exceptions.

The verdict was as follows:

"We, the jury, find for the plaintiff, and assess its damages for loss of profits, \$600, and for loss of wages paid employes, \$120; for injury to lumber, \$270; for expense sending man to Harrison \$7; total \$997."

A motion for a new trial was overruled, judgment entered for the appellee in the above sum, and the cause is here on appeal. Other facts stated in the opinion.

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellant.

WOOD, J. (after stating the facts as above).

[1] 1. The court erred in permitting the witnesses on behalf of the appellee to testify as to the contents of certain letters which it wrote to the foundry company in regard to the contemplated shipment of the "casting," and also as to the letter making inquiry as to why the casting had not been returned. These were letters addressed to the foundry company, and the primary evidence was the letters themselves. No sufficient foundation was laid for the introduction of testimony concerning the contents of these letters. It was not shown that the letters were not in the possession of the foundry company, and that they could not have been obtained and produced at the hearing.

[2, 3] 2. In the course of the argument of the attorney for the appellant, he turned to the deposition of a certain witness and start-

ed to read from it. Counsel for appellee objected to his doing so. Counsel for appellant thereupon stated that he did not desire to read the entire deposition, but merely to quote excerpts which, in his opinion, would bear out the contention he was then making in his argument, and he requested the court's permission to read to the jury such excerpts. The court refused to grant such permission and refused to permit him to quote to the jury any portion of the testimony of said witness by reading from said deposition; the court stating in the presence of the jury, "The evidence of the witness is introduced but once in my court." Appellant objected and excepted to this statement of the court, and also to the ruling of the court in refusing to permit counsel to read to the jury excerpts from the deposition of the witness.

There was no prejudicial error in the ruling of the court in refusing to permit the counsel to read excerpts from the deposition, nor in the remarks of the court giving his reason for such ruling. It is within the sound discretion of the court to grant or refuse permission to read excerpts from depositions of witnesses that have been read in evidence to the jury. Where there is a sharp dispute between counsel representing the respective parties to litigation as to what the deposition contained, then the court should permit the deposition to be re-read in the hearing of the jury to settle this controversy. But here the counsel announced that he merely wished to quote excerpts from the deposition in order to show that he was correct in his opinion of the testimony, and the contention that he was making in his argument. But the record does not disclose that the counsel for the appellee had challenged the correctness of any statement made by counsel for the appellant as to the contents of the deposition that had been read, and the court did not err, therefore, in refusing to permit counsel, in argument, to read from the deposition.

The remarks of the court in making its ruling were only tantamount to saying that the court would not permit the time to be consumed in reading the deposition more than once. It was the duty of the trial judge to see that the order of procedure was observed in the manner of introducing testimony and the arguments made before the jury, and this court will not reverse for the ruling of the trial court on these questions of procedure unless it appears that there is an abuse of the court's discretion which results in prejudice to the party making the objection. While the court might very properly have permitted the counsel to read the extracts he desired to read in order to show that he was stating the testimony correctly, the court did not err in refusing this permission and in thus leaving the matter to the recollection of the jury who had heard the reading of the deposition.

[4, 5] 3. The court erred in granting appel-

lee's prayer for instruction No. 1. This instruction was misleading. The jury were authorized by it to find that it was the duty of the appellant to deliver the casting to the consignee after it had reached Harrison. But, according to the undisputed testimony, the foundry company, the consignee, was situated beyond appellant's delivery limits, and there was no duty, therefore, resting upon appellant to deliver the casting to the consignee. Appellant's duty in this regard was to promptly give notice to the consignee of the arrival of the casting at Harrison and to deliver it to the consignee on its demand at appellant's place of business. Notwithstanding the undisputed evidence to the contrary, the jury, under the instruction, were told that it was the duty of the appellant to deliver the casting with reasonable dispatch and promptness. The court should have refused appellee's prayer in this regard, and should have instructed the jury, as requested by the appellant, that the place of business of the foundry company, the consignee, was outside of the delivery limits of the appellant. It was prejudicial error to submit that which the uncontroverted evidence established in favor of the appellant as though it were a disputed question of fact. Where "there is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so." *Catlett v. Ry. Co.*, 57 Ark. 466, 21 S. W. 1062, 38 Am. St. Rep. 254.

[6] 4. The court erred in admitting testimony and instructing the jury concerning damages to the lumber from bluing, and the verdict and judgment for damages in that particular were erroneous. The complaint does not aver that any such damages had resulted by reason of the alleged negligence of the appellant, nor was there any allegation in the complaint that any special notice was given to the appellant that such damages would result. If such damages did result, it was special and could not be recovered without an allegation and proof that such damage was caused by the negligence of appellant, and that appellant had special notice of such damage at the time of the shipment. See 5 Enc. Pl. & Pr. p. 719; *Crutcher v. C. O. & G. Ry. Co.*, 74 Ark. 358, 85 S. W. 770; *C. O. & G. R. Co. v. Rolfe*, 76 Ark. 220-223, 88 S. W. 870; 13 Cyc. 178; 3 Sedg. on Damages, § 1261.

[7] 5. The court erred in granting appellee's third prayer for instruction.

The testimony on behalf of appellant tended to show that appellant in due time notified the consignee foundry company, through the agent whose duty it was to give such notice, that the planer cylinder had been received. But this instruction makes appellant guilty of actionable negligence as a matter of law because one of its agents, according to the testimony, told an agent of the foundry company, upon inquiry, that no such

piece of machinery had been received. Notwithstanding this reply, it was still a question for the jury to say, under the circumstances, whether or not appellant was negligent. But the instruction makes the bare statement of one of the employés of appellant that the machinery was not on hand (in answer to the inquiry of the agent of the foundry company) conclusive evidence of the negligence of the appellant. The foundry company, having received due notice through appellant's agent that the planer cylinder had been received by appellant, could not, as a matter of law, make the appellant liable by simply inquiring of one of appellant's employés as to whether the piece of machinery was on hand, upon the reply simply of such employé that it had not been received, when it was not shown that such employé of the appellant was in charge of the piece of machinery or that it was the duty of such employé to know that the machinery was on hand.

The effect of the instruction was to make the appellant guilty of actionable negligence as a matter of law under such circumstances, whereas the question should have been left to the jury to determine as to whether, under such circumstances, appellant had failed to exercise ordinary care to notify the foundry company of the arrival of the planer cylinder in order that the same might be in due time delivered to the consignee.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

#### CLARK et al. v. J. R. WATKINS MEDICAL CO. (No. 220.)

(Supreme Court of Arkansas. Nov. 2, 1914.)

##### 1. CONTRACTS (§ 155\*) — CONSTRUCTION AGAINST PARTY USING WORDS.

A written contract is to be construed most strongly against the party preparing it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 736; Dec. Dig. § 155.\*]

##### 2. CONTRACTS (§ 170\*)—CONSTRUCTION GIVEN BY PARTIES.

In construing a contract, the court may consider the construction which the parties themselves have placed upon it, and the action they have taken in executing its provisions.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.\*]

##### 3. CONTRACTS (§ 176\*)—CONSTRUCTION—PROVINCE OF COURT.

Where the terms of a contract are unambiguous, it is the province of the court to construe it, and declare its purport.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.\*]

##### 4. APPEAL AND ERROR (§ 927\*) — PRESUMPTIONS—VERDICT.

On appeal from a directed verdict, the supreme court will take that view of the evidence most favorable to appellant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**5. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS — ENFORCEMENT OF CONTRACT — "DOING BUSINESS."**

Under the Wingo Act (Laws 1907, p. 744) § 2, prescribing a fine against any foreign corporation doing business in the state which fails and refuses to file its articles of incorporation, a statement of its assets and liabilities and its capital employed in the state, and of its principal place of business herein, and its consent to service of process upon any agent in the state or upon the Secretary of State, and, as an additional penalty, providing that such corporation cannot make any contract in this state enforceable by it either in law or in equity, one who, under a contract with a foreign corporation received its goods and, in the territory assigned him, used a horse and wagon in a house-to-house canvass to effect their sale was "doing business" in the state, so as to subject the foreign corporation to such penalty, if he was selling as its agent, and not merely as a buyer from the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

**6. CORPORATIONS (§ 674\*)—FOREIGN CORPORATION — ACTION ON CONTRACT — QUESTION FOR JURY—DOING BUSINESS.**

In an action by a foreign corporation for the price of medicines, extracts, etc., furnished by it to defendants under the terms of a written contract, defended on the ground that the contract was unenforceable by reason of plaintiff's failure to comply with the Wingo Act (Laws 1907, p. 744) § 2, providing that a foreign corporation which has not complied with its requirements as to the filing of its articles of incorporation and the designation of an agent for service of process cannot make any contract in the state enforceable either in law or in equity, *held* on the evidence that whether the transaction constituted a sale or an agency was for the jury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2651, 2652; Dec. Dig. § 674.\*]

**7. COMMERCE (§ 80\*)—INTERSTATE COMMERCE — STATE REGULATIONS.**

Under such contract, if the defendant was a mere purchaser of the goods from the foreign corporation, its right to recover a balance due would not be defeated by its failure to comply with such act, as such a requirement would impose a burden upon interstate commerce; such sale and purchase, if any, being an act of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 80.\*]

Kirby, J., dissenting

Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

Action by the J. R. Watkins Medical Company against Joe Clark and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

The appellee, a corporation organized under the laws of Minnesota and maintaining its principal place of business at Winona in that state, brought suit against the appellants to recover the price of certain medicines and articles of merchandise furnished by it to them under the terms of a written contract. Appellants Virgil Clark and Isaac Davidson entered into a written contract with appellee guaranteeing the payment for the articles

furnished their principal, Joe Clark, under his contract; hence the suit against them.

There was attached to the complaint the exhibits which constituted the contract between the parties upon which this suit was based. The first of these is a writing which has the caption, "Application for Agency." This application was dated the 3d of October, 1908, and contained answers to various questions propounded to the applicant, and, among others, the following answers were given, which, stated in narrative form, are as follows: That applicant was a farmer, and had never previously canvassed for any one. That he spoke English, and could furnish the required references. That he was not incapacitated for hard labor, and could furnish a suitable team and wagon, and preferred to have territory assigned to him in the state of Arkansas, in which state his first choice of territory was the county of Independence and his second choice the county of Carroll, but that he would be willing to go to a distance for territory if none was vacant near him. That he could begin canvassing within 15 or 20 days after the acceptance of his application, and that he would desire to run a time account to pay for goods furnished him, and would want the company to sell him a wagon on credit. This application contained the names of Virgil Clark and Isaac Davidson as names of parties applicant would expect to secure as bondsmen on his contract, if his application was accepted and, upon the acceptance of the application, they became his sureties and have been sued as such.

An agreement was executed between the parties, which bears date October 9, 1908, and which was made Exhibit No. 2 to appellee's complaint. This contract recites that the J. R. Watkins Medical Company appoints Joe Clark as a traveling salesman for its products in the following described territory, and no other, namely, in the state of Arkansas, county of Independence, and, further, that the J. R. Watkins Medical Company agrees to furnish its products f. o. b. cars at place of shipment, to said traveling salesman above mentioned, at such times and in such reasonable quantities as he may order, to be charged to him in accordance with the company's printed price list current, during the term of this contract, which is to be considered a part thereof. That the medicine company promises and agrees to take back all goods left in the possession of the traveling salesman at the time he quits work and to give credit for same at the prices originally charged, provided said goods are returned to the company by prepaid freight and are in the same condition as when shipped; otherwise a reasonable charge will be made for putting such goods into merchantable condition. That if, at the expiration of the service of such traveling salesman, there should be any sum due him

by said medical company, the said company agrees to immediately pay the amount so due in cash and, at the expiration of this contract, the medical company agrees to make a new contract with said traveling salesman without requiring his account to be paid in full at that time, provided the amount of his business and the conduct of the same has been satisfactory to the company. That the traveling salesman, for his part, promises to faithfully perform each and all of the agreements printed on the back of this contract. That the contract is not transferable and expires by limitation March 1, 1910. This contract was signed as follows:

"The J. R. Watkins Medical Company, by Paul Watkins, Vice President. (Traveling salesman sign here in ink.) Joe Clark."

The following obligation of the sureties was indorsed upon said writing:

"For and in consideration of the appointment of the above mentioned traveling salesman, we hereby agree to be jointly and severally responsible to said the J. R. Watkins Medical Company for the faithful performance of this contract on the part of said traveling salesman as outlined on the back of this agreement."

After the signatures of the sureties there appears the following statement in parenthesis:

"The above-mentioned sureties are entitled, upon request, at any time, to a full statement from the traveling salesman's register, showing the exact condition of the business."

Among the agreements printed on the back of the contract were the following:

"How the Products of the J. R. Watkins Medical Company are to be Paid for by Traveling Salesmen. It is agreed that the traveling salesman shall have the choice of two methods of paying for the products of the J. R. Watkins Medical Company under this contract: First, he may run an open account with the company, all products to be charged in accordance with the regular traveling salesman's price list before referred to, and the account to be paid by remitting to the company each week as per its weekly report blanks; second, he may pay cash within 10 days from date of bill for said products, and thus obtain a discount of 3 per cent. from said price list, it being understood that no bill can be discounted while the traveling salesman is still in debt to company for goods previously furnished him. As a guaranty of good faith, it is necessary for the traveling salesman to furnish sureties on either method of payment and to report each week on the blanks furnished by the company."

And there was also a statement of various agreements on the part of the traveling salesman and, among others, the following:

"To devote all of my time and attention to personally selling and disposing of the products of the J. R. Watkins Medical Company to actual consumers only in my territory, at retail prices to be indicated by the company, making a personal canvass of every farmhouse at least twice a year, or oftener, if advisable; having no other occupation and selling or handling no other goods whatever; to furnish and maintain at my own expense a suitable team; to pay transportation charges on the goods shipped to me; to begin work as soon as practicable after goods are received and to work continuously at the agency as far as weather and health will permit, observing such instructions in regard to the conduct of the business as may be given me by

the company from time to time; to pay all of my expenses on the road and stand the loss, if any, of breakage and of accounts made by me with customers; to make regular and satisfactory reports and pay for the goods furnished me according to one or the other of the methods of payment provided for on the back of the contract; to terminate my service upon written notice so to do in case of my violation of this contract or in the event of my failure to do a satisfactory business under this agreement; to return to the medical company, by prepaid freight, all goods furnished by it in my possession at the time I quit work, receiving credit for the same as provided for on the face of this contract, and to immediately pay in cash any balance that I may be then owing the company according to its books. [Signed] Joe Clark, Traveling Salesman."

A second agreement was entered into between the parties, which was also made an exhibit to the complaint and which reads as follows:

"This agreement, made at Winona, Minnesota, U. S. A., this 1st day of December, A. D. 1909, between the J. R. Watkins Medical Company, a corporation, hereinafter called the company, party of the first part, and Joe Clark of Batesville, Ark., party of the second part, witnesseth, that for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the party of the second part, the company promises and agrees to sell and deliver to the party of the second part, free on board cars, at Winona, Minnesota, or at its option, at any of its regular places of shipment, any and all medicines, extracts and other articles manufactured or sold, or which may hereafter be manufactured or sold by it at the usual and customary wholesale prices, as shown by the company's wholesale printed price list, as the party of the second part may reasonably require for sale by him at the regular retail prices from time to time, from the date hereof until the first day of March, 1911, when this agreement shall terminate; in the following described territory, excepting the incorporated municipalities therein located, to wit: In the state of Arkansas; Independence county.

"In consideration of the sale and delivery to him free on board cars at Winona, Minnesota, or other shipping point as above mentioned by said company, of the medicines, extracts and other articles manufactured or sold by it, in such reasonable quantities as he may require for sale in said territory at the regular retail prices as hereinbefore provided, the party of the second part promises and agrees, as soon as practicable after said medicines, extracts and other articles are received, to devote the whole of his time and attention to making a diligent, continuous and personal canvass of said territory, and to visit every farm house therein at least twice a year, at his own cost and expense and provide a good team and proper wagon and outfit therefor, and sell at the regular retail prices, aforesaid, said medicines, extracts and other articles or so much thereof, at each of said houses, to actual consumers in the above-mentioned territory, as possible, and at all times during said term, said party of the second part agrees to keep a complete record of all goods disposed of by him in his said territory, and on hand, and to make to said company complete regular weekly written reports of the sales and collections, and also report the goods on hand and outstanding accounts when required by said company so to do.

"And the party of the second part promises and agrees to pay to said company, at Winona, Minnesota, the wholesale prices, aforesaid, for the medicines, extracts and other articles sold to him from time to time, as hereinbefore provided, at the time and in the manner and in

accordance with the provisions of the weekly report blanks of said company furnished to the party of the second part, or in cash, within ten days from date of invoice, with the understanding that said company will allow a discount of three per cent. from said wholesale prices on cash payments, provided full payment for all goods previously furnished shall then have been made; but such payments, or any of them, may be extended by the said company without notice to the sureties hereon or without prejudice to the rights or interests of said company; and if the party of the second part shall not pay cash for said medicines, extracts and other articles so sold and delivered to him, and becomes indebted to said company therefor, and such indebtedness is allowed to continue unpaid, said company may in its discretion, thereafter either limit the sales herein agreed to be made, or discontinue the same until such indebtedness is paid or reduced as said company may require, and at the termination of this agreement, the party of the second part agrees to return by prepaid freight to said company, at Winona, Minnesota, in as good condition as when furnished to him, all of the said medicines, extracts and other articles undisposed of by him in his said territory, and said company agrees to receive such medicines, extracts and other articles as above provided, at the original prices at which the same were sold to him, and credit the party of the second part therefor, less a reasonable sum for putting the same or any part thereof in a salable condition if the same are not in such condition when so returned, and if there is any sum then due from either of the parties to the other, the same shall be due and payable on demand of the party to whom such sum is due.

"And it is mutually agreed between the parties hereto, that the party of the second part shall sell no other goods or articles during the term of this agreement, except those purchased by him from said company, as aforesaid, that he shall pay all transportation charges on goods he so purchases and all expenses and obligations incurred in connection with the canvass of said territory and the sale of the goods therein, and shall have no power or authority to incur any debt, obligation or liability of any kind whatsoever, in the name of, or for, or on account of, said company, and that said company shall in no way contribute to the expense of, nor share in the profits of such sales. The balance due at the date of this agreement from the party of the second part to the party of the first part for goods sold and delivered to him free on board cars at Winona, Minnesota, under a prior agreement, is hereby mutually agreed to be the sum of six hundred twelve &  $\frac{10}{100}$  dollars, which sum the second party hereby promises and agrees to pay during the term of this agreement. And if the party of the second part shall fail to perform any of the conditions herein contained, required of him to be performed, at the time and in the manner as herein provided, the said company may, at its option, upon such failure terminate this agreement, by giving said second party written notice thereof by mail, and any sum then owing from said second party to said company shall thereupon be and become immediately due and payable.

"In witness whereof, the party of the first part has caused these presents to be executed in its corporate name by its proper officer, and the said party of the second part has hereunto set his hand the day and year first above written. The J. R. Watkins Medical Company, by Paul Watkins, Vice President. (Party of the second part sign here in ink.) Joe Clark.

"In consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and of the execution of the foregoing agreement by the J. R. Watkins Medical Company, and the sale and delivery by it to the party of the second

part, of its medicines, extracts and other articles and the extension of the time of payment of the amount due from him to said company, as therein provided, we, the undersigned, jointly and severally guarantee the full and complete payment of said sum and of said medicines, extracts and other articles, at the time and place, and in the manner in said agreement provided. (Responsible sureties sign here; business men preferred. Sign in ink.) Virgil Clark; occupation, Gen. Mdse.; P. O. address, Delaplaine, Ark. Isaac Davidson; occupation, farmer; P. O. address, Paragould, Ark.

"Note.—At the expiration of this agreement the company will be willing to make a new agreement with the party of the second part, provided the amount of his business and the conduct of the same under this agreement shall have been satisfactory to the company."

These exhibits are all on printed forms furnished by appellee.

There appears to have been no controversy as to the quantity or price of the goods furnished appellant Joe Clark under the terms of these contracts, nor as to the amount of goods returned by him and the consequent balance which he would owe.

There was introduced in evidence copies of advertisements prepared by appellee to promote the sales of its salesmen, reference to which will be made in the body of the opinion, where additional facts will also be stated.

It was admitted that appellee had not complied with the provisions of Act No. 313 of the Acts of 1907, page 744, commonly known as the Wingo Act, and entitled:

"An act to permit foreign corporations to do business in Arkansas and fixing the fees to be paid by all corporations."

Appellants asked various instructions and, among others, the following:

"III. If the jury find from the evidence that plaintiff has been doing business in the state of Arkansas during the years 1909, 1910, 1911, and 1912, and that the contract sued on in this case was made in this state, then your verdict will be for the defendants."

The court refused this and all of the other instructions requested by appellants, and directed the jury to return a verdict for the amount sued for, which was done, and this appeal has been duly prosecuted from the judgment pronounced thereon.

R. E. L. Johnson and Geo. A. Burr, both of Paragould, for appellants. R. P. Taylor, of Paragould, for appellee.

SMITH, J. (after stating the facts as above). Section 2 of the Wingo Act prescribes a fine against any foreign corporation doing business in this state which shall fail and refuse to file its articles of incorporation, together with a statement of its assets and liabilities and its capital employed in this state, and a designation of its principal place of business in this state, or which shall fail to file the certificate of its board of directors consenting that service of process upon any agent of such corporation in this state, or upon the Secretary of State of this state, in any action brought or pending in this state, shall be a

valid service, and, as an additional penalty, provides that such corporation cannot make any contract in this state which can be enforced by it either in law or in equity. Notwithstanding the fact that the third section of the Wingo Act, which attempted to impose upon foreign corporations, as a prerequisite to doing intrastate business, the payment of certain fees, based upon the amount of their capital stock, has been held invalid, the first section of this act has been held valid. This first section provides for the filing of the certificates above mentioned. *Roberts v. Chatwin*, 108 Ark. 562, 158 S. W. 497.

While appellee admits that it has not complied with the terms of the Wingo Act, it says that it was not required to do so in order to maintain this suit, its position being that the contract exhibited constituted a sale of goods, and that the character of the transaction as a sale is not altered by the fact that it imposed certain conditions upon purchasers of its goods as a prerequisite to the sale of the goods, and it says that the correspondence and the literature emanating from it, which will be later referred to, concerning the conduct of appellant Clark's sales to consumers, were mere suggestions which from experience it had found would be helpful to its vendees in disposing of their wares.

[1] In executing the contracts sued on, appellant signed printed contracts, which had been prepared for that purpose by appellee, and the rule is that such contracts are to be construed most strongly against the party preparing them.

[2, 3] In construing a contract we may consider the construction which the parties themselves have placed upon it, and the action they have taken in executing its provisions. These rules of construction, however, are not available where the terms of the contract are unambiguous. Where the terms of the contract are unambiguous, it is the province of the court to construe the contract and to declare its purport; and appellee insists that that duty here devolved upon the trial court, and that that court correctly construed the contract as one of sale, and not as a mere appointment of an agent.

Counsel have cited and reviewed a great many cases; but there appears to be no necessity to review these cases in this opinion. It is clear that, if the contract between the parties constitutes a sale of the commodities there mentioned, there can be no doubt that the court correctly directed a verdict in favor of appellee. But the evidence upon that question is not so undisputed that it may be said, as a matter of law, that the contract constituted a sale of goods, and not an agency.

[4] The verdict having been directed in favor of appellee, it is our duty to take that view of the evidence which is most favorable to appellants; and if, when it has been viewed in the light most favorable to them, it

would justify a reasonable mind to fairly draw the inference from the evidence that the relationship between the parties was that of principal and agent, then the sufficiency of the evidence to sustain that view should have been submitted to the jury for its consideration.

[5, 6] Numerous letters, both personal and circular, together with various advertisements, sent out by appellee, have been offered in evidence and, without setting out all of this matter, it is sufficient to say that from it, in connection with the contracts themselves, the jury might have found the following state of facts: That the first contract executed by the parties appointed Joe Clark to an agency until March 1, 1910, and the second continued him in that capacity for another year. That these contracts required Joe Clark to devote all his time and attention to selling Watkins' products; to canvass every farmhouse in his territory at least twice a year; to sell these products at retail prices fixed by the company; to confine his canvassing to his own territory; to observe such instructions in regard to the conduct of the business as the company might give; to have no other occupation whatever, and to sell or handle no other goods whatsoever; to work continuously at the agency so far as weather and health will permit; to furnish team, wagon, and outfit for the business; to pay freight on the goods; and to make regular and satisfactory weekly reports to the company; to pay for the goods in one or the other of the ways provided therein; to return all goods by prepaid freight to the company when he quit the business, for credit on his account; to make written reports to the company of all sales, collections, goods on hand, and outstanding accounts; to sell only to actual consumers; and to keep a complete record of all goods disposed of in said territory. That the company agreed to let him pay for the goods by giving it half of the cash the agency produced each week, or by paying cash for goods within 10 days with 3 per cent. discount; and when he quit work, the company agreed to receive all goods on hand (to be returned by prepaid freight) and give him credit on his account at the original price paid for them; and, when a balance was struck, the party who owed the other should pay, on demand, such balance due.

The record contains letters in which appellee expressed its dissatisfaction with appellant Joe Clark's success in selling the goods, and he was urged in these letters to press his credit sales, and was advised to make sales at every house, and the assurance was contained in these letters that this was the plan through which other agents had succeeded in making money. And on November 1, 1909, appellee wrote a letter containing the following statements:

"We regret that your business is not satisfactory to us, and the next few weeks are going to

decide whether we retain you as our agent or not. Therefore you will have to show us very soon that you can do business that will be satisfactory to us, otherwise we shall notify your bondsmen and demand a settlement of your account in full by the time of expiration of your contract on March 1st, 1910."

On February 8, 1910, a letter was written in which it was stated:

"It is time now to be building up accounts with your customers and getting ready for the big collection season that comes in the fall. We want you to get around and supply the needs of every one in your county. See that no one puts you off without a sale."

Other letters were written in which they asked appellant Joe Clark to assist in securing agents for certain counties in this state where no agents were operating. It appears that the indebtedness for which this suit was brought grew out of these credit sales which appellant Clark had made, as he appears to have acted upon appellee's advice to press his credit sales, but to have been unable to make collections covering such sales.

There can be no question but that appellant Clark was doing business in this state. *Simmons-Burks Clothing Co. v. Linton*, 90 Ark. 73, 117 S. W. 775. It is undisputed that he went about from house to house and sold his wares and delivered them to the purchasers at the time the sales were made. But was this a business conducted by Clark for himself, or was it a business which he was conducting for appellee? We think the evidence raises this question of fact, and that it should have been submitted to the jury.

We are cited to the case of *J. R. Watkins Medical Co. v. Holloway* (Mo. App.) 168 S. W. 290, which was a suit upon a contract identical in every respect with the second contract set out in the statement of facts. In that case the court recites the facts to be that the goods were sold by a citizen of Minnesota, who was the plaintiff, to a citizen of the state of Missouri, who was the defendant, and that the sale was complete upon the delivery of the goods *f. o. b.* Winona, Minn., and that nothing remained to be done under the contract after the goods were placed on cars in Winona except to pay for them, and that these payments were remitted to Winona; that payment was to be in money in case the goods were sold or by allowing credit for the value of any goods returned, but that all of the goods were, in fact, sold and none were ever returned; that no office of any kind was ever maintained in Missouri by the plaintiff, nor did it retain any lien on or attempt to reserve any title to the goods from the moment they went aboard cars in Winona; that the goods became the property of the defendant as soon as they were delivered to the carrier, and that the defendant paid the freight and, so far as the evidence goes, exercised complete control and ownership over the merchandise as soon as delivered by the plaintiff. In the suit for the goods there furnished it was contended that no re-

covery could be had because the defendant had acquired the goods in violation of certain sections of an act of the General Assembly of that state concerning pools, trusts, conspiracies, and discriminations, found in chapter 98 of the Revised Statutes of Missouri of 1909, and that the contract there set out should be construed as a contract of agency as between the parties, and that the plaintiff, therefore, could not maintain this suit, as it had never taken out a license to do business in Missouri as a foreign corporation. The court reviewed a great many cases, and its conclusion, as stated in the syllabus of that case, was as follows:

"Plaintiff, a Minnesota corporation, entered into a contract with defendant, a resident of Missouri, whereby it agreed to sell and deliver in Minnesota, or any of its regular places of shipment, certain medicines and extracts, to be paid for at the usual wholesale prices, and to be delivered when required by defendant. The contract further required defendant to make regular canvasses in a specified county for the sale of such medicines and extracts, and forbade him to sell any others. All deliveries of medicines and extracts were made without the state of Missouri. Held, that as plaintiff reserved no title to the property sold, and merely gave defendant the option of returning it, the contract constituted 'interstate commerce,' and hence was not governed by the Missouri anti-trust laws, and plaintiff's right to sue cannot be defeated, because, though a foreign corporation, it had not procured license to do business in Missouri, as required by Rev. St. 1909, § 3040."

The court there found that the evidence did not establish the existence of an agency, but that the relationship of the parties was that of vendor and vendee, and, having so found the facts to be, its decision that the shipment and sale of the goods was an act of interstate commerce was, of course, correct, and it necessarily followed that this commerce was not subject to the restrictions and regulations of the statutes of that state.

In the opinion in this Missouri case the court cites the case of *Orr's Adm'r v. Orr*, 157 Ky. 570, 163 S. W. 757, and distinguishes the case there decided from this Orr Case and, having made this distinction between the two cases, concedes the correctness of the decision in the Orr Case under the facts as stated in that opinion. The litigation in this Orr Case grew out of a contract made with this J. R. Watkins Medical Company, and, while the contract is not set out in extenso in that case, it is fair to assume that it was evidenced in part by the same writing set out in this opinion and in the Missouri case. The facts there were that one Nance was the traveling salesman of the medicine company, with territory restricted to Montgomery county, in the state of Tennessee, and that, after having been engaged in the service of that company for some months, he became indebted to it in the sum of \$668.01 on account of articles which he had sold on credit, but for which he had been unable to collect, and that in settlement of this balance he executed a note to the medical company, together with E. O.

Orr and J. W. Orr as joint makers, and later this note was renewed by them, and the interest paid, both the original and renewal notes being dated at Winona, Minn., and payable at that point. In the suit on that note it was proved that, under the statutes of Tennessee, every foreign corporation is required to file a copy of its charter with the Secretary of State, and that it is unlawful for any such corporation to do; or attempt to do, any business in the state until it has complied with that statute, and that it has been uniformly held by the Supreme Court of Tennessee that, where a foreign corporation does business in that state without complying with the statute, all contracts growing out of such business are illegal and void; and it was also shown that the medical company had not complied with the statute. In the opinion of the court there is a statement of various things which Nance did pursuant to his contract with the medicine company, together with a statement of a number of the provisions of the contract and of the recitals on its back, all of which are also found in the record in the present case. A recovery was there denied because of the failure of the medical company to comply with the statute of Tennessee permitting foreign corporations to do business there, and in that connection the court said:

"Considering these facts and others which might be mentioned, there is no escape from the conclusion that appellant was doing business in Tennessee, and that Nance was not a mere purchaser of its products, but represented it as its agent. Nor is there any merit in appellant's plea that the transaction out of which the debt arose was interstate commerce, and that the note was binding, although the appellant had not complied with the laws of Tennessee. These products were not ordered by mail and shipped direct to its customers. As a matter of fact, they were shipped to Memphis, and from there distributed to its agent. Nance and his brother say that he never ordered any goods except from Memphis. Appellant's witnesses say that the goods were billed to Nance in Minnesota, and were merely sent to Memphis for distribution. Even if there be any doubt as to whether or not the interstate journey ended at Memphis, the interstate journey certainly ended when the goods were delivered to Nance. Upon their delivery to Nance their interstate character ceased. From that time on, Nance, as appellant's agent, proceeded to sell and deliver the goods in Tennessee. Under the facts, the defense of interstate commerce is not available."

It appears that the Supreme Court of Kentucky held, under the facts recited in its opinion, that Nance was not a mere purchaser of goods from the medicine company, but that he represented it as its agent, and from the facts stated in the Missouri opinion that court was of opinion that the relation of the litigants there was that of vendor and vendee; and we think there is no necessary conflict between these cases, as the proof was more fully developed in the Kentucky case than in the Missouri case. So in the case we now have under consideration: The facts

and circumstances in evidence are not necessarily inconsistent with the view that the relationship between the medicine company and Joe Clark may have been that of vendor and vendee; neither, on the other hand, are they necessarily inconsistent with the view that Clark was the mere agent of that company, and as reasonable minds might fairly draw different conclusions from this evidence, we think this question should be passed upon by the jury as one of fact, rather than by us or by the trial court as one of law.

[7] If Joe Clark was a mere purchaser of these goods from the medicine company, that company's right to recover cannot be defeated by any failure on its part to comply with the Wingo Act, as such a requirement would impose a burden upon interstate commerce; and there can be no question, as a matter of law, that it would be an act of interstate commerce if this was a sale. Upon the other hand, if Clark was the agent of the medicine company, then, this contract is within the terms of the Wingo Act; for it is not denied that the consignments of freight were broken up by him when he received them, and that he placed his wares in his wagon and went about from place to place delivering the goods whenever he made a sale.

The judgment will be reversed and the cause remanded to the court, with directions to submit this question of agency to the jury, with directions to return a verdict for the appellee if they find the relationship between the litigants was that of vendor and vendee, rather than that of principal and agent.

KIRBY, J., dissents.

#### SANDERS v. STATE. (No. 6.)

(Supreme Court of Arkansas. Nov. 23, 1914.)

#### 1. INTOXICATING LIQUORS (§ 223\*)—OFFENSES—PROOF.

In a prosecution for taking orders for the sale of intoxicants in nonlicense territory, the state need not limit its proof to any particular order, but may show any and all orders taken within a year prior to the date of the prosecution.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 263-274; Dec. Dig. § 223.\*]

#### 2. CRIMINAL LAW (§ 198\*)—FORMER JEOPARDY—ACQUITTAL.

Where, in a prosecution for taking orders for the sale of intoxicants in nonlicense territory, the state's evidence covered all orders taken within a year prior to the date of the prosecution, an acquittal is a bar to any subsequent prosecution based upon orders taken within that period.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 385; Dec. Dig. § 198.\*]

Appeal from Circuit Court, White County; Eugene Cypert, Special Judge.

H. C. Sanders was convicted of the offense of soliciting and receiving orders for whisky in nonlicense territory, and he appeals. Reversed, and cause dismissed.

Appellant was tried and convicted under an indictment charging him with the offense of soliciting and receiving an order for whisky in White county, Ark. Proof was offered tending to support the allegations of the indictment, which were substantially as follows: That on the 25th day of September, 1913, appellant unlawfully received from Mart Spurlin an order for one gallon of whisky in White county, where it was unlawful to grant a license to make such sales, and that said order was transmitted from said Mart Spurlin to the place of business of H. C. Sanders, who was a licensed liquor dealer in Newport, Ark., where the said H. C. Sanders filled it and shipped the whisky by express to Mart Spurlin at Searcy, Ark., where it was received by the said Mart Spurlin. A demurrer to the indictment was overruled, and upon his trial appellant was convicted and fined \$200, and he has duly prosecuted this appeal.

There are several assignments of error, and, among them, the court's failure to sustain a plea of former acquittal. The evidence on this point is that on the 15th day of December, 1913, J. N. Rachels, prosecuting attorney, filed an information with W. E. Harlin, a justice of the peace, charging appellant with having solicited and received an order for intoxicating liquor in Searcy, White county, Ark., on or about the 1st day of October, 1913. The case was tried before S. H. White, another justice of the peace, upon a change of venue, and appellant was acquitted. A transcript of the proceedings had before the justice of the peace was introduced in evidence, and the justice of the peace who tried the case testified that at the trial before him the state of Arkansas was represented by J. N. Rachels, the prosecuting attorney; that the investigation of such charge was not confined to any particular person or any particular date, but covered the full period of 12 months prior to the filing of the affidavit; that there were so many witnesses put upon the stand that he did not remember who all of them were. This evidence appears to be undisputed, and one of the material witnesses in the trial before the justice of the peace was T. N. Sanders, a brother of appellant; and the evidence at the trial below, from which this appeal is prosecuted, was that the order, for the receipt and transmission of which appel-

lant was convicted, was made through the instrumentality of T. N. Sanders.

At the trial in the court below appellant asked, among others, instruction numbered 10, which reads as follows:

"The jury are instructed that if you find from the evidence that defendant was arrested in White county, Arkansas, on the 15th day of December, 1913, charged with the same offense contained in the indictment, and on said trial the defendant was acquitted, then said acquittal would be a bar to this prosecution, and you will find the defendant not guilty."

The Attorney General has confessed error.

S. Brundidge and John D. De Bois, both of Searcy, for appellant. Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. (after stating the facts as above). [1, 2] The confession of error must be sustained, and the judgment must not only be reversed, but the cause must be dismissed. As appears from the statement of facts, the undisputed evidence is that appellant was tried before a justice of the peace, and in the attempt to secure a conviction there the proof on the part of the state covered a whole year, and there was no attempt made to limit it to any particular sale or transaction, and there is no intimation that the prosecution before the justice of the peace was not conducted vigorously and in entire good faith. The state is not required, in prosecutions of this character, to limit its proof, in the attempt to secure a conviction, to any particular order, provided such proof may not extend to a period of time more than one year prior to the date of the prosecution. The rule in such cases is well stated in the case of *State v. Lismore*, 94 Ark. 212, 126 S. W. 856, where it was said:

"In the case in which appellant was charged with keeping a bawdyhouse by the information filed before a justice of the peace, the state could have shown, if it had sufficient evidence, that the offense was committed within 12 months before the 6th day of July, 1909, the date of the filing of the information, and for that purpose could have adduced all the evidence of the commission of such offenses within that time, and relied upon the whole proof for a single conviction. In that case the appellant could have been convicted of any one of the offenses proved, if any; and such a conviction would be a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the information in the first case."

Here a conviction might have been had under evidence heard by the justice of the peace, and the confession of error will be sustained, and the judgment reversed, and the cause dismissed.

**GIBBS v. SINGFIELD. (No. 1.)**

(Supreme Court of Arkansas. Nov. 23, 1914.)

**EXECUTORS AND ADMINISTRATORS (§ 137\*) — SALE OF REALTY—CONFIRMATION.**

A private sale of his decedent's land by an administrator without a previous order of the court, not being authorized by statute, in view of Kirby's Dig. § 3793, providing that probate sales of real estate not in substantial compliance with statutory provisions shall be voidable, will not be confirmed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 557-559, 606½; Dec. Dig. § 137.\*]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by W. A. Singfield against Jackson Gibbs, administrator of the estate of Henry Gibbs, deceased. From the refusal to confirm a private sale, defendant appeals. Affirmed.

N. H. Nichols and C. T. Lindsey, both of Little Rock, for appellant. W. A. Singfield, of Little Rock, for appellee.

**McCULLOCH, C. J.** Appellant's intestate, Henry Gibbs, purchased a lot in the city of Little Rock from one Nora Green for the price of \$700, payable in installments, and the vendor entered into a written contract of sale whereby the deed was to be executed upon the payment of all of the purchase price. The purchaser paid the major portion of the price, but died leaving an unpaid balance. The vendor instituted an action in the chancery court of Pulaski county against appellant, as administrator, and the heirs of said decedent, to foreclose the lien, and a decree of foreclosure was rendered by the chancery court. The commissioner of the court was directed to sell the property on November 2, 1912. On that day, and before the hour set for the sale by the commissioner, Cornella Armistead paid off the amount of the decree at the instance of appellant, and he sold the property to her at private sale for the sum of \$800 and executed a deed pursuant thereto. Thereafter he reported the sale to the probate court, and that court confirmed the sale, but appellee, who had purchased the interest of one of the heirs of said decedent, appealed to the circuit court from the order of confirmation. The case was heard in the circuit court upon that appeal, and the court refused to confirm the sale. Appellant prosecutes an appeal from that judgment.

Other questions are argued, but we think the case comes down to the simple proposition whether a private sale, made by an administrator without a previous order of the court, should be confirmed. The question is easy of solution. The authority of an administrator with respect to sale of his decedent's land is limited by the statute which creates it, and nowhere in the statute is

found any authority for an administrator to sell lands at private sale or without an order of the court. The court itself has no authority to order a sale contrary to the terms of the statute. *Montgomery v. Johnson*, 31 Ark. 74; *Planters' Mutual Insurance Association v. Harris*, 96 Ark. 222, 131 S. W. 949.

Whether such a sale would, after confirmation, be treated as void, we need not determine, for this case involves only the question whether or not such a sale should be confirmed.

The act of 1891 provides that probate sales of real estate "made pursuant to proceedings not in substantial compliance with statutory provisions shall be voidable." Kirby's Digest, § 3793. Surely it needs no argument to show that a private sale, or one not previously ordered by the probate court, is not in substantial compliance with the statute, and should not be confirmed.

The judgment of the circuit court is correct and is affirmed.

**HEBERT et al. v. FELLHEIMER. (No. 4.)**  
(Supreme Court of Arkansas. Nov. 23, 1914.)**1. VENDOR AND PURCHASER (§ 275\*) — VENDOR'S LIEN—ASSIGNEE OF PURCHASE-MONEY NOTES.**

The provision of Kirby's Dig. § 510, that a vendor's lien expressly reserved in a deed shall inure to the benefit of, and may be enforced by, the assignee of the obligation given for the purchase money, applies to the bona fide purchaser of part of the negotiable notes, recited by the deed as evidencing the unpaid part of the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 772; Dec. Dig. § 275.\*]

**2. MORTGAGES (§ 151\*) — VENDOR AND PURCHASER (§ 266\*) — VENDOR'S LIEN — PRIORITIES—ASSIGNMENT OF NOTES—NOTICE.**

Reconveyance by M. to O., for a consideration acknowledged paid, of land which O. had conveyed to M. by deed reserving a vendor's lien as security for the recited negotiable purchase-money notes, does not extinguish the lien as to F., a bona fide purchaser of some of such notes, even as against subsequent mortgages, whose only notice of any right of F. was, under Kirby's Dig. § 762, from the recording of O.'s deed to M.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309-311, 314-329, 332-336; Dec. Dig. § 151.\*; Vendor and Purchaser, Cent. Dig. §§ 687, 713-750; Dec. Dig. § 266.\*]

**3. VENDOR AND PURCHASER (§ 265\*) — VENDOR'S LIEN — ASSIGNMENT OF NOTES — RECORDING — "INSTRUMENT AFFECTING TITLE TO REAL ESTATE."**

Though the vendor's lien reserved in a deed passes as an incident to the purchase-money notes on their assignment, they are not instruments affecting the title to real estate, within Kirby's Dig. § 763, so as to require their assignment to be recorded as against subsequent purchasers of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 492, 700-712; Dec. Dig. § 265.\*]

Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

Suits by G. A. Hebert against Virginia L. Thornton and others and by H. Fellheimer against W. S. Mackey and others, which were on trial consolidated. From a judgment for Fellheimer, Hebert and Thornton appeal. Affirmed.

F. H. Olmstead and wife, Louisa Olmstead, conveyed certain lands by warranty deed on December 1, 1906, to W. S. Mackey, for a consideration of \$3,500; the deed reciting \$500 paid in cash and the balance evidenced by 150 notes, for \$20 each, due monthly, and a vendor's lien reserved therein to secure the payment of the notes. The notes for the deferred payments were negotiable promissory notes for \$20 each, payable to the order of F. H. Olmstead, with 8 per cent. interest, and each recited that it was a certain number of a particular series of notes, aggregating \$3,000, mentioned in the deed of even date from Olmstead to Mackey and secured by a lien on the property conveyed, describing it. Fellheimer purchased for value 100 of these notes, numbered from 51 to 150, on the 4th day of June, 1907, in the usual course of trade, before maturity, and the same were indorsed by Olmstead and delivered to him. On the 21st day of March, 1908, Mackey executed a deed of trust upon the lands to C. N. Rix, trustee, to secure the payment of an indebtedness of \$520, evidenced by five notes to F. H. Olmstead. These notes were assigned and delivered to G. A. Hebert on April 16, 1908, as collateral to secure the payment of Olmstead's \$500 note to him, and the deed of trust was marked "Satisfied" on the margin of the record by F. H. Olmstead on March 21, 1910. On the 10th day of January, 1910, Mackey reconveyed the lands to Olmstead for a recited consideration of \$10 and other valuable considerations, the receipt of which was acknowledged. Olmstead and his wife conveyed the lands to W. H. Moore by warranty deed on May 4, 1910, for \$10 and other valuable considerations, who, on April 7, 1911, conveyed them to Louisa Olmstead for a consideration of \$10 and the assumption of the payment of a certain deed of trust to Jeff Fletcher. On April 8, 1911, F. H. Olmstead and Louisa, his wife, executed a deed of trust conveying these lands to C. Floyd Huff, trustee, to secure the payment of a note for \$2,000, borrowed money, to Virginia L. Thornton, cestui que trust.

Hebert brought suit to foreclose the deed of trust securing the notes held as collateral by him for the payment of the \$500 due him from Olmstead, alleging: That Mackey had subsequently conveyed the land to Olmstead for a nominal consideration by deed of record March 19, 1910, and that the deed of trust executed by Mackey to C. N. Rix, trustee for Olmstead, to secure the collateral notes, was duly recorded. That there appeared on the margin of the record of said deed the notation: "Attest: H. A. Whittington, on this 21st day of March, 1910. I hereby acknowl-

edge satisfaction in full and release the property described in this deed of trust. F. H. Olmstead." That said entry was made without authority, and that the debt secured by the deed of trust had not been satisfied. That C. N. Rix was the trustee, the holder of the legal title to the lands, and in law the proper person to satisfy the deed of trust, and that the notation of satisfaction by Olmstead did not operate to release the lands, nor to the benefit of subsequent purchasers and incumbrancers. Mrs. Thornton answered, denying that Hebert held said Mackey notes as collateral, and alleged that he failed to make the fact a matter of record, so as to impart notice to subsequent purchasers, and that the satisfaction of record of said deed of trust by Olmstead was valid, and released the property from the lien thereof; she having loaned money on the faith of the record, and being entitled to protection as an innocent purchaser. Hebert amended his complaint, making Fellheimer a party.

Fellheimer filed suit, alleging the conveyance of the land by Olmstead to Mackey by warranty deed, reciting the reservation of a lien for the payment of the remainder of the purchase money evidenced by the 150 \$20 notes, and that each note recited also retention of the vendor's lien on the land, with description thereof; that before maturity, in due course of trade, and for a valuable consideration he purchased 100 of the said notes numbered from 51 to 150, from Olmstead, who indorsed and delivered them to him and asked for a foreclosure of the vendor's lien. Mackey, Olmstead, and Thornton were made parties to this suit. Thornton answered this complaint, admitting the execution of the notes and deeds, but denied that Fellheimer was the legal holder of the notes, and alleged that the said owner paid the notes and the lien was extinguished by subsequent conveyance from Mackey to Olmstead, that she had the title examined by a competent attorney, and afterwards, upon his report that the title was good, made her loan of \$2,000, and asked that her lien be declared paramount to that of Fellheimer. The two cases were consolidated on trial, and the court directed a foreclosure of all liens and mortgages, and declared Fellheimer's lien superior to that of both the appellants, and the lien of Thornton superior to Hebert, and ordered the proceeds of the sale distributed accordingly; and from this judgment Hebert and Thornton appealed.

Rector & Sawyer, of Hot Springs, for appellants. James E. Hogue, of Hot Springs, for appellee.

KIRBY, J. (after stating the facts as above). [1] A vendor's lien was retained in the recorded deed from Olmstead to Mackey to secure the unpaid purchase money evidenced by the 150 \$20 negotiable promissory

notes, as recited in the deed, and Fellheimer, in the usual course of trade, for value, and before maturity, purchased 100 of said notes, and the same were indorsed and delivered to him. By said purchase he became the innocent holder thereof and entitled to enforce the lien for their payment. Section 510, Kirby's Digest; Smith v. Butler, 72 Ark. 350, 80 S. W. 580; Pullen v. Ward, 60 Ark. 90, 28 S. W. 1084.

[2, 3] The later reconveyance of these lands from Mackey to Olmstead, for a recited consideration acknowledged received, did not have effect to displace the lien, nor deprive Fellheimer, the bona fide holder of the purchase-money notes, to whom it passed as an incident of the transfer of the notes, of the benefit thereof and the right to enforce same. Fellheimer had no authority to prevent any such conveyance, and all those who took or were interested in the different conveyances of the property after Olmstead's deed to Mackey, reciting a portion of the consideration unpaid and expressly retaining a lien to secure the payment thereof, was recorded, were necessarily affected with notice of the lien retained for the benefit of the vendor and the assignee to any of the purchase-money notes. Sections 762, 763, Kirby's Digest; Turman v. Sanford, 69 Ark. 95, 61 S. W. 167; Green v. Maddox, 97 Ark. 402, 134 S. W. 931.

Although the lien reserved in the face of the deed to secure the payment of the purchase-money notes, passing as an incident thereto upon the assignment of the notes, is analogous to a mortgage executed to secure the payment of a note, and controlled by the same rules of law (Pullen v. Ward, supra), still the notes are not instruments affecting the title to real estate within the meaning of the recording act, and no record of them, nor their transfer, is required by it. The law does not require a notation of the assignment of the purchase-money note made upon the margin of the record of the deed reserving the lien, and the purchaser of said notes acquired the right to enforce the lien for the payment thereof superior to any right thereafter acquired by Hebert and Thornton under their contracts. The lien passes with the transfer of the notes, and expires when they are paid.

It is argued that the recorded reconveyance of the land by Mackey to Olmstead, for a consideration acknowledged paid, released the vendor's lien reserved in his deed for the payment of the purchase money, and that subsequent purchasers and lienholders could not but have understood therefrom that the consideration in the first deed was paid and the lien extinguished. Said deed, however, did not recite that the said consideration was paid, nor was there any notation upon the margin of the record of the deed reserving the lien indicating that such was the fact. It is also true that the record did not disclose the transfer of these purchase-money notes, nor the owner thereof; but it did disclose that a lien was retained for their payment, which inures, under the law, to the assignee of the notes without any record notation of the assignment made. It is also well known that the maker of a negotiable note takes the risk of payment of it to the payee and is not discharged from his obligation to the holder thereof if it has been transferred. Koen v. Miller, 105 Ark. 156, 150 S. W. 412. It was there said:

"A mortgagor, executing a mortgage as security for a negotiable note, is charged with knowledge that the note is negotiable, and he makes payments to the original mortgagee without the production of the note at his peril, and the payments so made are of no effect as against an indorsee thereof, who had possession at the time the payments were made."

Appellants cannot complain that Fellheimer gave them no notice that he was the owner of the purchase-money notes, with the right to enforce the lien for payment, since nothing more is required of him by the law than that his lien shall be expressly reserved in the deed retaining it.

The state of this record does not appear to require a decision of the question, as between appellants, whose lien is superior, and, furthermore, it discloses that the lands were sold and purchased by appellee for a much less sum than his judgment called for, thus precluding the possibility of either of appellants obtaining anything from the proceeds of the sale without regard to the priority of the lien. The question as between them is not, therefore, decided.

Finding no error in the record, the decree is affirmed.

## POTTER v. GARRISON et al.

(Court of Appeals of Kentucky. Dec. 8, 1914.)

## APPEAL AND ERROR (§ 56\*)—JURISDICTION OF COURT OF APPEALS—AMOUNT IN CONTROVERSY.

An appeal from an order denying a motion for judgment for plaintiff for \$4 and costs, notwithstanding the verdict for defendant, followed by a judgment of dismissal of the petition, is not within the jurisdiction of the Court of Appeals because it involves only \$4, exclusive of interest and cost.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 266; Dec. Dig. § 56.\*]

Appeal from Circuit Court, Clay County.

Action by N. C. Potter against John B. Garrison and another. From an order denying a motion for judgment for plaintiff notwithstanding the verdict, he appeals. Dismissed.

D. K. Rawlings, of London, and Rawlings & Wright, of Manchester, for appellant. A. B. Hampton, of Manchester, for appellees.

NUNN, J. Appellant sued to recover \$2,400 damages for trespass alleged to have been committed by appellees in the way of cutting and destroying timber growing on appellant's land. The appellees, by answer, denied the trespass, except an admission that they may have cut two of appellant's trees, and that their value was not more than \$4. The jury returned a verdict for appellees, and judgment was entered thereon dismissing the petition. No appeal is prayed from that judgment, and there was no motion for a new trial nor bill of exceptions. Immediately after the judgment was entered, the appellant entered the following motion:

"Now comes plaintiff, N. C. Potter, the jury herein on yesterday having made a verdict for the defendants, and moves the court to enter in her favor a judgment against the defendants for \$4, and the cost of this action, notwithstanding the verdict of the jury."

The court heard and considered the motion, and entered the following order:

"The plaintiff, N. C. Potter, having entered her motion for a judgment for \$4 and cost against the defendants notwithstanding the verdict of the jury, and the court having considered the same, now overrules the same, to which ruling of the court the plaintiff, N. C. Potter, objects and excepts and prays an appeal to the Court of Appeals, which is now granted."

Since the amount in controversy on appeal, exclusive of interest and cost, is only \$4, we are without jurisdiction to consider it, and the motion of appellees to dismiss must therefore be sustained.

## KOEHLER et al. v. ALMY et al.

(Court of Appeals of Kentucky. Dec. 8, 1914.)

## 1. FRAUDS, STATUTE OF (§ 128\*) — INTEREST IN LAND—SURRENDER.

Where a deed was given, admittedly as security for a debt, it cannot be changed by a

subsequent parol agreement, so as to make it an absolute transfer of the title.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 278; Dec. Dig. § 128.\*]

## 2. TRUSTS (§ 110\*) — CONSTRUCTIVE TRUST — PURCHASE AT JUDICIAL SALE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action wherein plaintiff sought to enforce a constructive trust in land, held to show that defendant had purchased the land at a judicial sale in proceedings against plaintiff, and had taken title in his son's name pursuant to an agreement with plaintiff that he would so purchase and would hold the land in trust as security for a debt owed to him by plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 160; Dec. Dig. § 110.\*]

Appeal from Circuit Court, Laurel County.

Suit by E. L. Koehler and others against A. A. Almy and others. From judgment for defendants, plaintiffs appeal. Reversed and remanded.

Hazlewood & Johnson, of London, for appellants. C. C. Williams and H. J. Johnson, both of London, for appellees.

HOBSON, C. J. On April 19, 1904, Elizabeth May conveyed to E. L. Koehler a tract containing 44¼ acres of land in Laurel county in part payment for which he executed two notes each for \$406.79. One of these notes was assigned to the East Bernstadt Banking Company. On August 20, 1904, Koehler executed to A. A. Almy a mortgage on the land to secure a debt of \$800. He failed to pay the purchase-money notes or the mortgage and in addition incurred a debt to the Banking Company of \$400.65. A suit was brought to sell the land for the debts, a judgment of sale was entered on February 8, 1906. On August 20, 1906, and before the order of sale had been executed, Koehler conveyed to A. A. Almy a tract of land he owned in Garrard county containing 225 acres. The deed is absolute on its face, and recites a consideration of \$300 in hand paid. The order of sale of the Laurel county land referred to was executed on September 10, 1906. The land was appraised at \$3,000, and was bought by S. W. Almy, the son of A. A. Almy, for \$1,731.90, A. A. Almy signing the bond of his son for the purchase money. On February 14, 1908, S. W. Almy, who had received a commissioner's deed, conveyed to Henrietta Koehler, the mother of E. L. Koehler, 35 acres of the land, retaining the coal and mineral rights. On February 24, 1908, he conveyed to his mother, Mary E. Almy, the remainder of the tract. On June 25, 1908, he made a lease of the coal under the 35 acres to W. R. Grant. Shortly thereafter, or about that time, A. A. Almy and wife sold to Green Reed, Annie Huston, and Russell Farris a part of the land conveyed by S. W. Almy to his mother, Mary E. Almy, and A. A. Almy received therefrom \$950 in addition to \$600 which was paid A. A. Almy by

Henrietta Koehler when the deed was made to her on February 14, 1908. On October 13, 1910, Henrietta Koehler conveyed back to Mary E. Almy the 35 acres conveyed to her in settlement of a judgment in her favor enforcing the lien retained in the deed; and on July 3, 1911, E. L. Koehler and his mother, Henrietta Koehler, brought this suit against A. A. Almy, Mary E. Almy, his wife, and S. W. Almy, his son, charging in substance that the deed for the Garrard county land was executed as a mortgage, and that A. A. Almy had sold from the land soon after he got the deed timber for which he received \$300, but that he refused to reconvey the land and was claiming it as his own. They also charged as to the Laurel county tract that A. A. Almy agreed to buy in the land at the sale on September 10, 1906, for E. L. Koehler, agreeing that he would have the purchase made in the name of his son, so that he could sign the sale bond as surety, and agreeing that he would hold the property for Koehler and deed it back to him as soon as his money was paid, that the sales of the different parts of the land above referred to were made under this agreement, A. A. Almy agreeing to credit the purchase money so received on the amount he had paid on the sale bond. The defendants filed answer, controverting the allegation of the petition. Proof was taken, and on final hearing the circuit court dismissed the petition, and the plaintiffs appeal.

[1] As to the Garrard county land, the testimony of A. A. Almy himself shows very clearly that the deed was a mortgage. He says:

"I think that at the time the deed was made we both considered it as security for \$300, and I am sure that I so held it until the date of our final settlement on March 2, 1909, when Koehler gave up his interest in it and took credit on his open account for \$300, which he had previously received. In other words, before we stated the final account, we both intended it to be a mortgage, and after that time we intended it to be a deed."

A statement of the final account was made nearly three years after the deed was executed, and if the instrument was a mortgage until that time, it still remains so. Koehler denies the parol agreement to give up the land, and the proof shows that it was then worth \$000. We, therefore, conclude that this deed must be adjudged a mortgage.

[2] As to the other tract of land, Koehler's statements as to the agreement by Almy to buy the land for him are confirmed by the testimony of three or four disinterested witnesses who testified to statements made by Almy and his son confirming the testimony of Koehler. While Almy denies making these statements, the witnesses are not otherwise impeached, and their testimony is confirmed by circumstances of no little weight. Koehler has remained in possession of the property at all times, and brought this suit to prevent Almy from disturbing him in his possession. He was consulted as to the sales

made of the property, and when his mother got the \$600, he went to Almy, telling him that his mother could pay \$600 on the land, that he could borrow the remainder of the money from another, and that he wanted Almy to deed the land back then. To this Almy replied by asking him if his money was not as good as the other man's. In addition to this it is now conceded by Almy that he took the deed for the Garrard county land as a mortgage; this deed was made only about two weeks before the sale of the Laurel county land. Koehler was running a sawmill; Almy was selling the lumber he cut. If the Garrard county land was a mortgage, it is reasonable that the purchase of the Laurel county land, which was Koehler's home place, was also a security for debt; for Almy at that time was evidently carrying Koehler, who was not a good business man, and seems to have understood very imperfectly his business. His mother, who was 73 years old, is a German, and cannot speak English; while E. L. Koehler was born in this country; they speak German in their home, and he seems to have had unbounded confidence in Almy, and to have little understood the form of the transactions above referred to. On the whole case we are satisfied that the purchase at the judicial sale was made in trust for Koehler, and that all the subsequent transactions must be regarded as ostensibly made by Almy for the purpose of carrying out this arrangement. Koehler was entitled to redeem the property at that sale; a few months later he signed a writing to Almy without consideration, waiving his right of redemption, evidently for the purpose of enabling Almy to sell off the lots and pave the way for Koehler to redeem the property. We, therefore, conclude that Almy held the property in trust for Koehler, and when it was put in the name of his son, or in the name of his wife, the trust still followed it; for the son and the wife were simply the agents of A. A. Almy, and acting for him. We have often held that such a constructive trust may be enforced. *Parker v. Catron*, 120 Ky. 145, 85 S. W. 740, 27 Ky. Law Rep. 536, 117 Am. St. Rep. 575; *Ware v. Bennett*, 143 Ky. 743, 137 S. W. 532, and cases cited.

On the return of the case to the circuit court a judgment will be entered that both tracts of land are held in trust for E. L. Koehler, and the case will be referred to the commissioner to determine the amount due from Koehler to Almy on either tract, and judgment will be entered in favor of Almy, enforcing a lien on each tract for the amount found due him.

The deed from Henrietta Koehler to Mary E. Almy will be treated as made to rescind the conveyance from S. W. Almy to her and in settlement of the judgment against her, for the purpose of restoring the status as it existed when the conveyance by S. W. Almy

to Henrietta Koehler was made. E. L. Koehler will be credited in the settlement with the amount paid by his mother, less the value of the lot deeded to her in the settlement. The settlements between A. A. Almy and E. L. Koehler are presumed correct, and the burden is upon Koehler to show mistake or fraud. A. A. Almy will be credited by any taxes he paid on the property with interest, and he will transfer to E. L. Koehler the coal lease.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

## CHILDERS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 8, 1914.)

### 1. CRIMINAL LAW (§ 1023\*)—APPEAL—ERRORS REVIEWABLE.

Under Cr. Code Prac. § 281, providing that the decisions of the court upon challenges to the panel and for cause shall not be subject to exception, irregularities in the manner of obtaining or selecting the panel are not available on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.\*]

### 2. HOMICIDE (§ 166\*)—EVIDENCE—ADMISSIBILITY—MOTIVE.

Where a wife was accused of killing her husband, and the state's case rested upon circumstantial evidence, the wife denying any complicity in the crime, evidence that the wife desired to be rid of her husband and frequently cursed him and threatened to kill him is admissible on the question of motive, although the wife is entitled to rebut such evidence and show that her marriage relations were happy.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

### 3. HOMICIDE (§ 166\*)—EVIDENCE—ADMISSIBILITY.

Where a wife was charged with killing her husband, evidence of difficulties with her husband several years before the homicide is not too remote; the length of time going to its weight, rather than admissibility.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

### 4. CRIMINAL LAW (§ 673\*)—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

In a prosecution for homicide, where evidence was admitted which showed ill feeling on the part of accused toward deceased, but did not show independent crimes, the court need not, at the time of its introduction, charge the jury that it was competent only on the question of motive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.\*]

### 5. HOMICIDE (§ 163\*)—EVIDENCE—GOOD CHARACTER.

Where a wife, charged with killing her husband, claimed that his quarrelsome and abusive conduct to his own family accounted for the quarrels and trouble between them, testified to by the state's witnesses, such evidence was not a general attack on his character which would authorize the state to introduce evidence of his good character.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. § 163.\*]

### 6. CRIMINAL LAW (§ 684\*)—EVIDENCE—ADMISSIBILITY.

While both the state and the defense should introduce in chief all evidence tending to support their respective contentions, the court may in its discretion allow the introduction in rebuttal of evidence which should have been introduced in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615, 1618; Dec. Dig. § 684.\*]

### 7. CRIMINAL LAW (§ 1153\*)—APPEAL—DISCRETION OF TRIAL COURT—ORDER OF RECEIVING EVIDENCE.

Unless an abuse is shown, the act of the trial court in allowing the introduction in rebuttal of evidence which should have been introduced in chief will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\*]

### 8. WITNESSES (§ 405\*)—CONTRADICTION.

Where accused's mother, who testified in her behalf, denied that she told accused not to admit killing her husband, the state may properly in rebuttal introduce evidence contradicting the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.\*]

### 9. WITNESSES (§ 407\*)—REBUTTAL OF CONTRADICTORY EVIDENCE.

Where the state in rebuttal introduces material evidence to contradict accused's witnesses, accused is entitled to an opportunity to meet the rebutting evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1280, 1282; Dec. Dig. § 407.\*]

### 10. CRIMINAL LAW (§ 719\*)—TRIAL—ARGUMENT OF COUNSEL.

It is highly improper for attorneys for the state to call the attention of the jury to material evidence that the court excluded from their consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.\*]

### 11. CRIMINAL LAW (§§ 711, 1154\*)—TRIAL—ARGUMENTS OF COUNSEL—DISCRETION OF COURT.

It is within the discretion of the trial court to determine what is a reasonable time for argument, and its discretion will not be reviewed unless abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1657, 3059; Dec. Dig. §§ 711, 1154.\*]

### 12. CRIMINAL LAW (§ 711\*)—TRIAL—ARGUMENT OF COUNSEL.

A reasonable time should be allowed for argument, and it is improper, where a large number of witnesses were examined and much conflicting evidence heard, to restrict the parties to an hour a side.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1657; Dec. Dig. § 711.\*]

Appeal from Circuit Court, Knox County.

Nora Childers was convicted of voluntary manslaughter, and she appeals. Reversed and remanded.

Black, Black & Owens, Golden & Lay, J. D. Tuggle, V. C. McDonald, C. Powers, and B. B. Golden, all of Barbourville, for appellant. Jas. Garnett, Atty. Gen., Chas. H. Morris, Asst. Atty. Gen., and J. M. Robson, of Barbourville, for the Commonwealth.

CARROLL, J. The appellant, Nora Childers, under an indictment charging her and Nelson Berry and Joe Berry with the murder of Charles Childers, was found guilty of voluntary manslaughter, and from the judgment on the verdict she prosecutes this appeal, asking for a new trial.

The deceased, Charles Childers, and the appellant, Nora Childers, had been married about eleven years, and were living together in the city of Barbourville as husband and wife at the time of his death, in December, 1912, which resulted from wounds inflicted by pistol shots while he was at the house of Joseph Berry, who was the father of his wife. At the time of the shooting, from the effect of which Charles Childers almost immediately died, there was present in the room where it occurred, at about 6 o'clock in the evening, Joseph Berry and his wife, the mother of the appellant, Nelson Berry, her brother, and his wife, and the appellant and her daughter, Georgia Childers, a child about nine years of age.

It was the theory of the commonwealth, supported by evidence, that, when the deceased opened the door and walked into the room in which these people were seated, the appellant first shot him twice with a pistol, and then Nelson Berry shot him twice, after which Joe Berry fired two other shots that struck him; and that he was killed without provocation and pursuant to an arrangement or conspiracy between the Berrys and appellant.

While the theory of the defense was that the deceased came into the room in a drunken, threatening manner and caught the appellant in the hair of her head with his left hand, jerking her out of the seat, and at the same time cursing her, while he had his right hand in his right-hand pants pocket; that, when this assault was made on appellant, her brother, Nelson Berry, took hold of the deceased, who thereupon turned from his wife and approached Joseph Berry in a threatening, violent manner; and that Joseph Berry then shot him five times, no other shots being fired.

With this brief statement, we will at once take up the grounds relied on for reversal:

[1] 1. It appears from the bill of exceptions that on the trial of the case, after the regular panel had been exhausted, the court directed the sheriff, S. L. Lewis, to proceed to Wilton and on Indian creek around Wilton in Knox county and summon 45 men to appear in the court for jury service, to which direction the attorneys for appellant objected and excepted; but the court stated that the citizens around Indian creek and Wilton were as fair-minded as in any part of the county and knew as little about this case as people in any part of the county, and thereupon the sheriff, in accordance with the directions of the court, proceeded to sum-

mon from that part of the county indicated the requisite number of jurors. After this, other objections to the jurors so summoned and to the panel were made and overruled.

The action of the court, in ordering a jury to be summoned, has been left by section 281 of the Criminal Code to the discretion of the trial judge, and is not subject to exception or review on appeal. This section provides that:

"The decisions of the court upon challenges to the panel, and for cause, or upon motions to set aside an indictment, shall not be subject to exception."

And we have uniformly ruled that error, if there be one, in the manner of obtaining or selecting the panel, is not available in this court. *Deaton v. Com.*, 157 Ky. 308, 163 S. W. 204. It might further here be repeated what was said concerning this section in *Ellis v. Com.*, 146 Ky. 715, 143 S. W. 425:

"It must be admitted that this section and the construction given to it places great and unrestrained power in the hands of the trial judge in the selection of a jury, but it is not to be assumed that a judge will exercise it in an arbitrary or unjust manner or so abuse his office or discretion as to knowingly or purposely deny either to the commonwealth or to the accused the right to select a jury in the mode pointed out in the Code and statutes. But, however this may be, it is certain that in this case the trial judge did nothing to affect either the rights of appellant or the commonwealth."

[2] 2. For the purpose of showing the motive that the appellant had for killing or aiding in the killing of her husband, Mrs. Hignite, a witness for the commonwealth, over the objection of counsel for the appellant, was permitted to testify about a scene and conversation that she saw and heard between appellant and the deceased some six years before he was shot and killed. This witness, after testifying that she was well acquainted with the parties, who were at that time conducting a store, said:

"One evening I went in their store, and Mr. and Mrs. Childers were there alone. It was after I had had supper, and I went in, and Mrs. Childers looked like she was mad. I says, 'Nora, what is the matter with you?' And she looked at Mr. Childers and cursed him and said he had said a girl that passed was pretty and called the girl a vile name. I says: 'That is not anything; she is just a child.' And Mr. Childers was writing and making out orders. When he got through, he came up and put his arm around her, and says, 'I don't want my little woman to be mad,' and she come at him with a hat pin, and says, 'G-d you! I'll kill you.' When she done that, I turned and walked out. Q. Did you hear the defendant at any other time make any other statement to her husband or offer to injure him in any way? A. Yes, sir. Q. When was that? A. At their home and in the store. Q. When was that? A. I cannot tell how long it had been, but since the time I saw her the first time. Q. What did she do or say at that time? A. If she would be mad at him, she would curse him all to pieces, and saying she would kill him."

Andy Gibson, another witness for the commonwealth, over the objection of counsel, testified that seven or eight years before the

trial he heard the appellant, in speaking to her husband, call him a G— d— s— of a b—, and say that she would kill him, and that he ought to be killed.

"How often did you hear her talk in that manner to her husband? A. I have heard her say that four or five or six times some five or six years ago."

Pleas Byrley, also a witness in behalf of the commonwealth, testified that about two years before the trial he had a conversation with the appellant. He said:

"Me and her were talking about a certain fellow, and I was telling her that I wouldn't treat Mr. Childers in the way she was treating him if I was her; if I loved a fellow, I would sue for divorce and go and marry him, and she said he wouldn't have her. She just told me he wouldn't have her; that is, when Childers was living he would not have her, and I think that was about all that was said. We were talking about a fellow by the name of Tom Williams."

This witness further said that a few days after this conversation he saw Williams and appellant hugging and kissing each other on the porch of her house, in the absence of her husband, and that after this they went into the house and Williams remained a good part of the night.

Harriett Bruce, testifying for the commonwealth, said that, on the day deceased was killed, the appellant, in speaking of a difficulty she and her husband had had the night before, said:

"She said her and Charlie had a racket that night. She said Charlie whipped Georgia and cut the blood out of her, and said she took the whip away from Charlie and knocked him down, and he got up and she knocked him down again, and told him if he ever whipped Georgia any more she would kill him. Georgia was their little girl."

In cases like this it often becomes material and important for the commonwealth to show the reason or motive that influenced the accused to commit the crime with which he is charged, and it is a uniform rule in criminal practice, especially in cases in which there is doubt as to who was the aggressor, or where, as in this case, complicity is wholly denied, to permit the commonwealth to give evidence of any pertinent facts or circumstances tending to show threats, ill will, or bad feeling on the part of the accused toward the deceased, or a motive that may have contributed to influence the commission of the act. Underhill on Criminal Evidence, § 323; Roberson's Criminal Law, vol. 1, § 246; Franklin v. Com., 92 Ky. 612, 18 S. W. 532, 13 Ky. Law Rep. 814; O'Brien v. Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. Law Rep. 534; Mathley v. Com., 120 Ky. 389, 86 S. W. 968, 27 Ky. Law Rep. 785; O'Brien v. Com., 115 Ky. 608, 74 S. W. 666, 24 Ky. Law Rep. 2511.

In the trial of this case it was especially important that the commonwealth should have been permitted to show the state of feeling appellant had for her husband and

the causes operating upon her mind that might probably have influenced her to desire to be rid of him. They were husband and wife, and as such were living together at the time he was killed, and her defense was that she had no part in the taking of his life. The witnesses to whose testimony we have referred related facts and circumstances conducing to show that the appellant and her husband had serious quarrels, resulting in assaults, the exchange of abusive language, the making of violent threats and other acts manifesting that although living together as husband and wife their relations were often marked by conduct indicating that their married life was not at all times either agreeable or happy, and that the appellant occasionally was guilty of improper conduct with other men and expressed, although perhaps indirectly, the wish or hope that she might be free to make other matrimonial engagements. We think this evidence, unless it be that it was too remote from the transaction being investigated, was clearly competent; and likewise it was admissible for the appellant to rebut the force of this evidence by showing, as she did, that the relations between her and her husband were happy.

[3] The contention that the evidence referred to on the part of the commonwealth was too remote to be admissible, we think, goes rather to the weight than to the competency of this evidence. It is entirely likely that the incident referred to by Mrs. Hignite, and which occurred several years before the deceased was killed, would be, by itself, too remote to throw any relevant light on the subsequent relations of appellant and her husband; but, taken in connection with the evidence of the other witnesses, it tended to show a continued state of bad feeling between them, beginning with the quarrel related by Mrs. Hignite and ending with the quarrel related by Harriett Bruce that occurred the day before the deceased was killed.

[4] It is also urged that when this evidence was admitted the court should have admonished the jury that it was competent only for the purpose of furnishing a motive that may or may not have induced the appellant to commit or aid in the commission of the crime.

It is a general rule of the criminal law that, where evidence of other offenses is competent, it is the duty of the court to admonish the jury, at the time of the introduction of the evidence, that it is only admitted for the purpose of showing if it does show a motive for the commission of the crime for which the accused is being tried; but, when the evidence as in this case merely goes to show the state of feeling on the part of the accused towards the deceased that might have induced her to kill or aid in

killing him, we do not think it was necessary to admonish the jury concerning the purpose for which it was admitted. There are a great many homicide cases in which the commonwealth, for the purpose of showing malice or motive, introduces evidence of threats and other acts tending to show ill feeling or ill will on the part of the accused toward the deceased, and when the evidence is introduced for this purpose it is not required that the trial judge shall give any admonition to the jury. They have the right to hear it and receive it as other evidence, because its purpose is, not to show the commission of another crime, but only to show the state of feeling existing between the accused and the deceased, or the influences operating on the mind of the accused.

[5] 3. The commonwealth was allowed to introduce evidence of the good character of the deceased when his character had not been put in issue by the appellant. In other words, although the appellant did not seek to prove that the deceased was a person of bad character or a violent, dangerous, or quarrelsome man, the commonwealth was allowed to show that he was a man of good habits, well disposed, peaceable, and quiet in his manner and disposition. On the part of the commonwealth, it is argued that this evidence was competent in view of the testimony of appellant that the deceased often abused, assaulted, and mistreated her, and for the purpose of rebutting the presumption raised by her evidence that he was a violent, quarrelsome, insulting, and brutal man in his relations toward his family.

The general rule in homicide cases is that it is not competent to introduce evidence for the purpose of proving the good character of the deceased until his character has been assailed. *Parker v. Com.*, 96 Ky. 212, 28 S. W. 500, 16 Ky. Law Rep. 449. So that the question here presented is: Was the evidence for the appellant tending to show that the deceased was quarrelsome, brutal, and abusive towards his family, such an assault on the character of the deceased as would permit the commonwealth to introduce rebutting testimony? We think not. The evidence introduced by the appellant did not reflect on the general character of the accused or his manner or conduct towards men or women or children generally, but only his manner and conduct towards the appellant. This evidence was brought out by the appellant for the purpose of explaining what occurred during the quarrels between her and her husband testified to by Mrs. Hignite, Harriett Bruce, and other witnesses and was not broad enough in its scope or effect to warrant evidence of the general peaceable, quiet, and well-behaved character of the deceased. We think, however, that in cases in which it might be competently shown by the accused that the deceased was ill mannered or insulting or rude towards women or children or

men generally, it would be competent to prove the good character of the accused in these respects, although the evidence for the defense might not be directed towards establishing that the deceased was a violent or dangerous or quarrelsome man. It was therefore error to admit evidence of the good character of the deceased.

[8-9] 4. The commonwealth introduced such evidence in rebuttal that should have been introduced in chief. The correct practice is that both parties should introduce in chief all of the evidence they have tending to support their respective contentions; but it is allowable and common practice to introduce in rebuttal evidence that might properly have been introduced in chief, and as a general rule this court leaves the regulation of the introduction of evidence to the trial judge, and it is only in rare cases that his discretion in allowing evidence in rebuttal will be disturbed. But in this case, after allowing Wharton Stamper and Stephen Stamper, who were two of the principal witnesses for the commonwealth in chief, to be recalled and testify in rebuttal that, when the appellant told them she had shot the deceased, her mother, who was present, said: "Hush, child! Keep still! You know you had to do it"—the court refused to allow other witnesses, who said they were present when this conversation took place and heard what was said by appellant and her mother, to testify that the mother did not make the statements attributed to her by the Stampers. The evidence of the Stampers was, we think, competent in rebuttal for the purpose of contradicting Mrs. Berry, who was inquired of about this matter when she was testifying as a witness for the appellant, and the court properly admonished the jury when the Stampers testified in rebuttal that their testimony should only be received by the jury for the purpose of contradicting Mrs. Berry and for no other purpose. But the statements made by these Stamper boys were very damaging evidence, and we think the court committed error in refusing to permit others who were present to say that no such statements were made.

There was some other evidence introduced by the commonwealth in rebuttal in reference to the extent that powder fired from a pistol would mark or burn clothing or flesh, which evidence was material for the commonwealth in the development of its case. After this evidence had been introduced, the defense offered evidence in contradiction of what was said on that subject by the witnesses for the commonwealth, but the court refused to permit these witnesses to testify, and in this respect we think error was committed.

In short, when the commonwealth or the defense is allowed by the court to introduce material evidence in rebuttal, whether it be for the purpose of contradiction or as evi-

dence in chief, the other side should also be allowed to introduce evidence to explain away or contradict this rebutting evidence. Evidence in rebuttal is just as damaging, often more so, than like evidence would be if offered in chief, and, if it would be competent to explain away or contradict the evidence if offered in chief, it would certainly be admissible to permit it to be explained away or contradicted when offered in rebuttal.

[10] 5. Much complaint is made of the argument of counsel employed to assist in the prosecution, and who was permitted to close the case for the commonwealth in place of the commonwealth's attorney. It would serve no useful purpose to repeat here the objectionable argument by counsel in the closing speech to the jury. That it was objectionable does not admit of doubt. For example, counsel referred to material evidence that the court had excluded, saying:

"Just as soon as we began to ask them about that, they said that there was nothing in the Williams business, and, when I put the question to them if they were not thrown out of the hotel at Knoxville, then they objected."

We have several times severely criticized attorneys for the commonwealth for going outside of the record in argument for the purpose of influencing the passions or prejudices of the jury, and especially has it been regarded as misconduct on the part of counsel to call the attention of the jury to material evidence that the court had excluded from their consideration. It is scarcely necessary to repeat what has been so often said by this court concerning the limitations upon the argument counsel for the commonwealth may make. That has been fully stated in *Slaughter v. Com.*, 149 Ky. 5, 147 S. W. 751.

6. In instruction No. 4 the court evidently by inadvertence used the name of Nelson Berry, when it appears that the indictment against Nelson Berry had been filed away.

[11, 12] 7. It is also complained that the court erred in limiting the argument of counsel on each side to one hour. A reasonable time, of course, should always be allowed for argument, but what is a reasonable time must of necessity be left almost entirely to the discretion of the trial court, and it is only when this discretion has been plainly abused that we will interfere. We think, however, that in a case like this, where there are a large number of witnesses and much conflicting evidence, an hour is not sufficient time in which to enable counsel to properly present the case. *Williams v. Com.*, 82 Ky. 640; *Tompkins v. Com.*, 117 Ky. 138, 77 S. W. 712, 24 Ky. Law Rep. 1254.

After a careful consideration of the whole case, we think that the errors mentioned entitle the appellant to a new trial. Wherefore the judgment is reversed, and the case remanded for a new trial.

## TREACY v. GILMAN.

(Court of Appeals of Kentucky. Dec. 10, 1914.)

### 1. BROKERS (§ 86\*) — ACTIONS FOR COMMISSIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions, evidence held to show that negotiations between defendant and a person interested in the property by the broker were not broken off to save commissions, but because the prospective purchaser did not make an acceptable offer, and that in subsequently selling the property to a third party defendant did not know that the third party was acting for the person so interested by the broker or that such person had any interest in the purchase.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

### 2. BROKERS (§ 56\*)—RIGHT TO COMMISSIONS—SALE BY OWNER DIRECT — "PROCURING CAUSE OF SALE."

Where an owner of property puts it in the hands of a real estate agent for sale, who finds a purchaser, but the contemplated purchaser and the owner cannot agree on terms, and the owner, with a view to avoiding the payment of commissions, withdraws the property from the agent's hands without his consent and breaks off the negotiations with the prospective purchaser, but thereafter sells the property to such prospective purchaser or to a third person for him, the agent should be treated as the procuring cause of the sale and entitled to his commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Procuring Cause*.]

### 3. BROKERS (§ 56\*)—RIGHT TO COMMISSIONS—SALE BY OWNER DIRECT.

Where negotiations between an owner of land and a prospective purchaser procured by a broker were broken off because the prospective purchaser did not make an acceptable offer, and not to save commissions, and, in selling the land to a third party after it had been withdrawn from the broker's hands, the owner did not know that the third party was acting for the person so procured by the broker, or that such person was interested in the purchase, the broker was not entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.\*]

Appeal from Circuit Court, Fayette County.

Action by B. J. Treacy against C. B. Gilman. From a judgment on a directed verdict for defendant, plaintiff appeals. Affirmed.

Allen & Duncan and Chester D. Adams, all of Lexington, for appellant. Hunt, Bullock & Hunt, of Lexington, for appellee.

CARROLL, J. This suit was brought by the appellant, Treacy, who will be called plaintiff, against the appellee, Gilman, who will be called defendant, to recover commissions alleged to be due him on account of the sale of real estate owned by the defendant. On a trial of the case, after the evidence for the plaintiff had been finished, the court directed the jury to return a verdict for the defendant, and of this ruling the plaintiff complains.

[1] Stating the material part of the evi-

dence of the plaintiff in narrative form, he said that he was engaged in the real estate and insurance business in Lexington and had known the defendant for many years; that some time in July, 1912, he discovered that a Mr. Beard was looking around for desirable property, and, believing that some property owned by the defendant was for sale, he asked the defendant about it, and was told that it was for sale and that the price was \$20,000, but that out of this he would pay the commission; that in July the defendant, Mr. Beard, and himself were looking at the property and discussing the contemplated trade, and when Beard asked defendant what he wanted for the property he said \$20,000, whereupon Beard replied that was too high and offered him \$15,000, which defendant declined to accept, insisting upon \$20,000; that after this other interviews took place between the parties, and finally Beard increased his offer to \$17,500, which was rejected by defendant; that on September 14th, and while negotiations were pending, the defendant asked him how much his commission would be, and he said \$600; that a few days later, after consulting with Beard, he proposed to defendant, in writing, that Beard would pay \$20,000 for the property, \$15,000 in cash and a note for \$3,800, and a house and lot valued at \$1,200; that the contract contained the further stipulation that a telephone pole and watchman's station were to be removed from near the premises; that defendant said he would not consider the proposition at all, and thereupon Beard said, "I have made up my mind to make you another offer of \$18,000 for the property, and that is all;" that when this proposition was made and rejected defendant said his commission was too high and notified him that he would withdraw the property from his hands; that after this he asked defendant if he had heard anything further from Beard, and he said he had not.

It also appears that about two weeks after this, and on October 1, 1912, the defendant sold the property to the Security Trust Company of Lexington for \$19,000. The circumstances connected with this sale, as related by Mr. Manning, secretary of the company, are in substance, these: He said that Beard came to him as secretary and requested him to make a proposition to the defendant relating to the purchase of the property, it being understood that if the property was bought it should be conveyed by the trust company to Beard; that he thereupon had a conversation with the defendant in which the defendant said he wanted \$20,000, but finally agreed to accept \$19,000, with the condition that the pole and watchman's house were to be taken away. He said, the title to the property was taken in the name of the Security Trust Company and that he did not tell the defendant either before or at the time the deed was made that the trust company was buying the property for Beard, or that Beard had

any interest in the transaction; that the property was paid for by the check of the trust company, as Beard told him not to inform the defendant that the trust company was buying it for him; and that so far as he knew the defendant did not know anything about Beard's connection with the purchase.

Beard, after corroborating in part the evidence of the plaintiff, testified that, a few days after negotiations were broken off and defendant refused to accept the written offer, he saw the defendant and told him they ought to get together and make a trade, and defendant said, "You have got to get rid of Treacy, and then I will talk to you." And "then I said, 'I have nothing to do with Treacy,' and we let it go at that; so we quit right there." He further said that he had never offered defendant \$19,000 for the property, or more than \$17,500; that he did not authorize the plaintiff to make the written proposition to the defendant, but that he was present when this proposition in writing was made and defendant refused to accept it; that probably he might have told the plaintiff he would give \$18,000 for the property, but, if so, he did not remember it.

This is the substance of all the evidence introduced, and on this evidence it is insisted by counsel for the plaintiff that he was entitled to go to the jury upon three questions:

"(1) Whether Mr. Treacy was the procuring cause of the sale. (2) Whether the negotiations were broken off by Mr. Gilman in good faith or for the purpose of avoiding the payment of Mr. Treacy's commission. (3) Whether in selling to Mr. Manning he had reasonable grounds to believe, and ought to have known, that in selling to Mr. Manning, or rather the Security Trust Company, he was in fact selling to Mr. Beard."

Returning now briefly to the evidence, we think it fairly shows that the plaintiff originally brought together the purchaser, Beard, and the defendant; but it also shows that, although they discussed the purchase of the property several times, Beard never made an offer that the defendant would accept, and because of this fact negotiations were broken off between them; that, in all the negotiations that took place between the parties, the defendant was insisting that he would not take less than \$20,000 for the property, but it appears that out of this he expressed at one time a willingness to pay the plaintiff's commission, but afterwards objected to the payment of it on the ground that it was too high. It further shows that, after the property had been withdrawn from the hands of Treacy and all negotiations concerning the sale of it to Beard had been broken off, the defendant sold the property in good faith to the Security Trust Company without any notice or information that Beard was interested in the purchase.

[2, 3] If the negotiations between Beard and the defendant brought about by the plaintiff in the first instance had been broken off by the defendant to save the commissions

of Treacy, and he had afterwards sold the property to Beard or to the Security Trust Company, or any other third person, knowing that it was really a sale to Beard and that Beard was in fact the real purchaser, there would be much force in the contention of counsel that the defendant should account to the plaintiff for the commissions, upon the theory that the defendant, in breaking off negotiations and afterwards selling the property to Beard or to a third person for him, was influenced to break off the negotiations with a view of saving the commissions.

We think that where the owner of property puts it in the hands of a real estate agent for sale, and the agent finds a purchaser, but the contemplated purchaser and the owner cannot agree on terms, and the owner, with a view of avoiding the agent's commission, withdraws the property from the hands of the agent without his consent and breaks off the negotiations with the purchaser, but thereafter sells the property to the purchaser brought to his attention by the agent, or to a third person for him, the agent should be treated as the procuring cause of the sale and entitled to his commission. But in this case there are two obstacles in the way of a recovery by the plaintiff. In the first place, we think the evidence plainly shows that the negotiations between Beard and the defendant were broken off, not to save commissions, but because Beard did not at any time offer to the defendant a price that he was willing to accept for the property; and, second, because there is no evidence that the defendant, in selling the property to the trust company, knew that it was buying it for Beard or that Beard had any interest in the purchase.

It is said that as in the negotiations between the trust company and the defendant it was understood, if not agreed, that the telephone pole and the watchman's house should be removed, this was sufficient to put the defendant upon notice that Beard was the real purchaser of the property, because the removal of these things was discussed in the proposition made by the plaintiff and Beard to the defendant. We do not, however, attach to this indefinite circumstance the weight given to it by counsel, and, aside from this, there is no circumstance connected with the transaction tending in the slightest degree to show that the defendant knew that the trust company was buying the property for Beard.

Under the facts of this case, the defendant had the undoubted right at any time to dispenze with the services of the plaintiff as agent and to take the property out of his hands, and that he did do this is shown by the evidence of plaintiff, who says:

"He (defendant) asked me if it was necessary to give me a written notice to withdraw it from

me, and I told him no, and he says, 'I now notify you that we will consider the trade off;' and I told him, 'If you sell that property to Mr. Beard or any one else for Mr. Beard, I will claim my commission.'"

And this was the last conversation he ever had with the defendant in regard to the matter, except he said that he met the defendant once afterwards and asked him:

"If he had heard anything further from Mr. Beard, and he said he had not. Q. Say anything further? A. No, sir. Q. As to whether or not he thought Mr. Beard was going to take the property? A. I don't recall, now, the conversation."

In *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Plant v. Thompson*, 42 Kan. 664, 22 Pac. 726, 16 Am. St. Rep. 512; *Hoadley v. Savings Bank*, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321; *Branch v. Moore*, 84 Ark. 462, 105 S. W. 1178, 120 Am. St. Rep. 78; *Henninger v. Burch*, 90 Minn. 43, 95 N. W. 578; *Coleman v. Meade*, 13 Bush, 358; *Stedman & Bowman v. Richardson*, 100 Ky. 79, 37 S. W. 259; and in many other cases—the general rule is announced that, where the real estate broker brings the parties together and is the procuring cause of the sale, he may recover his commissions, although the sale may in fact be made directly by the owner to the purchaser brought to his attention by the real estate broker. But the facts of this case as we have stated them do not bring it within the scope of this rule. The property had been in good faith withdrawn from the hands of the broker by the owner and negotiations between the owner and the contemplated purchaser had in good faith been broken off. They were not renewed, nor did the owner sell the property to the purchaser brought to his notice by the broker or knowingly to a third person for him.

We think the facts of this case are quite similar to the facts in the case of *Stedman & Bowman v. Richardson*, supra, and that the rule laid down in that case is controlling here. It appears from the opinion that Richardson placed his property in the hands of Stedman & Bowman, real estate agents, for sale, under an agreement that if they found a purchaser he would pay them an agreed commission. It seems that they did find one O. H. Chenault and showed him the property, but he did not buy it. After this, the property was taken out of their hands by Richardson, and thereafter he sold it to Chenault. In holding that the agent could not recover, the court placed its decision upon the ground that Richardson acted in good faith in withdrawing the property from the hands of the agent, and at the time the sale was made to Chenault the agency had been terminated.

Upon the facts appearing in the record, the ruling of the lower court in taking the case from the jury was correct, and the judgment is affirmed.

**HOLLIDAY et al. v. HOLLIDAY et al.**

(Court of Appeals of Kentucky. Dec. 10, 1914.)

**1. WILLS (§ 44\*)—TESTAMENTARY CAPACITY—INTOXICATION.**

That testator, when he executed his will, was under the influence of intoxicants was not ground to set the will aside, unless it appears that testator was so under the influence of liquor at the time as to be entirely deprived of reason and understanding.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 89-91; Dec. Dig. § 44.\*]

**2. WILLS (§ 324\*)—EXECUTION—VALIDITY—UNDUE INFLUENCE—QUESTION FOR JURY.**

Where, in a will contest, evidence of undue influence is entirely circumstantial, it is the court's duty to submit the issue to the jury, if all of the circumstances, taken together, raise the question, though each circumstance, standing alone, is inconclusive.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.\*]

**3. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE.**

In a will contest, evidence held to support a verdict against the will on the ground of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

**Appeal from Circuit Court, Clark County.**

Application by Thomas L. Holliday and others for probate of the will of Stephen Holliday, to which Lewis S. Holliday and others filed objections. From a judgment in favor of contestants, proponents appeal. Affirmed.

Jno. M. Stevenson, of Winchester, W. C. G. Hobbs and John R. Allen, both of Lexington, and F. H. Haggard, of Winchester, for appellants. Pendleton, Bush & Bush, of Winchester, Willis, Todd & Bond, of Shelbyville, and G. F. Wycoff, of Winchester, for appellees.

NUNN, J. Amanda Holliday, the widow, and her children by a former marriage, are the appellants and propounders of the alleged last will of Stephen Holliday, deceased. Her first husband was Benjamin Holliday, a brother of Stephen. The appellees are the contestants, about 25 in number, and the children of the other deceased brothers and sisters of Stephen Holliday. The contest is based on mental incapacity and undue influence. These questions were submitted to the jury, and their finding was against the will. The propounders appeal.

The form of the instructions is not criticized. Three grounds for reversal are urged, viz.: (1) There was not a scintilla of evidence upon which to base an instruction on undue influence; (2) that the use of intoxicants by a party, which will authorize the setting aside of his will and testament, must have been such that he was entirely deprived of his reason and understanding; that moderate drinking continuously and occasional sprees of drinking do not invalidate a will; and (3) that the verdict is against the law

and is not supported by the evidence; that an overwhelming preponderance of the proof is in favor of the validity of the will.

[1] The proposition of law stated in the second ground is undoubtedly correct, but we do not see, from the record, any controversy on this point. The instructions made no reference to intoxicants. Only two questions were submitted to the jury. The first was whether Stephen Holliday was mentally capable of disposing of his property; and, second, whether the execution of the will was the result of undue influence exerted upon him. There was a great deal of proof with reference to intoxicants and the long-continued use of the same by testator, but this was competent as affecting his mental capacity as well as his susceptibility to undue influence. The whole case comes down to a question of fact, and the established doctrine is that the scintilla rule applies to will contests, as well as other cases.

[2] It is equally well recognized that direct proof of undue influence can seldom be had, and as a rule must be proven by circumstances. Each circumstance, standing alone, might be inconclusive, yet if all the circumstances, taken together, raise the question, it is the duty of the court to give an instruction on undue influence. *Milton v. Hunfer*, 13 Bush, 163; *Fry v. Jones*, 95 Ky. 149, 24 S. W. 5, 15 Ky. Law Rep. 500, 44 Am. St. Rep. 206; *Lischy v. Schrader*, 104 Ky. 657, 47 S. W. 611, 20 Ky. Law Rep. 843; *Woods' Ex'r v. Devers*, 19 S. W. 1, 14 Ky. Law Rep. 82; *Meuth's Ex'r v. Meuth*, 157 Ky. 790, 164 S. W. 63.

We quote from *McConnell's Ex'r v. McConnell*, 138 Ky. 783, 129 S. W. 106, 137 Am. St. Rep. 408:

"In will cases, where the grounds of contest are undue influence and mental incapacity, the evidence is necessarily allowed to take a wide range, and every fact and circumstance that may throw light upon either of these facts is admissible."

In the light of these statements of the law, particularly applicable to this case, we come now to consider the facts, which the jury evidently deemed sufficient to constitute undue influence and mental incapacity.

[3] Of the Hollidays there were five brothers and three sisters. Two of these brothers were at some time confined in a lunatic asylum, and a sister died there. There is proof that others were similarly afflicted. The oldest brothers were Milton and Stephen. From 1854 to 1889, when Milton died, these two brothers lived together as bachelor hermits. They were good farmers and successful traders, and accumulated about 700 acres of fine land. All of the farm was cultivated and well stocked. They were boon companions, and all their holdings were in common. Milton seems to have been the moving spirit. There is evidence that they executed simultaneous wills, so that the survivor would

take all the property. When Milton died, his will was probated, and Stephen was sole devisee. If Stephen made a will, it is not in evidence, but no one disputes that it was understood he would make such a will, if, in fact, he did not. While they were men of strong character and self-willed, even eccentric, they did not lack for friends. But this was in some measure due to a five-gallon keg in which they kept an ample supply of whisky, and from which they, and as many of their neighbors as cared, drank regularly, if not too much. To a like source may be attributed the estrangement and difficulty that arose between the two brothers in 1885. At any rate, from some trifling circumstance, the brothers fell out, and Stephen shot Milton through the arm, crushing the bone. Milton lived four years after this and in the same house with his brother Stephen, but never became reconciled to him. There is evidence to show that some one stayed between them all the time to prevent a renewal of the conflict. After Milton's death, a contest of his will was threatened, and Stephen, fearing that the contestants would likely succeed because of the well-known family taint of insanity and Milton's dislike for him, talked with some of the family leaders and begged them not to contest. He told them that a lawsuit was not only distasteful but useless. He was then about 65 years of age. In connection with the fact that he was unmarried, he assured them that he never intended to marry, and with a little patience the heirs would get all the property anyhow. As a consequence, the contest was abandoned. But Stephen seemed to brood over the death of his brother and their estrangement. Numerous witnesses testify as to his conversations about it and the deep impression it made upon him. He continued to send the five-gallon keg to town as often as it needed replenishing, and drank from it many times every day. Except on two occasions, there is no evidence that he was ever drunk. Perhaps on no other subject is opinion evidence so prolific and yet of as little value. Opinions as to just what constitutes drunkenness are as varied as the amount necessary to produce that effect on different individuals. If such estimates are unsatisfactory, although uniform, as in this case, it is certain that when at home he drew from the cask, and if out on the farm he drank from the flask which he invariably carried. If he did buy the cheapest whisky, he lived long enough to wear out the keg and get many years' service from another.

Stephen continued to live a hermit life at the home place after Milton's death. He retained one negro servant, Alfred Webb, and for whom he frequently expressed affection and an intention to see that he was cared for if Alfred survived him. No serious effort was made to cultivate the farm, and blackberry thickets took possession. The

fencing and improvements were not repaired. Alfred Webb cultivated a few acres, but it brought no income. Stephen bought no more stock and did no trading of any sort, nor did he attempt to sell any stock from the place. In fact, years afterwards, when they had a public sale, there were horses and mules on the place 15 years old and not bridle-wise, and hogs so wild that they had to be shot down with rifles. His income dwindled to \$200, as estimated by some witnesses, and this came chiefly from blackberries which the neighbors picked. On these old negro Alfred collected for him a royalty of 5 cents per bucket.

About nine years after Milton's death, Stephen, while sleeping in his room alone late one night, was alarmed by a noise at the door, and, in response to his inquiry, a panel was smashed with a sledge hammer, and he perceived the hand of a black man reaching through to raise the latch on the inside. This hand proved to be that of Asa Murray, a notorious negro of the neighborhood. He was leader of a desperate band, and no doubt intended to rob and murder Mr. Holliday. In the way of weapons, Stephen only had a shotgun, and it contained but one load. Luckily it was beside his bed, and, raising it, he drew aim on the hand and shot it off. The robbers ran, but Stephen never allowed any one to wash the blood from the floor which dripped from the hand that lay there all night. As might be supposed, this incident also made a very deep impression upon him. He seems to have told every detail of it, and would repeat it as often as they would give ear to him. From this time he kept in the house three repeating rifles, two shotguns, and two pistols.

Because of this circumstance, his relatives considered it necessary for some of them to live in the home with him. Among the relatives who seemed most zealous for his welfare, was Amanda, widow of his brother Ben, and her daughter, Mrs. Shealey, also Felix Holliday, a son of Stephen's deceased brother Lewis. Felix, on invitation of the old man, went over to live with him. This was in the spring of 1898. Felix only stayed a few days, and moved away to Missouri. He says that his aunt Amanda interfered, and from his uncle Stephen he learned that she told him Felix might involve him in some domestic troubles. When Felix departed, Mrs. Shealey and her husband moved in. During the fall of that year Shealey and Mr. Holliday had a falling out over some matters of small consequence, and Shealey drew a pistol and threatened to shoot him. This terminated their relations for the time being, and Shealey and wife moved to Lexington, 16 miles away. Felix returned from Missouri, as he says, on the old man's request, and remained with him until the marriage in 1902. Felix says he got along all-right with the old man, except when Amanda

would come over to see him. After her visits the old man would get angry with him, because of things which he said Amanda told him derogatory to Felix. The old man was rheumatic and weighed over 200 pounds, and, after the Asa Murray incident, was rarely able to leave the house. He was in bed a great part of the time. In this connection, we may say that Felix was kind and attentive to him, and his treatment of the old man was as considerate as may be expected of one man to another. He lived nine years after his marriage to Amanda, and no one questions the fact that she too was as kind and attentive to the old man as a wife could possibly be. But through it all, and with them all, there is one outstanding fact, and that is the old man's property and its ultimate disposition. This influenced every act of those who came in contact with him.

To tell the story connectedly, we revert to the Shealey departure in the fall of 1898. In the following spring, a closed carriage drove up to the Holliday home, containing Shealey, his wife, and a lawyer. Who this lawyer was, no one knows. Shealey was dead at the time of the trial, and Mrs. Shealey testified that she could neither name nor describe the lawyer or any feature of him, although admitting the trip and the fact that they had a private conversation with the old man for the purpose of settling a controversy. She says the controversy was about some sheep that Shealey owned and left on the place. As they went in, Felix was asked to step out, but, knowing the enmity that existed between the old man and Shealey, he suspected some design upon him, and eavesdropped. He heard Shealey charge the old man with having tried to alienate the affections of his wife, and referred to a circumstance when the old man attempted to embrace her, and he heard his uncle reply that she did not resent his advances. After some further conversation, in which the lawyer took a part, he heard Stephen counting money to them. Several witnesses testify as to conversations with the old man about this circumstance, and, except the amount of money paid, he told them all about it. The whole neighborhood from that time seems to have been aware of the great dislike which the old man entertained for Shealey. As evidence of this, one of appellant's witnesses was a commissioner in the division of the lands of Benjamin Holliday, deceased. That farm adjoins Stephen's. This witness swears that Stephen begged him to see that no land adjacent to him should be laid off to Mrs. Shealey. The old man continued practically bedfast. Felix and other corroborating witnesses, most of them interested, however, tell of the old man's eccentricities, hallucinations, and toddles with increasing frequency. He would imagine a return of the robbers, and see their faces

at the window, or forms outlined on the wall, but was unable to recognize his friends and relatives as they would come to see him or to understand their relationship. About this time, however, he did begin to entertain marrying notions. But, in speaking of this, it was always in connection with some young girl—no one in particular. In this regard Amanda was the only one who seemed to take him seriously, and she concluded that, if they did not marry him into the family, he would likely marry out of it, with the result that the property would be divided, if not diverted. Felix grew tired of staying there, and, when Amanda indicated a willingness to sacrifice herself in marriage for the family good, Felix made no objection.

Amanda's sister testifies that Amanda told her "she married Mr. Holliday to keep the money in the family; that if she didn't marry him he was going to marry a younger woman." Felix says his aunt Amanda told him "to come over there [her home] and carry her down to Lexington to help her put the bridle on the old man and she would hold him." Acting on this request, Felix did take her to Lexington March 11, 1902. The marriage occurred on the 17th. Amanda says they had been engaged for a year, although he was then 77 and she was 65 years old. She wanted a preacher, but he wanted a magistrate—"everything plain, an old-fashioned wedding." "I wouldn't do it, and he said, 'select a place and time that suits you, and I will go whenever you send me word.'" Continuing, she says: "I went on to town [Lexington] to see the girls, and then sent for him—sent word that I had found a place—and if he would come we would be married, which he did." Her daughter, Mrs. Shealey, says that she "moved him," and Mr. Shealey helped her. This is the same Shealey with whom he had not been on speaking terms for four years. On cross-examination Mrs. Shealey explains that in the meantime she had been the bearer of mutual apologies, and at this time they bore no grudges. How they "moved him" is best told by Mrs. Shealey. When informed of the engagement, Mrs. Shealey inquired of her mother:

"'How would it do to come to my house and be married, and I will go and get the old gentleman down here?' And I said, 'I will go for him.' And she said, 'Well, drive down and see what he will say.' And we [Shealey and wife] hired a carriage from Ben Wilson's stable and drove down. I went in, both went in; and I said to him, 'How are you, Uncle Steve?' He said, 'Come in, have a chair and warm.' And we sat down by the fire. He was lying on the bed. It was in the morning, and he was lying across the foot of the bed suffering with a severe toothache, and his jaw was so swollen that he couldn't use it; and he said to come in and stay; and I said, 'Well, you will make a peculiar looking bridegroom.' That's the way I approached him, and he kind of laughed; and I said, 'Mother says you are engaged, and want to marry at Becknerville.' And he said, 'Right now I am not in any condition; what does she say about it?' She is in Lexington; and I said, 'She told me to hire this rig and come

down here and see if you wanted to come to Lexington?" He said, "I am feeling so bad I cannot make the trip." I said, "Won't you make the trip?" He said, "I cannot do anything for this toothache." And I asked him what he had tried to do for it, and what he had there to do for it; and he said, "Yes, I have tried tobacco, and I have tried whisky, and that won't do any good." And I said, "I will try turpentine," and I packed his tooth around with turpentine, and he was lying down. He said, "Stay until after dinner." And he called the cook in and had her fix us a nice dinner, for Felix was living there at the time, and he asked Felix to see that the horse was taken to the stable and fed, which my cousin did. And finally I said, "Well, it is getting late, and I must go." And he said, "My tooth is so much easier, if you will dress me I will go." And I said, "I hardly think you are able to make the trip." And he said: "I want to see Mandy. I want to have something done with this tooth." And he got up and got in the carriage, and, after we had got down on the road, he said he felt very bad, but he wanted to see Mandy. I told him I would take him back and make another trip for him, and he said, "No, take me to Mandy, and, if I die on the road going to her, take me to her."

It was bitter cold weather, and they reached Lexington after dark. This was his first time out of doors for more than a year. Out of deference to his wishes for a plain wedding, Amanda wore plain clothes; that is, she did not make up anything new. He wore his funeral shroud ordered years before. The Shealeys thoughtfully brought it along. That he might have his way, they also consented that he remain seated during the ceremony. On the next day a physician was called to examine him. This physician came again on the 19th and 25th; also on April 8th and June 6th. We quote his testimony:

"Q. What was the old gentleman's trouble at that time? A. Well, when I walked into the room the old gentleman was sitting in a chair. I remember it was rather cool, and they had quite a large fire, and they all seemed to be laughing, and much amused, and I asked the question what caused the amusement, and they said there had been a marriage. \* \* \* Q. What was he doing at that time? A. Well, he was sitting in a chair, and wasn't saying anything at all. In fact, it was almost impossible to get him to do any talking. When I would ask him questions, he would look at me and smile, and about the only thing I could get from him was a smile. He didn't talk at all. \* \* \* When I asked the question, the questions were answered by Mr. Shealey. \* \* \* For instance, I asked him how he was complaining, and I was informed he was complaining about his side; that he was suffering with his side. \* \* \* I think very much under the influence of liquor. \* \* \* Well, he told me that he would see me the next morning, and I went the next morning, I think, between 11 and 12 o'clock, and walked in the room, and found him in bed, lying in bed, with his clothes on, and his boots. \* \* \* He was in a very weak condition; he struck me as being a very old man and very childish. \* \* \* Mr. Holliday's condition was very much depleted, and he seemed to be exceedingly childish; impressed me that he had suffered from a chronic softening of the brain. He seemed to be indifferent to what you would say to him; didn't seem to dwell on any subject at all. I talked to him about his symptoms and tried to prescribe for him on that idea."

Mr. and Mrs. Holliday stayed in Lexington with the Shealeys until July. A son of the

marrying magistrate was a real estate man, and Shealey was his by-bidder. From the time of his brother's death, the old man had added nothing to the estate, but it seemed his interest suddenly revived, and during his short stay he made three investments in Lexington real estate—about \$8,000 altogether. He also purchased an automobile and a carriage. Notwithstanding the circumstances, the real estate investment proved profitable. The marriage marked other changes in the old man's attitude. He began to charge rent against Alfred Webb, the old negro servant. He cut off a \$50 annuity to his insane sister.

In July the Hollidays returned to the farm. On March 13, 1903 (the following year), his will was written, but that was the second attempt. The attending physician and a neighbor acted as attesting witnesses, and a Lexington lawyer, brother-in-law of the physician, was called to write it. The physician admits that he made all the arrangements. He says:

"These people lived in rather a secluded place in winter, and they asked me to get some one to write this will for him."

The first attempt was about 10 days before and without success. Mrs. Holliday, while denying that she was a factor in procuring this will, and insisting that she did not know that the lawyer and witnesses were coming, yet admits that she met them at the door and, without any preliminaries, "told them he was not going to make a will that day; I told them he was not in condition to do anything." The parties went into his room and found him lying in bed under the influence of liquor, as they describe him. When he was aroused and the doctor proceeded to examine him, the old man flew into a rage, drew his cane, and ordered them out. The doctor testifies:

"He was abusing me. I approached him, and he told me to get out of there or he would hit me with that stick."

Mrs. Holliday says that he was not drunk, only excited; that she had given him but two drinks that morning. The colored girl says that she also gave him one. Ten days later they again met at the old man's home, but in the meantime the colored girl had been discharged. On this occasion there is no difference of opinion as to the condition of the old man or the amount of liquor he had taken. All testify that he understood everything and was mentally competent to make a will. The physician and attending witnesses say the lawyer asked him what he wanted to do with his property, and he said "he wanted to give it to his wife." The lawyer testifies:

"He said he wanted to leave everything to his wife, and he wanted her to have it absolutely to do as she pleased with it."

The will reads that way. The will was then delivered to Amanda and safely kept by her until the time of probate, about nine years afterwards, Mr. Woodford, attesting

witness, although insisting that he never had any doubt about Mr. Holliday's mental soundness, admits that, at the time the will was probated, he hesitated to answer the county judge's question on that subject until he was sure of the right of the judge to ask it. During these next nine years Mr. Holliday remained at home, most of the time bedfast. His rheumatic afflictions grew, and he had practically lost use of one leg. He was lame in it even before Milton's death. There is another incident that corroborates the physician who treated him at the time of the marriage. In January, 1909, senile gangrene set up. He was carried to a Lexington hospital and the leg amputated. A hospital physician says:

"The gangrene, of course, was the result of a physical condition produced by the hardening of the arteries and other changes incident to his age."

When asked as to his mental condition, he replied:

"Well, I can't tell you positively, because the condition of delirium would, to a certain extent, cover that up, and it would be hard to state what his exact mental condition was when he wasn't suffering from this septic absorption; I doubt if he ever knew positively where he was and what had been done to him."

Another hospital physician makes an issue here and says:

"I thought his mental condition was all right. I saw nothing wrong with his mental condition."

He survived the operation and died in January, 1912, at the age of 86.

True, this is only one side of the case. But that side must be considered to ascertain if there was any evidence to justify an undue influence instruction. As for the other side, there were about an equal number of witnesses, interested and disinterested, who testified that the old man was endowed with strong mental faculties, and that they showed no sign of weakening until the last year or so of his life. The attesting witnesses, the beneficiary, and the attorney who drafted it are positive that the will was written when he had mind and memory sufficient to know his estate, its character, and value, as well as his relations and the natural objects of his bounty, and was thoroughly competent to dispose of his estate according to a fixed purpose of his own.

As is said in the Woods Case, supra:

"The statements, or some of them, made by witnesses for the contestants may appear incredible when contrasting it with that for the propounders of the will; still the question of fact was one for the jury, and with this conflicting testimony, coming from the lips of many witnesses on each side, the jury considered and weighed it, and, it being their province to determine the issue on the facts, we cannot disturb it, if supported by the evidence."

No one of the circumstances, taken singly, is conclusive that the old man was mentally unsound or that he was a subject of sinister influence. He may have believed it was nec-

essary to shoot his brother, and certainly he had a right to shoot the robbers. Having a competency, he may not have cared to cultivate or manage his farm, and could afford to let the stock run wild. His mental unsoundness is not established by the fact that he discharged Shealey, nor by the fact that he afterwards compromised the threatened lawsuit, and even later made friends with him. Reaching old age and tiring of bachelorhood, he had a right to marry, although the fact that he waited so long for the first experiment may seem to some a strong presumption against his sound judgment. But counsel do not stress this proposition as if either entertained very settled convictions as to its effect on the question. Anyhow, there is not a suggestion of love or fine sentiment connected with it, and no one claims that the match was made in Heaven. But whether or no, this is not a divorce proceeding, and the validity of the marriage is not in question. It is brought into the case as a circumstance, and, taken in connection with all the other facts, certainly a question is raised as to his capacity to make a will, and his susceptibility to influence. After reading the voluminous record, we cannot say that the jury erred in finding against the will. In fact, the decided weight of the evidence supports the verdict, as it seems to us.

The judgment is therefore affirmed.

#### BON JELLICO COAL CO. v. MURPHY.

(Court of Appeals of Kentucky. Dec. 8, 1914.)

##### 1. MASTER AND SERVANT (§ 88\*)—INJURIES TO SERVANT—RESPONDEAT SUPERIOR—INDEPENDENT CONTRACTOR.

Where two miners contracted to widen an entry in defendant's mine, take out the coal, and remove the slate, at a specified price per ton of coal and yard of slate, and they employed plaintiff by the day as a loader, he being paid by defendant, less supplies and the amount charged to the miners, plaintiff was an employee of defendant, and it was bound to exercise ordinary care to provide him with a reasonably safe place to work, and was therefore liable for injuries to him caused by a fall of a portion of the roof, through the miners' negligence; they not being independent contractors.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.\*]

##### 2. MASTER AND SERVANT (§ 235\*)—INJURIES TO SERVANT—LABORERS IN MINE—DUTY TO INSPECT.

In the absence of a contract or special assumption of duty to inspect, a servant need not inspect the place where he works; the master being responsible for danger negligently permitted in such regard, unless it is patent or obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

##### 3. CONTINUANCE (§ 33\*)—DENIAL—ABSENCE OF WITNESS—ABUSE OF DISCRETION.

Under Civ. Code Prac. § 315, providing that a trial shall not be postponed because of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the absence of a witness, if the affidavit shall be read as his evidence, where an absent witness was not a party, and the affidavit as to what he would testify was read as his testimony, the court's denial of an application for a continuance, because of his absence, was not an abuse of discretion, because the attorney who made the affidavit might not have been able to give all the evidence of the witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 113; Dec. Dig. § 83.\*]

#### Appeal from Circuit Court, Whitley County.

Action by Henry Murphy against the Bon Jellico Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Tye, Siler & Gatliff, of Williamsburg, for appellant. Henry C. Gillis, J. B. Snyder, and B. B. Snyder, all of Williamsburg, for appellee.

NUNN, J. Appellee was injured by a fall of slate while working in appellant's mine. The third finger of his right hand was cut off, and the second and little fingers were so bruised and lacerated as to leave them permanently stiffened. He sued and recovered a \$750 judgment.

In one of the mine entries, there was a sag in the floor. In order to fill up this sag and raise the track to grade, appellant contracted with Kilby and Estes, experienced miners, to make the entry three feet wider and shoot down two or three feet of the roof for a distance of about 180 feet, and with this broken-down roof it was planned to raise and level the track to correspond with the normal grade of the entry. Kilby and Estes received pay per ton of coal and yardage for driving the entry. At the time of the accident to Murphy, the slate had been shot down overhead of the original entry, and they had been paid for removing that slate. They were taking coal out from under the three feet of extra width. They had no contract for taking down slate from that part of the work, except that, in taking out the coal, it was their duty to either prop or take down the loose slate. If the price could be agreed upon, they expected to make a contract, after taking out the coal, to take down the slate from over it, in order to make that roof conform to the new roof in the original entry. Coal had been taken out from under this 3-foot strip for a distance of about 80 feet, and 3 props had been placed at one end. There is no proof of any other props or support along the whole distance of the new entry or along the 3-foot strip.

Kilby and Estes had employed Murphy as a loader, and he was getting \$2 per day. They turned Murphy's name in to the company, and it was carrying him on its books, paying him his wages, less supplies furnished him at the store; but the amount paid to Murphy was deducted from the earnings of Kilby and Estes.

[1] The accident occurred about 7 o'clock Monday morning, soon after work commenced. Murphy had loaded one car of coal and near-

ly completed another. He was loading this from coal which had been shot late Saturday evening, and Kilby was then picking it down. Murphy was standing on the car track in the mine entry. A large piece of slate, weighing, as some of the witnesses say, from 5 to 7 tons, and from 20 to 30 feet long, fell from over the place where Kilby and Estes had taken and were taking the coal out of the 3-foot strip. The bulk of this slate rolled out toward the track, but the break extended overhead into the entry, and one piece, weighing about 40 pounds, fell from immediately over where Murphy was standing. It is not made clear whether that was the piece of slate which struck him.

It is not contended that the danger was such an obvious or patent one as to put a man of ordinary prudence on his guard, nor does appellant insist that Murphy owed any duty to inspect the roof or take any steps to properly secure it. He was merely employed to load coal. In actually digging and mining, he never had altogether more than two days' experience. But appellant says that Murphy was not its servant; that he was in the service of Kilby and Estes, who were independent contractors; that it was the duty of Kilby and Estes to prop this slate and take it down, and their failure to do so was their negligence, and not the company's, and, if Murphy is entitled to anything by way of compensation for their negligence, he must look to them, and not to the company.

We are of the opinion that Murphy was appellant's servant, although engaged by Kilby and Estes. Under the facts proven, appellant owed him the duty of exercising ordinary care to give him a reasonably safe place to work, and appellant is not relieved of this duty by delegating it to others. The negligence of Kilby and Estes is virtually admitted, and their negligence is negligence of the company, for which it should respond in damages.

The case of Interstate Coal Co. v. Trivett, 155 Ky. 795, 160 S. W. 731, is in point. The facts are almost identical, and we quote:

"The first question made on the appeal is that Charles M. Trivett was not in the service of the coal company, but was working for one Hill, who was an independent contractor. The facts on this subject are briefly these: Charles M. Trivett applied to the mine boss for work. The boss was not able to give him employment such as he wanted at the time. Hill was getting the coal out of certain rooms in the mine and loading it on the cars at so much a ton, and, at the suggestion of the boss, Trivett went to work for Hill at \$2 a day, to be paid by Hill. It was part of Hill's duty to take down the draw slate. Trivett went to work in the morning, and on the same day, about 3 o'clock, was injured. While Hill was being paid for what he did by the ton, he worked under the direction of the mine boss. A large part of the coal in Eastern Kentucky is gotten out by the miners by the ton, and not by the day. Hill was simply a miner who was getting out coal for the company and being paid according to the quantity of coal he got out. The company furnished the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—11

cars and hauled out the coal. Hill loaded the cars after he had gotten the coal ready to be loaded. Except in the mode of payment, Hill, in getting out the coal, did just as miners generally do in coal mines. He was not an independent contractor, but a servant, whose compensation depended upon the amount of coal he got out; and, while he paid Trivett and the other persons who helped him, the pay was simply taken out of his pay. The mode of payment is not conclusive in cases of this sort as to whether the person is an independent contractor of a servant, although it is a circumstance to be considered with the other facts, and our conclusion is, in view of all the circumstances under which the work was done, that Hill was a servant of the company, and that Trivett was simply working under him."

The same question was raised in *Employers' Indemnity Co. v. Kelly Coal Co.*, 156 Ky. 74, 160 S. W. 914, 49 L. R. A. (N. S.) 850. We there held that one working under similar circumstances was an employé of the company.

[2] The court gave an instruction on contributory negligence in the usual form, but appellant complains that this instruction is erroneous because it fails to point out the "facts and things," as contended by appellant, which constitute contributory negligence on the part of Henry Murphy. Appellant offered an instruction on contributory negligence, which it says the court erred in refusing to give. That instruction is as follows:

"If you believe from the evidence in this case that the plaintiff either knew, or by the exercise of ordinary care could have known, that a shot had been fired at or near the rock or slate which fell upon and injured him, then it was his duty to sound such rock or slate before working adjacent thereto, and if you should further believe from the evidence that the plaintiff could in this way have discovered that the rock or slate was either loose, dangerous, unsafe, or liable to fall, and that he failed to do so, then the law is for the defendant company, and you should so find."

The instruction offered is based upon the idea that it was Murphy's duty to inspect and examine the roof. There is no testimony to that effect, and, in the absence of a contract or special assumption of such duty, it is not incumbent upon the servant to examine or inspect the place where he works. The master is responsible if there is negligence in this regard, unless the danger is patent or obvious. We believe the court's instructions fairly presented the case to the jury, and there was no error in refusing to give the one quoted, which appellant offered.

[3] Neither do we believe the court erred in refusing to continue the case. Appellant presented an affidavit showing what an absent witness would testify, if present. The court permitted this affidavit to be read as the testimony of the witness. It may be that the attorney who made the affidavit was not able to give all the evidence of the absent witness, and it may be the affidavit did not have the force of such testimony, if given in person by the witness. But these are not such facts as warrant us in concluding

that the lower court was guilty of an abuse of discretion in refusing to continue the case. The circumstances must be extraordinary to take the case out of provision §15 of the Code, which provides that the trial shall not be postponed on account of the absence of a witness, if the affidavit shall be read as his evidence.

This case does not come within the rule laid down in *Langdon-Creasy Co. v. Rouse*, 139 Ky. 647, 72 S. W. 1113, 24 Ky. Law Rep. 2098, Ann. Cas. 1912B, 292, relied on by appellant. The corporation, Langdon-Creasy Company, was sued for damages for personal injury. Mr. Langdon, who was president of the corporation, was the person guilty of the alleged negligence. He bore practically the same relation as a party defendant, and as a party to the action, as well as a witness, his presence was needed. The facts to which he would testify could not be supplied by other witnesses, and his evidence was very material. His mother died, and he could not attend the trial. This court held that it was an abuse of discretion to refuse a continuance under the circumstances. In this case, the absent witness, Hiram Estes, was not a party. He went to Tennessee a few days before the trial, and was beyond the court's jurisdiction. We cannot say it was an abuse of discretion to refuse a continuance when the statement of what the absent witness will prove is admitted as evidence. *Hutton v. First National Bank*, 45 S. W. 668, 20 Ky. Law Rep. 225; *M. & L. R. Co. v. Herrick*, 13 Bush, 122.

The judgment of the lower court is therefore affirmed.

#### NATIONAL CASH REGISTER CO. v. WILLIAMS.†

(Court of Appeals of Kentucky. Dec. 11, 1914.)

##### 1. MASTER AND SERVANT (§ 330\*)—MASTER'S LIABILITY TO THIRD PERSON—SUFFICIENCY OF EVIDENCE—EXISTENCE OF RELATION.

In an action against a company for the negligence of the chauffeur of a general agent of the company, a finding by the jury that the chauffeur at the time was delivering repair work which the agent was required to do under his contract with the company, and not repair work independently contracted for by him, held not to be palpably against the weight of the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

##### 2. APPEAL AND ERROR (§ 1194\*)—SUBSEQUENT PROCEEDINGS IN LOWER COURT—NEW TRIAL—SCOPE OF ISSUES.

A decision by the Court of Appeals that it was a question for the jury, under the evidence, whether the one whose negligence caused plaintiff's injury was engaged in the work of a company, or in that of an independent contractor, was conclusive on a subsequent trial, where the evidence was substantially the same.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. § 1194.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 22, 1915.

### 3. TRIAL (§ 296\*)—MISLEADING INSTRUCTIONS—CURE BY OTHER INSTRUCTION.

Where a contract between a company and its agent required the agent to make repairs which the company was required to make under its contracts for the sale of machines free of charge, and also required him to make other repairs for which he was permitted to make charges, an instruction that, if the chauffeur of the agent was delivering a machine upon which repairs had been made by the agent under his contract with the company at the time of an accident, the delivery was for the company, and it was liable for his negligence, if misleading as not requiring a finding that it was a machine which was to be repaired free of charge, was cured by another instruction which directed a verdict for defendant if the jury found that the chauffeur was delivering a machine upon which the repairs had been made by the agent individually and not under his contract with the company.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.\*]

### 4. MASTER AND SERVANT (§ 302\*)—MASTER'S LIABILITY TO THIRD PERSON—SCOPE OF EMPLOYMENT.

Where a contract between a company and its general agent required the agent to make repairs upon machines which the company was required to make by the terms of its sale contracts, the chauffeur of the agent, who was delivering a machine which had been repaired by the agent under his contract, was engaged in the business of the company so as to render the company liable for his negligence, regardless of whether the agent was required by his contract to deliver the repaired machine to the owner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217–1221, 1225, 1229; Dec. Dig. § 302.\*]

### 5. DAMAGES (§ 134\*)—EXCESSIVE DAMAGES—PERMANENT INJURIES TO HEAD.

Where a woman was thrown from a buggy onto a pavement, resulting in a depression in her skull, partial paralysis of her left leg, and impairment of her hearing in one ear, so that her ability to do the work which she had been doing was permanently impaired, a verdict for \$6,500 damages was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 368, 386–394; Dec. Dig. § 134.\*]

### 6. MASTER AND SERVANT (§ 333\*)—INJURIES TO THIRD PERSONS—ACTIONS—RECOVERY AGAINST MASTER ALONE.

An injured person, who sued a servant and his master jointly for the negligence of the servant, could recover from the master, where the verdict was silent as to the liability of the servant, even though that silence be treated as a verdict for the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1279; Dec. Dig. § 333.\*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Pearl B. Williams against the National Cash Register Company and another. Judgment for plaintiff against the National Cash Register Company, and the company appeals. Affirmed.

Stephens L. Blakely and Geo. E. Philipps, both of Covington, C. D. Bronson, of Dayton, and John H. Klette, of Covington, for appellant. Robt. C. Simmons, of Covington, for appellee.

TURNER, J. This is the second appeal of this case. Williams v. National Cash Register Co., 157 Ky. 836, 164 S. W. 112. A buggy in which appellee was driving on the streets of Covington in June, 1911, collided with an automobile driven by Todd Meadows, an employé of Bert Alexander, a sales agent of appellant, who maintained an office in the city of Cincinnati, but whose territory covered Kenton and Campbell counties in this state. The action was instituted against Meadows and the National Cash Register Company; the allegations being, in substance, that the accident which resulted in injuries to the plaintiff was brought about by the negligence of Meadows, who, at the time, was the agent of and acting for the National Cash Register Company, and engaged in its business. On the first trial in the lower court, a verdict was returned against Meadows which was subsequently set aside, but the court sustained a motion made by the National Cash Register Company and directed a verdict in its favor. From that judgment an appeal was prosecuted by the plaintiff, and resulted in the opinion of this court above referred to. In that opinion the court, after a full discussion of the evidence and an exhaustive investigation of the terms of the contract between Alexander and the National Cash Register Company, held that there was sufficient evidence that Meadows at the time of the accident was engaged in the business of the National Cash Register Company to justify the submission of that question to the jury. Upon the return of the case another trial was had, which resulted in a verdict and judgment for \$6,500, from which this appeal is prosecuted.

[1] Alexander, while operating his business chiefly as an agent for the National Cash Register Company, had and operated in connection with it a repair shop, at which he not only did repair work which the company under its contract was obligated to make, but also did repair work on cash registers on his own account and independent of his contract with the company. The whole controversy here revolves around the question whether, at the time of the accident, Meadows was delivering a register which Alexander had repaired under his contract with the National Cash Register Company and in his capacity as its agent, or whether he was delivering a register which had been repaired by Alexander individually, and was being delivered independent of his contract of agency with the company.

There seems to be no doubt, under the evidence, that at the time of the accident Meadows was delivering a cash register to one Shotwell at Latonia, Ky.; but what cash register that was seems to be the point of difference. In May, 1908, Shotwell bought a cash register from the company, and in April, 1911, as he testifies, he bought another one;

the old one being taken in by the company in part payment for the last one. Under the contract between Shotwell and the company, at the time of the last purchase by Shotwell, which was made through Alexander's agency, the company contracted to keep the register in repair for two years without expense to Shotwell. Now it is the theory of the plaintiff that this machine, which the company was under contract to repair, was the one which was being delivered when the accident happened, while it is the contention of the company that the register which was being delivered was one which had been repaired by Alexander at his shops under a contract with Shotwell with which the company had nothing to do, and that therefore as to that transaction he was an independent contractor and the company was not liable for his negligence. The evidence upon this issue on the last trial was not substantially different from what it had been on the former trial.

[2] The opinion of this court on the former appeal, there being no essential difference in the testimony of the two trials, is conclusive of the question whether the case was properly submitted to the jury. While the weight of the evidence, in numbers at least, may be said to be upon the side of appellant to the effect that on the day of the delivery of the machine Shotwell paid Meadows for the repairs thereon, which is treated by the company as conclusively showing that the register that day delivered could not have been the one sold to Shotwell in April, 1910, which the company was under contract to keep in repair without expense to him for two years. On the other hand, Shotwell and another man, who was present, testified that no such payment was made; and in addition to that there is the uncontradicted statement of Shotwell that the company took in the old register as part payment on the new one at the time he purchased the latter in April, 1910. We do not feel justified in usurping the functions of the jury by holding that the verdict was palpably against the weight of the evidence.

[3] The first instruction is objected to by the appellant because it says the court did not distinguish therein the difference between repairs made under the contract by Alexander for himself individually and by Alexander for the company. The instruction submitted this issue as follows:

"And if the jury shall further believe from the evidence that the defendant Meadows was at that time delivering a cash register upon which repairs had been made by Alexander under the contract between the defendant National Cash Register Company and Alexander, then the delivery was for the defendant National Cash Register Company, and it is liable for said injuries jointly with the defendant Meadows, and the jury will so find."

It is the argument for appellant that this language does not fairly submit the issue in view of the fact that under one clause of the contract between Alexander and the com-

pany he was required to make repairs on registers whether they were to be made free of charge or not. But even if this language be treated as inexplicit and somewhat confusing in the submission of that issue, the defect was certainly cured by the language employed by the court in the second instruction, which was intended as the converse of the first. The second instruction is wound up with this language:

"Or if the jury shall believe from the evidence that the defendant Meadows was at the time of the accident delivering a cash register upon which repairs had been made by Alexander individually, and not under his contract with the defendant National Cash Register Company, then the jury will find a verdict for the defendant National Cash Register Company."

Certainly this language, in connection with that used in the first instruction, could not have well been misunderstood by the jury.

[4] It is also complained by appellant that the instructions did not submit the question whether or not the delivery of the register was required to be made under the contract between appellant and Alexander; but under the language of the former opinion, which, of course, is the law of this case, if Meadows was at the time of the accident delivering a repair job done by Alexander under the contract, the delivery was being made for the company and it is liable. In other words, if Meadows, when the accident happened, was engaged in the business of the company, it matters not whether Alexander, under the terms of the contract, was obligated to make the delivery. The question is: Was he at the time engaged in the business of the company?

[5] In the light of appellee's testimony, we are not impressed with the contention that the verdict is excessive. She testified that she was thrown from the buggy on her head upon a paved street; that the fall resulted in a depression in her skull and in permanent injury; that there was, more or less, paralysis of the left limb from the knee down resulting from the fall; that the hearing of one of her ears had been impaired as a result thereof, and there had been since a discharge from that ear. It appeared on the last trial, which was held three years after the accident, that her ability to do the work which she had previously done was permanently impaired. It would be unprofitable to cite numerous cases where this court has approved higher verdicts for less serious injuries.

[6] The verdict in this case was for \$6,500 in favor of the plaintiff against the National Cash Register Company, and failed to mention the name of the defendant Meadows. From this it is argued by the appellant that a failure to find a verdict against Meadows, whose alleged negligence admittedly was the sole cause of the accident, was in effect a verdict that he had not been guilty of negligence, and that if he was guilty of no negligence there should have been no verdict against the company; and a motion by appellant for a

judgment notwithstanding the verdict against it was entered and overruled by the lower court.

But this is not an open question in this state. In the recent cases of *Broadway Coal Co. v. Robinson*, 150 Ky. 707, 150 S. W. 1000, and *I. C. Ry. Co. v. Outland's Adm'r*, 160 Ky. 714, 170 S. W. 48, this court adhering to previous decisions on that question, has treated it as settled in this jurisdiction against the contention of appellant.

Judgment affirmed.

## CITY OF LOUISVILLE v. HEHEMANN et al.

(Court of Appeals of Kentucky. Dec. 10, 1914.)

### 1. MUNICIPAL CORPORATIONS (§ 736\*)—DISPOSITION OF GARBAGE—LIABILITY FOR NEGLIGENCE.

In the collection and disposal of garbage, a city acts for the public health and discharges a governmental function as an arm of the commonwealth, and hence is absolved from liability for the negligence of its employes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1552; Dec. Dig. § 736.\*]

### 2. EMINENT DOMAIN (§ 2\*)—NUISANCE—LIABILITY FOR INJURY TO PROPERTY—CONSTITUTIONAL PROVISION.

In view of Const. § 242, requiring municipal corporations invested with the power of eminent domain to make just compensation, a city maintaining a dump at a proper place for it was liable for injury to the property rights of one living in the vicinity from the decaying animal and vegetable matter dumped there, creating bad odors and swarms of flies, and making residence there annoying and dangerous.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.\*]

### 3. NUISANCE (§§ 49, 50\*)—LIABILITY FOR INJURY TO PROPERTY—DAMAGES—EVIDENCE.

Where a city maintained a garbage dump near plaintiff's property, he could prove sickness and annoyance suffered by him or his family, as they impaired his enjoyment and depreciated the usable value of his property; the measure of damages being such amount as would fairly and reasonably compensate for any diminution in the value of its use.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 115-127; Dec. Dig. §§ 49, 50.\*]

### 4. WITNESSES (§ 377\*)—CREDIBILITY—INTEREST.

In an action by the owner of residence property against a city for damages from its maintenance of a public dump, where defendant on cross-examination asked another resident in the vicinity whether he had a suit against the city, such inquiry, if tending to show that his testimony was affected by his interest, made it competent for plaintiff, on redirect, to bring out that witness had a suit against a city and it had been terminated, to show that he was not interested.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1207; Dec. Dig. § 377.\*]

### 5. APPEAL AND ERROR (§ 671\*)—EXCEPTION—REVIEW.

Where it did not appear from the bill of exceptions that the alleged improper argument was made, and there was nothing in the affidavit copied into the bill or in the record to indicate the court's ruling on appellant's objection

thereto, the court could not say whether there was error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Lula B. Hehemann and others against the City of Louisville. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. J. O'Connor and Pendleton Beckley, both of Louisville, for appellant. Gilbert Burnett, Burnett & Burnett, and Benjamin F. Gardner, all of Louisville, for appellees.

NUNN, J. In 1909 and 1910 Cabel street was used as a city dump. Appellees recovered a judgment for \$500 against the city of Louisville, for the injury this dump caused to their property, and damage in their use of it. They owned and lived in a little two-room house on Pocahontas alley in the "Point." The property reached back 150 feet to Cabel street. In 1909, when the city began to create the nuisance complained of, these two rooms sheltered the appellees and their eight children. The territory of the Point is low and flat and subject to periodical overflows. The city desired to raise the grade of Cabel street, and was encouraged in this move by petition of the residents adjacent to the street, including appellees. The proposed fill extended through the point for about 2,000 feet.

During the summer months of 1909, this work of filling became in reality a city dump, and especially was this so in the vicinity of the Hehemann home. All sorts of decaying animal and vegetable matter were brought there and dumped day after day. Witnesses tell of seeing on the dump, not only back-door refuse and vegetable garbage, but dead rats, cats, dogs, chickens, and barrels of spoiled fish. This became a putrifying mass, from which constantly arose unmentionable odors and such a flock of flies and vermin as commonly come with carrion; all going to make human existence terrible in that vicinity. Some excuse is offered in behalf of the city by evidence that dead fish, fowls, and animals were brought there by individuals, not the city, and without the knowledge of the city's responsible officials. But responsibility cannot be escaped when it is shown that the city kept there every day during working hours a dump boss, who was in a position to control the situation, and when there is abundant evidence to show that the offensive material was so disposed of with his knowledge and direction, and many of these carcasses were dumped from city garbage wagons.

Such conflict as there is in the evidence goes to conditions existing at different places on the fill. They were not all bad. For instance, toward the corner of Cable and Fulton, where the street commissioner lived, and

also at a place where another city office lived, the material was cinders and dirt taken from excavations in and about the city.

All of appellees' children were taken down with sickness which continued from three weeks to a year. Two of them died of meningitis. Their illness began with dysentery and went into typhoid. The attending physician testified that in all probability all the sickness was directly traceable to the unsanitary dump we have described.

[1] In the collection and disposition of garbage, undoubtedly the city acts for the public health and discharges a governmental function. In this regard, it is an agent or arm of the commonwealth, and for that reason is absolved from liability for the negligence of its employés.

[2] But there is an element of wrong complained of in this case, which goes beyond that. Conceding that a city dump is necessary for the public good, and that Cabel street was the proper place for it, still the city has no right to take or injure adjacent private property or the occupants in the use thereof without making compensation.

Section 242 of the Constitution requires that municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by them. *City of Paducah v. Allen*, 111 Ky. 361, 63 S. W. 981, 23 Ky. Law Rep. 701, 98 Am. St. Rep. 422; *Clayton v. City of Henderson*, 103 Ky. 228, 44 S. W. 667, 20 Ky. Law Rep. 87, 44 L. R. A. 474. In applying this section, the court makes a distinction between injuries to person from negligence on the part of agents or servants of municipal corporations, committed when in the discharge of some public duty, and injuries done to property rights, although likewise in the performance of public duties. The case of *Board of Park Commissioners v. Prinz*, 127 Ky. 460, 105 S. W. 948, 32 Ky. Law Rep. 359, makes the distinction clear, and cites the leading cases on the proposition.

In *Madisonville v. Hardman*, 29 Ky. Law Rep. 253, the city maintained an open drain or sewer, which caused disagreeable odors and served as a breeding place for flies and insects and injury to the health of Herdman's family. And we said:

"Cities, in the exercise of their governmental functions, may construct sewers, streets, and other similar improvements, but they have no right to build a sewer in such a manner that it will discharge, at the very door of a citizen, the accumulated filth of livery stables, \* \* \* and, when guilty of such wanton disregard of the rights of others, they must respond in damages."

See, also, *City of Georgetown v. Ammerman*, 143 Ky. 209, 136 S. W. 202.

[3] In all such cases it is competent to prove sickness and annoyance suffered by the property owner or his family, as these impair his enjoyment, and depreciate the usable value of his property.

The instructions limited a recovery to "such sums in damages as you may believe from the evidence will fairly and reasonably compensate them for any diminution, if any, in the value of the use of their property." We cannot agree with appellant's contention that the only damage recoverable under the pleadings is for diminution of the market value. The instructions given by the court substantially conform to the claim set up in the petition as amended, and, in our opinion, state the proper measure of damage. Appellant complains that the instructions were materially changed, or that one was not given until after argument of its counsel was completed. But these facts are not shown by the record.

[4] Appellant complains that the court refused to discharge the jury in view of an incompetent and prejudicial question asked of a witness by appellees' counsel. It seems that other residents of this vicinity had suits of like character against the city, and some of them were offered as witnesses by appellee. On cross-examination appellant asked one of them, "You have a suit against the city?" to which he responded, "No, I did have." On redirect examination, appellees' counsel asked the witness, "You had a suit against the city and got a judgment and verdict against the city?" If the witness answered, the record does not show it, but appellant immediately objected to the question, and the court, in sustaining the objection, cautioned counsel to refrain from this line of examination, and admonished the jury not to be influenced in making up their verdict by the improper question. It will be seen that the objectionable question, if indeed it was so, was brought out by the question which appellant's counsel propounded on cross-examination. Of course, the city's liability to appellees could not be fixed or enhanced by the fact that it had satisfied or compromised other claims of a similar character, but, if appellant's inquiry tended to show the testimony was affected by interest of the witness, it was competent for appellee to show that he was not interested in order to repel that idea.

[5] Appellant complains of prejudicial misconduct of appellees' counsel in his argument to the jury. By an affidavit which is copied into the bill of exceptions, it appears that counsel for appellees called attention to sanitary precautions on the Isthmus of Panama, and the steps taken in other cities to destroy garbage, with comparisons adverse to Louisville. The court merely certifies that the affidavit was filed. It does not appear from the bill of exceptions that such argument was made. Neither is there anything in the affidavit or the record to indicate the ruling of the court on appellant's objection to the argument. In the absence of such information, we cannot tell whether there was error.

The judgment is affirmed.

**STUDEBAKER CORPORATION OF AMERICA v. DODDS & RUNGE.**

(Court of Appeals of Kentucky. Dec. 11, 1914.)

**1. PARTIES (§ 94\*)—MISNOMER—OBJECTIONS—DEMURRER.**

An objection that defendant was not sued in its real corporate name could not properly be interposed by demurrer, but should have been presented by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing defendant's true name.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 155-159, 177; Dec. Dig. § 94.\*]

**2. PARTIES (§ 97\*)—MISNOMER OF DEFENDANT—ESTOPPEL.**

Where defendant made defense in the trial court on the merits and it was apparent that it was the corporation intended to be sued, it was estopped to complain that judgment was rendered against it in its true corporate name, though it was sued under another name.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 178; Dec. Dig. § 97.\*]

**3. PRINCIPAL AND AGENT (§ 23\*)—AUTHORITY OF AGENT—EVIDENCE.**

Where, in answer to plaintiffs' letter inquiring for agency rights, defendant's branch office replied that their "Mr. H." would call on plaintiffs within a few days, he having called and made an agency contract with plaintiffs on defendant's behalf, the fact that he signed himself as "salesman," and that others testified that he was a mere soliciting agent employed by defendant to sell its automobiles and was without authority to make the contract sued on, did not establish such want of authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

**4. DAMAGES (§ 120\*) — BREACH OF AGENCY CONTRACT.**

Where an automobile agency contract provided that plaintiff should have exclusive sale of defendant's automobiles and parts after September 1, 1912, in specified counties, that plaintiffs were to receive shipment of six automobiles September 1, 1912, to be paid for on presentation of bill of lading and should have defendant's regular 1913 agency contract, it being agreed that plaintiff should get the six cars at defendant's catalogue prices less 20 and 10 per cent., and that they should sell the cars at the catalogue prices, the difference being their compensation, evidence that by defendant's breach of the contract plaintiffs did not receive the six cars was sufficient to show plaintiffs' recoverable damage, the measure of which was the difference between the contract price they agreed to pay for the machines and their reasonable value delivered to plaintiffs in their city.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.\*]

**5. PARTNERSHIP (§ 30\*) — ORGANIZATION — AGREEMENT—SHARING PROFITS.**

A contract to remunerate an agent by a share of the profits of the business does not of itself make such agent a partner in the business, though such a relation may constitute a partnership if the entire transaction discloses an agreement by which the parties are coprincipals and the business is carried on for their mutual profit.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 38-48; Dec. Dig. § 30.\*]

For other definitions, see Words and Phrases, First and Second Series, Partnership.]

**6. PARTNERSHIP (§ 34\*)—ORGANIZATION—ESTOPPEL.**

In order that persons between whom there is no actual partnership may be held liable as partners to third persons, a case of estoppel must be made out against them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 49; Dec. Dig. § 34.\*]

**7. PARTNERSHIP (§ 29\*) — ORGANIZATION — SALESMAN AS PARTNER—CONTRACTS.**

Plaintiffs, having contracted to act as defendant's agents for the sale of automobiles, employed Q. to assist in the sale thereof, agreeing to pay him a part of the profits. Q. had no interest in automobiles purchased under the contract that were to be shipped to plaintiffs for sale, nor was he a party to that contract. He did not agree to furnish any part of the money to pay for the automobiles, nor did he agree to assume any responsibility for any debts contracted by plaintiffs in the course of their business. *Held*, that Q. was not plaintiffs' partner, and, in the absence of express authority, had no power to cancel the order for the automobiles which defendant had contracted to deliver.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 30-33; Dec. Dig. § 29.\*]

**8. TRIAL (§ 296\*) — INSTRUCTIONS — CURE OF ERROR.**

In an action for breach of an automobile contract executed on defendant's behalf by H., the court charged that if, when the contract was made, H. was defendant's agent and had authority to execute the contract, or if defendant by its act and conduct held H. out as its agent in such a way as to induce a reasonably prudent person to believe that he was its agent with power to execute such contracts, then they would find for plaintiffs such sum as would fairly compensate them for defendant's breach, etc. *Held*, that the failure of the instruction to charge that plaintiffs must have relied on defendant's representations and its holding out of H. as its agent was substantially cured by the part of the instruction that the representations of defendant and its holding out of H. as its agent must have been such as to induce reasonably prudent persons to believe that he was its agent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Appeal from Circuit Court, McCracken County.

Action by Dodds & Runge against the Studebaker Corporation of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler & Hughes, of Paducah, for appellant. Hendrick & Nichols, of Paducah, for appellee.

**SETTLE, J.** This is an appeal from a judgment of the McCracken circuit court, entered upon a verdict which awarded appellees \$750 damages for the breach of a contract alleged to have been made by them with appellant. It was averred in the petition that by the contract in question appellees were given by appellant the exclusive agency for the sale of its automobiles in the counties of McCracken, Marshall, and Calloway for the remainder of the year 1912 and the whole of the year 1913; that six of the

automobiles to be sold by appellees were to be shipped them by appellant September 1, 1912, for which they were to pay upon receipt of the bills of lading, and others were to be shipped them later as needed; that the prices appellees were to pay for the automobiles shipped them by appellant, and also the prices at which they were to sell them, were fixed by catalogues furnished them by appellant when the contract was made; and that the difference in amount between these catalogue prices were to be retained by appellees to compensate them for the sales made. It was further alleged that appellant violated this contract by illegally revoking appellees' agency and refusing to ship them the six automobiles which it provided should be furnished them September 1, 1912. The defense interposed by appellant's answer was that it did not make the contract and that one A. C. Hill, by whom it was made with appellees, was not its agent and had no authority from it to make such a contract.

Appellant asks a reversal of the judgment on the grounds: (1) That the trial court erred in overruling its demurrer to the petition; (2) in overruling its motion for a peremptory instruction; (3) in the matter of instructing the jury.

[1, 2] The ground of demurrer was that the name "Studebaker Corporation," appearing to the written contract, is not that of the appellant, whose real corporate name is "Studebaker Corporation of America." As to this ground little need be said. The objection made could not properly be interposed by demurrer, but should have been presented by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name of the appellant. If this had been done, appellees could have amended their petition and proceeded against the appellant in its true name. Moreover, it is apparent from the record that appellant was the corporation for which Hill claimed to be acting when he made with appellees the contract alleged to have been violated; and, as appellant made defense in the court below on the merits, it is estopped to complain that judgment went against it in its true corporate name. *Univ. of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, 32 Ky. Law Rep. 431, 14 L. R. A. (N. S.) 784, 128 Am. St. Rep. 355; *L. & N. R. Co. v. Hall*, 12 Bush, 131; *Teets v. Snider Heading Mfg. Co.*, 120 Ky. 653, 87 S. W. 808; *Pike, Morgan & Co. v. Wathen*, 78 S. W. 137, 25 Ky. Law Rep. 1264.

The writing evidencing the contract here involved is as follows:

"This is to certify that Dodds & Runge of Paducah, Kentucky, are to have exclusive sale of E. M. F. & Flanders automobiles and parts, on and after Sept. 1st, 1912, in said counties as, viz., McCracken, Marshall & Calloway. Also they are to receive shipment of six automobiles Sept. 1, 1912, for which they agree to receive and pay cash upon presentations of bill of lading. It is also agreed that the above-mentioned

parties are to have our 1913 Regular Agents Contract.

"Studebaker Corporation, Louisville Branch,  
"By A. C. Hill, Salesman."

Appellant's complaint of the refusal by the court of the peremptory instruction asked by it seems to be based upon three grounds: First, that there was a failure of proof as to the authority of A. C. Hill to make for appellant the contract with appellees; second, that there was no proof of the damages alleged to have been sustained by appellees; third, that if there was such a contract, the order from appellees for the shipment to them of the six automobiles by appellant was canceled by appellees through their representative, Quarles, sent to the office of appellant at Louisville.

[3] As to the first of these contentions, we think it sufficient to say that there was abundant evidence conducing to prove the agency of Hill. It is insisted that the word "salesman" attached to his name shows that he was a mere soliciting agent employed by appellant to effect sales of its automobiles and that he was without authority to make such a contract as that sued on. Other agents of appellant testified that Hill's agency was confined to the making of sales of automobiles, and that the addition of the word "salesman" to his name on the contract was intended to indicate that fact. On the other hand, evidence of Hill's authority to make the contract for appellant was furnished by the following letter written by appellant to appellees, August 15, 1912:

"Louisville, Ky. Aug. 15, 1912.  
"Messrs. Dodds & Runge, Paducah, Ky.—Gentlemen: We have your favor of the 14th and our Mr. A. C. Hill will be in Paducah and will call on you within the next week or ten days.

"Yours very truly,

"Studebaker Corporation of America,  
Louisville Branch,  
"By William Wymer."

This letter was in reply to one of the 14th of August written by appellees to appellant, in which they asked to enter into a contract with it to become agents for the exclusive sale of its automobiles in the counties of McCracken, Marshall, and Calloway. Within a few days after appellant's letter of August 15th was written to appellees, Hill did call to see them, as the letter said he would, and then made with them for appellant the contract in question. The letter refers to Hill as "our Mr. A. C. Hill." The only business he could have had with appellees was in reference to the contract he made with them, and it is admitted that Hill was then in appellant's employ. The letter referred to, together with the acts of Hill in calling to see appellees and making the contract with them, at least, furnished sufficient evidence of the agency and his authority to make the contract, to require the submission of the question to the jury.

[4] No reason is apparent for sustaining appellant's contention that there was no evidence conducing to show that appellees sus-

tained any damages by appellant's violation of the contract. It is true there was no evidence as to any loss sustained by appellees on account of being deprived of the exclusive sale of appellant's automobiles in the three counties named in the contract, for that element of the damages claimed in the petition was eliminated on the trial by the court, as too remote and speculative for recovery; which ruling cannot be reviewed by us, as appellees have not taken a cross-appeal. But there was evidence as to the damages sustained by appellees from the failure of appellant to ship them the six automobiles ordered by them. As to this matter, the evidence shows that appellees were to get the cars at appellant's catalogue prices, less 20 per cent. and 10 per cent.; and that they were to sell them at certain prices fixed by a catalogue furnished them by appellant. It was then shown by proof, furnished in part by the catalogues, which were introduced in evidence, what appellees were to pay for the automobiles delivered at Paducah; and that the catalogue prices at which they were required by the contract to sell, and could have sold them there, were the market prices at which such machines were then selling at that place. These facts being thus established, the measure of damages, if any were awarded by the jury, was the difference between the contract price agreed to be paid by appellees to the appellant for the automobiles, and the reasonable market value of same at the time they were to be delivered to appellees in the city of Paducah.

Appellant's contention that appellees' order for the six automobiles was canceled by Quarles as its representative is not maintainable. Quarles was introduced as a witness by appellees, and he admitted that he called at appellant's office or place of business in Louisville shortly after the contract between it and appellees was made, and that, while there, he inspected automobiles of the class ordered by appellees; that he was then told by Wymer, an employé at the time in charge of its office, that appellant had closed a contract with a party or parties in Paducah, whose names were not given, for the selling of its automobiles; but that he did not advise Wymer that he had any business connection with appellees or interest in the contract which had been made by the latter with appellant. Quarles further testified that his inspection of the automobiles at appellant's place of business in Louisville was made in obedience to a telegram received by him from appellees at Cleveland, Ohio, and that he had been employed by appellees to sell for them the automobiles they were to receive under their contract made with appellant, for which he was to be paid by them one-half the profits realized from such sales. He did not testify, however, and was not asked, whether he gave Wymer any advice or direction canceling appellees' order for the

shipment to them of the six automobiles to be delivered at Paducah. Wymer, who was the last witness introduced on the trial, testified as to the visit of Quarles at appellant's Louisville office, and said that he then tried to get from Quarles his name, but was unable to do so; that Quarles wanted to know what cars appellant has shipped Dodds & Runge, and said to him, "Don't ship a thing until I get back and you hear from us." For some reason unexplained in the record, Quarles was not reintroduced to contradict this testimony of Wymer. Whether he would have done so cannot therefore be told, but the record furnishes no evidence whatever that he had been authorized by appellees to cancel their order for the shipment to them of the six automobiles. At the time the contract between appellant and appellees was made, the latter gave to Hill, as the agent of appellant, an order to it to ship the six automobiles as stipulated in the contract, and at the same time also gave Hill a check of \$150, required by appellant as a deposit before shipping to them the automobiles. On August 24, 1912, and after the visit of Quarles to appellant's Louisville office, its manager wrote appellees the following letter, which was duly received by them:

"The Studebaker Corporation of America.

"Louisville, Ky. August 24, 1912.

"Messrs. Dodds & Runge, Paducah, Ky.—Gentlemen: We are in receipt of your order given to our Mr. Hill and your check on deposit, which we are returning. We are sorry we cannot accept same as our dealer in Paducah has decided to put in a place and take in a partner and will devote considerable more time and attention to our stuff, and inasmuch as he has represented us there for years, it will not be right to cancel his contract at this time. Thanking you for your interest in our behalf, and sorry we cannot accept such a valuable order at this time, beg to remain,

"Yours very truly,

"The Studebaker Corporation of America,  
Louisville Branch.

"By W. W. Beason, Mgr."

It will be observed that this letter does not rest appellant's refusal to ship the six automobiles upon the ground that the order which appellees had given therefor had been canceled by Quarles. On the contrary, it based the refusal of the order solely upon the ground that a former Paducah dealer in automobiles, who had been handling its machines had taken in a partner and wished to continue in the business of selling them for it, and that as he had represented appellant there for years it would not be right to cancel his contract at that time. The contents of this letter throws much doubt upon the statement of Wymer as to the canceling of the order for the automobiles by Quarles.

[5, 6] It is insisted for appellant that, although the evidence fails to show that Quarles had authority from appellees to cancel their order, the fact that he was to share with them the profits to be realized from the sales of appellant's machines under

their contract with it made him a partner in the business; and if this be true, as a member of the partnership, he had a right to cancel the order for the shipment to appellees of the automobiles, without express authority from them to do so. This contention is also unsound. A contract for the remuneration of an agent of a person engaged in business, by a share of the profits of the business, does not of itself make the agent a partner in the business. Such a relation may, however, constitute a partnership if the entire transaction discloses an arrangement by which the parties are coprincipals and the business is carried on for their mutual profit. But in order that persons between whom there is no actual partnership may be held liable as partners to third persons, a case of estoppel must be made out against them. As said in 30 Cyc. 385:

"According to the rule now generally prevailing both in England and in America, where there is no partnership in fact, merely sharing the profits of a venture does not create one as to third persons, who have not been legitimately led to believe that one exists. \* \* \*

Again in the same volume, page 388, is this further statement of the law:

"According to the weight of authority, one who, without any interest in the business property, is, by agreement, to receive as compensation for his services, and only as compensation therefor, a certain proportion of the profits of the business or a stipulated sum, together with a certain proportion of the profits, and is neither held out to the world as a partner nor through the negligence of the owner of the business permitted to hold himself out as a partner, is not a partner either as to the owner or third persons."

This view of the law is sustained by numerous decisions of this court. *Fuqua v. Masie*, 95 Ky. 387, 25 S. W. 875, 15 Ky. Law Rep. 849; *Douley v. Hall*, 5 Bush, 549; *Heran v. Hall*, 1 B. Mon. 159, 35 Am. Dec. 178; *Stone v. Turfmen's Supply Co.*, 103 Ky. 318, 45 S. W. 78, 19 Ky. Law Rep. 2025.

[7] According to the admitted facts, Quarles was to own no interest whatever in the automobiles that were to be shipped appellees by appellant. He was not a party to the contract between them, was not to furnish any part of the money to pay for the automobiles, was to assume no responsibility for any debts that might be contracted by appellees in the course of the business, and there would have been nothing in the service he was to perform for them that would have held him out to the public as a partner of theirs in the business of selling appellant's automobiles. He was, or would have been, a mere agent or salesman for appellees, employed to sell the automobiles, or some of them, in the territory covered by their contract with appellant, and was to be compensated for his services by being paid half the profits realized on such automobiles as might be sold by him. In view of these facts,

Quarles was not a partner of appellees; consequently he had no power, in the absence of express authority from appellees—of which there was no proof—to cancel their order for the six automobiles appellant contracted to furnish them. It is our conclusion that the giving of the peremptory instruction, on any of the grounds urged by appellant, would have been unauthorized; therefore its refusal by the trial court was not error.

[8] Appellant's complaint of error in the instructions is without merit. Instructions 1 and 2 are objected to. No. 1 was as follows:

"The court instructs the jury that if they believe from the evidence that, at the time the contract sued on was executed, A. C. Hill was the authorized agent of the defendant and had power and authority to sign and execute the same, or if they believe from the evidence that the defendant by its acts and conduct held said A. C. Hill out as its authorized agent in such a way as to induce a reasonably prudent person that he was its authorized agent with power and authority to execute such contracts as the one herein sued on, then they will find for the plaintiff such sum in damages as they may believe from the evidence will fairly and reasonably compensate them for the loss, if any, sustained by them on account of the failure of the defendant to comply with said contract in delivering the cars or automobiles mentioned in this case, not exceeding in all the sum of \$1,547.11, the amount claimed in the petition; but unless you so believe from the evidence that the said A. C. Hill was the authorized agent of the defendant, as defined to you herein, to make and execute said contract, you will find for the defendant."

It is objected that this instruction did not properly state the law, as it omitted to advise the jury that, in order to find for appellees, they must believe from the evidence that in making the contract—for the alleged breach of which damages were claimed—they must have relied upon the representations of appellant and its holding out of A. C. Hill as its agent. This objection is hypercritical. The omission in question was substantially cured by that part of the instruction which told the jury that the representations of appellant and its holding out of Hill as its agent must have been such as to induce reasonably prudent persons to believe he was its agent, and, as there was nothing in the evidence conducing to show that appellees were not of this class of persons, the conclusion was inevitable that they were thereby induced to enter into the contract. As the jury could not have been misled by the instruction in the form given, the omission complained of was not prejudicial to appellant.

As instruction No. 2 is as to the measure of damages, and the measure given therein is as stated in a preceding part of the opinion and is correctly worded, comment thereon is deemed unnecessary.

As the record furnishes no legal cause for disturbing the verdict of the jury, the judgment is affirmed.

**PADUCAH & ILLINOIS FERRY CO. v. ROBERTSON.†**

(Court of Appeals of Kentucky. Dec. 9, 1914.)

**1. CORPORATIONS (§ 404\*) — DIRECTORS — RIGHT TO CONTROL PROPERTY—ACTION OF SHAREHOLDERS.**

Where a board of directors adopted a resolution specifying that the corporate property should be sold on a certain day at a certain place, the action of the stockholders in ratifying such resolution did not deprive the board of control over the corporate property or invalidate their subsequent resolution postponing the sale without consent of the stockholders, to avoid a sacrifice of the corporate property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1626-1628, 1633-1639; Dec. Dig. § 404.\*]

**2. CORPORATIONS (§ 404\*)—AGENTS—AUTHORITY—ACQUIESCENCE IN APPOINTMENT.**

The failure of the president of the board of directors of a corporation, after being fully informed of the facts, to object to the action of a stockholder in appointing an auctioneer to sell corporate property was an acquiescence by him in such appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1626-1628, 1633-1639; Dec. Dig. § 404.\*]

**3. CORPORATIONS (§ 603\*) — DISSOLUTION — SALE OF PROPERTY.**

The act of the directors of a corporation in adopting a resolution providing for a sale of all the corporate property is not of itself a "dissolution" of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2404-2409; Dec. Dig. § 603.\*]

**4. CORPORATIONS (§ 298\*)—DIRECTORS—VALIDITY OF MEETING.**

That only two of the three members of the board of directors of a corporation were present at a meeting called in an emergency to postpone a sale of corporate property to prevent its sacrifice did not invalidate their action, where both voted for postponement of the sale, especially where the third member, though denying that he had notice of the meeting, was present at the place of meeting at the time fixed and, after being informed of its object, left to keep from participating in the action taken.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.\*]

**5. ACTION (§ 27\*)—NATURE OF ACTION—CONTRACT OR TORT—WAIVER OF TORT.**

Where corporate property was wrongfully sold by an auctioneer at a sale which had been postponed by action of the board of directors, the fact that the corporation could have sued in equity to set the sale aside or sued in law to recover the property did not preclude it from suing the purchaser for conversion.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

**6. CORPORATIONS (§ 298\*)—SALE OF PROPERTY —DELEGATION OF POWER.**

In order that the appointment of an auctioneer to sell corporate property may be binding on the corporation, the board of directors should act in an official meeting in delegating to him the power of sale, and such act must be shown by the corporate records.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.\*]

Appeal from Circuit Court, McCracken County.

Action by the Paducah & Illinois Ferry Company against Charles L. Robertson. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

J. D. Mocquot, of Paducah, for appellant. Campbell & Campbell, of Paducah, for appellee.

**SETTLE, J.** This action was instituted in the court below by the appellant, Paducah & Illinois Ferry Company, a corporation, to recover of the appellee, Charles L. Robertson, the value of a steamboat, known as the G. W. Robertson, ferry franchise, landings, docks, and wharves, at the city of Paducah, of which it claimed to be the owner, upon the ground, as alleged, that appellee had unlawfully converted the same to his own use; it being further alleged in the petition that the steamboat was of the value of \$10,000 and the landings, docks, wharves, and franchise of the value of \$5,000, for which sums, aggregating \$15,000, judgment was prayed.

The appellee's answer contains two paragraphs. In the first it is denied that he unlawfully, or with intent to deprive appellant of the ownership of the property referred to, took possession of or converted same to his own use, denied that he had ever converted or had possession of the landings, docks, wharves, or franchise, and also denied that the steamboat was worth \$10,000 or any amount exceeding \$2,500, or that the franchise, docks, wharves, and landings were of the value of \$5,000.

In the second paragraph of the answer it was alleged: That at a meeting of the board of directors of the appellant corporation, held on January 6, 1914, a resolution was adopted ordering that appellant's steamboat, ferry franchise, landings, docks, and wharves be offered for sale at public auction on February 10, 1914, at 10 o'clock a. m., at the Paducah boat landing, to the highest and best bidder, for one-third cash and the balance in equal installments, payable in 3, 6, 9, and 12 months after the date of sale, for which the purchaser should be required to give notes with approved security, bearing 6 per cent. interest from date until paid, with the privilege to him to pay all cash if desired. That the resolution further provided that no person should be accepted as a bidder for the property until he had deposited with the auctioneer his certified check, payable to the corporation, in the sum of \$1,000, which, if he should become the successful bidder and comply with the terms of sale, would be accepted as part of the purchase money. If, however, he became the successful bidder but failed to comply with the terms of sale, the amount of the check in that event should be forfeited to the corporation as damages for such failure. That, immediately after the adoption of this resolution by the board of directors, its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 15, 1915.

action in respect thereto was approved by the stockholders of the corporation at a meeting then held by them. That appellant advertised the sale of the whole of the property by insertion of advertisements in newspapers in the cities of Paducah, Memphis, Tenn., St. Louis, Mo., and other points; and that thereafter, at the time and place fixed by the resolution of the board of directors for the sale of the property, it was offered for sale by Cecil Reed, as auctioneer, in accordance with the terms of the resolution and advertisements of sale, and appellee, who had previously deposited with Reed the certified check for \$1,000, being the highest and best bidder, became the purchaser of the whole of the property in question, at his bid of \$2,500, whereupon he paid to Reed the entire \$2,500 and received from him the steamboat G. W. Robertson.

By its reply appellant denied that Cecil Reed was authorized by its board of directors to sell the property in question, and alleged that prior to 10 o'clock a. m., on February 10, 1914, and before the alleged sale of the property by Reed, appellant's board of directors held a meeting at its office in the city of Paducah, at which all of its members were present, and at such meeting adopted a resolution by a majority vote of the members of the board rescinding so much of the resolution adopted by it January 6, 1914, as provided for the sale of the property on February 10, 1914, and postponing the sale, notice of which resolution was communicated by the president of the board of directors to Reed, the auctioneer, at the place of sale and before it was made by him, which notice was accompanied by an order given him by the president of the board of directors not to make the sale; but that, notwithstanding such notice and order, Reed illegally attempted to proceed with the sale and went through the form of offering the property and of accepting the alleged bid made by appellee therefor; that the sale thus attempted to be made was illegal and void, because of which appellee took no title to the property in question or any part thereof, and that his act in taking possession of the property and continuing to hold it constituted an illegal conversion of same.

After the filing of appellee's rejoinder controverting the affirmative matter of the reply, the case went to trial and resulted in a verdict in behalf of appellee, in obedience to an instruction given by the trial court at the conclusion of all the evidence, peremptorily directing the jury to so find. Judgment was entered in accordance with the verdict. Appellant was refused a new trial; hence this appeal.

[1] It is insisted for the appellant that the giving of the peremptory instruction directing a verdict for appellee was error, entitling it to a reversal of the judgment appealed from. The reason for this ruling by the circuit court is not stated in the record, but

it seems to be agreed by counsel that it was based upon the theory that the evidence failed to sustain the cause of action alleged in the petition. In order to determine whether this ruling was authorized, consideration of the evidence will be necessary. The salient facts appear to be as follows:

The appellant, Paducah & Illinois Ferry Company, is a corporation operating a ferry, under a franchise granted by the city of Paducah and McCracken county court, between Paducah and points on the Illinois shore and at a point in Livingston county, using therefor a steamboat called the G. W. Robertson. Its capital stock, amounting altogether to \$40,000, was held at the time of the institution of this action, one-fourth by the appellee, C. L. Robertson, one-fourth by J. T. Barnes, and one-half jointly by Louis Clark and Ophelia Clark. The corporation's board of directors consisted of Louis Clark, who was president, Ophelia Clark, secretary and treasurer, and J. T. Barnes. Prior to January 6, 1914, the corporation seemed to have become somewhat involved in debt, and there had been an unsuccessful attempt made by appellee to have its business and property placed in the hands of a receiver; and, with a view of relieving itself of these embarrassments, its board of directors met on that day and unanimously adopted the following resolution:

"Be it resolved by the board of directors of Paducah & Illinois Ferry Company, subject to the ratification of the stockholders of the corporation, that the property and effects of the corporation be offered for sale at public auction on February 10, 1914, at 10 o'clock a. m., at the boat landing at the foot of Kentucky avenue, or on the boat, to the highest and best bidder for one-third cash, and the balance in equal installments due three, six, nine and twelve months, to be evidenced by notes of the purchaser with approved security, bearing interest from date until paid at 6 per cent. per annum, with the privilege to the purchaser to pay all cash, if desired. No person shall be accepted as a bidder for said property until he shall have deposited with the auctioneer his certified check payable to the corporation in the sum of \$1,000, which, if he shall be the successful bidder, and shall comply with the terms of sale, shall be deducted from the sale price, and if he shall be the successful bidder and fail to comply with the terms of sale, the said sum shall be forfeited to the corporation as damages for failure to comply with his bid. Said property shall be offered: First. The franchise, docks, landing privileges and landing at Livingston Point. Second. The steamer G. W. Robertson. After said property shall be sold separately as above stated, then the steamer G. W. Robertson and the aforesaid franchises, etc., shall be offered as a whole, and the method of sale bringing the highest price shall be accepted. \* \* \* It was thereupon moved and seconded that the said sale be duly advertised in the local papers of Paducah, and in the Waterways Journal and Memphis Commercial Appeal, at least two insertions each week in the latter. There being no further business, the meeting adjourned."

At the same time and place, and immediately upon the adjournment of the board of directors, the stockholders met and adopted the following resolution:

"At a meeting of the stockholders of the Paducah & Illinois Ferry Company, this day held at the office of J. D. Mocquot in Paducah, Ky., there were present in person the following persons: Louis Clark, Mrs. Ophelia Clark, C. L. Robertson and J. T. Barnes, holding all of the stock of the said corporation. The resolution adopted by the board of directors of the corporation at the meeting this day held and the action of the board of directors was read to the meeting and, upon motion duly seconded, the action of said board was ratified unanimously. There being no further business to come before the meeting, it adjourned."

After the adoption of the above resolution by the board of directors and stockholders, the steamboat and other property of the corporation was advertised for sale as therein directed. It is claimed by the appellee, Robertson, that he was authorized by the board of directors or stockholders to attend to the matter of advertising the sale, but such authority does not appear from the resolutions of the board of directors or that of the stockholders. On the day fixed for the sale of the property, Louis Clark, the president of the board of directors, seemed to have received information that there would be no bona fide bidders for the property at anything like its real value, so he, as president, and Mrs. Ophelia Clark, secretary of the board of directors, called a meeting of its members for 9:30 o'clock a. m. on the day of sale, with a view of taking action looking to a postponement of the sale which was to take place at 10 o'clock a. m. of that day. The two Clarks and J. T. Barnes, the other director, met at the time indicated at the store of Louis Clark. Although the object of the meeting was stated to Barnes by the president of the board, he left before any action was taken, but at that meeting Louis and Ophelia Clark, constituting a majority of the board of directors, adopted the following resolution:

"A meeting of the directors of the Paducah & Illinois Ferry Company was held at the office of the company on this the 10th day of February, 1914, at 9:30 a. m. Resolved, that the ferryboat G. W. Robertson and ferry franchise be not sold this day.

"Louis Clark, President.

"Ophelia Clark, Secretary and Treasurer.

"J. T. Barnes leaving the meeting before it closed. There being no further business to come before the meeting, it adjourned."

After the adoption of this resolution, Louis Clark, president of the board of directors, went to the place of sale at the boat landing and there notified Cecil Reed, who was undertaking to act as auctioneer, of the action of the board of directors postponing the sale, and objected to the sale of the boat and other corporate property. Despite this notice and objection from Clark, Reed proceeded to cry the sale in accordance with the advertisement, and finally knocked down the boat, franchise, and other property to the appellee, Charles L. Robertson, for \$2,500; this being the amount of the latter's bid. Reed then accepted from appellee the \$2,500 in cash and made manual delivery to him of the boat, and also such delivery as could be made of the

franchise, landings, docks, and wharves included in the sale. Appellee held the boat for about ten days, and then sold it for \$10,000.

[2] It is appellant's contention that, even in the absence of such action as was taken by the board of directors in calling off or postponing the sale, Reed was without authority to make it, and that he made the sale at the instigation of the appellee, Robertson, and by his employment. This contention is, in part, untenable. It is true that what Reed did was by the procurement of the appellee, Robertson, but it is fairly apparent from the evidence that Clark, the president of the board of directors, was informed, prior to the day of sale, that Reed had been selected as the auctioneer to make it. Clark had previously contemplated securing one Husbands to act as auctioneer in making the sale, but, when advised of the selection of Reed as auctioneer, he made inquiry of Bradshaw, president of a Paducah bank, with reference to his fitness for such service, and, upon being informed by Bradshaw that Reed was a competent man, he made no objection to his acting as auctioneer at the sale. In view of these facts, it is our conclusion that Clark, as president of the board of directors, acquiesced in the appointment of Reed as auctioneer.

But back of this question is the appellant's more serious contention that the sale was unauthorized because of the action taken by the board of directors, before the sale, to prevent it, and the communication of this action by its president both to the auctioneer, Reed, and the appellee, Robertson, before the sale. The legal effect of the action taken by appellant's board of directors February 14, 1914, and before the sale, was not to rescind its previous act of January 6, 1914, approved by the stockholders, ordering the sale of its corporate property, but merely to postpone the sale to a later date. If the board of directors had this power, the conduct of Reed, the auctioneer, in proceeding with the sale in willful disregard of the order of the board of directors that it be not made, rendered the sale invalid, for appellee, purchaser at the sale, as well as the auctioneer, had been notified by the president of the board of the order of postponement. In 10 Cyc. 758, it is said:

"Generally speaking, the directors of a joint-stock corporation are trustees in the control of its property and in the direction and management of its business affairs. As hereafter seen, shareholders have not, as a general rule, any direct voice in the management of the business affairs of the corporation, but their voice can be heard only when speaking through the directors, who are deemed, in a qualified sense, their agents, but are really mandataries. There are three different views with reference to the duties and powers of directors: (1) That they are the body which has been incorporated, and hence the corporation itself. This is true in some cases. (2) That they are general agents of the shareholders. (3) That they are special agents of the shareholders in the sense that

the public are bound to take notice of the limits of their authority. But plainly they are not agents in the strict sense; but an examination of their powers will lead to the conclusion that in most cases they derive their authority partly from the voice of the shareholders expressed in general meeting duly convened, partly from the charter, partly from applicatory statutes, partly from by-laws duly enacted, and (in some cases) partly from other governing instruments."

Again on page 760 of the same volume it is said:

"Loose expressions are found in judicial opinions to the effect that the board of directors or trustees practically constitute the corporation, and in general may act as the corporation, and, unless specially restricted, exercise the corporate powers. But this in strictness is only true of those corporations in which the board of trustees or directors are themselves incorporated and are the corporation, which we have already seen is often the case. In ordinary business corporations the powers of the board of directors, as we shall presently see, fall far short of being coequal with the powers of the corporation. It is hence better said that 'the directors, in the absence of restrictions in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business.'"

It would be a better statement of the law to say that the board of directors of a corporation, unless restricted by its charter or by-laws, has full control and management of the corporate business and property, and that the shareholders cannot act for the corporation, either individually or collectively, as they are not agents for the corporation and cannot bind it either by their acts, declarations, or admissions; and the weight of authority seems to be that the power of stockholders is mainly limited to a few matters concerning its internal affairs, viz., the election of its directors, the increasing of the capital stock, the adding to the powers and purposes of the corporation, and the authorizing its dissolution. So, ordinarily, neither the assent nor dissent of the stockholders can affect the validity of the acts of the directors. Among the powers that may be exercised by the board of directors is that of mortgaging or selling the corporate property for the purpose of paying the corporate debts. But according to the weight of authority the board of directors, in the absence of the approval of the stockholders, is without authority to direct a sale of all the corporate assets or property for the purpose of dissolving the corporation. Whether the directors can, without the assent of the stockholders, sell all the corporate property for the purpose of applying its proceeds to the purchase of other property to be used in the business of the corporation is involved in much doubt.

It is not made to appear in this case that the action of the board of directors of January 6, 1914, directing a sale of all of the appellant's corporate property, contemplated a dissolution of the corporation. Neither the record of that meeting nor that of the meeting of the stockholders held at the same time

indicates any such intention. Therefore it remained within its power to buy a new franchise and boat and continue business. Section 6496, Thompson on Corporations, in dealing with this question, announces the following principle:

"Both courts and law writers have undoubtedly fallen into some error because of a failure to distinguish between the dissolution of a corporation and that of the sale and disposal of its property and franchise. Sufficient has already been said to show that a corporation is not dissolved, ipso facto, by the sale of all its property, or by the sale of its property and the cessation of business, as a corporation could exist without property and without transacting business. In this condition it could sue and be sued. And even in such condition it might again acquire property and resume its corporate business. In case of such sale of the corporate property, the corporation will still exist, in contemplation of law, and may sue and be sued so long as there is no surrender of the charter."

This principle was recognized by this court in the case of *Geo. T. Staggs Co. v. E. H. Taylor, Jr., & Sons*, 113 Ky. 709, 68 S. W. 862, 24 Ky. Law Rep. 495, in the opinion of which it is said:

"E. H. Taylor & Co. was not dissolved, nor had it ceased to exist, by reason of the fact it conveyed its distilleries, with the appurtenances, to George T. Staggs Company. It maintained its organization and continued to own property during its existence. The annual election of its officers evinced a purpose to continue an existence as a corporation. Besides, the testimony tends to prove that its stockholders never intended a dissolution of the corporation during its corporate existence, as fixed by its articles of incorporation."

[3] The cases afford many instances of the failure to perform certain acts and many contingencies, the happening of which do not ipso facto dissolve the corporation, but such instances and contingencies only furnish grounds for forfeiture and dissolution at the suit of the state or some interested party. Circumstances which constitute grounds for proceedings to have the corporation dissolved do not of themselves operate as a dissolution. We are satisfied, therefore, that appellee's contention that the action of the board of directors in this case was a dissolution of the corporation, and therefore an action peculiarly within the power of the stockholders, over which the board of directors had no control, cannot be sustained.

But it may be conceded, for the purposes of this case, that the action referred to did look to a dissolution of the corporation and its going out of business as such. But, if so, the action taken by the stockholders in approving that of the board of directors ordering the sale of the corporate property empowered the latter to carry out the will of the stockholders. In other words, the action of the stockholders did not divest the board of directors of authority to control the corporate property, as had been its wont, or of its authority to continue in the management of the corporate business. The board still retained all its powers, including authority

to see to the advertising of the sale and manner of conducting it. Neither the record of the action taken by the board of directors, nor that of the stockholders, with respect to the sale of the corporate property, shows the appointment of a special agent to advertise or conduct the sale; therefore the entire matter must be regarded as having been left to the control of the board of directors. This being true, if the board of directors, after causing or permitting the sale to be advertised, became advised that it would cause a sacrifice of the corporate property to sell it on the 10th of February, 1914, as fixed by the resolution adopted by it on January 6, 1914, it had the power, without the consent of the stockholders, to postpone the sale of the property to a later date, and especially would this be so if the information that the sale of the property on the day directed would result in its sacrifice came to the board of directors too near the hour fixed for the sale for it to have an opportunity to consult with or call a meeting of the stockholders.

It does not follow that, because approval by the stockholders of the action of the directors looking to the sale of all the corporate property was necessary, the latter did not have authority to postpone or change the date of the sale. It is not to be overlooked that February 10th was named by the directors and not by the stockholders as the date for the sale. The essential thing necessary on the part of the stockholders, and what they were asked to do, was to authorize the sale of all the property by the board of directors. Doubtless any other date for the sale, not too remote, would have been as acceptable to the stockholders as February 10th. Having authorized the sale of the property by the board of directors, the work of the stockholders was complete, for without further action by them the directors, under the general power appertaining to their office, had the right to temporarily delay or change the date of the sale, if in their sound discretion such delay or change was necessary to prevent the sacrifice of the corporate property and consequent loss to the creditors or stockholders of the corporation.

[4] If we are correct in this conclusion, the only question remaining to be determined is: Was the directors' meeting of 9:30 a. m., February 10th, at which was adopted the resolution postponing the sale advertised for that day, legally held? As previously stated, there were but three directors of the appellant corporation, Louis Clark, Ophelia Clark, and J. T. Barnes. The resolution adopted at that meeting shows that all the members of the board of directors were present, but that J. T. Barnes left the meeting before the resolution was adopted. According to the testimony of Louis Clark, a messenger had been sent to Barnes to notify him of the time and place of this meeting. The messenger did not testify on the trial, but J. T. Barnes, in giving his testimony, denied that a messenger

notified him of the time and place of the meeting. He admitted, however, that he was at the place of meeting at 9:30 a. m., the time fixed therefor, but that, without previous knowledge of the meeting, he merely stopped at the place on his way to where the sale of appellant's property was to be made at 10 o'clock. Both Louis Clark and Mrs. Ophelia Clark testified that Barnes was at the place of meeting at the time fixed therefor, and that, when Mr. Clark stated to him the object of the meeting, he left and did not participate in the action then taken. These statements of the Clarks were not in terms contradicted by Barnes. We do not mean that Barnes admitted he was informed of the object of the meeting while with the Clarks, but that he contented himself with saying that, though there was some conversation between him and the Clarks with reference to the holding of a meeting, he did not remember what was said. It is, however, apparent from this testimony as a whole that, whether notified or not, Barnes did attend the place of meeting at the time fixed for the meeting, and that, though he did not remain at or participate in the meeting, he was informed of its object and left to keep from participating in the action taken. His absence still left a majority of the board of directors to take action, and this they did by adopting the resolution which directed that appellant's property be not sold February 10, 1914, as advertised. We think the action thus taken by a majority of the board of directors was valid. The necessity for giving notice to the members of a board of directors of the time and place of a special meeting, such as this, arises out of the requirement of the law that they, or a majority of them, shall act as a board, and the best way to secure their attendance is to give each of them notice of the time and place of the meeting; but where all of the members attend the place fixed for a special meeting of the board, though such attendance be accidental, necessity for the giving of notice is obviated. We are unable to find that there is in this state any statutory regulation of board meetings of this character, but in 10 Cyc. 326, it is said:

"It should constantly be kept in mind that no matter where the meeting is held, or how defectively the members are notified, the proceedings will bind all who appear at the meeting and participate in it without dissent."

And to this we may properly add that where such a meeting is attended by only a majority of the board, if the proceedings are participated in by such majority and they concur in the action taken, the proceedings will, in that event, be as legal and binding for all purposes as if all members of the board of directors had been notified thereof. In Thompson on Corporations, § 1142, we find this statement of the law on the subject under consideration:

"Special Meeting—When Valid without Notice.—The rule that all directors are entitled to notice of special meetings, and that acts done or business transacted without such notice, is

invalid, like most other general rules is subject to some exceptions. \* \* \* So emergencies may arise which will excuse the giving of notice to all of the directors of a special meeting. \* \* \* The exigency demands immediate attention to save the property and to save expense. \* \* \* Another exception to the rule is that notice may be dispensed with where all the directors are present and participate in the proceedings. The only object of notice is that the directors have an opportunity of being present at the meeting and taking part in its proceedings."

If the facts and circumstances upon which a majority of appellant's board of directors acted in calling the special meeting held by them on the morning of February 10, 1914, did not present an emergency requiring the action taken at the meeting, it would be difficult to conceive a state of facts that would constitute an emergency. The fact that appellant's entire property, worth, according to the weight of the evidence, \$15,000, was knocked down at the sale at the grossly inadequate price of \$2,500 demonstrates the urgent need of such action as was taken by the majority of appellant's board of directors in attempting to prevent the sale. That it failed of success was not because of any lack of effort on the part of the two directors taking the necessary action, but because of the auctioneer's willful disregard of such action, in which he was aided by the appellee, Robertson, purchaser of the property attempted to be sold. The illegality of the sale being manifest, neither the appellant corporation, its board of directors, nor stockholders were bound by it.

[5] Appellant might have brought an action in equity to have the sale set aside, or an action at law to recover the specific property held by appellee, but it also had the right to resort to the remedy pursued in the present action; that is, treat appellee's possession of the property as a wrongful taking and conversion thereof and sue to recover its value. *Sutherland-Innes Co., Ltd., v. Weaver*, 143 Ky. 827, 137 S. W. 542; *Eversole v. Moore*, 3 Bush, 49; *Brocking v. O'Bryan*, 129 Ky. 544, 112 S. W. 631.

[6] The action of the auctioneer in selling the property, or that of appellee in purchasing it, cannot be justified upon the ground that the latter was authorized by appellant's board of directors to advertise and procure the sale of the property. The alleged agency of appellee is not shown by any competent evidence appearing in the record. There was nothing in the action of the board of directors or that of the stockholders showing the appointment of appellee as such agent. The corporate board of directors should act in official meeting in delegating a delegable power, and such act must be shown by its records in order to bind it. *Star Mills v. Bailey*, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370.

It follows from what has been said that the trial court erred in giving the peremptory instruction directing a verdict for appellee.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

### HICKMAN, Mayor, et al. v. KIMBLEY.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

#### 1. STATUTES (§ 141\*)—AMENDMENT—SETTING FORTH AMENDED ACT.

Acts 1912, c. 113, which was entitled "An act to amend the charter of cities of the third class," and which states that it amends Ky. St. c. 89, by adding a new section to be known as § 459a, providing for the construction of public improvements by cities of the third class on the ten-year bond plan, in fact amended section 3449, relating to the construction of such improvements, and since it did not refer to that section or re-enact it as amended, it is contrary to Const. § 51, providing that no law shall be amended by reference to its title only, but so much as is amended shall be re-enacted and published at length.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 120\*)—PUBLIC IMPROVEMENTS — ORDINANCES — VALIDITY —EFFECT OF PARTIAL INVALIDITY.

In an ordinance for an improvement of a street which stated that the improvement was to be constructed on the ten-year bond plan, as authorized by Acts 1912, c. 113, which was unconstitutional, the provisions for the method of payment under that act cannot be disregarded and the provisions for the construction sustained; since the provisions for payment are such a material part of the ordinance that it is impossible to separate them from the balance and assume that the improvements would have been ordered without the provisions for payment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. § 120.\*]

Appeal from Circuit Court, Daviess County.

Suit for injunction by Hugh Kimbley against J. H. Hickman, as Mayor, and others. Injunction granted, and defendants appeal. Affirmed.

Geo. S. Wilson, of Owensboro, for appellants. La Vega Clements, of Owensboro, for appellee.

CLAY, C. In the month of August, 1914, the general council of the city of Owensboro, a city of the third class, passed an ordinance which was approved by the mayor on August 8, 1914, providing for the improvement of a portion of Third street in that city on the ten-year bond plan, as provided by an act of the General Assembly entitled "An act to amend the charters of cities of the third class," which was approved by the Governor on March 18, 1912. See Acts 1912, c. 113. Bids for the construction of the street in accordance with the terms of the ordinance were called for by advertisement, when plaintiff, Hugh Kimbley, who owns property on Third street, brought this action against the mayor and city engineer of the city of Owensboro and the city of Owensboro to enjoin the proceedings under the ordinance, on the ground that both the act under which the or-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dinance was enacted and the ordinance itself were unconstitutional. A permanent injunction was granted, and the defendants appeal.

So much of the act in question as is material is as follows:

"An act to amend the charters of cities of the third class.

"Sec. 1. Chapter 89 of the Kentucky Statutes, Carroll's Revision of 1909, the same being the charter of cities of the third class, is hereby amended by adding thereto after section 3459 thereof, the following section as section 3459a, which section shall read as follows, to wit:

"Section 3459a. The common council may provide that the construction or reconstruction of any of the sewers, streets, alleys, public ways and sidewalks shall be made on the ten (10) year plan; and thereupon when any such improvement or reimprovement has been completed and accepted a notice shall be given by publication in a newspaper of general circulation published in the city, requiring the property owner to pay the assessments made against their property for such work; and if such assessments be not paid by such property owners, then to provide a fund for the payment of such portion of the entire cost of such improvement or reimprovement as the property holders shall be liable for but may not pay in cash in conformity with said notice the common council is authorized to borrow money at a rate of interest not exceeding six per cent. per annum in anticipation of the collection of a special tax or assessment for such improvement or reimprovement from such property holders, and to issue the bonds of the city therefor in manner and form herein provided, pledging the liens on the property and any fund which the city may have set apart for said purpose and the faith and credit of the city where the city has been authorized to pledge its faith and credit, or any or all of said pledges may be given by the city for the payment of the principal and interest of said bonds as the city may desire. The city may, if it so desires and has been authorized by law, to pledge the faith and credit of the city in payment of its part of the cost of any improvement made hereunder, issue bonds for its part of the cost of the improvement in like manner as is herein provided for the issuance of bonds in payment of the cost of the improvement on behalf of the property holders. But said city may assess the entire cost of such improvement or reimprovement against the property owners and issue bonds therefor as herein provided."

The section then proceeds to describe the character of bond to be issued and the method of enforcing the lien on the abutting property, by which the bonds are secured.

Section 51 of the Constitution is as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

[1] It will be observed that the title to the act is, "An act to amend the charters of cities of the third class." The body of the act purports to amend chapter 89, Kentucky Statutes. However, section 3459a is plainly an amendment of section 3449, being part of an act approved June 14, 1893, entitled "An act for the government of cities of the third

class." Laws 1893, c. 222. The amendatory act did not repeal or purport to repeal section 3449, but merely amended it. Section 3449 provided for the improvement of streets, alleys, sidewalks, and public ways in such manner as the city council might think proper, while the amendatory section sets out in detail the manner in which the improvement might be made, leaving section 3449 undisturbed, except as it was changed by the amendatory act. When the Legislature desires, by alteration or addition, to amend a section of an act without referring to the Kentucky Statutes, or a section of the act as it appears in the Kentucky Statutes, it may do so by amending the section of the act as it appears in the act under a title that will identify clearly the title of the act proposed to be amended, or it may amend the section according to its number in the Kentucky Statutes, under a title giving the section of the Kentucky Statutes proposed to be amended; and, whichever method is adopted, the body of the new act should contain the section as it will read when revised or amended, if it is the purpose to re-enact or leave in force any part of the section amended or revised. The amendatory act did not do this. It did not republish any part of section 3449 that was, in fact, amended by section 3459a. It left the original section in force, but amended it by adding to it the new matter contained in the amendatory act. It follows that the amendatory act violates the provisions of section 51 of the Constitution.

[2] But it is insisted that, as the amendatory act of 1912 relates only to the method of paying for the improvements, that part of the ordinance enacted pursuant thereto may be disregarded, and the remainder of the ordinance held valid under existing statutes. The existing statutes, however, do not provide for street improvements on the ten-year bond plan. The ordinance in question is very comprehensive, and not only follows closely the provisions of the amendatory act of 1912, but distinctly provides "that the improvements provided for in this ordinance shall be made on the ten-year plan," as provided by act of the General Assembly entitled "An act to amend the charters of cities of the third class," which was approved by the Governor of the commonwealth of Kentucky on March 18, 1912, and which is chapter 113 of the Acts of the General Assembly of Kentucky of 1912. There being no other statutes authorizing street improvements on the ten-year plan, it is not to be presumed that the general council would have enacted the ordinance in question had they not believed that it was authorized by the act of 1912. The plan of paying for the improvements is such a material part of the ordinance that it is impossible to separate the plan of payment from that part of the ordinance ordering

the improvement. In other words, the construction itself and the plan of payment are so closely related, and so dependent the one on the other, that if the plan of payment fails because unauthorized by law, that part of the ordinance ordering the construction must also fail. We therefore conclude that the entire ordinance is invalid.

Judgment affirmed.

### SANDY VALLEY & E. RY. CO. v. BENTLEY et al.†

(Court of Appeals of Kentucky. Dec. 11, 1914.)

#### 1. EMINENT DOMAIN (§ 222\*)—TAKING PROPERTY FOR PUBLIC USE—DAMAGES—"MARKET VALUE."

In proceedings to condemn land for railroad use, an instruction directing the jury to award defendants a fair equivalent for the entire property taken, which finding should be its market value at present in money, which market value was the price it would bring when offered for sale by one desiring, but not obliged, to sell it and bought by one who is under no necessity of buying it, the fair value between the one who wants to purchase and one who wants to sell was correct.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. § 222.\*]

For other definitions, see Words and Phrases, First and Second Series, Market Value.]

#### 2. EMINENT DOMAIN (§ 124\*)—CONDEMNATION OF LAND—AD INTERIM IMPROVEMENTS.

Since where an appeal is taken in condemnation proceedings, evidence of the value of the property condemned should be confined to its value at the time of the trial, the owner is not deprived of the value of improvements placed on the land in good faith and as an ordinarily prudent business man would do under like or similar circumstances between the date of the institution of the proceedings and the time of the trial.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. Dig. § 124.\*]

#### 3. EVIDENCE (§ 501\*)—NONEXPERTS—OPINION—VALUE OF REAL PROPERTY.

Evidence of value in condemnation proceedings is an exception to the rule that witnesses are to state facts and not to express opinions, and hence the fact that witnesses to the value of property sought to be condemned were unable to give facts on which they based their opinion because there had been no sale of similar property, sufficiently near in point of time and circumstances to afford a fair basis in measuring the market value of the property condemned, did not deprive their opinions of admissibility or render them of no value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.\*]

#### 4. EMINENT DOMAIN (§ 202\*) — DAMAGES — USES OF PROPERTY.

Where business property in a town was sought to be condemned for railroad purposes, evidence that practically all the property in the town was owned by a coal company and not for sale was admissible under the rule that the market value of property may be estimated by reference to the uses for which it is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.\*]

#### 5. APPEAL AND ERROR (§ 1056\*)—REVIEW—EXCLUSION OF EVIDENCE—PREJUDICE.

While evidence of the scheduled value of property for taxation is admissible on the issue of value in condemnation proceedings, its actual weight is so slight that its exclusion would not be regarded as prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

#### 6. EMINENT DOMAIN (§ 150\*)—CONDEMNATION PROCEEDINGS—VALUE OF LAND—EXCESSIVE AWARD.

Where, in proceedings to condemn business property in a town for railroad purposes, six witnesses testified for plaintiff that the value at an earlier date than the last trial was from \$2,500 to \$5,000, but conditions had changed in the meantime, and nine witnesses testified for defendants that the land was worth from \$40,000 to \$65,000, the Court of Appeals could not set aside a verdict finding the value at \$43,000 as excessive.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 402; Dec. Dig. § 150.\*]

#### 7. TRIAL (§ 133\*)—MISCONDUCT OF COUNSEL—CURING ERROR.

Misconduct of defendants' counsel in condemnation proceedings in stating, before several of the jurymen while the jury was being impaneled and in his opening statement, that plaintiff wanted to get possession of the property to put defendants out of business was cured by the court promptly sustaining an objection to the language and admonishing the jury not to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

Appeal from Circuit Court, Letcher County.

Condemnation proceedings by the Sandy Valley & Elkhorn Railway Company against J. H. Bentley and others. From a judgment fixing the value of the property sought to be condemned, plaintiff appeals. Affirmed.

Hager & Stewart, of Ashland, Morgan & Harvie, of Whitesburg, and S. S. Willis, of Ashland, for appellant. O'Rear & Williams, of Frankfort, David Hays, of Whitesburg, and S. B. Dishman, of Barbourville, for appellees.

CLAY, C. Plaintiff, Sandy Valley & Elkhorn Railway Company, instituted this proceeding in the Letcher county court to condemn a lot of ground, consisting of 1.02 acres, situated in the town of Jenkins, and belonging to defendants, J. H. Bentley and Mary Bentley. The commissioners appointed by the county court fixed the value of the lot at \$21,500. Plaintiff excepted to the finding of the commissioners, and on a trial before a jury a verdict fixing the value of the lot at \$37,000 was rendered. On appeal to the Letcher circuit court, a jury there fixed the value of the lot at \$43,000. The railroad company appeals.

It appears from the evidence that Jenkins is a town of 4,000 or 5,000 inhabitants, and is several miles long. It is located in a narrow valley. It came into existence during the summer of 1911, and its remarkable growth is due to the coal development in that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 27, 1915.

section of the state. The Consolidated Coal Company had acquired almost all the land within a radius of five miles of Jenkins. When this proceeding was instituted the lot in question was occupied by an old dwelling house and store. These buildings were small, and of but little value. After this suit was filed the defendant built a better residence and a more substantial store, both buildings costing about \$1,000. The defendants conducted a country store on the property and lived on it.

Plaintiff introduced six witnesses who valued the land as of June 3, 1912, at from \$2,500 to \$5,000. The defendants introduced nine witnesses who valued the land at from \$40,000 to \$65,000.

The court instructed the jury as follows:

"The court tells the jury that they will find for the defendants a fair equivalent for the entire piece of property, which finding should be its market value at present in money, and its market value is that price it would bring when it was offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of buying it; in other words, a fair market value means the fair value between one who wants to purchase and one who wants to sell."

Plaintiff offered the following instructions, which were refused:

"(a) The court says to the jury the measure of damages, when the whole of any particular piece of property is taken for public use as in this case, is the market value of that property so taken.

"The term, 'market value,' means the fair value as between one who wants to purchase and one who wants to sell, and not what could be obtained for it, under peculiar circumstances, when a greater than its fair price could be obtained, nor its speculative value, nor a value obtained from the necessity of another.

"(b) Therefore you will find for the defendants, J. H. and Mary Bentley, the fair and reasonable market value in cash as above defined, for the 1.02 of an acre of land sought to be taken in this proceeding by the plaintiff, and you will fix a value as of to-day.

"(c) The court says to the jury that you cannot find for the defendants, the value of any improvements, placed on the property, after this proceeding was instituted, which was the 3d day of June, 1912, and you will deduct from the present value of said property the value of the new store building and of the new dwelling house, which defendants erected on the property, since the institution of this proceeding."

[1] It is first insisted that the trial court erred in giving the instruction by which the case was submitted to the jury, and in refusing the instructions offered by plaintiff. The given instruction has been often approved by this court. *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 734, 109 S. W. 328, 33 Ky. Law Rep. 98, 36 L. R. A. (N. S.) 456; *Madisonville, etc., R. Co. v. Ross*, 126 Ky. 138, 103 S. W. 330, 31 Ky. Law Rep. 584, 13 L. R. A. (N. S.) 420; *Lewis on Eminent Domain*, § 478; *David v. L. & I. Railroad Co.*, 158 Ky. 721, 166 S. W. 220.

[2] Plaintiff, however, contends that the measure of damages is incorrect, as applied to the facts of this case, because it did not permit the jury to make any deduction for

improvements made after the action was instituted. It is the settled rule in this state that in a condemnation proceeding, where an appeal is prosecuted to the circuit court, evidence of the value of the property condemned should be confined to its value at the time of the trial. *David v. L. & I. Railroad Co.*, supra. A judgment in a condemnation proceeding does not impose upon the party seeking to condemn the absolute obligation of taking the property. That being true, we are not disposed to hold that if the owner improves the property after the proceedings were instituted, and an appeal is prosecuted, he does so at his peril. So long as he acts in good faith, and as an ordinarily prudent business man would do under like or similar circumstances, he is not to be deprived of the value of such reasonable improvements as he may make. Here the defendants had a substantial mercantile business from which they derived a good income. The old buildings were of but little value. The new buildings cost about \$1,000. There is nothing in the record to show that the defendants acted in bad faith in erecting the improvements, and as the value of the new improvements is very small in comparison to the value of the lot, we see no reason why their value should be excluded in determining the value of the lot.

[3] It is next insisted that the court erred in permitting defendants' witnesses, who had not sufficiently qualified themselves, to give their opinions as to the market value of the property in question. Some of these witnesses lived in Jenkins, and some of them lived some distance therefrom. In this connection it is insisted that we should apply the rule applicable to will cases, where it is sought to set aside the will on the ground of mental incapacity, and hold that opinions without facts to support them are of no value. *Clark v. Young*, 146 Ky. 377, 142 S. W. 1032; *Phillips v. Phillips*, 149 Ky. 206, 148 S. W. 51. In our opinion, however, the same rule does not apply. Here it was difficult to obtain any facts on which to base an opinion. There had been no sales of similar property sufficiently near in point of time and circumstances to afford a fair basis in measuring the market value of the property condemned. After all, the question was reduced to one of opinion. It is not possible to lay down with any reasonable accuracy how much knowledge a witness shall possess in order to express such an opinion. The determination of this matter rests largely in the discretion of the trial judge. *Stilwell Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035; *Lawrence v. Boston*, 119 Mass. 126; *Chandler v. Jamaica Pond Aqueduct Corporation*, 125 Mass. 544. Where a witness possessing some knowledge of the subject gives his opinion, it is, of course, proper to cross-examine him as to the extent and accuracy of his knowledge,

and the facts on which such knowledge is based. The value of his opinion is then for the jury. It will not do to say that because a witness does not know of any sales having been made, he is thereby precluded from giving his opinion as to the value of the property. Indeed, it has often been held that persons may testify as to the value of property, although no sales have been made to their knowledge of that or similar property. *Montana Railway Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96, 34 L. Ed. 681. Furthermore, evidence of value in condemnation proceedings furnishes an exception to the general rule that witnesses are to state facts and not express opinions. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; *L. & N. R. Co. v. Jones*, 52 S. W. 938, 21 Ky. Law Rep. 749. If the rule were otherwise, then, as stated, there would be but little, if any, competent evidence before us in this case. While it may be that those testifying for defendants are not to be regarded as experts on lot values, it is likewise true that plaintiff's witnesses did not show a superior knowledge.

[4] Another error relied on is the fact that the trial court permitted witnesses to show that practically all of the property in the town of Jenkins was owned by the Consolidated Coal Company, and was not for sale. It is well settled that the market value of property may be estimated by reference to the uses for which it is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. *Chicago, St. Louis & New Orleans R. R. Co. v. Rottgering*, 83 S. W. 594, 28 Ky. Law Rep. 1167; *West Virginia, etc., R. Co. v. Gibson*, 94 Ky. 234, 21 S. W. 1055, 15 Ky. Law Rep. 7. Necessarily, therefore, the market value of property is affected by the supply and demand. If the property is suitable and valuable for business purposes, the fact that no other property in the community may be secured for that purpose will necessarily add to its market value. We, therefore, see no error in the admission of the evidence complained of.

There are other complaints in regard to the admission of evidence, but we find in each instance that plaintiff's objections were sustained thereto.

[5] Further alleged error grows out of the refusal of the trial court to permit the yellow sheets on which the defendants had scheduled their property for taxation to be given in evidence. While such evidence is admissible, yet in view of the fact that it throws but little light on the actual value of the property assessed, and necessarily has but small weight with the jury, we conclude that its rejection was not prejudicial. *L. & N. R. Co. v. White Villa Club*, 155 Ky. 452, 159 S. W. 983.

[6] One of the chief complaints of plain-

tiff is that the verdict is excessive. As before stated, the case is a peculiar one. The land sought to be condemned lies in a long, narrow valley, in which is located the town of Jenkins. In this valley there is but little, if any, land available for private business enterprises. Since the great development and growth of the town there have been but few sales of similar property. That the lot in question, by reason of its location and adaptability for business purposes, and by reason of the great difficulty in securing like property for such purposes, has an unusually high market value there can be no doubt. Six witnesses for the plaintiff fix the value of the lot as of June 3, 1912, at from \$2,500 to \$5,000. The evidence should have been confined to the time of the last trial. In view of this fact, and of the changed conditions, the evidence for plaintiff was of but little value. On the other hand, nine witnesses fixed the value of the lot at from \$40,000 to \$65,000. While it may be true that the value of the property as fixed by the jury is unusually high, and much more than we would have fixed it, if the question were not for the jury, but one for our determination, yet where six witnesses fix the value at from \$2,500 to \$5,000, and nine witnesses fix the value at from \$40,000 to \$65,000, we know of no rule of law that will permit us absolutely to ignore the testimony of the nine witnesses, and conclude that the six witnesses are correct in their opinion. Indeed, the only way by which we could reverse this case would be to disregard the evidence entirely, and also the finding of the jury, and fix the market value of the lot in controversy at what we think would be fair and right under the circumstances. This we have no right to do. In the case of *L. & N. R. Co. v. White Villa Club*, 155 Ky. 452, 159 S. W. 983, it was insisted that the value placed by the jury on certain land sought to be condemned was excessive. In discussing the question the court said:

"It is true the assessment made by the jury was large, and yet there was abundant evidence to support the finding. Of course there was wide difference of opinion between the estimates as to the damage made by the witnesses for the railroad company and by the witnesses for the club, but in all cases of this character there is room for much latitude of opinion, and the jury was as well, if not better, qualified than we are to reconcile differences of opinion as to value and arrive at a reasonable and fair conclusion."

[7] Lastly it is insisted that counsel for defendants were guilty of misconduct in stating before several of the jurymen while the jury was being impaneled, and in making the opening statement, to the effect that plaintiff wanted to get possession of the property for the purpose of putting their client out of business. As the court, however, very promptly in each instance sustained an objection to the language complained of, and admonished the jury not to consider it, we

see no reason for reversing the case on this ground.

Of course, the judgment does not require the plaintiff to take the property, but only to pay the amount fixed by the judgment in case it elects to take it. Nor does the affirmance carry damages.

Judgment affirmed.

### GRAY v. BOARD OF PRISON COM'RS OF KENTUCKY.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

**CRIMINAL LAW (§ 1208\*)—PUNISHMENT—EXTENT—PAROLE—STATUTORY PROVISIONS—DISCRETION OF BOARD OF PRISON COMMISSIONERS.**

Under Parole Act 1910 (Acts 1910, c. 16) § 2, providing that no person shall be eligible to parole until he shall have served the minimum term of imprisonment for the crime for which he was committed, except prisoners committed for life who shall have actually served five years, and the former Parole Laws of 1888 and 1900 (Acts 1887-88, c. 1420; Acts 1900, c. 26), a person sentenced to imprisonment for life prior to the enactment of the act of 1910 may, after serving five years, be paroled in the discretion of the Board of Prison Commissioners, but is not entitled to a parole as a matter of right, and hence cannot compel the granting of a parole by mandamus.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.\*]

Appeal from Circuit Court, Franklin County.

Mandamus by Clarence Gray against the Board of Prison Commissioners of Kentucky. From a judgment dismissing the action, plaintiff appeals. Affirmed.

James H. Polsgrove, of Frankfort, for appellant. James Garnett, Atty. Gen., and Chas. H. Morris, Asst. Atty. Gen., for appellee.

HANNAH, J. Appellant, Clarence Gray, was tried and convicted in the Bell circuit court in January, 1906, of the crime of murder, and his punishment fixed at confinement for life in the penitentiary. He was committed to and received into that institution December 16, 1906. On January 21, 1913, he applied to the Board of Prison Commissioners for a parole, which being denied, he sought to coerce by a mandamus proceeding instituted against the board, in the Franklin circuit court. The court sustained a demurrer to his petition and dismissed the action, and he appeals.

He claims that he is entitled to a parole under the provisions of the Parole Act of 1910 (Acts 1910, p. 61). That act provides that:

"No person \* \* \* shall be eligible to parole, or entitled to the provisions of this act, until he shall have served the minimum term of imprisonment provided by law for the crime for which he was so committed, except prisoners committed for life, who shall have actually served five years."

It was held in Board of Prison Com'rs v. Smith, 155 Ky. 427, 159 S. W. 960, that prisoners who were convicted of crimes before the enactment of the Indeterminate Sentence Law of 1910 (Acts 1910, c. 4) were not entitled to a parole under the Parole Act of 1910 as a matter of right, but may be paroled only in the discretion of the Board of Prison Commissioners. And in Board of Prison Commissioners v. De Moss, 157 Ky. 303, 163 S. W. 183, it was said that prisoners convicted before the enactment of the Indeterminate Sentence Law, whose punishment was fixed by a jury at confinement for life, may after serving five years be paroled in the discretion of the Board of Prison Commissioners, under the former Parole Law of 1888 and 1900. These cases are here controlling and conclusively deny to appellant a parole as a matter of right.

Judgment affirmed.

### ROGERS v. BOARD OF PRISON COM'RS OF KENTUCKY.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

**CRIMINAL LAW (§ 1208\*)—PUNISHMENT—EXTENT—PAROLE—STATUTORY PROVISIONS—ALLOWANCE FOR GOOD BEHAVIOR.**

Under Parole Act 1910 (Acts 1910, c. 16) § 2, providing that no person shall be eligible to parole until he shall have served the minimum term of imprisonment for the crime for which he was committed, nor unless he shall have been obedient to the rules of the institution for at least nine consecutive months preceding his parole, a person imprisoned under an indeterminate sentence of from two to ten years is not entitled to parole at the expiration of two years, less the commutation for good behavior provided for by Ky. St. 1909, § 3801, as that section does not affect the rights of persons convicted under the Indeterminate Sentence Law (Acts 1910, c. 4), while the Parole Act of 1910 was in effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.\*]

Appeal from Circuit Court, Franklin County.

Mandamus by W. B. Rogers against the Board of Prison Commissioners of Kentucky. From a judgment dismissing the proceeding, plaintiff appeals. Affirmed.

James H. Polsgrove, of Frankfort, and J. E. Warren, of Mayfield, for appellant. James Garnett, Atty. Gen., and Charles H. Morris, Asst. Atty. Gen., for appellee.

HANNAH, J. In October, 1912, appellant, W. B. Rogers, was tried and convicted in the Kenton circuit court of the crime of forgery; and at the same term, pursuant to the statute fixing the penalty therefor at from two to ten years' confinement in the penitentiary, an indeterminate sentence was passed upon him. On November 11, 1912, he was committed to and received into the state penitentiary. On June 2, 1914, after serving nearly one year and seven months of the

minimum sentence fixed, he applied to the Board of Prison Commissioners for parole. This being denied, he sought to compel the board to grant him a parole, by a mandamus proceeding instituted by him in the Franklin circuit court. The court having sustained a demurrer to the petition and dismissed the proceeding, he appeals.

Appellant bases his asserted right to a parole upon the Parole Act of 1910 (Acts 1910, p. 61) as construed by this court in *Wilson v. Commonwealth*, 141 Ky. 341, 132 S. W. 557, and *Board of Prison Commissioners v. De Moss*, 157 Ky. 289, 163 S. W. 183. Under that act as construed, he would be entitled to a parole as a matter of right after the expiration of the minimum term for which he was sentenced. He contends, however, that in fixing the period which he must serve in satisfaction of the minimum term for which he was sentenced, he is entitled to the commutation of seven days in each calendar month provided for in section 3801, Kentucky Statutes, which statute allows to each prisoner confined in the penitentiary against whom no charge of misconduct is sustained a commutation of seven days in each calendar month for good behavior; and that therefore, although he has served but one year and seven months, and the minimum term for which he was sentenced was two years, he is entitled to a parole.

The Parole Act of 1910 provides that no person confined in the penitentiary shall be eligible to parole unless he shall have been obedient to the rules and regulations of the institution for at least nine consecutive months next preceding the date of his parole. And appellant argues that, as a commutation of seven days in each calendar month would reduce a twelve months' term to approximately nine months, it was the intention of the Legislature that the commutation for good behavior should be deducted from the minimum sentence. But the Parole Act of 1910 specifically says that:

"No person \* \* \* shall be eligible to parole, or entitled to the provisions of this act, until he shall have served the minimum term of imprisonment provided by law for the crime for which he was so committed."

If it was the legislative intent that there should be deducted, from the minimum term provided by law, the commutation allowed to persons convicted before the passage of this act, we should expect to find such intent definitely expressed therein. The Legislature has not seen fit to make such provision. The provisions of section 3801, Kentucky Statutes, had no relation to paroles at the time of the enactment thereof. The statute affected prisoners who were not paroled, by reducing the term of imprisonment for good behavior. It was not a part of chapter 97, Kentucky Statutes 1909, which was repealed by the Parole Act of 1910, for the reason that it had no relation to paroles. And while

not expressly repealed by the Parole Act of 1910, it does not affect the rights of persons convicted under the Indeterminate Sentence Law while the Parole Act of 1910 was in effect. Appellant was sentenced for a minimum term of two years, and is not entitled to a parole before the expiration of that time. Judgment affirmed.

## CHESAPEAKE & O. RY. CO. v. KELLY'S ADM'X.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

### 1. APPEAL AND ERROR (§ 1236\*)—DAMAGES ON AFFIRMANCE—SUPERSEDEAS.

Damages will not be awarded on the affirmance of a judgment, unless the supersedeas bond is in the record and an order of supersedeas has issued; but, when the bond has been executed, it will be presumed that an order of supersedeas issued, unless it is affirmatively shown that it did not.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4778-4784; Dec. Dig. § 1236.\*]

### 2. APPEAL AND ERROR (§ 1188\*)—DISPOSITION OF CAUSE—OPERATION AND EFFECT OF DECISION—"FINAL JUDGMENT"—"OPINION"—"JUDGMENT."

Under Civ. Code Prac. § 760, providing that no mandate shall issue nor decision become final until after 30 days from the day on which the decision is rendered, judgments of the Court of Appeals do not become final until the mandate is issued at the expiration of 30 days, or after the disposition of the petition for a rehearing, if one is filed, as it is the mandate which is the judgment of the court; the opinion being merely an expression of the views of the court, that are made effective by the mandate.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4643; Dec. Dig. § 1188.\*]

For other definitions, see *Words and Phrases*, First and Second Series, Final Decree or Judgment; Opinion; Judgment.]

### 3. APPEAL AND ERROR (§ 1236\*)—RECORD—AMENDMENT AFTER OPINION HAS BEEN HANDED DOWN.

Where a supersedeas bond has been executed and an order of supersedeas issued, but through an oversight or a mistake of the clerk the bond is not incorporated in the record, a supplementary record may be filed, after an opinion for affirmance has been handed down, but before the issuance of a mandate, to make the bond a part of the record, in order that damages may be awarded because of the supersedeas.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4778-4784; Dec. Dig. § 1236.\*]

On motion for leave to file supplementary record as a basis for an award of damages because of the issuance of a supersedeas. Motion granted, and damages awarded.

For opinion affirming the judgment, see 160 Ky. 296, 169 S. W. 736. See, also, 171 S. W. 185.

CARROLL, J. On October 15, 1914, the opinion in this case was handed down, and may be found in 160 Ky. 296, 169 S. W. 736. On November 17, 1914, the appellant filed in this court a petition for a rehearing, which was pending, undisposed of, on November

25th. On November 25th the appellee moved the court to permit her to file an amended record from the clerk of the Montgomery circuit court, showing that the supersedeas bond and order of supersedeas issued thereon were omitted by mistake to be transcribed into the record, and tendered and offered to file, in connection with her motion, a copy of the supersedeas bond, duly attested by the clerk of the Montgomery circuit court. The record accompanying this motion consisted of a copy of the supersedeas bond, certified as correct by the clerk of the Montgomery circuit court, and his affidavit, in which he said that the appellant, Chesapeake & Ohio Railway Company, had executed in his office and before him the supersedeas bond, and thereafter an order of supersedeas was issued by him, but that he was unable to find the order and return thereon, because it had been mislaid. He further said that by oversight he failed to copy the supersedeas bond and transmit the same with the original record to this court.

[1] Damages will not be awarded on the affirmance of a judgment, unless the supersedeas bond is in the record and an order of supersedeas has issued; but, when the bond has been executed, it will be presumed that an order of supersedeas issued, unless it is affirmatively shown that it did not. *Whitehead v. Boorum*, 7 Bush, 399; *United States Fidelity & Guaranty Co. v. Boyd*, 94 S. W. 35, 29 Ky. Law Rep. 598. The object, therefore, of tendering the supplementary record, was to furnish the court authority upon which it might award damages on the judgment, which was affirmed. Counsel for appellant seriously protest against allowing the supplementary record to be filed, upon the ground that, unless the supersedeas bond is in the record when the case is decided—that is, when the opinion is handed down—the court is not authorized to award damages. On the other hand, it is the argument on behalf of appellee that the court may permit a supplementary record, such as is here tendered, to be filed at any time before the judgment becomes final, or, in other words, before the mandate has been issued, and upon the filing of the supersedeas bond within this time damages should be awarded as if the bond were in the record when the opinion was delivered.

[2] Section 760 of the Civil Code provides in part:

"No mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered."

And the judgments of this court never become final until the mandate is issued. The mandate from this court is the order that gives authoritative notice to the parties and the trial court that the judgment appealed from has been reversed or affirmed, as the case may be. In other words, the mandate is the judgment of this court; the opinion being merely an expression of the views of the court, that are made effective by the man-

date. If no petition for a rehearing is filed, it is the duty of the clerk, unless otherwise directed by the court, to issue the mandate as a matter of course when it is due, as provided in section 760; but if a petition for a rehearing is filed, this suspends the issue of the mandate until it is disposed of. When a petition for a rehearing is filed, and pending its disposal, the court has the same power over the case as it would have within the 30 days if no petition for a rehearing was filed. So that, if this supplementary record could have been filed at any time after the opinion was handed down, it might be filed at any time before the petition for a rehearing was disposed of, although this might permit its filing after the expiration of 30 days from the date when the decision was rendered.

[3] The precise question therefore is: May this court, at any time after the opinion in the case has been delivered and before the mandate issues, permit a supplementary record containing the supersedeas bond to be filed? This is purely a question of practice, entirely within the power of this court to control; there being no Code or statutory provision on the subject. Being thus a question of practice, it is important that it should be definitely settled, as there appears to be some doubt as to the proper practice, owing to apparent, if not real, conflict in the opinions in which the matter has been treated in cases involving questions like the one here presented, as well as in cases involving analogous questions.

In the case of *Phoenix Ins. Co. v. McKernan et al.*, 104 Ky. 224, 46 S. W. 10, 698, 20 Ky. Law Rep. 337, it appears that after the opinion had been handed down affirming the case, and before the mandate issued, the appellees moved this court to permit them to file certified copies of the supersedeas bonds executed in the circuit court, and upon the filing of the bonds to direct either the clerk of this court or the clerk of the Logan circuit court to issue a supersedeas on the bonds and to award appellees 10 per cent. damages on the amount of the judgment. As no order of supersedeas was issued on these bonds, the execution of the bonds alone did not entitle the appellees to damages, or prevent the appellees from enforcing the collection of the judgments by execution in the usual way, and this court merely declined to order a supersedeas issued, so that damages might be collected on the bonds, saying:

"This court cannot—now the judgment has been affirmed, and there is no legal obstacle in the way of collection or satisfaction of it—on appellees' own motion, order a supersedeas issued, merely that we may have a pretext for awarding damages."

Obviously that case is not authority against the motion here made by the appellee, because in that case the enforcement of the judgment was not suspended. Here it was suspended, as an order of supersedeas issued.

In the case of *M. V. Monarch Co. v. Farmers' & Traders' Bank*, 106 Ky. 206, 50 S. W.

33, 20 Ky. Law Rep. 1788, also relied on by counsel for appellant, it appears that the judgment was affirmed on January 26th, and an inspection of the record shows that the motion to file the supplementary record containing the supersedeas bond and order of supersedeas was not made until \_\_\_\_\_, after the mandate had issued, and so the motion of appellee was denied. The essential difference between that case and this consists in the fact that there the offer to file the supplementary record and the motion to award damages were not made until after the mandate issued. Here the offer to file the supplementary record and the motion to award damages is made before the mandate has issued. So that case is not authority against the right to grant the motion made by appellee in this case.

In the case of *Mutual Fire Ins. Co. v. Hammond*, 51 S. W. 151, 21 Ky. Law Rep. 204, it appears from an inspection of the record that there was an offer made to file a supplementary record showing the execution of the supersedeas bond and the issuance of an order of supersedeas and a motion made to award damages before the mandate issued, but the court denied the motion and said:

"While there seems to have been no authoritative utterance to the same effect in this court, the unvarying practice here has been to refuse damages, except where there is a supersedeas bond in the record when the case was decided."

So that this case is direct authority against the motion made by appellee in this case.

These three cases are the only ones we have been referred to by counsel or have been able to find in which a question relating to the filing of a supplementary record containing a supersedeas bond was considered by the court. On the other hand, it has been the uniform practice of this court to permit supplementary records to be filed by the appellee after the opinion has been handed down and before the mandate issues, for the purpose of correcting errors or omissions in the record when it was considered by the court and the opinion delivered. Illustrative cases, on this subject are *Wade v. First National Bank of Franklin*, 11 Bush, 697; *Bank of Kentucky v. Com.*, 107 S. W. 812, 32 Ky. Law Rep. 1087; *Stewart v. Blue Grass Canning Co.*, 121 S. W. 609; *Breathitt Coal, Iron & Lumber Co. v. Patrick*, 144 Ky. 601, 139 S. W. 790; *Louisville & Nashville R. R. v. Woodford*, 157 Ky. 426, 163 S. W. 238; *Leonard's Administrator v. Cowling*, 121 Ky. 631, 87 S. W. 812, 27 Ky. Law Rep. 1059; *Id.*, 121 Ky. 631, 89 S. W. 131, 28 Ky. Law Rep. 145; *Wade v. Wade*, 154 Ky. 24, 156 S. W. 873; *Miller Creek Railroad Co. v. Barnett*, 160 Ky. 845, 170 S. W. 202. In this last-mentioned case it appears that on June 2d the case was reversed for error in the instructions, but with the petition for a rehearing there was filed the certificate of the circuit clerk, showing that the instructions copied in the record, and upon which

the opinion was based, were not the instructions that were given to the jury. In the instructions actually given, and upon which the jury rendered their verdict, there was no error. Upon this showing the rehearing was granted, and the former opinion reversing the case withdrawn, and the judgment affirmed.

Adopting the rule of practice announced in the *Miller Case* and others as correct, we are unable to perceive any reason why the same rule should not be applied in this case. Here by the oversight or omission of the circuit clerk a portion of the record material to the protection of the rights of appellee was not copied in the record. Therefore, if the supplementary record is not allowed to be filed, the appellant has had the benefit accruing to it on account of the suspension right of appellee to enforce the judgment, without the burden that should have followed the suspension of the judgment when it was affirmed. When the appellant, as defendant in the lower court, executed the supersedeas bond, and the order of supersedeas issued thereon, it voluntarily undertook to and did obstruct the collection of the judgment in the ordinary course, and assumed an obligation to pay the damages allowed by law for this obstruction if the judgment was affirmed. If the clerk had copied, as he should have done, the supersedeas bond and order in the record, there could, of course, have been no objection raised by the appellant to the awarding of damages by the court following the affirmance.

Now should the appellee be defeated in her right to these damages by the oversight or mistake of the clerk in failing to incorporate in the record the bond? We think not. When damages are awarded, the appellee will get no more than she became entitled to by the execution of the bond and the issuance of the order which prevented her from collecting the judgment, and the appellant will not suffer any loss that it did not voluntarily assume when it executed the bond. In short, the allowance of damages in this case will only be doing what the appellant, by its own act, agreed might be done, and what the appellee had a right to expect would be done.

We therefore hold that, when the supersedeas bond is by mistake or inadvertence or oversight not copied in the record, but the bond and order of supersedeas, if one issued, is tendered in this court before the mandate has issued, it should be allowed to be filed and treated as if it were a part of the record when the opinion was delivered, and damages on the affirmance should go accordingly. The case of *Mutual Fire Ins. Co. v. Hammond*, 51 S. W. 151, 21 Ky. Law Rep. 204, is overruled.

Wherefore, the whole court sitting, the motion to file the supplementary record is granted, and damages awarded.

## CHESAPEAKE &amp; O. RY. CO. v. KELLY'S ADM'X.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

## 1. COURTS (§ 489\*)—JURY (§ 11\*)—JURY TRIALS—CONSTITUTIONAL PROVISIONS—STATE AND FEDERAL COURTS—CONCURRENT JURISDICTION.

Under Federal Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (U. S. Comp. St. 1913, § 8662), providing that the jurisdiction of the courts of the United States thereunder shall be concurrent with that of the courts of the several states, a state circuit court had jurisdiction of an action thereunder, though under Const. Ky. § 248, and Ky. St. § 2268, three-fourths of the jurors may return a verdict in the circuit court, while under Const. U. S. Amend. 7, providing that the right of trial by jury in suits at common law shall be preserved, there is a right to a trial by a jury of 12 men, whose finding shall be unanimous, as that amendment does not apply to actions in the state courts, though brought to enforce civil rights and remedies created by congressional legislation, and such actions, in the absence of any conditions imposed by Congress, must be tried according to the practice and procedure of the forum and under the jury system adopted by the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.\* Jury, Cent. Dig. §§ 19-24; Dec. Dig. § 11.\*]

## 2. COURTS (§ 489\*)—JURISDICTION—JURISDICTION OF STATE COURTS UNDER FEDERAL LAWS.

The state courts may take jurisdiction to enforce civil rights and liabilities arising under congressional legislation, unless there be something in the congressional legislation forbidding such courts to take jurisdiction of cases thereunder.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.\*]

On petition for rehearing. Overruled.

For former opinion, see 160 Ky. 296, 169 S. W. 736. See, also, 171 S. W. 182.

CARROLL, J. [1] Counsel for appellant, in a petition for a rehearing, present for the first time the argument that the judgment below should be reversed, because the Montgomery circuit court had no jurisdiction to entertain or determine the action. The seventh amendment to the Constitution of the United States provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

And it has been uniformly held by the Supreme Court of the United States that the jury trial contemplated by this section is the right to a trial by a jury of 12 men, whose finding shall be unanimous. *American Publishing Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; *Thompson v. Utah*, 170 U. S. 843, 18 Sup. Ct. 620, 42 L. Ed.

1061; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801.

Section 248 of the Constitution of this state reads in part:

"The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

Section 2268 of the Kentucky Statutes, enacted pursuant to this constitutional provision, provides:

"That in all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Section 6, as amended in 1910, of the federal Employers' Liability Act, provides that:

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no cases arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The argument against the jurisdiction of the Montgomery circuit court is this: It is said that Congress did not have power to confer or commit jurisdiction of cases arising under the federal Employers' Liability Act to the courts of any state that does not recognize the binding necessity for a jury of 12 and a unanimous verdict, or that has by its Constitution and laws taken from its courts the authority to require a unanimous verdict of such a jury, because under the seventh amendment it is indispensable that every court that hears and determines a common-law case arising under congressional legislation shall have the power to require a jury of 12 and a unanimous verdict, which power is denied to the courts of this state by the Constitution and statutes of the state. It will, however, be observed that this congressional legislation does not confer jurisdiction on state courts to hear and determine cases arising under the act; it merely recognized the existing jurisdiction of state courts, and to make plain this jurisdiction the act provides that:

"No cases arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

[2] It is further well established that state courts may take jurisdiction to enforce civil rights and liabilities arising under congressional legislation, unless there be something in the congressional legislation forbidding the state courts to take jurisdiction of cases arising under it. Thus it was said in

**Claffin v. Houseman**, 93 U. S. 130, 23 L. Ed. 833:

"The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. \* \* \* If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws."

In **L. & N. R. R. Co. v. Scott**, 133 Ky. 724, 113 S. W. 900, 19 Ann. Cas. 392, the suit was brought in the state court against the railroad company to recover damages under the congressional legislation known as the Carmack amendment to the Interstate Commerce Act, and in holding that the state court had jurisdiction to enforce the provisions of this act, we said:

"The acts of Congress within the sphere of its jurisdiction are the law of the land, no less than the acts of the state Legislature within the sphere of its jurisdiction; and as the court must take judicial notice of these laws, and as facts, of which it must take judicial notice, by the Code, need not be stated in the pleadings, it was unnecessary for the plaintiff to refer to the United States statute in his petition. Accordingly, we have uniformly given judgment against carriers where they had, in shipping stock from one state to another, failed to water the stock, as required by the act of Congress, without any reference in the pleadings to that act."

This case was affirmed by the Supreme Court of the United States in **L. & N. R. Co. v. Scott**, 219 U. S. 209, 31 Sup. Ct. 171, 55 L. Ed. 183.

Speaking of the federal Employers' Liability Act in **Mondou v. N. Y., N. H. & H. Railroad Co.**, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, the Supreme Court said, in reference to the action of the Connecticut court in declining to take jurisdiction of cases arising under the act, that:

"There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, \* \* \* is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. \* \* \* We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states, when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

Inasmuch, then, as state courts, as a matter of right, independent of congressional

sanction, have jurisdiction to enforce civil rights and remedies created by congressional legislation, unless the right is denied by the legislation, it is difficult to understand upon what ground the assertion can be soundly rested that the seventh amendment controls jury trials in state courts, in the face of the often-repeated declaration of the Supreme Court that this amendment affects only trials in courts of the United States. **Maxwell v. Dow**, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; **Edwards v. Elliott**, 21 Wall. 532, 22 L. Ed. 487; **Bolin v. Nebraska**, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; **Twitchell v. Pennsylvania**, 7 Wall. 321, 19 L. Ed. 223; **Walker v. Sauvinet**, 92 U. S. 90, 23 L. Ed. 678.

It seems to us that, when state courts are given jurisdiction to hear and determine causes of action created by federal legislation, they may exercise this jurisdiction according to the practice and procedure of the forum and under the jury system adopted, subject, of course, to such conditions as Congress may attach to the legislation; and Congress did not, in the legislation here in question, attempt to attach any conditions to the practice and procedure through which the jurisdiction of state courts of competent jurisdiction might be exercised in the enforcement of rights arising under this act. **Gibson v. Bellingham & N. Ry. Co. (D. C.)** 213 Fed. 488; **Winters v. Minneapolis & St. L. R. R. Co. (Minn.)** 148 N. W. 106.

It might be added that, as it appears from the record that there was in this case a jury of 12 and a unanimous verdict, it may seriously be questioned if the appellant has the right to raise the constitutional question we have discussed. But, in order to remove any doubt of the right of appellant to avail itself on appeal of an adverse ruling on the subject presented in the petition for a rehearing, we have stated our views at some length.

The petition for a rehearing is overruled.

#### HYDEN v. CALAMES.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

##### 1. PROCESS (§ 100\*)—NONRESIDENT—JURISDICTION.

In an action to reform a deed as against a nonresident grantor, and to enjoin a judgment creditor of such grantor from levy and sale of the land, where no warning order was spread, though authorized by the allegations of the petition, the action was not commenced against such nonresident.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 127; Dec. Dig. § 100.\*]

##### 2. EXECUTION (§ 172\*)—LEVY—INJUNCTION.

Where a judgment creditor of grantor, having no lien, had not extended credit on the faith of the grantor's reserved oil and coal rights in its deed to plaintiff which reservation was questioned by plaintiff, and where there was no act of plaintiff operating as an estoppel to as-

sert title to such rights, the creditor would be enjoined from a levy and sale thereof as the property of the grantor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.\*]

**3. LIMITATION OF ACTIONS (§ 173\*)—PERSONS ENTITLED TO RELY ON LIMITATION—CREDITOR.**

In such case, and in view of the fact that the grantor company, as to whom it was not certain the statute of limitations against the reformation of a deed had ever begun to run, by reason of its nonresidence, and that it might never plead the statute, the judgment creditor could not plead it, since the plea of limitations was personal to the grantor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 658; Dec. Dig. § 173.\*]

Appeal from Circuit Court, Breathitt County.

Action by Henson Calames against E. C. Hyden and others. Judgment for plaintiff, and defendant Hyden appeals. Affirmed.

Florence McGuire, of Jackson, for appellant. Leonidas Y. Redwine, of West Liberty, for appellee.

**NUNN, J.** The appellee, Henson Calames, is a colored man 75 years old and unable to read or write. In 1907, having saved up about \$1,100, he decided to buy a home. The Kentucky Sawmill Company, an Ohio corporation, owned 232 acres of land in Breathitt county which it desired to sell, having already cut the timber. In July of 1907, Mr. Bartles, its chief officer in Breathitt county, executed a writing, agreeing to convey the tract in fee simple to appellee on September 1st, upon payment of \$1,100 in cash, with the right to cancel the contract in ten days if disapproved of by the home office. The corporation, approving the trade, sent a deed to a bank in Breathitt county and notified Calames to get it. He went to the bank in company with Bartles. The deed, or a part of it, was read to Calames by Bartles. Calames paid the money, took the deed, and on the way home met a friend, who examined the deed, and Calames discovered for the first time that it did not convey to him the coals and oil underlying the land. Calames says that no mention of this reservation was made when Bartles read the deed to him. The next morning he went back to town, found Bartles, tendered the deed, and demanded his money. Bartles told him that his money was gone, that is, he had sent it to the company in Ohio. It seems that the sawmill company was winding up its business in this state, and had no other visible property. Calames took possession of the place, made some improvements, but put his case in the hands of a lawyer. This lawyer testifies that he was prepared to bring suit to reform or cancel the deed when, in about six months, he saw Bartles, and Bartles told him not to bring suit; that it would be unnecessary, as his company would make no claim to the oil or

minerals. Subsequently, the appellant, Hyden, recovered a judgment against the sawmill company for \$294, and, in searching the records to find some estate out of which the judgment might be collected, he discovered this reservation in the Calames deed, and caused the sheriff to levy an execution. This suit was brought by Calames to enjoin Hyden and the sheriff from levy and sale of any of his land. The sawmill company was also named party defendant, and a reformation of his deed was requested to conform to the original contract which stipulated a fee-simple conveyance. The petition was verified, and the allegations were sufficient for a warning order against the sawmill company as a nonresident. No warning order was spread, but a report was filed purporting to come from a regularly appointed attorney for the nonresident. Issue was joined by appellant, Hyden, and the sheriff, Hudson, and all the proof taken. Hyden attempts to defend as a creditor without notice. On this state of the record, the report of the attorney for the nonresident was stricken because no warning order was ever spread. It was then more than five years from the date of the deed, and Hyden undertakes to plead the five-year statute of limitation against reformation of the deed. New affidavits were filed, and a warning order duly spread, but no further proof was taken.

[1, 2] Until the warning order was spread the action was not commenced against the nonresident sawmill company, and, not being before the court, the testimony of Calames and his attorney with reference to the fraud and waiver of the claim to the coal and oil is incompetent. The court, therefore, refused to reform the deed, because there was no competent proof to show that Calames was entitled to that relief. But appellant, Hyden, and the sheriff were enjoined from attempting to levy upon or sell the coal and oil rights. We think the court properly ruled in this also. While it is admitted that Hyden was a creditor, yet it is not pretended that he has any lien, or that the credit was extended on the faith of the reservation in Calames' deed. In fact, it does not appear whether the debt was created before or after the Calames deed. There is no allegation that any act of Calames induced appellant to extend the credit, and there is nothing in the case that could operate as an estoppel to prevent Calames asserting title to coal and oil.

[3] A plea of limitation is personal, and one's creditor cannot make it for him. Although five years have passed from the date of the deed, it is not certain that the statute ever began to run, for the sawmill company is a nonresident, and we infer from the record it was a nonresident during all the time in question. But if its position is such as to entitle it to plead limitation, it may never do

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so, that is, it is optional whether it will plead the statute or not. This option is with the sawmill company—not appellant.

Perceiving no error in the judgment, it is affirmed.

### CREWS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

CRIMINAL LAW (§ 1159\*)—VERDICT—CONCLUSIVENESS.

A conviction of murder will not be disturbed, though the evidence leaves the court in doubt as to the guilt of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from Circuit Court, Monroe county.

Martha Crews was convicted of murder, and she appeals. Affirmed.

Sherman Spear, Spear & Denton, and Jackson, Denham & Copass, all of Tompkinsville, for appellant. Jas. Garnett, Atty. Gen., for the Commonwealth.

CARROLL, J. On a former appeal (see 155 Ky. 122, 159 S. W. 638), a judgment sentencing the appellant to imprisonment for life, under an indictment charging her with the murder of her husband, was reversed on the ground that the evidence was not sufficient to sustain the verdict. The case was remanded for a new trial, and on another trial there was again a verdict finding the appellant guilty and fixing her punishment at imprisonment for life. From the judgment on that verdict, this appeal is prosecuted, and the only ground urged for reversal is that the verdict was not supported by the evidence.

The facts of the case are set out at some length in the former opinion, and for this reason we do not think it necessary to restate them here. On the last trial the commonwealth strengthened its case by evidence that was not before the jury on the first trial, or at least that did not appear in the transcript of the evidence of the first trial brought to this court.

We have considered carefully the evidence, as well as briefs of counsel, and have reached the conclusion that, while the evidence of appellant's guilt is not satisfactory, there is yet enough to sustain the finding of the jury. Of course, if the evidence were the same as on the first trial, we would again reverse the case for the same reason that it was before reversed. But the additional evidence secured by the commonwealth, in connection with the evidence on the first trial, is, we think, sufficient to support the verdict. At any rate, the verdict is not so flagrantly against the evidence as to authorize us to reverse the case on this ground.

On the last trial the only witnesses in behalf of the appellant were herself and her son, Willie Knuckles, who was found guilty

and sentenced to life imprisonment on the first trial, and who accepted without appealing the sentence imposed. On the trial of the case in which he was found guilty, he denied all connection with the murder, but on the second trial he testified that he killed Graven Crews, and that the appellant had nothing to do with the commission of the crime. Evidently the jury attached no weight to his admission of guilt, and, under the circumstances, we are not disposed to find fault with their conclusion. The appellant gave, in substance, the same evidence that she did on the first trial, and so, putting aside the evidence of Willie Knuckles as not entitled to any weight, the only difference in the evidence on the first and second trials consists in the particulars in which the commonwealth strengthened its case.

Counsel for appellant point out in their brief the additional evidence developed by the commonwealth, but insist that it did not add anything to the force of the evidence introduced on the first trial. It is true this additional evidence is not convincing, and yet we think it was with the jury to say whether, on the whole evidence, the appellant was guilty or not guilty of the crime charged. It is further said that no instruction on the subject of a conspiracy with Willie Knuckles to commit the crime should have been given. But this is upon the theory that there was no evidence to justify such an instruction. But we think there was at least enough to let the jury determine the case.

Under the evidence in the record, if the jury had found the appellant not guilty, it could not be said that their finding was flagrantly against the evidence, nor can it be said that their finding of guilty is. The record leaves us in doubt as to whether or not appellant did commit the crime or conspire with or aid or abet Willie Knuckles in its commission, but we think there was sufficient to let the jury pass on the question of fact; and therefore we affirm the judgment.

### WADE v. BRENTS.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

1. HIGHWAYS (§ 184\*)—ACTION FOR INJURY—INSTRUCTIONS.

In an action for injury to plaintiff's horses, frightened by a collision with defendant's automobile, where the only evidence of negligence was that as to the speed of the automobile, governed by the motor vehicle laws (Acts 1910, c. 81; Acts 1914, c. 69), forbidding the operation of a motor vehicle on a public highway at more than reasonable speed for the time, place, traffic, and use of the highway, and providing that more than eight miles around a curve is prima facie unreasonable speed, instructions that it was the duty of defendant's chauffeur, approaching the curve, to have the machine under control and not to exceed eight miles per hour, and that if he did not have it under control, or if he was negligently running more than eight miles per hour, plaintiff could

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

recover, were not objectionable as declaring defendant not liable if his speed was less than eight miles an hour, since they meant that either a failure to keep it under control, or its operation at more than eight miles an hour, was negligence for which plaintiff might recover, and control meaning such as would be efficient under the circumstances.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

## 2. HIGHWAYS (§ 184\*)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE.

In an action for injury to plaintiff's horses, frightened by a collision with defendant's automobile when rounding a curve, where the only evidence of negligence was that relating to its speed, evidence held to sustain a verdict for defendant.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

## 3. HIGHWAYS (§ 184\*)—ACTION FOR INJURY—EVIDENCE.

Where defendant's chauffeur in rounding a curve did not discover plaintiff's standing team until he was almost on it, evidence for plaintiff relative to observations made and measurements taken at the place of the accident was not material.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

Appeal from Circuit Court, Marion County.

Action by Mrs. Amanda Wade against G. N. Brents. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Spragens, of Lebanon, for appellant. W. W. Spalding and P. K. McElroy, both of Lebanon, for appellee.

HANNAH, J. Mrs. Amanda Wade owns and operates a farm in Marion county. She had sent two teams and wagons to a neighbor's after some hogs; and as these were returning in the nighttime along the Lebanon and Springfield pike, one of the wheels of the rear wagon came off. The driver thereof called the driver of the team in front to his assistance; and the driver of the front team left his team standing about the middle of the road, and went back to the assistance of the driver in the rear. At the place where this team was left standing in the road, there was a sharp curve. It was quite dark, and there were no lights on the wagon. While the team was standing there, an automobile owned by G. N. Brents, a liveryman and driven by his chauffeur, came around this curve and ran against the tongue of the wagon, frightening the horses, causing them to back over an embankment, and injuring them. To recover damages for the injuries to the team and wagon, Mrs. Wade brought this action against Brents in the Marion circuit court. Upon a trial, there was a verdict and judgment for the defendant. Plaintiff appeals.

[1] 1. The court instructed the jury that it was the duty of the defendant's servant, in charge of the automobile as he approached the curve where plaintiff's team was standing, to have the machine under control, and not to exceed a speed of eight miles per hour,

and that if the jury believed from the evidence that he did not have the machine under control, or was negligently operating it at a speed greater than eight miles per hour, they should find for the plaintiff, but that unless they believed from the evidence that the driver did not have the machine under control as he approached the curve, or that he was operating it at a speed in excess of eight miles per hour, they should find for the defendant. Appellant complains of these instructions, claiming that the effect thereof is to declare that the defendant is not liable if the speed of the machine was less than eight miles per hour. But, considering them as a whole, it will be seen that what the trial court meant was that either a failure to have the machine under control, or operating it at more than eight miles per hour, was negligence for which plaintiff might recover.

It was the rule of the common law, and has been made so by legislative declaration (Acts 1910, p. 242; Acts 1914, p. 179), that no person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper in view of the time and place, and having regard to the traffic and condition and use of the highway; and the statute (motor vehicle law) further provides that a speed in excess of eight miles when the rounding a curve is *prima facie* evidence of unreasonable speed. The only evidence of negligence herein related to the speed of the automobile. Lee Wade, the driver of the team, when asked, "Do you know how fast that automobile was traveling that night?" answered, "Not exactly, but I judge from ten to twelve miles an hour." This was all the evidence offered by plaintiff on the subject, and both the driver of the machine and the passenger whom he was transporting swore that the speed did not exceed eight miles an hour. Appellant says in his brief:

"Plaintiff's witnesses were in no position to know and could not testify as to the rate of speed or as to whether the driver had the machine under control. The only evidence upon this point was that of appellee's driver and passenger, and singularly enough they both place the rate of speed at not over eight miles per hour, and testify that the machine was under control."

He argues that the instructions limited plaintiff's right to recover alone upon the question of whether defendant's servant complied with the statutory requirements; i. e., that the driver approaching a curve shall have the machine under control and shall not exceed eight miles per hour. But he refers to no evidence in this record which would authorize an instruction based on any other act. There must be some evidence upon which to base an instruction, or it should not be given. The instructions complained of might easily have more clearly expressed the effect of the statute. Indeed, an instruction

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

embodying the language of the statute itself is desirable in defining the duties of the operator of a motor vehicle on the public highways.

But in this case there was no proof that the machine was not under control, or that it was not stopped as soon after the discovery of the standing team as was possible to stop such a machine when operated at a reasonable speed. We do not think the instructions complained of were prejudicial to the substantial rights of the plaintiff. The jury doubtless understood that to have an automobile under control means such control as would be efficient under the circumstances.

[2] 2. Appellant also insists that the verdict of the jury was flagrantly against the weight of the evidence. There was no proof that the automobile was being operated at an unreasonable speed, except that of the driver of the team. This was denied by both the driver of the automobile and the passenger whom he was transporting. Nor was there any proof that the machine was not under control. The driver thereof and the passenger both testified that they were driving slowly owing to its being dark and the road being narrow. The lights of the automobile threw their rays directly ahead on a line with the body of the machine, and for that reason, in rounding the curve, the presence of the standing team was not disclosed until they were so close that the machine could not be stopped in time to avoid running into it. And the jury were doubtless largely influenced in reaching their verdict for the defendant by the apparently negligent act of the team driver in leaving his team standing unattended in the road in the nighttime. It was for the jury to pass upon the issue of negligent operation of the automobile. They have done so, and we are not disposed to disturb their finding.

[3] 3. Appellant also contends that the trial court erred in excluding evidence offered by her relative to "observations made and measurements taken at the place where the accident occurred." This evidence was not material. That the occupants of the automobile did not discover the standing team until they were almost upon it is not denied.

Judgment affirmed.

#### MULLOY v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

##### 1. NEW TRIAL (§ 89\*)—GROUNDS—SURPRISE.

In an action against a city for injury from a fall caused by its failure to keep the sidewalk on the "north side of Oak street and Twelfth street" and the intersection of the two streets in condition reasonably safe for public travel, in which plaintiff located the accident on the "northeast" corner of Twelfth and Oak, it was competent for defendant to prove that it occurred on the "northwest" corner, and after judgment for defendant, such proof did not war-

rant a new trial on the ground of surprise, where plaintiff was not deceived or lulled into security by any improper conduct of the defendant.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 177-180; Dec. Dig. § 89.\*]

##### 2. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

In an action against a city for personal injury from a fall caused by its negligent failure to keep a sidewalk on the "north side of Oak and Twelfth street" reasonably safe for public travel, where plaintiff located the accident at the "northeast" corner, instructions requiring the jury to believe that the accident occurred at that corner in order to find for plaintiff were not prejudicial to her.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 822\*)—ACTION FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In such action, where plaintiff admitted that she was going in a hurry to have a prescription filled, and where there was evidence as to the manner in which she approached and crossed the place, an instruction as to her contributory negligence was properly given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Mary A. Mulloy against the City of Louisville. Judgment for defendant, and plaintiff appeals. Affirmed.

O'Doherty & Yonts, of Louisville, for appellant. W. J. O'Connor and Pendleton Beckley, both of Louisville, for appellee.

NUNN, J. The appellant was the plaintiff below, and, the jury finding against her, she asks for a new trial on account of newly discovered evidence and because of surprise which ordinary prudence could not have guarded against. She sued to recover \$15,000 for injuries received in a fall caused by negligent failure of the city to keep "the sidewalk on the north side of Oak street and Twelfth street, and the intersection of said two streets," in condition reasonably safe for public travel. The unsafe and negligent condition is described as follows:

"The existence of boards or planks or materials or wood upon said sidewalk and intersection, and holes and depressions upon said sidewalk and street and intersection, and piles of dirt and sand upon said sidewalk and street and intersection."

It is further averred that, on August 23, 1910:

"While walking along the north side of Oak street, and while undertaking to walk across a board or plank placed there for the use of the public generally, and made necessary by reason of the existence of the holes, depressions, piles of sand, and other obstructions upon said street and sidewalk said board turned, and she was thereby caused and made to fall to the ground, and to sustain serious, painful, and permanent injury to her leg, back, arms, and nose, and internal injuries, and that her nerves and nervous system were shocked and impaired."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This torn-up condition of the street was due to the building or repair of a sewer at this intersection, and was in charge of the sewerage commission. The answer was a traverse, and an affirmative plea of contributory negligence.

The appellant testified that a physician was called that morning about 4 o'clock to see her sick child; that he wrote a prescription, and she took it to the drug store; that in going to the drug store she passed "the *north-east* corner of Twelfth and Oak, just about 5 o'clock, just getting daylight," and that she fell from a plank used by the public in getting from the street to the sidewalk. There is evidence to show this plank had been there for a week or more, and was necessarily used by pedestrians to avoid pools of water suffered to collect in the street, and that it had become twisted or warped, so that it did not have a firm rest at either end.

Concerning the question of contributory negligence, the time of day and place of the accident were very material, that is, whether it was before or after daylight. This affected the degree of care she should use for her own safety. She claimed the accident occurred before it was light, and introduced several witnesses corroborating her on this question, and also as to the warped condition of the crossing board at the northeast corner. She introduced no witness who saw the accident, but others, including the physician called to treat her, testified as to the severity of her injuries.

The city by way of defense introduced a number of witnesses, some of whom saw the accident, and from their testimony it must have occurred between 7 and 9 o'clock in the morning. Among these witnesses are the druggist who filled the prescription and workmen engaged on the sewer construction. These witnesses fix the time when it was good daylight, and when there was no reason why she was unable to see the defect, if it existed. They also testify that she did not receive her injuries on the *northeast* corner, but that it was on the *northwest* corner, and that she did not fall from the warped plank on the northeast but from a four-plank platform on the northwest. They say the platform was not warped, but had been knocked slightly out of position a few minutes before the accident by a delivery wagon. Appellant says:

"To the amazement and surprise of plaintiff and her counsel, it was, for the first time, suggested upon the trial of the case, in the face of the pleadings and evidence theretofore obtained, that the accident did not occur at the *northeast* corner of Twelfth and Oak, but on the *northwest* corner."

And in support of her motion for a new trial on this ground of surprise and newly discovered evidence, she files affidavits of several witnesses. The statements of these witnesses would serve to corroborate her testimony that the accident occurred about 5

o'clock, but none of them saw the accident or know whether it occurred on the northeast or northwest corner, that is, whether she fell from the warped plank or from the platform.

[1, 2] Waiving the question of diligence in procuring these witnesses, do the facts warrant the court in granting plaintiff a new trial? A motion for a new trial on such grounds ordinarily comes from the defendant. The petition did not fix the place of accident any more definitely than the north side of Twelfth and Oak. Under this somewhat general issue as to place, the plaintiff located the accident on the northeast corner of Twelfth and Oak and as occurring from the warped and twisted board. Under the issue tendered, it was competent for the defendant to prove, not only that the accident did not occur at the northeast corner, nor at 5 o'clock, but that she did get a fall between 7 and 9 o'clock, after it was good daylight, and at another place and from other causes than testified to by plaintiff. When the plaintiff announced ready for trial, it amounted to a challenge that she was prepared to prove her case. If, after the trial on the general issues tendered, and which has resulted favorably to the defendant, the plaintiff discovers other witnesses who would strengthen her case, and make her evidence preponderate, is it not too late to ask for a new trial? She has had her day in court; she knew what facts she relied upon and needed to establish. If during the trial she discovers that her case has been erroneously prepared, or that she has not enough proof to support the issue tendered, she may save the case by dismissing without prejudice, or ask for a continuance on satisfactory reasons shown to the court. Failing to do this, she ought to be precluded by the judgment.

When the defendant finds himself in such a predicament, he has no power to dismiss. But he should ask for a discharge of the jury and continuance of the case, rather than a new trial for newly discovered evidence. In the case of *Remley v. I. C. R. R. Co.*, 151 Ky. 796, 152 S. W. 973, we said:

"Where a party is taken by surprise by the introduction of evidence he should on this ground, move to set aside the swearing of the jury and for a continuance; and his failure so to do before verdict precludes him from such relief after verdict."

To the same effect are the cases of *Jones' Adm'r v. L. & N. R. R. Co.*, 108 S. W. 865, 32 Ky. Law Rep. 1371; *Monarch v. Cowherd*, 114 S. W. 276.

In this case, the newly discovered evidence is parol and, although material, it serves only to corroborate the evidence establishing the very facts to which plaintiff has already introduced proof. In other words, the case amounts to this: When all the evidence was in, she did not have enough proof, or at least as much proof as defendant had, on the questions at issue. When the plaintiff tenders

the issue and it is accepted as tendered, the plaintiff should abide the result, although it was possible for her to have presented a stronger case. The result may be a hardship to her, but the misfortune is hers. The defendant has rights which must be considered in the same connection, and unless the plaintiff has been deceived or lulled into a sense of security by some improper conduct of the defendant, then she must suffer for going into and proceeding with the trial when unprepared to meet the issues. To grant a new trial to the plaintiff under the circumstances, would set a precedent with a tendency to prolong instead of settle litigation. *McFarland's Adm'r v. Clark*, 9 Dana, 136.

[3] Neither do we think the appellant was prejudiced by the instructions which required the jury to believe that the accident occurred on the northeast corner before they could find for her. She testified that it occurred there. All the witnesses agreed that the warped plank was there. That is the only ground of negligence she relied on. The city was not negligent as to conditions at the other corner, if indeed they were unsafe. There was some proof on the question of contributory negligence if the injury occurred at the northeast corner. She admitted that she was in a hurry to have the prescription filled; she thought her child was about to die. The time of day when the accident occurred and her manner of approaching and crossing the place, as brought out by the testimony of her own witnesses, raises the question of contributory negligence, and the court did not err in giving an instruction on the point.

The judgment of the lower court is affirmed.

#### NORTH JELLICO COAL CO. v. DISNEY et al.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

#### MASTER AND SERVANT (§ 233\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a trackman employed by a coal company attempted to operate a mine motor with the trolley pole extending forward, and was killed when the pole jumped the wire and was broken by striking against the roof of the mine, the employé created the danger himself, and there can be no recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.\*]

Nunn, J., dissenting.

Appeal from Circuit Court, Knox County.

Action by Amelia Disney and others against the North Jellico Coal Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

P. D. Black and Black, Black & Owens, all of Barbourville, for appellant. J. M. Robison, of Barbourville, for appellees.

HOBSON, C. J. Ancil Disney was in the employment of the North Jellico Coal Company as a trackman, and lost his life under the following circumstances: James Hart was the head trackman. One evening, shortly before quitting time, Hart was told by the foreman that the track was spreading at the foot of Tango Hill, and he wanted him to go back after supper and put in new ties and draw the track to gauge, asking him if he could not get Ancil Disney to come back also. Hart saw Disney, and told him what the foreman said, and Disney said, "All right." After Hart got his supper, he came back and met Disney at the mouth of the mine. The place where they were to fix the track was about three-fourths of a mile from there. The company had two motors—one which was allowed to be used by the men in taking things into the mine; another larger and more powerful one, which according to the rules of the mine was only to be used in bringing out coal. Disney had worked in the mine about seven years. He had operated at times the small motor, but had never operated the large motor, which was always run by the regular motormen. When they reached the mine, they found the large motor standing on the track just outside the drift mouth, with some 40 or 45 empty cars coupled to it, where they had been left at the close of the day's work by the men who had used them. The smaller motor was on another track, and could not be so conveniently gotten out. They went to the track on which the large motor and empty cars were standing. Hart cut a car loose from those behind it. They loaded up on the car about 20 ties. After they got the ties loaded up, Hart went upon the right-hand side and Disney went on the left-hand side: Hart walked up to the switch and threw the switch. Disney got up in the motor and pulled it up 3 or 4 feet. He then stopped, changed the trolley from one wire to another, which led to the mine. He pulled up 12 or 15 feet again, and changed the trolley to another wire. He then pulled something like 12 or 15 feet, when Hart heard the trolley break, and heard Disney holler: "Lord! Lord!" Hart went up to him as quickly as he could get there, and Disney was leaning out of the motor with his right hand on the ground, and his left hand on the brake wheel. He did not speak, was badly mashed, and died from his injuries. The place at which the accident occurred was narrow, the timber at the side coming very close to the cars. Disney was operating a motor with the trolley in front. The trolley jumped from the wire and struck against the roof of the mine. The pole then broke, and Disney was either hit by the pole, or, in getting out of the way of the pole, was caught between the motor and the timbers. Hart did not direct Disney to operate the motor. He got up there without

any direction to do so, when Hart went to turn the switch. Disney knew that Hart knew nothing about motors.

This action was brought to recover for Disney's death. On the trial the facts we have stated were shown by the evidence. The court overruled the defendant's motion to instruct the jury peremptorily to find for the defendant, and, the case being submitted to the jury, there was a verdict and judgment in favor of the plaintiff for \$8,000. The defendant appeals.

If Disney had taken the trouble to turn the trolley behind the motor, instead of running the motor with the trolley in front, the trouble could not have occurred; for if the trolley had been behind, and had jumped the wire, no harm would have followed. But when it was in front, and jumped the wire, it was jammed against the roof of the mine, and this caused the pole to break, and brought about Disney's death. Danger so obvious was well known to the men who worked in the mine. The same trouble would have occurred with any motor under the circumstances. There was no defect in the motor. The sum of the case is that Disney, who had operated several times the smaller motor, thought he was competent to manage the large motor, and undertook to operate it without putting the trolley behind, and without any direction from Hart. Although Hart acquiesced in Disney's operating the motor, both of them were violating the well-known rule of the mine which forbade their using this motor for such purposes; but the proximate cause of Disney's death was his operating the motor in the mine with the trolley in front. He created the danger himself, and his death was due wholly to a condition which he himself brought about. We therefore conclude that the defendant is not liable, and that the court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

NUNN, J., dissents.

#### WATHEN et al. v. SKAGGS et al.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

#### 1. INSANE PERSONS (§ 61\*) — VALIDITY OF DEED.

The deed of a person of unsound mind is not void, but merely voidable.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 93-99; Dec. Dig. § 61.\*]

#### 2. DEEDS (§ 211\*) — CANCELLATION — SUFFICIENCY OF EVIDENCE—THREATS.

In a suit for the cancellation of a deed, evidence held insufficient to show that the deed was induced by threats that the grantee would send the grantor's daughter to the penitentiary unless it was executed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

#### 3. DEEDS (§ 68\*)—VALIDITY—"MENTAL INCAPACITY."

To constitute "mental incapacity" invalidating a deed, the grantor must have been incapable of comprehending or understanding the subject of the contract, its nature and probable consequences, and, if he has sufficient mental capacity to know and understand the nature and effect of his act, mere weakness of intellect will not invalidate his deed, unless coupled with inadequacy of consideration, undue influence, or other circumstances of an inequitable nature.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

For other definitions, see Words and Phrases, Second Series, Mental Incapacity.]

#### 4. DEEDS (§ 211\*)—SUFFICIENCY OF EVIDENCE—CAPACITY OF GRANTOR.

In an action to cancel a deed on the ground that the grantor was without sufficient mental capacity, evidence held not to show his mental incapacity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

#### 5. DEEDS (§ 211\*)—CAPACITY OF GRANTOR—PRESUMPTION AND BURDEN OF PROOF.

To overcome the presumption that a grantor had sufficient mental capacity to support his conveyance, there must be more than a mere equilibrium of testimony, and the burden is upon the party alleging incapacity; and the fact of an inquest a few days after its execution adjudging the grantor incompetent to manage his estate did not relieve such party from the burden of showing incapacity as of the time of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

#### 6. INSANE PERSONS (§ 26\*)—INQUEST—EFFECT ON CONVEYANCE.

An inquest adjudging one incompetent to manage his estate was conclusive evidence of his condition only at the time of such inquest, and, even if held before his deed was executed, would have been only prima facie evidence of incapacity.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.\*]

#### 7. DEEDS (§ 211\*)—EVIDENCE—CONSIDERATION.

In a suit to cancel a deed where the price received was not unreasonable or inadequate, where a part of the purchase money was spent in completing a house in which the grantor afterwards lived, and the rest was spent for his maintenance, there was no such inadequacy of consideration as, coupled with the grantor's weakness of mind, would invalidate his deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.]

Appeal from Circuit Court, Larue County.

Action by Joseph H. Wathen and others against Let Skaggs and others. Petition dismissed, and plaintiffs appeal. Affirmed.

O. M. Mather and Claude Hudgins, both of Hodgenville, for appellants. Jones & Graham and Williams & Handley, all of Hodgenville, for appellees.

HANNAH, J. In November, 1909, Joseph H. Wathen and Sarah N. Wathen, his wife, the former being about 88 years of age and the latter about 70, resided upon a farm in Larue county, comprising about 100 acres. They had previously conveyed this farm to their daughter, Martha Puryear, in consid-

eration of her undertaking and agreement to support and maintain them during their respective lifetimes. She, however, had repudiated or abandoned her contract, and had executed an attempted assignment thereof and of her rights thereunder to one Luther Holland, who married her daughter. Luther Holland and his wife, a granddaughter of the Wathens, were living with the old couple, and this arrangement was not at all to their liking. During the time when their daughter, Martha Puryear, had lived with them and supported them pursuant to the obligation assumed by her, the house on the place had become so very dilapidated that the daughter determined to build another. She borrowed the sum of \$150 from one Willis Liggin, a colored pensioner whose place of abode was in the neighborhood, and gave to him her note therefor, with Luther Holland, her son-in-law, and Let Skaggs, her cousin, a niece of the Wathens, as sureties thereon. Seventy-five of these \$150 she expended for lumber which was used in the construction of a house on the place; the remaining \$75 was expended by her in supporting her parents. After Martha Puryear abandoned her undertaking to maintain her parents according to the terms of their deed to her, the Liggin note matured. Martha Puryear insisted that, as her parents had received the benefit of the entire sum, they ought to pay the note. And the Wathens agreed to pay it, provided Martha would reconvey their farm to them, and provided Luther Holland would surrender up whatever rights he claimed under and by virtue of the purported assignment by Martha Puryear to him of her rights under the conveyance executed to her by her parents, and provided Luther Holland would move out of their house. Pursuant to this understanding, Holland restored whatever writing had been executed to him by Martha Puryear; Martha Puryear reconveyed the farm to the Wathens, her parents; and they assumed the payment of the note to Willis Liggin. Liggin wanted only a mortgage to secure the note, but the Wathens having no ability to earn any money to pay off a mortgage with, and being in need of money to live on, proposed to sell to Liggin 20 acres off of the 100 acres comprising the farm, for \$200, \$150 thereof to be paid by the cancellation of the Martha Puryear note, and the remaining \$50 to be paid to them in cash. This proposition Liggin accepted. There was in connection with this a collateral understanding that the Wathens were to be permitted to use firewood from off of this 20 acres during their lifetime, and that, should any of their children pay Liggin his money with interest, they were to be entitled to receive a conveyance of the land. Whether this agreement was included in the deed or not, the record does not disclose; for, although this is a suit to obtain the cancellation of a deed, we

have found no copy of the deed anywhere in the record. The Wathens thereupon executed a deed to Liggin covering the 20 acres, and Liggin paid them \$50 and canceled the Martha Puryear note. About a month thereafter Liggin sold the land to Let Skaggs.

On June 27, 1913, Wathen and his wife instituted this action in the Larue circuit court seeking a cancellation of the deed from them to Liggin, and of the deed from Liggin to Let Skaggs, upon the ground that Joseph H. Wathen had not at the time of the execution of the conveyance sufficient mental capacity to give effect thereto; and upon the further ground that the execution of the deed from them to Willis Liggin was induced by false representations made to them by Let Skaggs that Martha Puryear, their daughter, had committed a felony, and would be sent to the penitentiary unless they executed the conveyance in question. A special demurrer was interposed by the defendant, setting up the fact that upon an inquest held November 29, 1909, Joseph H. Wathen was adjudged incompetent to manage his estate by reason of physical and mental infirmities; and the court thereupon permitted the action to be prosecuted by and in the name of a next friend. Upon submission and trial, the chancellor dismissed the petition, and plaintiff appeals.

1. The exact date of the deed from the Wathens to Liggin, the cancellation of which is herein sought, is not shown, but it is alleged in the petition that it was executed in November, 1909, the month in which the inquest was held.

[1] In this state, the deed of a person of unsound mind is not void, but merely voidable. *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413; *Arnett's Committee v. Owens*, 65 S. W. 151, 23 Ky. Law Rep. 1409; *Johnson's Committee v. Mitchell*, 146 Ky. 382, 142 S. W. 675; *Logan v. Varnarsdall*, 86 S. W. 981, 27 Ky. Law Rep. 822; *Dowell v. Dowell*, 137 Ky. 167, 125 S. W. 283.

[2] Concerning the charge that the execution of the conveyance from the Wathens to Liggin, herein sought to be canceled, was induced by threats that the daughter, Martha Puryear, would be sent to the penitentiary unless the deed was executed by the Wathens, little need be said more than that the proof is insufficient to support the charge. Mrs. Wathen herself when testifying said that Let Skaggs threatened that if the deed was not executed Martha Puryear would be sent to the penitentiary. When asked for what crime, she said, "For owing the money and not paying it." She admits that several persons advised her not to execute the conveyance; and her nephew, Joseph Edwards, aged 60, and living within a half mile of the Wathens, testified that he informed them that Martha Puryear was guilty of no offense against the law. Her son, J. R. Wathen,

aged 50, and living within a quarter of a mile of the home of his parents, was cognizant of the negotiations which terminated in the execution of the deed in question. Moreover, she herself, when asked whether the threat mentioned was one of the things that induced her to sign the deed, said: "Well, the main thing that induced me was to get shut of our living with Luther Holland." Her testimony alone supports this charge, and upon this issue she is contradicted by all the direct evidence of the subject as well as by the circumstances obtaining at the time the conveyance was executed.

[3] 2. As to the alleged mental incapacity upon the part of Joseph H. Wathen as of the date of the execution herein sought to be avoided, the rule is that, to constitute mental incapacity invalidating his deed, the grantor must have been incapable of comprehending or understanding the subject of the contract, its nature and probable consequences. If he has sufficient mental capacity to know and understand the nature, meaning, and effect of his act, then mere weakness of intellect will not invalidate his conveyance, unless coupled with inadequacy of consideration, undue influence, or other circumstances of inequitable nature. *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422; 22 Cyc. 1206; 13 Cyc. 574, 581, 586.

[4] That there existed upon the part of Joseph H. Wathen, on the date of the conveyance in question, some weakness of mind, may be conceded. He was old, and "childish," and he sometimes talked "cranky" and "kinder flighty." But the proof is wholly insufficient to support the assertion of alleged mental incapacity upon his part to give validity to his conveyance. One of his sons, who testified to his father's mental incapacity, admitted that he himself, a short time before the deed was executed, had tried to buy a part of his father's farm. It is not a violent inference to say that he doubtless then had no serious misgivings concerning his father's capacity to convey. Another son, since the execution of the conveyance here sought to be avoided, has received from his parents a conveyance of their farm. Moreover, it was shown in evidence that Joseph Wathen made two trips to Willis Liggin's on the day the deed was executed, perfecting the negotiations, and then he and his wife went to the residence of a notary in the neighborhood where they acknowledged it. This notary states that the deed was explained to Joseph Wathen, that he seemed to understand the transaction and know what he was doing and acknowledged it there in her presence. One of his sons, "Dick" Wathen, was there present at the time. Six witnesses (his wife, a son, a nephew, and three neighbors) testified that the condition of Joseph H. Wathen's mind on the date of the conveyance was "not good"; while, on the

other hand, the defendant and four neighbors, one of them a nominal defendant in this action, testified that it was "good." Of the facts upon which these opinions were formed, the record is practically bare.

[5, 6] It was said in *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422, that, to overcome the presumption that the grantor of land is possessed of sufficient mental capacity to give effect to his conveyance, there must be more than a mere equilibrium of testimony. The requirement of this rule the plaintiffs have failed to meet. The burden of proof was upon them; they have failed to sustain it. The fact of the inquest held a few days after the execution of the conveyance sought to be canceled, upon which inquest Joseph H. Wathen was adjudged incompetent to manage his estate, did not operate to relieve the plaintiffs of their duty to establish the asserted mental incapacity upon the part of Joseph H. Wathen as of the date of the conveyance. The inquest was conclusive evidence of his mental condition only at the time of such inquest. *Johnson's Committee v. Mitchell*, 146 Ky. 382, 142 S. W. 675; *Logan v. Vanarsdall*, 86 S. W. 981, 27 Ky. Law Rep. 822; *Dowell v. Dowell*, 137 Ky. 167, 125 S. W. 283. And, had the inquest been held before the deed was executed, it would have constituted only *prima facie* evidence of mental incapacity, and, being a mere presumption, it could be repelled by proof. *Dowell v. Dowell*, *supra*.

[7] 4. Nor is there proof in the record of inadequacy of consideration or other inequitable circumstances which may be coupled with Joseph H. Wathen's weakness of mind, and thus destroy the validity of his conveyance. The price which they received for the land was not unreasonable or inadequate; and they did receive it. Half of the \$150 which their daughter borrowed from Liggin was spent for lumber to build the house the Wathens now live in; the other half was expended in their maintenance. The additional \$50 which they received from Liggin was expended by them in maintaining themselves.

Upon the whole case, we are convinced that the chancellor's judgment was right, and the same is affirmed.

# DICE'S ADM'R v. ZWEIGART'S ADM'R et al.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

## 1. LANDLORD AND TENANT (§ 169\*)—DANGEROUS PREMISES—LIABILITY OF LANDLORD—PLEADINGS AND PROOF.

A mere allegation that a landlord of a farm reserved control over a dangerous cistern near the dwelling house on the farm, and proof that he promised to repair the cistern, unaccompanied by any contractual reservation or exercise of control, did not show such control of

the cistern as to impose any liability on the landlord because of its defective condition.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 163.\*]

## 2. LANDLORD AND TENANT (§ 162\*)—REASONABLY SAFE PREMISES—OBLIGATION OF LANDLORD.

Ordinarily a landlord need not exercise ordinary care to furnish a tenant reasonably safe premises; but the tenant takes the premises as he finds them, and as to him the doctrine of caveat emptor applies.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629; Dec. Dig. § 162.\*]

## 3. LANDLORD AND TENANT (§ 164\*)—REASONABLY SAFE PREMISES—OBLIGATION OF LANDLORD.

Where a landlord of a farm promised to repair a dangerous cistern near the dwelling house on the farm, but failed to do so, he was not liable for the death of a child of the tenant falling into the cistern after the removal of a defective covering, since the duty of the landlord to repair was not imposed by law, but merely grew out of the relation existing between him and the tenant, and the consequences arising from his failure to repair were not within the contemplation of the parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-637, 639, 641; Dec. Dig. § 164.\*]

## 4. DAMAGES (§ 23\*)—MEASURE OF DAMAGES—BREACH OF CONTRACT.

Where an ordinary contract is violated, the damages are limited to such as are within the reasonable contemplation of the parties.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.\*]

## 5. NEGLIGENCE (§ 2\*)—NATURE AND ELEMENTS—BREACH OF CONTRACT.

An action of tort is based on negligence, and, where the only relation between the parties is contractual, the liability of one to the other in tort for negligence must be based on a positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provided for was done; and a mere violation of the contract, in the absence of any general duty, is not the basis of an action for tort.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.\*]

## 6. DEATH (§ 14\*)—ACTIONS FOR DEATH—STATUTORY PROVISIONS.

Ky. St. § 6, giving a right of action for death caused by negligence or wrongful act, is confined to torts, and does not cover a case of breach of an ordinary contract.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Mason County.

Action by Sherman Dice, as administrator of Laurence Dice, deceased, against J. G. Zweigart's administrator and others. From a judgment denying relief, plaintiff appeals. Affirmed.

Frank P. O'Donnell, J. G. Wadsworth, and Allan D. Cole, all of Maysville, for appellant. Worthington, Cochran & Browning, of Maysville, for appellees.

CLAY, C. John G. Zweigart was the owner of a farm in Mason county, which was under lease to Sherman Dice, and had been occupied by him from year to year since March,

1907. John G. Zweigart, who had been paralyzed and unable to walk without assistance for several years, died in December, 1910. J. F. Barber, qualified as his administrator. In January, 1911, about a month after John G. Zweigart's death, Laurence Dice, a son of Sherman Dice, and who at the time was five years of age, fell into a cistern near the house on the farm rented by his father and was drowned. Sherman Dice, as administrator of Laurence Dice, brought this action against John G. Zweigart's administrator, his brother, C. F. Zweigart, and his sister, Anna Marie Zweigart, to recover damages for his son's death. A demurrer was sustained to the petition as against C. F. Zweigart and Anna Marie Zweigart, and the petition as to them dismissed. No appeal was taken from that judgment. Afterwards the case as to John G. Zweigart's administrator went to trial, and at the close of the testimony for plaintiff the trial court peremptorily instructed the jury to find a verdict in favor of the defendant.

The case is predicated on a promise by decedent to repair the cistern, and on the further fact that he retained control of the cistern for the purpose of making repairs. The cistern in question is located a few feet from the house occupied by Sherman Dice and family. At the time of the accident it was covered by a large rock. In the center of this rock was a hole. The hole was covered by a plank, and on top of the plank was placed a rock weighing 25 or 30 pounds. There was sleet on the ground, and the little boy requested his mother to let him go sleighriding. She claims that she refused to permit him to do so. Later on he asked permission to go out and respond to a call of nature. She unbuttoned his trousers and he then left the house. At the same time she cautioned him not to go near the cistern. A little later she called him to her, and, receiving no response, went out into the yard. The rock and plank had been removed from the hole in the rock covering the cistern. The boy's sled was near by. On investigation it was found that the boy had fallen into the cistern, and life was extinct. A brother of the boy testified that in July, 1909, his father and mother said to John G. Zweigart that unless he would fix the cistern they would not rent the place for the following year, commencing March 1, 1910. Zweigart replied that if they would stay there one more year he would fix the cistern. In April, 1910, witness' father asked Mr. Zweigart what about the cistern. Zweigart answered, "Mr. Dice, I am going to fix that cistern." There is also evidence to the effect that Sherman Dice asked permission to put in a pump and take it out of the rent, but Mr. Zweigart replied that he was going to see about putting in a pump himself.

[1-4] This is not a case of an open, unguarded, and uncovered cistern, or other con-

dition of the premises which amounted to a nuisance. The cistern was covered, and it became dangerous only because the covering was removed. It is not a case of fraud on the part of the landlord in misrepresenting that he had placed the property in good repair. It is not a case of lease of public property, where the landlord owes some duty to the public and to his tenant. It is not a case where a portion of the leased premises is reserved to the common use of tenants. It is not a case where the landlord reserves control over the premises, or of that defective portion out of which the injury grew. The mere allegation that the landlord reserved control over the cistern, based alone upon the allegation and proof that he promised to repair the cistern, unaccompanied by any contractual reservation to that effect, or exercise of control, does not show such control of the dangerous portion of the premises as to impose any liability on the landlord because of such defective condition. It is not a case involving concealment of defects in the property which are known to the landlord, and unknown to the tenant, or not discoverable by reasonable inspection. It is not a case where the landlord undertook to make repairs, and performed the work in a negligent manner. It is simply a case of the landlord's promise to repair the cistern, and of his failure to do so.

[5] The only question to be considered, therefore, is whether or not the landlord under these circumstances is liable in damages for personal injuries received by a member of his tenant's family. The child in this case was not on the premises by invitation of the landlord. He was there by virtue of the relation which he sustained as a member of the tenant's family. If there be any liability, therefore, it grows out of that relation; and if the landlord be not liable to the tenant under the same circumstances, he is not liable to a member of the tenant's family. Ordinarily, of course, the landlord is not under a duty to use ordinary care to furnish a tenant reasonably safe premises in which to live. The tenant takes the premises as he finds them. As to him the doctrine of caveat emptor applies. Here the dangerous condition was known to the tenant. The law imposed no duty on the landlord to repair the premises, and no liability for personal injuries growing out of the defective condition of the premises. It is difficult to perceive upon what theory a mere agreement to repair could impose a liability not imposed by law. Of course, cases may arise where a legal duty arises from a contractual relation, and for a breach thereof an action of tort will lie; but such a case is altogether different from a duty entirely dependent upon a contract in which it is assumed. Where an ordinary contract is violated, the damages are limited to such as are within the reasonable contemplation of the parties. Manifestly,

if a third party agreed to repair the cistern, there would be no liability for personal injuries growing out of the failure to repair. Since the duty of the landlord to repair does not grow out of the legal relation existing between him and the tenant, his agreement and failure to repair should subject him to no greater liability than a third party, who had violated his agreement to repair; for such consequences are no more within the contemplation of the parties in the one case than in the other. As was well said by the court in the case of *Tuttle v. George H. Gilbert Mfg. Co.*, 145 Mass. 160, 13 N. E. 465:

"The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure."

In the recent case of *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169, the court, after citing numerous authorities, laid down the following rule:

"In accordance with the foregoing authorities, it may be stated as a principle of law that, where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done, and that the mere violation of a contract, where there is no general duty, is not the basis of such an action. This being so, and the relation between the parties to this suit being that of landlord and tenant, and it having been decided in *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 478, that no duty is imposed by law upon a landlord to make repairs upon leased premises for the benefit of his tenant, or a member of the tenant's family, it follows that the present action cannot be maintained because of the mere failure of the defendant to keep her agreement to repair. In fact, it is generally held that a tenant, a member of his family, or his guest cannot sue a landlord in tort for personal injuries due to his omission to repair premises which have passed into the possession and control of the tenant, even if the landlord has agreed to make repairs."

This is the generally accepted rule, and is supported by the great weight of authority. *Collins v. Karatopsky*, 36 Ark. 316; *Hanson v. Cruse*, 155 Ind. 176, 57 N. E. 904; *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143; *Shackford v. Coffin*, 95 Me. 69, 49 Atl. 57; *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 479, 106 Am. St. Rep. 691, 3 Ann. Cas. 832; *Sanders v. Smith*, 5 Misc. Rep. 1, 25 N. Y. Supp. 125; *Folsom v. Parker*, 31 Misc. Rep. 348, 64 N. Y. Supp. 263; *Kabus v. Frost*, 50 N. Y. Super. Ct. 72; *Flynn v. Hatton*, 43 How. Prac. (N. Y.) 343; *Spellman v. Bannigan*, 36 Hun (N. Y.) 174; *Schick v. Fleischauer*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Sherlock v. Rushmore*, 99 App. Div. 598, 91 N. Y. Supp. 152; *Boden v. Scholtz*, 101 App. Div. 1, 91 N. Y. Supp. 437; *Kushes v. Ginsberg*, 99 App. Div. 417, 91 N. Y.

Supp. 216; *Stelz v. Van Dusen*, 93 App. Div. 388, 87 N. Y. Supp. 716; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *Brown v. Tofonto General Hospital*, 23 Ont. 599; *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 581; *Reams v. Taylor*, 31 Utah, 288, 87 Pac. 1089, 8 L. R. A. (N. S.) 436, 120 Am. St. Rep. 930, 11 Ann. Cas. 51; *Cromwell v. Allen*, 151 Ill. App. 404; *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 13 L. R. A. (N. S.) 378, 124 Am. St. Rep. 575; *Marcheck v. Klute*, 133 Mo. App. 280, 113 S. W. 654; *Kushes v. Ginsberg*, 188 N. Y. 630, 81 N. E. 1168, affirming 99 App. Div. 417, 91 N. Y. Supp. 216; *Schiff v. Pottlitzer*, 51 Misc. Rep. 611, 101 N. Y. Supp. 249; *Goetchius v. Gale*, 57 Misc. Rep. 192, 108 N. Y. Supp. 1079; *Cuilhe v. Ackerman*, 58 Misc. Rep. 538, 109 N. Y. Supp. 714; *Parbridge v. Dykins*, 28 Okl. 54, 113 Pac. 928, 37 L. R. A. (N. S.) 984. Indeed, there are but few cases to the contrary, and it would seem that these cases are based on dicta growing out of the caution of courts in stating the general doctrine of nonliability on the part of the landlord for personal injuries growing out of defective premises, rather than actual adjudications on the question. Thus, in the recent case of *Anderson v. Robinson* (Ala.) 62 South. 512, 47 L. R. A. (N. S.) 330, the court referred to the following language in one of its former opinions:

"As to them, in the absence of covenant to repair, he is only liable for the injuries resulting from latent defects, known to him at the time of the leasing, and which he conceals from the tenant. 24 Cyc. 1114, and cases cited in note 50; *Thomp. Neg.* §§ 1130, 1131. If the defect is obvious at the time of the letting, the tenant takes possession of the premises as he found them, and the landlord would not be liable for injuries resulting from said obvious defects to the tenant, his family, servants, or guests."

The court then proceeded to say:

"It may be true that in stating the rule we were overcautious in confining it to cases in which there was no covenant to repair, but we did not hold that such a covenant would change the rule of liability, and expressly pretermitted the question further on in the opinion in dealing with count 4 of the complaint in said case. In the case at bar, however, some of the counts set up a covenant to repair when the lease was made as a part of the consideration of same; but it seems from the great weight of authority that said covenant does not increase the liability of the landlord, or change the rule above set forth as to his liability in tort to the tenant, his family, servants, or guests for injuries caused by virtue of defects in the rented premises. In other words, it seems settled by the weight of authority that the landlord is not liable in tort for injuries to said class, whether there be a covenant to repair or not, unless the defects existed at the time of the letting, where known to him, and which he concealed from the tenant."

[8] The case is not affected by the provisions of section 6 of the Kentucky Statutes, which gives a right of action for death from injury inflicted by negligence or wrongful act. That section is confined to torts, and does not cover a case of breach of an ordi-

nary contract. *Lewis v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1044, 23 Ky. Law Rep. 2218, 57 L. R. A. 447; *Randolph v. Snyder*, 139 Ky. 159, 129 S. W. 562. It follows that the trial court properly directed a verdict in favor of defendant.

Judgment affirmed.

## DICK v. JAMES CLARK, JR., ELECTRIC CO.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

### 1. SALES (§§ 284, 287\*)—WARRANTY—SATISFACTION OF BUYER—DUTY TO RETURN.

Where plaintiff sold defendant a vacuum cleaner guaranteed to give him entire satisfaction, defendant was the sole judge as to whether the cleaner was satisfactory; but, if it was not, it was his duty to return it, and elect not to accept and pay for it, within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803-806, 811-816; Dec. Dig. §§ 284, 287.\*]

### 2. SALES (§ 445\*) — REJECTION BY BUYER — REASONABLE TIME—QUESTION FOR COURT OR JURY.

In general, whether a buyer with a right to return the goods as unsatisfactory has elected to do so within a reasonable time is for the jury; but when, under all the facts and circumstances, it plainly appears that the offer to return was not made within a reasonable time, the question is for the court.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.\*]

### 3. SALES (§ 287\*)—OPTION TO RETURN—REASONABLE TIME.

Where a buyer of a vacuum cleaner had the option to return it if not satisfactory, but did not elect to return it until 17 months after it was installed, his election then to return was not made within a reasonable time as a matter of law; and this, though the seller in the meantime, on complaints being made to him concerning the machine, continued to endeavor to make it work satisfactorily.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 811-816; Dec. Dig. § 287.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by the James Clark, Jr., Electric Company against Al M. Dick. Judgment for plaintiff, and defendant appeals. Affirmed.

Albert C. Dick, of Louisville, for appellant. Austin E. Walsh and Kinney & Thomas, all of Louisville, for appellee.

CARROLL, J. The appellee, Electric Company, brought suit against the appellant, Dick, to recover \$545.09, consisting of \$525, the price of a vacuum cleaner; the remainder being for fixtures. The suit was brought in March, 1912, and it was alleged, and is not denied, that the vacuum cleaner was furnished and installed in November, 1910, and further alleged that the sum sued for was due in December, 1910. For answer to this suit, Dick, after admitting the purchase of the cleaner at the time and for the price mention-

ed, averred that as a part of the purchase the Electric Company gave him a guaranty that the cleaner would give him entire satisfaction, and that he would not have to pay for the same unless it worked to his satisfaction. He further averred that it had never done satisfactory work, and that the Electric Company, on numerous occasions, had promised to repair it so that it would operate in a satisfactory manner; that, relying upon the promises to repair, he retained the cleaner, but when all efforts to repair it had failed, and in March, 1912, after suit was brought, he notified the Electric Company that he would not accept the cleaner, and that he held the same subject to their order. To this answer a reply was filed, completing the issues. After this, the case went to trial before a jury, and by direction of the court there was a verdict for the Electric Company for the amount claimed.

The question for decision is: Did the court err in taking the case from the jury? Dick testified, in substance, that when he bought the cleaner in 1910 the Electric Company guaranteed that it would operate in a manner satisfactory to him in every respect, or else he did not have to pay for it; that, shortly after it had been installed, it made so much noise that the tenants in the building complained. He further said that for one cause and then another the cleaner had failed to give satisfaction or operate properly from the time it had been installed; that, although the Electric Company sent its men to repair and adjust it time and again, they failed to make it work in a satisfactory manner, or to do the work it was intended to do. Asked if he ever notified the company to take the cleaner out of his house, he said: "Well, I think I wrote them one time about it." In this connection it might be noted that the first letter written by Dick to the Electric Company, complaining of the manner in which the machine worked, was on December 28, 1911, some 13 months after the cleaner was installed. Farther in his examination this occurred:

"Q. Was any time mentioned as to when you should determine as to whether or not it was satisfactory to you? A. No, sir. Q. What was the agreement about the time? A. The agreement was it was to work satisfactory to me in every way; but it never did from the start. Q. How long did you have to determine that? A. There wasn't nothing said that I recall about that. Q. You were to choose your own time to determine whether or not this machine was satisfactory? A. I say the same thing over: I don't recall anything about that part. Of course, naturally, if a business man buys anything, he expects to pay for it, if it is satisfactory. Q. And you expected to have as long a time as you wanted to determine that? A. Oh! no; when it didn't work at the start, that settled it with me; but as long as they kept on trying, and still it didn't work, I knew it wasn't going to be satisfactory. Q. You have still got this cleaner in your apartment house? A. Yes, sir. Q. When did you first make any objection to it? A. Right at the start, on account of the noise. Q. Was that remedied? A. Yes; but

then some other troubles come up. I can't recollect what. It was first one thing and then another, all the time. Q. Is it not a fact that you had that machine out there at your apartment house, and used it and operated it, and never made any complaint about the motor until the fall of 1911, one year after you bought it? A. There was always something the matter with it. Q. Mr. Dick, answer the question; is that not a fact? A. Could not tell you that at all. Q. What was the matter with the motor; do you know? A. I could not tell you, only he said it was not large enough to do the work. Q. After you made this complaint about the motor, did Mr. Clark agree to give you a larger motor? A. Mr. Clark said he would put a larger one in, if I would pay the difference, which I declined to do. Q. Didn't he finally offer to give you a motor? A. Yes, sir. Q. Why didn't you take it? A. Because he wanted me to accept it, if he put the motor in, and I said: 'I don't know whether that is the whole cause of it; and if you put the motor in, and it works all right, I will take it.'"

There was further introduced during the examination of Mr. Dick a letter, dated April 10, 1912, in which for the first time he made a tender of the cleaner to the Electric Company.

James Clark, Jr., manager of the appellee company, introduced as a witness for Dick, said, in substance, that after the motor had been installed Mr. Dick complained about the noise it was making, and that he sent a man out to see what the trouble was every time complaint was made; that some changes were made to eliminate the noise, and afterwards some other changes were made. He said the noise was attributable to some conditions in the construction of the building, and not to defects in the cleaner.

Without relating further of the evidence, it is sufficient to say that Mr. Dick complained often to the Electric Company about the cleaner not working in a satisfactory manner, and that whenever he made complaint the company sent a man out to remedy it, or see what the trouble was, and that after some repairs eliminating the noise had been made the cleaner worked in a satisfactory manner when it was operated by the employees of the company, but failed to give good service when operated by the janitors in charge of the building where it was located.

The lower court, in directing a verdict for the Electric Company, was influenced to do so by the fact that it was the duty of Dick, if the cleaner did not work to his satisfaction, to return or offer to return it within a reasonable time, and that, as he retained the cleaner for about 17 months without offering to return it, he waived his right to return, and must keep and pay for it, notwithstanding the fact that he was continually protesting that the cleaner did not work to his satisfaction, and the Electric Company as often as he complained sent its men to remedy the trouble.

For the Electric Company the argument is made that when a machine is sold, and guaranteed to work to the satisfaction of the

purchaser, it is the duty of the purchaser to inspect and test the machine within a reasonable time after it is delivered, and, if it is unsatisfactory, to return it or offer to return it to the vendor within a reasonable time after discovering that it is not satisfactory. While counsel for Dick argue that this general principle, which is conceded to be correct, is not applicable or controlling in this case, because the Electric Company, by its promise to repair and its attempt to repair the cleaner, had waived its right to make the defense that Dick had failed to return or tender the cleaner within a reasonable time after he discovered it did not operate in a satisfactory manner.

[1] Under the contract Dick had the right to return the cleaner if it was not satisfactory, and of course, if returned for this reason in a reasonable time, he could not be compelled to pay for it. It may also be conceded that under the contract he was the sole judge of the question as to whether or not the cleaner was satisfactory. He had a right to determine this matter for himself. *Kidder Press Co. v. Reed*, 133 Ky. 350, 117 S. W. 950, 134 Am. St. Rep. 450. It may also be readily admitted that the cleaner was not satisfactory to Dick; so that the only question left open is: Did he exercise, within a reasonable time, his right to return it?

[2] When a purchaser, under a contract like this, receives property or machinery of any kind, he is allowed a reasonable time in which to determine whether it is satisfactory to him or not; but if he finds it is not satisfactory, he must return it within a reasonable time after coming to this conclusion. *Yeiser v. Russell & Co.*, 83 S. W. 574, 26 Ky. Law Rep. 1151. And, generally speaking, the question whether the offer to return unsatisfactory articles is made within a reasonable time is for the jury; but when, under all the facts and circumstances of the case, it plainly appears that the offer to return was not made within a reasonable time, the question becomes one of law to be determined by the court.

[3] In this case Dick testifies that within a few days after the installation of the cleaner he discovered that it was not satisfactory; and, this being so, his retention of it for more than a year without any offer to return it would clearly establish that he did not offer to return it within a reasonable time after coming to the conclusion that it was not satisfactory, and therefore the question would be one of law for the court, and not of fact for the jury.

It is, however, earnestly insisted by counsel for Dick that the conduct of the Electric Company took this case out of the general rule, and relieved Dick of the necessity of returning the cleaner within a reasonable time after he learned it would not be satisfactory. The conduct thus relied on as a

waiver of the right of the company to insist that Dick lost his right to return by his laches is based on the fact that the Electric Company was continually making repairs on the cleaner and attempting to put it in such condition as would satisfy Dick. It is true that on a number of occasions extending through several months, the Electric Company did send its men to repair the cleaner and put it in working order. Indeed, the evidence shows that Dick often complained to the company that the machine was not doing satisfactory work, and that almost every time complaint was made it sent one of its men to remedy the trouble. Probably the difficulty with the satisfactory operation of the machine was due to the fact that the employees of Dick who undertook to operate it did not understand how to do so and possibly there may have been some defects in the cleaner that interfered with its successful operation even by a skilled person; but, however this may be, it is certain that Dick made frequent complaints, and the company as often complied with his request and sent its men to adjust the cleaner. But there is no evidence that the company ever requested Dick to keep the cleaner, or that it promised or agreed in any way with him that, if he did keep it, it would put or keep it in repair. Nor is there any evidence that it induced him in any way to believe that, if he would keep the cleaner, it would make it do satisfactory work. All that it did do was to send its men to see about it every time complaint was made.

Counsel for Dick argue, and it is probably so, that this course of conduct on the part of the company misled him into the belief that it would finally put the machine in a condition that it would do satisfactory work, and for this reason he did not offer to return it sooner than he did. But we do not think this excused Dick from tendering the cleaner back within a reasonable time after he found it not to be satisfactory or that in law the conduct of the company amounted to a waiver on its part of the right to demand that Dick's unreasonable retention of the cleaner should make him liable for the contract price. Undoubtedly, if the company had requested Dick to keep the cleaner until it could be made to do satisfactory work, or if by its course of dealing it had induced him to believe that he could keep the cleaner without losing his right to return it within a reasonable time, it could not meet his defense by the assertion that he had lost his right to avoid the purchase price by his failure to return the cleaner within a reasonable time. But the election was with him to either keep or return the cleaner, and we think that by failing to return it within a reasonable time he lost his right to do so, and must pay the purchase price.

The judgment is affirmed.

**SPEER v. STATE. (No. 3321.)**

(Court of Criminal Appeals of Texas. Nov. 18, 1914.)

**1. CRIMINAL LAW (§ 885\*)—SUSPENDED SENTENCE—RECOMMENDATION OF JURY—NECESSITY OF APPLICATION.**

Where no application for suspended sentence was made by accused, the jury has no right to recommend such suspension.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2108; Dec. Dig. § 885.\*]

**2. CRIMINAL LAW (§ 1038\*) — APPEAL — REQUESTED INSTRUCTIONS — EXCEPTIONS TO CHARGE.**

Under Acts 33d Leg. c. 138, the refusal of requested charges will not be considered on appeal, where no objection was filed to the court's charge when it was presented to counsel for inspection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

**3. CRIMINAL LAW (§ 829\*)—TRIAL—REQUESTED INSTRUCTIONS—REPUTATION.**

Where the court's charge fully covered the law of the case, there was no error in refusing charges requested by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Mrs. K. C. Speer was convicted of pandering, and she appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was convicted of pandering, and her punishment assessed at five years' confinement in the state penitentiary.

[1] There are no bills of exception in the record reserved to the introduction or rejection of any testimony had on the trial of this case. The first bill of exceptions complains of the following matter: After the jury had retired, they propounded to the court the following question: "Can we recommend a suspended sentence?" To which the court replied in writing: "No application for a suspended sentence has been requested; hence you have no right to recommend it to the court." Appellant contends that, although no application had been made by her, yet the jury ought to have been permitted to recommend a suspension of the sentence, if they so desired. This is not the law. *Barnett v. State*, 170 S. W. 143, recently decided, but not yet officially reported.

[2] Appellant, at the time the charge of the court was presented to her counsel for inspection, filed no objections thereto; but the record discloses several special charges were requested. It has been held, under the law passed by the last Legislature (Acts 33d Leg. c. 138), these should not be considered, unless objections were made to the charge as given at the time same was presented to counsel for inspection. If error there be, either of omission or commission, the court's attention must be called to such matter by ob-

jection to the charge in the particular where it is deemed erroneous before it is read to the jury.

[3] However, we have read the court's charge, and think it a fair submission of all the issues raised by the evidence, and fully covered all those portions of the special charges requested which are the law of the case. Of course, the testimony is in direct conflict. The state's evidence makes a case, while that of defendant and her witnesses would render her absolutely innocent of the offense of pandering, although running a rooming house of questionable reputation at least. Under the evidence, we do not think there is any question that Mrs. J. G. Wilson, Jr., had acts of intercourse with men in appellant's rooming house, yet under appellant's testimony the court instructed the jury:

"The court further instructs you that if you find from the evidence that Mrs. J. G. Wilson, Jr., committed acts of prostitution in the Opera Hotel, and if you believe from the evidence that said house was a house of prostitution, still before you can convict the defendant, after finding as above, you must also find beyond a reasonable doubt that the defendant, Mrs. K. C. Speer, induced or procured or attempted to procure the said Mrs. J. G. Wilson, Jr., to enter or remain therein as an inmate thereof for the purpose of prostitution."

He also instructed the jury:

"You are instructed that a house of prostitution is one that is kept for the purpose of prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation. Unless you believe from the evidence beyond a reasonable doubt that the Opera Hotel, which is alleged to have been kept by this defendant, was such a house of prostitution, as above defined, then it is your duty to find the defendant not guilty."

Under the facts we do not feel authorized to disturb the verdict, and the court in his charge having fully covered the law of the case, there was no necessity to give any of the special charges requested.

The judgment is affirmed.

**ROMANO v. STATE. (No. 3335.)**

(Court of Criminal Appeals of Texas. Nov. 18, 1914.)

**1. CRIMINAL LAW (§ 1099\*)—APPEAL—STATEMENT OF FACTS.**

A statement of facts, not filed until four months after the adjournment of the term of court at which defendant was convicted, could not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

**2. CRIMINAL LAW (§ 1099\*)—APPEAL—PRESENTATION FOR REVIEW—REFUSAL OF INSTRUCTION.**

An assignment of error, complaining of the refusal of a requested instruction, could not be considered on appeal, where no statement of facts was filed in time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

Appeal from District Court, El Paso County; Dan M. Jackson, Judge.

George Romano was convicted of embezzlement, and appeals. Affirmed.

L. A. Dale, and C. C. McDonald, both of El Paso, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of embezzlement; his punishment being assessed at two years' confinement in the penitentiary.

[1] The statement of facts was not filed until nearly four months after the adjournment of court. Appellant files an affidavit in regard to this matter, the substance of which is that he had only employed counsel to defend him in the trial court, not having in contemplation his services to perfect an appeal. When court adjourned he did not file pauper's affidavit in regard to securing statement of facts, because he says his friends had agreed to secure money sufficient to obtain the statement of facts. The money was not obtained until after the 90 days had elapsed. After this time a statement of facts was prepared and presented to the district judge, who approved the same as being correct, which statement of facts was filed practically four months after the court adjourned. Under the decisions of this court the statement of facts cannot be considered.

[2] A special charge was requested, which was refused. Without the statement of facts, we are unable to determine whether there was error in refusing to give this charge. Therefore, we cannot revise this question.

The writer desires to say that if the facts had been presented in time to be considered, it is a very serious question whether appellant should have been convicted of the charge of embezzlement, and in fact the writer does not believe he should have been convicted.

As the matter is presented, we are of opinion that the judgment must be affirmed; and it is accordingly so ordered.

#### WATTS v. STATE. (No. 3303.)

(Court of Criminal Appeals of Texas. Nov. 11, 1914. Rehearing Denied Dec. 2, 1914.)

#### 1. CRIMINAL LAW (§ 366\*)—ADMISSIBILITY OF EVIDENCE—RES GESTÆ—ROBBERY.

In a prosecution for theft from the person, a witness' testimony that immediately after the alleged theft the injured person came to his place, which was about 200 yards from the scene of the theft, and requested the witness to give him something with which to defend himself, as the persons who had robbed him were then trying to kill him, was properly admitted as part of the res gestæ, where it appeared that the statement was made while the injured person was excited from being robbed and chased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.\*]

#### 2. WITNESSES (§ 388\*)—CROSS-EXAMINATION—IMPEACHMENT.

On cross-examination of a witness for the defendant, the state's counsel was properly permitted to ask him for impeachment purposes, whether, on the day following the alleged theft from the person, he had made a written statement to the city attorney concerning what occurred at the scene of the theft.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.\*]

#### 3. CRIMINAL LAW (§ 396\*)—HEARSAY—EX PARTE STATEMENT.

An ex parte written statement made by a witness for defendant to the city attorney was properly admitted on rebuttal, over defendant's objection that it was hearsay, where defendant had previously elicited testimony as to the contents of a portion thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.\*]

#### 4. CRIMINAL LAW (§ 508\*)—WITNESSES—COMPETENCY—CONVICTED PERSON.

A person charged, in a separate indictment, with the same offense as defendant, and convicted thereof, was incompetent to testify on defendant's behalf, though sentence had been suspended and not pronounced against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508.\*]

#### 5. LARCENY (§ 81\*)—INDICTMENT—VALUE OF PROPERTY STOLEN.

An indictment for theft from the person need not charge the value of the property taken.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 76-80; Dec. Dig. § 31.\*]

#### 6. CRIMINAL LAW (§ 918\*)—JURY—OBJECTION AFTER CONVICTION.

An objection that defendant, a negro, was discriminated against, in violation of Const. Amends, U. S. 14, 15, in that the jury commission did not draw a negro on the petit jury, came too late when first made after conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. § 918.\*]

#### 7. CRIMINAL LAW (§ 826\*)—INSTRUCTION—TIME TO REQUEST.

A requested instruction should be called to the court's attention before he reads his charge to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2008; Dec. Dig. § 826.\*]

#### 8. WITNESSES (§ 388\*)—CROSS-EXAMINATION—IMPEACHMENT—STATEMENTS BEFORE GRAND JURY.

In a prosecution for theft from the person, it was not error to permit the county attorney, on cross-examination to lay a predicate for impeachment, to ask a witness for defendant whether he did not make certain statements before the grand jury, though the effect of such evidence was not limited by the court's instruction, where no request was made for such an instruction, and it appeared that the evidence thus elicited could not have been considered for other than impeachment purposes.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.\*]

#### 9. WITNESSES (§ 393\*)—CROSS-EXAMINATION—IMPEACHMENT—STATEMENTS BEFORE GRAND JURY.

A statement made by a witness before the grand jury, reduced to writing and identified by the assistant county attorney, and signed by the witness, was properly admitted in evidence to

impeach the witness, where a proper predicate had been laid for impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.\*]

**10. CRIMINAL LAW (§ 824\*)—FAILURE TO INSTRUCT—EFFECT OF EVIDENCE.**

In a prosecution for theft from the person, failure of the court to limit the effect of evidence admissible only for impeachment purposes was not error, in the absence of a request for such an instruction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

**11. CRIMINAL LAW (§ 1159\*)—APPEAL—EVIDENCE.**

The weight of evidence and credibility of the witnesses, in a criminal case, is for the jury and not for the appellate court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from District Court, Collin County; M. H. Garnett, Judge.

Will Watts was convicted of theft from the person, and appeals. Affirmed.

J. D. Cottrell, of Plano, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**DAVIDSON, J.** The indictment contains one count charging robbery and one charging theft from the person. The county attorney elected to try on the count charging theft from the person.

[1] Claude Mayes was permitted to testify, over appellant's objections, that at the time or immediately after the time of the alleged theft the injured party Reagan came to his place, something like 200 yards from the scene of the theft, and requested the witness to give him something to defend himself; that the negroes had robbed him and were then trying to kill him. Mayes further testified that he stepped out of his door and saw three men standing up the street near where two streets cross. His testimony does not definitely in the bill of exceptions state the distance these persons were from his house or the distance from the scene of the theft. This occurred immediately after the transaction, and, if we go to the statement of facts, the state's evidence shows that these parties had chased Reagan, some using a knife or knives and a pistol. This matter was so closely related to the transaction, and while the alleged injured party was laboring under excitement, etc., we think it comes under the rule of *res gestæ*. See *Walling v. State*, 55 Tex. Cr. R. 258, 116 S. W. 813. There were two bills of exception reserved to this; the court signing the last of the two bills with this qualification:

"This testimony was admitted as *res gestæ*; the evidence showing that the matters testified by the witness occurred as quickly as the witness could run from the place of the alleged theft and immediately thereafter to the Mayes restaurant, about halfway around the block, a distance of about 200 yards."

This evidence, under the authority of *Walling v. State*, *supra*, would be admissible.

Other cases might be cited in support of this proposition, but the *Walling Case* seems to be directly in point.

[2] Will Smith, alias Lee Smith, testified for the defendant. After he had finished examining the witness, state's counsel proceeded to cross-examine him. Among other things, he asked the witness if he had made a statement to the city attorney at Plano the day after the alleged transaction, which was written down. These statements were with reference to what occurred at the scene of the theft. The objection was that it was an *ex parte* statement, and the defendant was not present, and had no chance to cross-examine him. The court admitted this as a matter of impeachment. The facts are not sufficient to show definitely the matter, and for this reason the bill might be considered defective. The witness qualifiedly denied making some of the statements. This bill seems to show that these questions were simply asked for the purpose of impeachment. Under the statement of the bill, we think there was no error. If it was not for the purpose of impeachment, and was an *ex parte* statement in the absence of the defendant, the bill should have shown it. This was proper as a predicate for impeachment.

[3] Dick Reagan was the injured party. A bill of exceptions recites after the defendant had rested his case, and the state was offering rebuttal testimony, among other things, the county attorney offered to read in evidence an *ex parte* statement made by Dick Reagan before the city attorney at Plano. It is further recited this *ex parte* statement was not taken at the examining trial, but was made in the office of the city attorney, and no one was present, except himself and the witness Reagan. This statement was written, signed, and sworn to by Dick Reagan. Objection was urged to this on the ground that it was hearsay, prejudicial, and defendant was not present at the time it was made, and was hearsay as to him. Thereupon the court stated that, counsel for defendant having asked the witness Harrington to state whether certain things were or were not in the *ex parte* statement, he did not see how counsel were in a position to object to its being read to the jury. Thereupon counsel for defendant stated that the county attorney had been reading excerpts from an *ex parte* statement, and that he felt sure that he had at one time objected to them and understood that the evidence would go in over his objections; that he only asked the witness about a part of the *ex parte* statement, matters that Mr. Truett had read from extracts from the *ex parte* statement. Thereupon the court stated that he had not ruled on the *ex parte* statement, and would keep it out, except for the cross-examination of the witness. Thereupon the county attorney stated that he read a part of the *ex parte*

statement about which the witness testified, and that was directly on the matter brought out by counsel for the defendant at the time, and since that time counsel for the defendant has asked the witness numerous questions as to whether this statement does or does not contain certain things. Thereupon the court overruled said objection and permitted the county attorney to read said statement in evidence before the jury. Then follows the statement of the witness read, or that portion of it read, to the jury. The court explains this bill in this wise:

"The state was permitted to read in evidence the ex parte statement of Dick Reagan, complained of because the defendant had examined the witness Harrington in regard to the contents of the statement. Furthermore, the examining trial statement of Dick Reagan had already been admitted in evidence without objection by defendant, and said examining trial statement contains all the material matters that are contained in the ex parte statement."

As presented, we think there is no error. The bill recites that the witness Reagan had been examined about some of these matters by counsel for the defendant, and the statement made was read by the county attorney in answer to those questions and that examination. The bill does not undertake to show nor assert that the statement introduced was not in reply or to meet the questions and matters brought out by the appellant. If one party reads a portion of a statement, the other side has the legal right to read all the remaining portion of it which relates to or explains that which was introduced by the first party, or about which inquiry is made. Unless this is shown to be error, this court cannot hold it error.

[4] Another bill recites that Bud Bowman, alias Automatic Slim, was called by defendant and offered as a witness. Objection by the county attorney was that this witness was not competent, he being charged, under a separate indictment, with the same offense as this defendant, and his case has not been finally settled. Thereupon, at request of counsel for defendant, the jury was withdrawn. The court then stated that he understood that the witness offered by the defendant is charged in a separate indictment with the same offense, and this witness had been tried and not acquitted, but was convicted and given a sentence for so many years and his sentence suspended. The court further stated that he would rule that the law means that, unless he is acquitted, he cannot testify. Then follows the testimony which witness would have given had he been permitted to testify, covering several pages. This witness was not a competent witness for the defendant. The statute provides, where parties are indicted jointly or for the same offense under separate indictments, they cannot be used as witnesses for each other until they have been acquitted. This applies to felony cases. The witness had not been acquitted but had been convicted. He was not a convict, within the

terms of the statute, because sentence had not been pronounced against him, but the sentence was suspended. This would not render him a competent witness for defendant. The indictment and the verdict of the jury were hanging over him. Under the statute, until he has been acquitted, he could not be a competent witness for the defendant.

[5] Another bill recites that after defendant had been convicted, and after the evidence was all in for the state, a motion was made by defendant to require the state, to elect on which count it would rely for a conviction, and after the state had duly elected to rely on the second count in the indictment, to wit, theft from the person, the defendant then made his motion in arrest of judgment. The substance of this motion is that the indictment was defective because it did not allege the value of any item charged to have been taken from the person of Dick Reagan, but simply charges that said Will Watts did then and there, etc., take corporeal personal property, to wit, one pocketbook, containing one \$10 bill, the same then and there being United States paper money, and two nickels, and one bottle of medicine. It is unnecessary to charge the value of the property taken in cases of theft from the person. See *Chitwood v. State*, 44 Tex. Cr. R. 439, 71 S. W. 973; *Shaw v. State*, 23 Tex. App. 497, 5 S. W. 317; *Green v. State*, 28 Tex. App. 497, 13 S. W. 784; *Branch's Criminal Law*, § 827.

[6] It is further contended the motion in arrest of judgment should have been sustained because the defendant is a negro, and the jury commission who drew the grand jury that indicted appellant, and the jury that tried him, discriminated against him in this: The said jury commission did not draw a negro on the petit jury, and therefore, he was discriminated against, in violation of the fourteenth and fifteenth amendments to the Federal Constitution of the United States of America. And further that defendant was in jail when the indictment was returned, and not given a chance to object to the grand jury that found the indictment. These matters came too late after the conviction. If appellant had desired to take advantage of the proposition of discrimination against him because he was a negro, it should have been taken in advance of the conviction.

[7] Appellant requested a special charge, which was refused by the court. The bill states that after the state and defendant had introduced all of their evidence, and after the court had given his main charge to the jury, the defendant duly presented to the court special charge No. 1, and requested him to give same to the jury. Upon the merits of the charge itself, in view of the charge given by the court, we do not believe it presents error. The matter was sufficiently given by the court in his main charge. The court says that this bill of exception was pre-

sented to him on the 5th of September, and that he had no recollection of the charge having been presented to him, yet he would have refused it, and, if it was in his power, would still refuse to give it. Under the late statute, this charge comes too late. There was no exception taken to the court's charge, so far as this record is concerned, before it was read to the jury, and no exception reserved to any portion of that charge. The bill recites that this charge was asked after the court had read his charge to the jury. Appellant should have brought himself within the rule to the extent of calling the court's attention to it before he read his charge to the jury. We are of the opinion this bill does not show that appellant brought himself within the letter or spirit of that statute.

Another bill recites appellant, after the testimony was all in, asked the court to withdraw from the jury all of the testimony of Claude Mayes wherein he stated what occurred between himself and Reagan at Mayces' restaurant just after this transaction, and especially the expressions used by Reagan that "they have robbed me." All this was a part of the *res gestæ*, and the facts all show for the state that these parties drew a pistol and had a knife or knives, and it was at the time of the alleged theft and occurred immediately after he demanded the return of his property. It is unnecessary to go into details. It was part of the *res gestæ*. We are of the opinion that the testimony was admissible, and there was no error in not withdrawing it.

[8] Another bill recites that, while Thomas, defendant's witness, was being cross-examined by the county attorney, he asked him if he did not make certain statements before the grand jury. Appellant objected on the ground that these were *ex parte* statements and at a time and place where defendant was not present and was not allowed to be present, and was hearsay as to him, etc. This was permitted to go to the jury. What that testimony is is not set out in the bill, but the bill further recites that the court erred in not limiting this to impeachment purposes, and further recites that this was called specially to the court's attention in the ninth paragraph of the amended motion for new trial. The court appends this statement to this bill.

"The question propounded to the witness was legitimate and proper for the purpose of laying the predicate to impeach the witness. The portions of the statement read in evidence tended or rather did impeach his statement made on the trial. There was no request made to me at the time to limit the evidence. There was no charge requested for this purpose, and no exception made to my charge because of this fact. The jury could not possibly have used such evidence for any other purpose."

These reasons given by the judge seem to be sound, especially in view of the late statute which requires these exceptions to charges, etc., before the charge is read to the

jury. We also have a line of authorities to the effect that, where testimony can be used for no other purpose than impeachment, it is not error to refuse to limit it. Under the qualification of the bill by the court, there is presented no error requiring a reversal for this reason.

[9, 10] Another bill recites that the state produced a witness named Neathery, who testified that he was assistant county attorney and was before the grand jury when the witness Allen Thomas testified with reference to the robbery or theft from Dick Reagan on the 6th of February; that he reduced the statement of Allen Thomas to writing; that the same was read over and signed by Allen Thomas, and the witness identified the paper shown to him as being such statement. Thereupon the county attorney stated he would offer two paragraphs of such statement for the purpose of impeachment. Counsel for defendant examined the statement, and then stated to the court that he objected to the statement because it was hearsay as to the defendant. The court thereupon asked the county attorney if he had laid a predicate for this evidence, and the county attorney stated that he had. The court thereupon overruled the objection. The county attorney read said extracts from said statement of Allen Thomas made before the grand jury, which is unnecessary here to repeat, but it is set out in the bill. The court makes this statement on this bill:

"The county attorney had in fact laid the proper predicate for the purpose of impeaching the witness, and, before the charge was read, the defendant and his counsel were given an opportunity to except to it, and no exception was made to the charge because it did not state to the jury that such evidence was only admitted for the purpose of impeaching said witness, nor was any such charge requested of me."

This testimony was properly admitted under the statement of the court, and appellant did not bring himself within the rule of the statute by which he could take advantage of the matter in regard to the failure of the court to charge with reference to this testimony.

[11] It is also contended the evidence is not sufficient to support the conviction of theft from the person. It is unnecessary to repeat the evidence in this connection. It is, we think, sufficient to show that appellant took suddenly from the pocket of Reagan his property and refused to give it up. Reagan shows it was a pocketbook with \$10 and two nickels in it and a bottle of what he called medicine, which was diluted alcohol prepared for medicine under the direction of his physician. This was denied by appellant's side of the case. We think the evidence is sufficient if the jury believed Reagan, but there is other testimony which corroborates him. But, be that as it may, we think the evidence is sufficient to justify the verdict of the jury; they have the right to weigh the testimony

and credibility of the witnesses and pass on those matters.

For the reasons indicated, this judgment will be affirmed.

### HOUSE v. STATE. (No. 3261.)

(Court of Criminal Appeals of Texas. Nov. 18, 1914.)

#### 1. CRIMINAL LAW (§ 699\*)—TRIAL—OPENING STATEMENT FOR DEFENSE—RIGHT.

Under Code Cr. Proc. 1911, art. 717, prescribing the order for trial, and providing that after the evidence of the state is introduced the nature of the defenses relied upon shall be stated by defendant's counsel and the facts expected to be proved in their support, it is error to refuse permission to make such statement when application therefor is made in an apt time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.\*]

#### 2. CRIMINAL LAW (§ 699\*)—TRIAL—OPENING STATEMENT BY DEFENDANT—TIME.

The fact that defendant had put two character witnesses on the stand before offering to make such statement does not defeat his right to make the statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.\*]

#### 3. HOMICIDE (§ 169\*)—EVIDENCE—PREVIOUS CONDUCT OF DECEASED—ILL WILL TOWARD DEFENDANT.

In a prosecution for homicide, where defendant contended that deceased was angry with him because defendant had succeeded in winning a young lady for whom both had been rivals, while the state contended that the ill feeling was caused by a remark made by defendant concerning a sister of deceased, but that it had been explained, and deceased at the time of the homicide bore no ill will toward defendant, defendant was entitled to show, as a circumstance tending to support his version of the difficulty, that deceased had urged another young man to attempt to go with the young lady, offering the use of his horse and buggy for such purpose, and stating that he would stop defendant from going with her if he was big enough, and he thought he was, which statement was communicated to defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.\*]

#### 4. WITNESSES (§ 406\*)—CONTRADICTORY STATEMENTS—COMPETENCY—OTHER OFFENSES—DETAILS.

In a prosecution for homicide, where defendant had denied having had an altercation with a road overseer, even though the state might show that defendant had previously been convicted for such altercation, it was error to permit all the details of that transaction to be presented to the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.\*]

#### 5. HOMICIDE (§ 309\*)—INSTRUCTIONS—MANSLAUGHTER—APPLICATION OF FACTS.

In a prosecution for homicide, where defendant had previously been severely beaten by two others and contended that deceased had taken part against him in that affray, and that just before the homicide deceased made a sneering reference thereto which enraged defendant, who thereupon attacked deceased with an axe handle and killed him, defendant was entitled to an instruction applying the law of manslaughter

to the acts of deceased and of those whom defendant claimed were acting with him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

#### 6. HOMICIDE (§ 309\*)—INSTRUCTIONS—MANSLAUGHTER—STANDPOINT OF DEFENDANT.

Where the state's theory was that deceased took no part in the previous affray and bore no ill will to deceased, the court should have instructed the jury that they should consider the question of provocation from the standpoint of the defendant as the facts were presented to his mind.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

#### 7. HOMICIDE (§ 290\*)—INSTRUCTIONS—INTENT.

Where defendant killed deceased by striking him with an axe handle, which was admittedly not a deadly weapon, and claimed that he had no intent of killing deceased, he was entitled to an instruction as to the law of White's Ann. Pen. Code 1911, art. 719, which provides that where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not guilty of homicide unless it appears that there was an intent to kill, but he may be convicted of any grade of assault and battery.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 595; Dec. Dig. § 290.\*]

#### 8. CRIMINAL LAW (§ 823\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Where defendant contended that deceased had participated in a previous affray between defendant and two others, in which defendant was severely beaten, and that at the time of the homicide deceased made a sneering reference to that beating which enraged defendant so that he attacked and killed deceased, error in instructions on manslaughter, which limit the provocation to the acts at the time of the killing, was cured by other instructions that the jury should consider all the facts and circumstances in evidence in regard to the adequacy of the provocation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

Davidson, J., dissenting in part.

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Sam House was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Allen Beadel, of Moody, and Williams & Williams, of Waco, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree; his punishment being assessed at ten years' confinement in the penitentiary.

The evidence shows, substantially, that appellant and deceased were young men living in the same section of the county, and had been friends. Prior to the trouble which resulted in the death of the deceased, a young lady came to the neighborhood and taught school. Defendant and deceased became rivals for her affection; appellant winning in

the race. This angered the deceased, and was the cause of ill will on the part of the deceased. About a week or ten days before the fatal trouble, appellant was invited to a social gathering where deceased and the Irwin boys attended. The evidence tends to show that he was invited to attend with a view of having trouble that did actually occur at the social function in which the Irwin boys gave appellant a pretty severe beating. It was an issue on the trial whether the deceased was in this or not as a participant. Appellant's testimony shows he was, and that, when appellant had one of the Irwin boys down, deceased caught him by the hair and pulled him off, to the end that the Irwin boys might have the advantage, which they seem to have secured after this act on the part of deceased. The state sought to deny this. This made an issue on this particular question. A few days subsequently appellant and his brother went to the town of Moody at the request or command of their father to buy a plow, have some blacksmith work done, and purchase an axe handle. While waiting for the work at the blacksmith shop, deceased and a friend drove into town. The inference is fully and fairly deducible that neither deceased nor appellant expected to meet each other in town. About 12 o'clock appellant and his brother and another young man were talking. The deceased and his friend passed them. Deceased asked him how he felt by now. The wounds inflicted by the Irwin boys and deceased, if he was engaged in it, had not healed; he was still suffering from that beating. He says that when deceased spoke to him, using the language mentioned, he did it in a sneering way, and that he immediately followed and struck him twice with the axe handle on the head. Some of the witnesses say that he struck three times, once after deceased fell to the sidewalk. There is a great deal of testimony introduced in regard to this particular question as to whether two or three licks were struck, and whether deceased was down when one of the licks was struck. Those are matters about which the testimony raised the issue. Appellant said that he was angered and outraged at the previous beating given him, and, knowing that deceased was engaged in it, that the remark made to him by deceased as he passed so outraged him that he proceeded to assault him. It is agreed that the axe handle was three feet long and weighed one pound and nine ounces. This is a sufficient statement of the case, we think, to bring in review the matters thought necessary to be discussed.

[1] The first bill of exceptions was reserved to the refusal of the court to permit appellant to make a statement to the jury, as authorized by the statute of his side of the case, as to the testimony which would be introduced. The bill recites the following: After a statement by the attorneys to the effect above mentioned, the court stated:

"It is not customary, and that has not been the practice. Mr. Williams: But it is the statute. The Court: I do not feel like doing that; it is not practiced anywhere that I know of. Mr. McNamara: This is not the time for it, even if we followed that rule. Mr. Williams: We put on two character witnesses. I am not trying to do anything unusual. It is the plain letter of the statute. The Court: I will overrule the plain letter of the statute. You will have plenty of time to argue the case when the evidence is in."

This bill is signed without qualification. Among other things, the statute provides that the indictment shall be read to the jury by the district or county attorney, special pleas, if any, shall be read by defendant's counsel, and, if the plea of not guilty is relied upon, it shall be stated; that counsel prosecuting for the state shall inform the jury as to the nature of the accusation and the facts which are expected to be shown by the state. The testimony on the part of the state shall be introduced. The nature of the defenses relied upon shall be stated by counsel for the defendant, and the facts expected to be proved in their support. The testimony on the part of the defendant shall be introduced, and rebutting testimony may be offered on the part of the state and the defendant. Just what effect to give this statute with reference to these matters has not been definitely settled. It has been discussed slightly in *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523. In that case it was held that, where the prosecution had failed to make a statement to the jury of the state's case, it was not reversible unless it was made to reasonably appear that injury had been done the accused by such failure. In *Owen v. State*, 52 Tex. Cr. R. at pages 67, 68, 105 S. W. 513, the question was again discussed. In that case, as in this, the accused requested the court that he be allowed to state to the jury, in substance, his defenses in order that the jury might be informed of the nature, character, and extent of it. That was out of the due order of the trial in that case, as provided in the statute (article 717 of the present Revised Code of Criminal Procedure); but in this particular case the bill shows that appellant insisted upon his right to make a statement to the jury as authorized by the statute at the proper time; that is, after the state had finished its testimony. It was stated in the *Owens Case*, supra, there was nothing in the bill to make it appear that in the due order of the proceedings appellant offered to make the statement at the time authorized by the statute, or that the court refused to hear a statement or permit it to go to the jury as provided by the statute. The court then says:

"If it had been offered at the proper time, we would presume, in the absence of the contrary showing, that the court would have permitted the statement to have been made. As the bill presents the matter, we do not feel called upon to decide what would be the effect of a refusal at the proper time to hear such statement; but in passing, however, we would state wherever the statute provides a matter that may redound

to the benefit of the accused on his trial, or that is authorized in his behalf, such provision of the statute should be complied with and enforced. Whatever the courts may think about such proceedings, the Legislature has so provided, and the safe rule is to follow statutory enactments. To say the least of it, it will avoid questions for decision upon appeal without any necessity for such questions."

By the bill it is shown that the appellant insisted upon it, we think, in ample time and in the due order of trial as required by the statute.

[2] There is but one qualification to be made to the statement, and that is two witnesses for the defendant had been introduced as to his general reputation, or what the bill calls "character witnesses." We think this does not interfere with the right of appellant to make a statement as to the facts of the case. He insisted upon it, demanded it, reserved bill of exceptions because he was not awarded the plain statutory privilege, or right. We suppose the statute meant something when it authorized the defendant to make a statement of his case to the jury before introducing his evidence, otherwise the Legislature would not have enacted it. It was enacted to be observed and not ignored. The court says:

"I will overrule the plain letter of the statute. You will have plenty of time to argue the case when the evidence is in."

The court should not have "overruled the plain letter of the statute," but should have enforced "the plain letter of the statute." Statutes are made for enforcement and to be observed, and not to be overridden and nullified. The Legislature must have thought that it was worth while to enact this statute, and that it was according the accused a right to be heard as to the nature of his evidence to be introduced before it was introduced. This is not a case of a failure to ask or a waiver of his right, but rather a strenuous insistence that his rights be observed and be accorded him. Whenever this provision is sought to be used by defendant at proper time, the court should permit it.

[3] The second bill is very lengthy, and we think not necessary to be repeated. It may be stated from the contents of this bill that the trouble had arisen between deceased and appellant with reference to the young lady whose affections the appellant had succeeded in obtaining to the extent that he had become engaged to marry her. This seems to have angered the deceased and been the cause, at least the initial cause, of subsequent troubles between them. This bill shows, in this connection, that he proposed to show by the witness Myers that deceased came to him in July, 1913, and wanted him to pay attention to the young lady so as to prevent appellant from going with her; and he further stated to Myers that he (deceased) intended to stop appellant from going with her if he was big enough, and he thought he was. The court stated that this was not a threat

communicated or uncommunicated. Appellant's counsel stated it was admissible for the purpose of showing motives and feelings of deceased against defendant. The court then sustained the objection, whereupon appellant took the further exception:

"We except and contend that it is admissible for the reasons stated, and that it is prejudicial error for the court to reject the testimony."

It was further stated by counsel at the time that they could prove these facts by this witness if he was permitted to testify. It was then offered to be proved by Myers that deceased, about seven months before the homicide, tried to persuade the witness, who was then a young single man, to pay attention to the young lady in question, and offered him his horse and buggy for that purpose at any time he might desire to use it, and in this connection stated to the witness that he was going to stop defendant from courting and paying attention to the young lady if he was big enough to do so, and he thought he was, and that this conversation was communicated to defendant prior to the homicide. Also, in this connection, appellant calls the court's attention to the evidence in the case showing that both young men, defendant and deceased, were in love with the young lady in question, and both had courted her and made love to her, and defendant had proposed marriage and had been accepted. The deceased had substantially been discarded. Appellant's contention, and he so testifies, was that some weeks before the homicide deceased, with three or four young men, invited him to a singing one night where he was without friends, and had all jumped on him and beat him severely, and had thereafter stated that defendant had only gotten one beating and that he had to take another one still by each one of the boys involved. Defendant further testified that on the day of the homicide deceased, in company with another, was following him around the town of Moody and, as he thought and believed, was seeking an opportunity to beat him; that he avoided him several times, but finally, just before the homicide, deceased passed him and made the remark, "How are you feeling by this time"; that the remark was made with a sneer, and defendant so construed, and that it had reference to his having been previously beaten and was intended as an insulting remark; and that he followed and immediately struck deceased with the axe handle. The state contended that deceased had not assisted in giving appellant the beating at the singing function, and that any talk or threats made by the deceased grew out of some alleged talk that defendant had made about deceased's sister; and the state's theory was also that deceased was not even mad at the defendant, and at the time of the difficulty was his friend, and pulled the other boys off of him, and had taken no part in the fight. The defendant's theory was that deceased was mad at him,

and the real cause of his madness was jealousy with reference to the young lady, in the race for whose affections they had been engaged, and in which race the appellant had come off victorious.

In this condition appellant offered the testimony set out by the witness Myers. The state objected without assigning any reason, the defendant contending that it was admissible for the purpose of showing motives and feelings of deceased towards defendant and for general purposes of the case. We are of opinion that appellant's contention is correct. It was his side of the case. The state had introduced evidence of motives against the defendant, that he had made some remarks about the sister of deceased, and about which he and deceased had had some talk and which had been denied by appellant, and he thought deceased had accepted the statement as true, but the defendant proposed to meet all this testimony by showing the real reason of the trouble—because he (defendant) had won the affections of the young lady in question, and deceased had become mad about it and jealous—and also to explain his reasons for believing that deceased was engaged in these difficulties and troubles with the Irwin boys and seeking to induce the other young men to use his horse and buggy and interfere between appellant and his young lady sweetheart. We think this testimony clearly admissible, and see no reason why it should not have gone to the jury. It would have put a different light on the testimony in favor of appellant, had the jury believed it, and would have been an inducing cause for them to believe appellant's side, that deceased was engaged in these troubles against him.

[4] Another bill recites that the county attorney, cross-examining the appellant, asked him if he had not had a fight with a road overseer named Edgar Holt, and if he had not drawn a stick of cordwood on him. Appellant denied this; and further he asked him if said road overseer had not warned him to work the road, and if he had not refused to go. Some of this appellant denied. He then asked appellant if he had not paid a fine for not working the road. Appellant answered: "Yes, I paid a fine for not working the road. I paid my road tax." The state then introduced as a witness the road overseer and went into quite a lengthy detail of the facts, conversations, and circumstances and details of what occurred between himself and the defendant when they were talking about appellant not working the road. Under the case of *Williamson v. State*, 167 S. W. 360, recently decided by this court, in an opinion by Judge Harper, it was held, where the defendant puts in a request for suspended sentence, that the state may inquire if he had been arrested or prosecuted for any of these small offenses that would not be available to impeach his general rep-

utation otherwise. Without going into a discussion of that question here, we are of opinion that this bill of exception shows error, in that it permitted the county attorney to go into all the facts and details of the little trouble that occurred between the road overseer and defendant as if defendant was then on trial under a plea of not guilty in a prosecution for not working the road. The state, under the authority cited, might prove the fact that he had paid a fine or had been arrested for it or convicted for it, as the case may be; but this would not authorize the state to turn aside and go into all the details of that transaction in the trial of this case. Under all the authorities, this would not be permissible.

[5] The charge of the court is vigorously assailed from two standpoints: First, inaccuracies in regard to the charge on manslaughter; and, second, on intent. The court in his charge gave the following:

"The provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. The act must be directly caused by the passion arising out of the provocation, if any, at the time of the killing. It is not enough that the mind is merely agitated by the passion arising from some other provocation, or a provocation given by some person or persons other than the party killed."

Many objections were urged to this charge. The provocation arising at the time could hardly be sufficient to be considered adequate cause; but taken in the light of preceding circumstances and troubles, it was sufficient and required a charge on manslaughter, which the court gave, submitting that issue. The facts show, from the defendant's standpoint, that there had been a series of provocations and insults and threats and abuses from deceased towards appellant, running back a period of some months. Ten days before the homicide, deceased and some other young men had committed an assault upon and gave appellant a very severe beating. On the day of the homicide deceased and another young man, whom appellant regarded as one of deceased's friends and belonging to the same crowd, were following appellant around the town of Moody seeking a meeting for the purpose of bringing on another difficulty with him, as he believed, in harmony with the threats he had heard as coming from deceased against him. Deceased passed and insultingly referred to the former beating he had gotten, etc. This is appellant's statement of the facts and circumstances bearing upon the manslaughter issue, in part at least. This was defendant's side of it, and, in view of these matters, the court should have instructed the jury without limiting the provocation to the time of the difficulty, and also should have included these provocations given by other persons. They all occurred, and under defendant's theory deceased was a participant in those transactions, and necessarily involved in them, and

in his mind associated with the same. Whatever the court may think of the testimony, this was defendant's side of it, and he had a right to have the jury pass on the law and the case from his standpoint. Therefore we are of opinion that the court erred in this portion of his charge, because defendant had the right to have the manslaughter question looked at in the light of all these matters, and under these provocations given by other parties and in connection with it. This charge of the court eliminated all those matters. We understand the rule to be that, where there is evidence that some other person or persons acted in conjunction with deceased in giving provocations, it is error for the court to prevent a consideration by the jury of the provocations given by some other than the party killed. See *Byrd v. State*, 39 Texas Cr. R. 614, 47 S. W. 721; *Garcia v. State*, 156 S. W. 939. While the other parties, except one, were not present at the time of the difficulty, yet the present difficulty, the one resulting in the homicide, can be looked to through these antecedent circumstances, and they could not be properly looked at with the other parties eliminated. In other words, the court was in error in limiting all those matters to the provocation to deceased alone, and at the time of the homicide, for the facts show in the previous difficulties other parties were acting with him. It was an issue that other parties were engaged in the previous troubles, and the court should have properly so charged the jury.

[6] We desire to call the court's attention here to the fact that there was a failure to instruct the jury to view these facts and circumstances from the standpoint of the defendant. It was a sharp issue made by the state as against the defendant's theory, and defendant's theory against that of the state with reference to all these matters. Therefore we think it became necessary, under the peculiar circumstances of this case, for the jury's attention to be called to the fact that they should look at these matters from the standpoint of the defendant as they were presented to his mind, as inducing cause to do what he did.

[7] There is another very serious question in the case involving intent. Appellant swore positively that he did not intend to kill deceased, had no idea of killing him, and that it was one of those sudden impulses that grew out of the environments already detailed and so presented to his mind that it enraged him at the time, and he struck with the axe handle. That it resulted disastrously and in the death of the deceased, it is true; but appellant swears he did not intend to kill him, and the evidence is uncontroverted that it was not a deadly weapon per se, and therefore the intent became a very serious question in the case. The court should have instructed the jury pertinently that, if there was no intent to kill, they should acquit of

any degree of homicide. The court did submit the theory of intent to the jury of presumption from the use of a weapon under article 717 of White's Annotated Penal Code. That article reads this way:

"The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears."

The court should also have given article 719 of White's Annotated Penal Code. It reads thus:

"Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery."

The court's charge upon this subject is predicated upon the presumption arising from the use of the weapon. If the intention was not to kill, it is not to be presumed that he intended to kill, unless that intention evidently appears. This is statutory. Appellant asked a charge submitting the question of intent from a broader standpoint: That if he did not intend to kill, under the circumstances of this case, then the jury would acquit of homicide. This question was decided, as contended for by appellant, in *Fitch v. State*, 37 Tex. Cr. R. 500, 36 S. W. 584; *Danforth v. State*, 44 Tex. Cr. R. 105, 63 S. W. 159; *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 361; *Patterson v. State*, 60 S. W. 557. Judge Hurt wrote the opinion in the *Fitch Case*. In that case the facts show:

"The stick was about 3½ or 4 feet long, and 2 or 2½ inches in diameter, and was a part of a seasoned rail, and would weigh 3 or 4 pounds. When defendant stooped to pick it up, only about a foot of it was visible; the rest was in the kiln. Richey was unconscious from the time he was struck. He lived about an hour and a half."

In this case the homicide occurred under somewhat similar circumstances, except in the *Fitch Case* the instrument or weapon used was much larger and heavier than that used by appellant. The one used by appellant was an axe handle three feet long, weighing one pound and nine ounces. Quoting from Judge Hurt's opinion, we find this language:

"If the instrument or means used be not likely to produce death, we are not permitted to presume that death was designed, unless, from the manner in which it was used, the intent to kill evidently appears. But let us suppose that the instrument be one likely to produce death, the jury may infer therefrom the intention to kill; but still it is a question for the jury as to whether the intention to kill existed or not. It does not follow that, in every killing or homicide committed with an instrument likely to produce death, the intention to kill existed. The fact of the intention to kill must be established. This can be done, however, by the character of the instrument or weapon used. If it is likely to produce death, the jury would be

warranted in finding an intention to kill; but, as a matter of law, this is not the case. It is still a question of fact for the jury. The instrument used in this case was a stick of wood or piece of rail, about three or four feet long and about two inches in diameter, and weighing three or four pounds. Now, can the court assume that it was a deadly weapon, and from that assumption infer absolutely the intention to kill, and withhold that question from the jury? We think not. We are of opinion that the court should have submitted this question to the jury. This was not done. Counsel for appellant requested instructions bearing upon this question, which were refused."

Judge Hurt, in another part of the opinion, uses this language:

"Under this state of case, to constitute murder or manslaughter, must the party intend to kill? We answer that he must."

Patterson v. State, and other cases cited, are in direct line and consonance with the Fitch Case. The court, we think, should not have confined the intent to presumption in regard to the killing, but should have instructed the jury plainly, independent of the statutes quoted, that, before they would be warranted to find appellant guilty of the homicide under the circumstances of this case, they must find that he intended to kill.

For the errors indicated, the judgment is reversed and the cause remanded.

[8] The majority are of opinion and hold the charge on manslaughter as given is sufficient, inasmuch as the court in a subsequent paragraph instructed the jury to consider all the facts and circumstances in evidence in regard to the adequacy of the provocation, except that he ought in said charge to have applied the law to acts of deceased and those acting with him.

#### JOHNSON v. STATE. (No. 3258.)

(Court of Criminal Appeals of Texas. Nov. 4, 1914. Rehearing Denied Dec. 2, 1914.)

#### 1. INTOXICATING LIQUORS (§ 6\*)—POWER OF STATE TO DEFINE OFFENSES.

The Legislature may pass laws defining offenses for new conditions arising under the prohibition law, to aid in the prevention of illegal sales.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.\*]

#### 2. INTOXICATING LIQUORS (§ 14\*)—PROHIBITION TERRITORY—STATUTES—VALIDITY.

The Allison Act (Acts 33d Leg. Ex. Sess. c. 31), prohibiting the shipment of intoxicating liquors into prohibition territory, is constitutional.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.\*]

#### 3. INTOXICATING LIQUORS (§ 205\*)—TRANSPORTATION INTO PROHIBITION TERRITORY—INDICTMENT—REQUISITES.

An indictment charging the transportation and delivery of intoxicating liquor in prohibition territory, which alleges that on a designated date an election was held under proper authority and that prohibition was adopted, was sufficient, without naming the various voting precincts in the county.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. § 205.\*]

#### 4. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY.

An indictment charging conjunctively a violation of Allison Act, § 4, making it unlawful, except as otherwise provided, for any person to ship, transport, carry, or deliver intoxicating liquors to any other person in prohibition territory, charges but one offense, committed in any one of the ways specified.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 5. CRIMINAL LAW (§ 404\*)—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY.

Where, on a trial for carrying into prohibition territory intoxicating liquor, there was evidence that a valise containing whisky was the property of accused, and that he had transported the same into prohibition territory from a point in the state, the action of the court in allowing the district attorney to open the valise in the presence of the jury, and introduce it and the whisky contained therein in evidence, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

#### 6. INTOXICATING LIQUORS (§ 231\*)—VIOLATION OF PROHIBITION LAW—EVIDENCE—ADMISSIBILITY.

On a trial for carrying intoxicating liquor into prohibition territory, the testimony of an officer, seizing a valise of accused which he had carried into the prohibition territory, that the bottles in the valise contained whisky, was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. § 231.\*]

#### 7. CRIMINAL LAW (§ 338\*)—EVIDENCE—RELEVANCY.

Where, on a trial for carrying into prohibition territory intoxicating liquor, the evidence clearly showed that a valise containing bottles of whisky was carried into the territory by accused, the testimony of an officer that he saw a third person go to a negro coach, and saw a negro's arm handing the valise out to him, and that when the third person saw the officer he threw the valise under the coach, was admissible as against the objection that it was not shown that accused handed the valise to the third person; the evidence excluding every other reasonable hypothesis than the fact that accused was the one who handed the valise to the third person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

#### 8. INDICTMENT AND INFORMATION (§ 125\*)—STATUTORY OFFENSES.

Where several offenses are embraced in the same general statutory definition, and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count, and a conviction may be had on proving the commission of the offense in any of the ways alleged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 9. INTOXICATING LIQUORS (§ 236\*)—VIOLATION OF PROHIBITION LAW—EVIDENCE—SUFFICIENCY.

On a trial for unlawfully transporting and delivering intoxicating liquor in prohibition territory from another point in the state, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Davidson, J., dissenting.

Appeal from District Court, Lampasas County; John D. Robinson, Judge.

Cooper Johnson was convicted of crime, and he appeals. Affirmed.

T. S. Alexander and Word & Walker, all of Lampasas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** The indictment in this case alleges that prohibition was in force in Lampasas county, and that appellant on or about March 11, 1914, did unlawfully transport, carry, and deliver one quart of intoxicating liquor to Horace Griffin, within prohibition territory in this state from a point within this state to the grand jurors unknown.

[1, 2] Appellant moved to quash the indictment, because the act of the Legislature under which this prosecution was brought was enacted after prohibition had been adopted in Lampasas county, making the same argument as heretofore made that the Legislature was without power to adopt remedial legislation in aid of the enforcement of the prohibition law, and to prevent illegal sales being made. This question was so thoroughly discussed in the case of *Fitch v. State*, 58 Tex. Cr. R. 367, 127 S. W. 1040, we do not deem it necessary to do so again. The contention that the Legislature was without power and authority to pass the law was also held adversely to appellant in the *Fitch Case*, supra. As said in that case, "It would be a monstrous doctrine to hold that the Legislature is powerless to enact legislation defining offenses \* \* \* for the new conditions that may arise" under the prohibition law, and if the new enactment has for its object and purpose to aid in the prevention of illegal sales it is to be commended, and not condemned. As to the constitutionality of what is known as the "Allison Law," this court has heretofore upheld its constitutionality. *Ex parte Muse*, 168 S. W. 520, and *Ex parte Peede*, 170 S. W. 749, decided at this term and not yet officially reported.

[3] Neither was it necessary in the indictment to allege the names of the various voting precincts in the county. The allegation that on the 30th day of November, 1910, an election was held under proper authority, and that prohibition has been adopted, etc., was sufficient, without naming the various voting boxes in the county.

[4] The complaint that the indictment charges three offenses, and is therefore void, is, we think, without merit. Section 4 of the Allison law (page 63, Session Acts 33d Leg.) makes it an offense for any person to ship, transport, carry or deliver intoxicating liquor to any other person in prohibition territory, except as otherwise provided in the act. The offense may be alleged to have been committed in all of these ways, and proof that the offense was committed in either of the ways alleged would sustain a conviction. The fact that the pleader could have elected to

charge that he committed the offense defined in this section in only one of the ways does not prevent him from also charging that defendant committed the offense in all of the four ways mentioned, by use of the conjunction "and," instead of "or." In *Comer v. State*, 26 Tex. App. 509, 10 S. W. 106, it was held by this court that if several offenses are embraced in the same general definition, and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count. See, also, *Howell v. State*, 29 Tex. App. 592, 16 S. W. 533; *Laroe v. State*, 30 Tex. App. 374, 17 S. W. 934; *Holman v. State*, 90 S. W. 174; *Prendergast v. State*, 41 Tex. Cr. R. 358, 57 S. W. 850; *Morris v. State*, 57 Tex. Cr. R. 163, 121 S. W. 1112, and cases cited.

[5] The facts in this case would authorize a jury to find that appellant approached Horace Griffin, who was in Lampasas, Lampasas county, a county where prohibition was in force, and solicited an order for intoxicating liquors, in that he told Griffin he was going after whisky, and asked him if he wanted some. Griffin replied that he wanted two quarts. He then paid appellant \$2, and told him he wanted bonded goods, either Hill & Hill or Jersey Cream. Appellant then told him his part of the expense would be 55 cents, and Griffin paid this amount in addition to the price of the whisky. Appellant for some reason did not want to take his valise on the train, and asked Griffin to have Ford Mitchell do so, and this Griffin did. Ford Mitchell carried the grip or valise to the train, and procured Douglass Finley to carry it on the train. This grip had appellant's name on it, and witnesses testify that it was light at this time and did not have anything in it, unless some light clothing. Appellant is traced on this train to Belton, where he tells witness Barnes he is going to Temple. He is traced back from Belton to Lampasas. When he gets back to Lampasas, he hands the valise out of the car window to Ford Mitchell, and then gets off the train. Officer Mace sees Ford Mitchell take the valise out of the window, and, when he attempts to arrest him, Mitchell throws the valise under the train. The officer has Mitchell to secure the valise, and when appellant is apprehended the key to the valise is secured from him, and in the valise are found 12 quarts of whisky—5 Jersey Cream, 2 Cascade, 4 Sunny Brook, and 1 Hill & Hill, all bonded goods, 2 of which were intended for Griffin. It is thus made apparent that appellant secured 12 quarts of whisky either in Belton or Temple, carried and transported it to Lampasas, and handed it to Ford Mitchell. These facts we think the record shows beyond question.

Bill of exceptions No. 4 is not in the record before us, and in bill No. 5 appellant complains of the fact that the court allowed the district attorney to open the valise in the

presence of the jury and introduce it and its contents in evidence, on various grounds. This valise had been identified as the one carried to the depot by Ford Mitchell and placed on the train by Douglass Finley, as the valise handed out of the car window to Ford Mitchell, and which the officer secured from him at the time of the arrest. The officers testified it was in the same condition that it was in at the time it was taken from Mitchell's possession, and under such circumstances there was no error in admitting it and its contents in evidence.

[6] It also appears by another bill that, when Mr. Mace testified that the bottles contained whisky, the defendant objected to him being permitted to so testify, "because the bottles were sealed up," and the contents was the best evidence. The court then permitted the district attorney to unseal one of the bottles and hand it to the witness Mace, who then swore that he knew it contained whisky. As appellant was being prosecuted for carrying, transporting, and delivering whisky in prohibition territory for illegal purposes, there can be no question of the admissibility of this testimony. It would settle, and did settle beyond question, as to what was the contents of the valise.

[7] Appellant also objected to Officer Mace being permitted to testify:

"I saw Ford Mitchell going to the negro coach, and saw a negro's arm handing this grip out to him, and when Ford Mitchell saw him, he (Ford) run and shot the grip under the coach"

—the objection being that it was not shown that it was defendant who handed the grip to Ford. Several witnesses testify that there were but two negroes in this coach when it got to the depot—appellant and John Barnes. John Barnes testified that when he went out of the coach he left appellant, and appellant alone, in the coach. The grip had appellant's name thereon, and by exclusion at least the evidence makes it virtually impossible for it to have been any other person than appellant who handed it out. The facts and circumstances render it as certain as it is possible for circumstantial evidence to show any fact. It excludes every other reasonable hypothesis.

The contention that it was not shown to be appellant's grip cannot be sustained. The evidence, and all the evidence, shows this beyond question. Neither did the court err in permitting the entire contents of the grip, the 12 bottles of whisky, to be introduced in evidence, even though appellant was charged with carrying, transporting, and delivering only one bottle. The evidence was *res gestæ* of and a part of the transaction alleged.

[8] Appellant objected to the charge of the court in one particular only. The indictment alleging that appellant "did carry, transport, and deliver," he insists the court erred in authorizing a conviction if the jury found appellant "carried, transported, or delivered"—this time contending that the indictment al-

leged only *one* offense, and appellant must be shown to have carried, transported, and delivered, all three, before a conviction could be had, while in the motion to quash he had contended that it charged three separate and distinct offenses. As before stated, if several offenses are embraced in the same general definition, and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count, yet a conviction may be had if the offense is committed in either of the ways alleged. *Copping v. State*, 7 Tex. App. 61. This rule of law has always been followed in this court, and is stated to be the correct rule by Mr. Bishop and other text-book writers.

[9] The court did not err in refusing the peremptory instructions requested, nor did he err in refusing the instructions that if a delivery was not made to Horace Griffin in person to acquit. We are of the opinion that, under the facts and circumstances in this case, the delivery to Ford Mitchell was a delivery to Horace Griffin; but, if that be not a correct deduction from the evidence, a conviction would be authorized under the other means alleged in the indictment of violating the law. We do not think the evidence raises the question of appellant being an agent of Horace Griffin, but, on the other hand, shows an illegal solicitation of an order for the sale of intoxicating liquor, which contemplated a delivery by appellant to Griffin of the liquor in prohibition territory, and as he received a profit over and above the price of the whisky—55 cents—this would constitute a sale in the prohibition territory. But inasmuch as my Associates on the bench hold that the evidence would not support a finding that it was a sale (in which view I do not concur), the evidence beyond peradventure of doubt shows that appellant approached Griffin and, to use Griffin's own language, the following took place:

"I know Cooper Johnson. I saw him in Lampasas about the 11th day of last March. I was employed then at the Wachendorfer Hotel. It was before noon. He said he was going down the road, either to Temple or Belton. It was in the morning, before the Santa Fé was due. He asked me if I wanted to send down there for some booze. I gave him \$2.55. It was for two quarts. I told him to bring me two quarts of bonded whisky. I said Hill & Hill or Jersey Cream. I gave him \$2 for whisky and the 55 cents was for railroad fare. He did not say what the railroad fare would be, but said my part was 55 cents. He said he would be back that evening."

Taking all other facts and circumstances in evidence, the writer thinks it but a cloak for a sale, and if a proper submission of the issue, under an indictment charging him with making a sale, had been given the jury, he would sustain a finding that it was a sale. However, as my Associates view the testimony otherwise, I will not place the affirmation on that ground, but will discuss the case from their standpoint, that it made appellant the agent of Griffin. This I do not un-

derstand to be a correct view, since section 6 of the Allison law makes it a felony to solicit or take orders for whisky in prohibition territory. Under the evidence he could be prosecuted for soliciting this order from Griffin for whisky, getting thereby a part of his railroad fare paid, to say the least, and this court would sustain such conviction, and, therefore, he would be carrying and transporting this whisky for an illegal purpose, to fill an order he had theretofore solicited.

But, in the event it is held that he by these acts was merely the agent of Griffin, and that he was merely carrying the whisky to his principal, having no other connection therewith, the evidence in this case wholly fails to show what use Griffin intended to put the whisky to when he received it, and the question of whether one can have whisky shipped to him for personal use is not raised by the evidence, and need not be and should not be discussed. Griffin testified he was not a member of Cooper Johnson's family; that he was not a minister of the gospel; in fact, there is no evidence tending to bring appellant within the exceptions—that he was carrying or transporting it to Griffin for any of the purposes which have been excepted from the provisions of the law. Section 4, as applicable to this case, reads:

"Except as otherwise provided in this act, it shall be unlawful for any person \* \* \* to ship, transport, carry or deliver any intoxicating liquor to any other person, \* \* \* in this state."

The offense is thus defined, and in the indictment it is not necessary to negative any of the exceptions. And when the state proves on the trial that the person on trial did carry and transport to another in prohibition territory intoxicating liquor, it has made its case. If the defendant wishes to bring himself within any of the exceptions, he must offer some proof, else the issue is not raised. If one kills another, upon proof of that fact, the state has made its case. If a defendant relies upon that portion of the statute which exempts him from punishment, he must offer proof of that fact; otherwise the issue of self-defense is not raised. If one carries a pistol, proof by the state that he did have a pistol, makes its case; if appellant relies on the exceptions, that he was a traveler, or that he was merely carrying it to his home, he must offer proof of that fact, else the issue is not raised, and a conviction is authorized on mere proof that he had a pistol.

So in this case, when the state proved that appellant had carried and transported whisky from Temple or Belton for delivery to Griffin in Lampasas (where prohibition prevails) the state has made its case, and a conviction was authorized and will be sustained. If appellant desired to bring himself within any of the exceptions, being separate articles of the statute, and not included in the definition of the offense, he should have offered

some proof. The record is plain that appellant carried it to be delivered to Griffin; the record is silent as to the use Griffin intended to put the liquor to. So the question of whether one may carry or transport liquor to another in prohibition territory for the personal use of such person is not raised, nor even suggested, by the testimony, and therefore we do not deem it necessary to discuss that question. And the mere fact that appellant was the mere agent of Griffin does not raise that question, when there is no evidence as to the use Griffin intended to put the whisky to. Griffin himself had no right to carry the whisky into the territory, except for his own use, and his agent could have no greater right than the principal, and if Griffin had carried the whisky into the prohibition territory, and the state proved that fact, he could be convicted, unless he should offer some evidence that it was for his own use, or the use of members of his family. And as there is no testimony that the whisky was so intended to be used, even if appellant should be held to be merely an agent of Griffin, we will not discuss that theory of the case, although my Associates do so, taking opposite views on that question.

The only other bill of exceptions in the record complains of the action of the court in refusing to give a special charge wherein appellant requested the court to charge the jury that they should acquit unless they found beyond a reasonable doubt that appellant *carried, transported, and delivered* the liquor to Griffin—that is, did all three things alleged. This is not the law, for he could be convicted for having done either of three things alleged.

The facts in this case, to our minds, show that the whisky was being carried into Lampasas county for a purpose prohibited by law. The evidence shows that appellant approached Horace Griffin and asked if he wanted some whisky, and Griffin told him he did—he wanted two quarts. Appellant accepted the money for the whisky, with an understanding that he was to secure the whisky and deliver it to Griffin in Lampasas. He not only accepted the price of the whisky, but collected 55 cents extra—getting a profit over and above the price of the whisky for himself. The facts show an illegal transportation and carriage. There has never been any doubt in our minds, and since the passage of the Webb-Kenyon Act (U. S. Comp. St. 1913, § 8739) we do not think there can longer be any question, that a law of the state prohibiting the carrying and transportation of intoxicating liquors into prohibition territory for the purpose of making illegal sales thereof, or for any other illegal purpose, is valid and violative of no provision of the Constitution, either state or federal.

Being of the opinion that the law prohibiting the carrying, transportation, and de-

livery of whisky into prohibition territory for the purpose of making sales thereof in violation of law, or for any other illegal or unlawful purpose, is valid, and that the evidence in this case makes it clear that appellant was carrying and transporting this whisky into prohibition territory for an illegal purpose, the judgment is affirmed.

PRENDERGAST, P. J. (concurring.) As the indictment alleged, and the proof showed, appellant procured intoxicating liquor from some other point in this state, and did "transport, carry, and deliver" it to Griffin in Lampasas county, in this state, where prohibition was in effect, he is guilty, and I agree to the affirmance of the judgment. To "transport" means exactly the same thing as to "carry."

I base my concurrence in the affirmance of the judgment solely on the ground that appellant *carried and delivered* the liquor to Griffin in prohibition territory, wholly regardless of what use Griffin had for it, or intended to put it to, and wholly regardless of what appellant did, other than that he carried it and delivered it to Griffin. Section 4, Allison Act, approved August 21, 1913, p. 62. There is no evidence which shows or tends to show that Griffin intended the liquor for any unlawful purpose whatsoever; but, as I understand it, it tends to show he had it brought and delivered to him for his own use.

Appellant was in no way prosecuted for selling the liquor to Griffin, and, as I understand the evidence, he in no way made a sale of it to Griffin; but, as I understand the law and the uniform decisions of this court, some of which are cited in section 569, Branch's Crim. Law, he acted in the transaction merely as the agent of Griffin and not otherwise. However, even if he had made a sale of it to Griffin, that could not affect the question, for he was in no way prosecuted for making a sale to Griffin, nor for carrying it and delivering it in Lampasas county for that purpose, but solely for carrying and delivering it to him. So, even if he illegally solicited an order for the sale of it, that could have no bearing whatever on the case, or any question in it, for he was in no way prosecuted for that offense.

The Webb-Kenyon Act of the Congress has no possible bearing on this case, or any question in it.

DAVIDSON, J. (dissenting.) I cannot agree with the result reached in this case. Judge HARPER holds that the facts show a sale, and therefore punishable under the charge of carrying intoxicants into local option territory. Presiding Judge PRENDERGAST holds the facts do not show a sale, but only an agency on part of appellant, and nothing else. I agree with Judge PRENDERGAST on this phase of his concurring opinion. Ap-

pellant was charged with violating what is known as the Allison bill, the allegation being that he transported, carried, and delivered to Griffin whisky in local option territory. The state's case, therefore, must rest upon these allegations. Griffin gave appellant \$2 with which to buy for him two bottles of whisky, and 55 cents to pay or assist in paying his railroad fare to Belton or Temple and return. Appellant bought the whisky in one of the towns mentioned for Griffin with Griffin's money. This constituted him the agent of Griffin. I do not see how, by any possible construction of this testimony, it could be correct to hold that appellant sold Griffin the whisky. If it was a sale, appellant violated the local option law in Lampasas county; but he was not charged with this offense, and the facts do not support it. The authorities sustaining my views of it are found collated in Mr. Branch's work on Criminal Law, § 569. Quoting from that work:

"If defendant is in no way interested on behalf of the seller, but is simply acting as agent of prosecutor, he is not guilty of making a sale." Key v. State, 37 Tex. Cr. R. 78, 38 S. W. 773; Reed v. State, 44 S. W. 1093; Crawford v. State, 76 S. W. 576; Blasingame v. State, 47 Tex. Cr. R. 587, 85 S. W. 275; Rector v. State, 90 S. W. 41; Short v. State, 49 Tex. Cr. R. 244, 91 S. W. 1087; Bowman v. State, 35 S. W. 382; Brignon v. State, 37 Tex. Cr. R. 71, 38 S. W. 786; Kirby v. State, 46 Tex. Cr. R. 584, 80 S. W. 1007; Way v. State, 36 Tex. Cr. R. 40, 35 S. W. 377; Gaston v. State, 102 S. W. 116; Hood v. State, 35 Tex. Cr. R. 585, 34 S. W. 935; Crawford v. State, 58 S. W. 1006; Johnson v. State, 44 S. W. 834; Phillips v. State, 40 S. W. 270.

It was also held, if there is evidence that the accused bought liquor from another as agent of the purchaser and that he was in no way interested on behalf of the seller, it is error to refuse a charge affirmatively presenting this issue. Campbell v. State, 37 Tex. Cr. R. 572, 40 S. W. 282; Treue v. State, 44 S. W. 829; Strickland v. State, 47 S. W. 721; Driver v. State, 48 Tex. Cr. R. 20, 85 S. W. 1056; Goolightly v. State, 49 Tex. Cr. R. 45, 90 S. W. 26, 2 L. R. A. (N. S.) 383, 122 Am. St. Rep. 779, 13 Ann. Cas. 827; Evans v. State, 55 Tex. Cr. R. 450, 117 S. W. 167; Wright v. State, 35 Tex. Cr. R. 582, 34 S. W. 935. These authorities settle the question that this was not and could not constitute a sale. If any illegality existed or could possibly arise under the facts of this case, it was that appellant bought whisky in Temple or Belton for Griffin and carried it to him at Lampasas, and was therefore acting as his agent. If he violated any law, it is that clause of the Allison bill which prohibits transporting, carrying, and delivering whisky in local option territory. Judge PRENDERGAST holds this part of the Allison bill valid. With this view I cannot concur. Some of our courts have gone far enough to say that the citizen may be punished for storing intoxicants in local option territory for illegal selling purposes, and this seems to rest upon the theory that

this can be prevented because of anticipated sales to occur in the future. That question does not arise in this case, because the evidence is conclusive that the whisky belonged to Griffin and was carried by his agent, appellant, to him in Lampasas county.

So we have this question: Can a citizen be punished by confinement in the penitentiary for carrying whisky into local option territory with no possibility of violating the local option law? The Allison law is dependent for its existence on the local option law. When the local option law passes out, that dies for want of something to keep it alive. With whatever far-reaching power and authority the Legislature may be clothed under the Constitution of Texas (article 16, § 20), that power is circumscribed to prohibiting selling in local option territory. There is no question, I would suppose, at this late day in Texas that this law does not authorize the punishment of the citizen for giving away whisky and cannot legally—the Allison bill to the contrary notwithstanding. Under all the authorities it has been held that the giving of intoxicants in local option territory could not constitute a violation of that law. This has been held even as to giving it to minors. If the party gave to minors, he would have to be punished for violation of the local option law. *Atkinson v. State*, 46 Tex. Cr. R. 229, 79 S. W. 31, 3 Ann. Cas. 839; *Tracy v. State*, 48 Tex. Cr. R. 50, 85 S. W. 1056; *Tompkins v. State*, 49 Tex. Cr. R. 155, 90 S. W. 1019. This court has held the Legislature had no authority to authorize an election to determine whether the gift of intoxicating liquors shall be prohibited—whether the gift was with intent to evade the law or not. *Holley v. State*, 14 Tex. App. 505; *Bottoms v. State*, 73 S. W. 16; *Steele v. State*, 19 Tex. App. 425. It was also held in *Stallworth v. State*, 16 Tex. App. 345, that an indictment for ordinary local option violation which charges a gift charges no

offense. For many cases deciding this particular phase of the law, see Branch's Criminal Law, § 567.

As I understand the law, viewed in the light of the constitutional guaranty and wording of section 20, art. 16, the Legislature cannot prohibit the citizen of this state from conveying to his friend, or giving to his friend, or to his principal as his agent, intoxicating liquors in local option territory, so long as he does not violate some of the inhibitions with reference to sales or illegal matters of that character. An accused does not have to prove his innocence; the state must prove guilt to secure a conviction. In other words, the Legislature cannot make it a felony and incarcerate our citizenship in the penitentiary, even in local option territory, where one friend gives to another intoxicants, or where one citizen gives to another citizen intoxicants, or buys it as agent of the principal; and I understand the law to be further that the Legislature cannot abrogate or abolish the law of principal and agent; that the Legislature is powerless to abolish the law and doctrine of agency. If appellant was guilty, I do not understand why Griffin was not, on the theory of agency. Griffin could be an accomplice on that theory. This certainly would pass even the limit of the power of the Legislature. The principal may do through his agent what he himself may do. The Allison law authorizes the principal to carry the whisky into local option territory for his own use. I therefore agree with Judge PRENDERGAST that appellant was only the agent of Griffin, but disagree with him as to his conclusion of the validity of the Allison bill on this question, and disagree with Judge HARPER that the facts constituted a sale by appellant to Griffin.

With due deference to the opinion of my Brethren, I respectfully enter this dissent.

**LEMPKE v. STATE. (No. 3388.)**

(Court of Criminal Appeals of Texas. Jan. 20, 1915.)

**SUNDAY (§ 6\*)—OFFENSES—MOVING PICTURE SHOW.**

The opening of a moving picture show and the performance of an exhibition there on Sunday is a violation of the statute (Pen. Code 1895, art. 199) prohibiting the opening on Sunday of places of public amusement, including theaters and such other amusements as are exhibited and for which an admission fee is charged.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 11, 12; Dec. Dig. § 6.\*]

Davidson, J., dissenting.

Appeal from McLennan County Court; George N. Denton, Judge.

J. A. Lempke was convicted of violating the Sunday law, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

**DAVIDSON, J.** The complaint and information charge appellant with violating the Sunday law, in that he ran a moving picture show on Sunday. In order to obtain the enhanced punishment, other clauses were added in the pleadings charging prior convictions of a similar offense. There are two reasons why it is contended the pleading is not sufficient, as well as in failing to charge an offense. Under *Muckenfuss v. State*, 55 Tex. Cr. R. 216, 117 S. W. 853, the complaint and information sufficiently charge prior convictions of similar offenses, and under *Ex parte Lingenfeiter*, 64 Tex. Cr. R. 30, 142 S. W. 555, Ann. Cas. 1914C, 765, the opening of a moving picture show on Sunday is an offense. The writer has not agreed with the majority holding that the opening of a moving picture show on Sunday is a violation of the statute. These matters have been discussed by this court, and the majority have held it to be an offense. The writer has seen no reason to change his views expressed in the dissenting opinion. Under the authority of the above cases the judgment will be affirmed.

There are no bills of exception or statement of facts. The matters urged with reference to the charges therefore cannot be intelligently revised.

As the record is presented, the judgment will be affirmed.

**LEWIS v. STATE. (No. 3275.)**

(Court of Criminal Appeals of Texas. Nov. 11, 1914. On Motion for Rehearing, Dec. 9, 1914.)

**1. LARCENY (§ 13\*)—"SWINDLING"—"THEFT."**

Pen. Code 1911, art. 1332, provides that, if money be obtained by any false pretense with intent to deprive the owner of the value thereof and to appropriate it to the benefit of the per-

son taking, such person is guilty of theft. Article 1421 declares that the acquisition of money by any false or deceitful pretense with intent to appropriate it to the use of the person acquiring is swindling. *Held* that, where by the fraud practiced the title to money is passed, the offense is "swindling" and not theft, but if mere possession is obtained by false pretenses, and title does not pass, the person acquiring the money is guilty of "theft."

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 32, 33; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, First and Second Series, Swindling; Theft.]

**2. LARCENY (§ 55\*)—PROSECUTION—EVIDENCE—SUFFICIENCY.**

In a prosecution for theft of money by false pretenses, evidence *held* to warrant a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.\*]

**3. CRIMINAL LAW (§ 603\*)—TRIAL—CONTINUANCE.**

Under Code Cr. Proc. art. 608, providing that an affidavit for a continuance shall state the diligence used to procure the attendance of the absent witness, and it shall not be held sufficient diligence merely to apply for a subpoena, where the law authorizes an attachment, the application must not only show the materiality of the testimony sought, but diligence in applying for process to compel the witness' attendance or facts to excuse the failure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.\*]

On Motion for Rehearing.

**4. LARCENY (§ 68\*)—PROSECUTION—EVIDENCE—JURY QUESTION.**

In a prosecution for theft of money by false pretenses, evidence *held* not to raise the issue whether the money was loaned to accused.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.\*]

**5. CRIMINAL LAW (§ 922\*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OBJECTIONS TO INSTRUCTIONS.**

Under Acts 33d Leg. c. 138, providing that before the charge is read to the jury accused or his counsel shall have a reasonable time to examine it and shall present his objections thereto in writing, objections to the charge cannot for the first time be made on motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.\*]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

J. Vance Lewis was convicted of theft, and he appeals. Affirmed.

J. M. Gibson, W. W. Wander, and Norman G. Kittrell, Sr., all of Houston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was convicted of theft, and his punishment assessed at three years' confinement in the state penitentiary.

The evidence in this case would show that Ida Childress was arrested in Harris county, charged with a misdemeanor alleged to have been committed in Nacogdoches, Tex. When she was so arrested, she was in Harris county. As to who employed J. Vance Lewis to represent her is a disputed question. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state's evidence is that he was employed by a sister of Ida Childress, Annie Baxter, who says that he charged her a fee of \$10 and she paid it to him.

Appellant's contention is that he was not employed by Annie Baxter to represent Ida Childress, but he was employed by Hattie Bullock, and that his fee was \$125, and all the money he received from Hattie Bullock was in payment of that fee. Hattie Bullock and Annie Baxter deny this, and say that Annie Baxter employed appellant and paid him, and all the money received by appellant from Hattie Bullock was money to be used as bond for Ida Childress. Anyway, it appears conclusively from this record that appellant was employed to represent Ida Childress; that he sued out a writ of habeas corpus before Judge Robinson, and no bond of any character was required on the hearing. Now, the state's testimony is that when the hearing was had appellant went to Hattie Bullock, a cousin of Ida Childress, and represented to her that the bond of Ida Childress was fixed at \$100, and he wanted her to assist in making the bond. She said she did not have that much money, but had \$50 which she would put up, and did put up, on the bond for Ida Childress. Appellant said this was all right; he would put up the remainder. Ida Childress was discharged by Judge Robinson. Several days thereafter appellant approached Hattie Bullock and told her that the bond of Ida Childress had been increased and he needed \$75 additional to put up as bond for Ida Childress, which would be returned to her in 60 days. Hattie Bullock gave appellant this \$75, and on this transaction this prosecution is based.

[1] The state's contention is that under article 1332 of the Penal Code this constituted "theft"; that article providing that if the money was obtained by any false pretext, with the intent to deprive the owner of the value thereof, and with the intent to appropriate the money to the use and benefit of the person taking it, it would constitute theft.

Appellant's contention is that, even though the money was obtained under the circumstances detailed by the state's witnesses, the crime proven would be "swindling" under article 1421 of the Penal Code, and appellant could not be convicted under an indictment charging him with theft. Article 1421 provides that the "acquisition of any \* \* \* money \* \* \* by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring," is swindling.

These two articles of the Code, which to a casual reader would indicate that the Legislature had defined the same state of facts to constitute two separate and distinct offenses—theft by fraudulent pretext, and swindling—have often been before this court, and a line of demarcation has been clearly and dis-

tinctly marked out, as to what will constitute theft under article 1332, and what acts will constitute swindling under article 1421. In *Underwood v. State*, 49 Tex. Cr. R. 285, 91 S. W. 572, this court, speaking through Judge Brooks, said:

"The unbroken line of authorities in this court lay down the proposition that where the money is obtained by false pretenses, and the party intended at the time the same was obtained to part with both the title and possession of the money, these facts make out a case of swindling, and not theft. The facts before us, as stated above, show that prosecutor intended to part both with the title and possession of the money; and hence this prosecution should have been brought for swindling and not theft. *Taylor v. State*, 32 Tex. Cr. R. 110, 22 S. W. 148; *Frank v. State*, 30 Tex. App. 381, 17 S. W. 936; *Pitts v. State*, 5 Tex. App. 122; *Williams v. State*, 34 Tex. Cr. R. 523, 31 S. W. 405; *Powell v. State*, 44 Tex. Cr. R. 273, 70 S. W. 968; *Price v. State* [49 Tex. Cr. R. 181, 91 S. W. 571], decided at Tyler term, 1905."

In the case of *Bink v. State*, 50 Tex. Cr. R. 448, 98 S. W. 865, this court, speaking through Judge Henderson, said:

"The material question is whether this conviction can be sustained for theft. Appellant contends that it cannot; that if he is guilty of any offense it is swindling and not theft, inasmuch as the evidence without controversy shows that the fee in the property was acquired by him by means of a false pretext, and not the mere possession of the property. We understand our decisions on this point to hold that the acquisition of the title to the property—that is, the fee in the property—if it is acquired by means of the false pretext, it is swindling; whereas, if the mere possession of the property is parted with by means of the false pretext, it is theft. *Articles 861, 674, Penal Code*; *State v. Vickery*, 19 Tex. 328; *May v. State*, 15 Tex. App. 430; *Sims v. State*, 28 Tex. App. 447 [13 S. W. 653]; *Price v. State*, 49 Tex. Cr. R. 131, 91 S. W. 571; *Curtis v. State*, 31 Tex. Cr. R. 39 [19 S. W. 604]; *Johnson v. State*, 46 Tex. Cr. R. 415 [80 S. W. 621]."

And in the case of *Bink v. State*, 50 Tex. Cr. R. 452, 98 S. W. 250, this court, speaking through Judge Davidson, said:

"There is and has been, in England and America, and it is true in Texas, a marked distinction between theft and swindling. Article 861, Penal Code, provides, in substance, that if the possession of the property is wrongfully obtained, it is theft if the purpose at the time of obtaining the property was to appropriate it, or if it was obtained by false pretenses for the purpose of appropriating it. Article 877 provides that, wherever property is obtained by contract of borrowing or other bailment, and the property is subsequently appropriated, it constitutes theft. But, under these statutes and all of the law of theft, the distinction between that crime and swindling is found in this: That in theft the title to the property is not an issue. In swindling the passing of the title is necessary. The rule may be stated in this way: 'The true distinction between theft and swindling, where the property is acquired by means of false pretenses, is this: If the owner was induced to part with his property finally by means of the false pretenses, the offense is swindling. But where the possession delivered by the owner was obtained in a manner not sufficient to pass title to the property, the owner only intending to part with the possession and custody and not the title to his property, and the party so acquired possession then and there entertaining the fraudulent intent to appropriate it and did appropriate it, the offense is theft.' In this state, this is the

distinction made by the statutes in regard to swindling and theft, and has been recognized by all the decisions in an unbroken line, commencing with *White v. State*, 11 Tex. 769. See, also, *State v. Vickery*, 19 Tex. 326; *Cline v. State*, 43 Tex. 494; *Pitts v. State*, 5 Tex. App. 122; *Hudson v. State*, 10 Tex. App. 215; *Frank v. State*, 30 Tex. App. 881 [17 S. W. 936]; *Curtis v. State*, 31 Tex. Cr. R. 39 [19 S. W. 604]; *Taylor v. State*, 32 Tex. Cr. R. 110 [22 S. W. 148]."

It is thus made plainly manifest that, if by the fraud practiced the title to the property passed to the person obtaining it, the offense is swindling and not theft; on the other hand, if the mere possession of the property was obtained by the fraud practiced, and the title to the property did not pass to the person obtaining it, such acts constituted theft under the provisions of the Code hereinbefore cited. So the question in this case is: Does the evidence offered in behalf of the state show that the mere possession of the property passed to appellant, or does it show that the title to the property passed to appellant? If the title passed, the conviction cannot be sustained; if the mere possession of the money passed and not the title to it, the acts constituted theft and not swindling. The law is thus made plain, and it only remains to be determined what the facts would show.

[2] Hattie Bullock testifies that the \$75 was obtained from her by appellant by the representation that the bond of Ida Childress had been increased, and that she gave him the money to be deposited in lieu of a bond, to be returned to her in 60 days. Annie Baxter also so testifies. Under this testimony, the title to the money did not pass to appellant—merely the possession of it, to be deposited in lieu of a bond, and the prosecution, if maintained at all, was necessarily brought under the article of the Penal Code charging appellant with theft of the money by fraudulent pretext, for the identical money was to be returned in 60 days. The evidence does not raise the question of a loan to appellant. He says this \$75 was paid to him as a fee in the Ida Childress case, and at the request of appellant the court instructed the jury that if the money was paid to appellant as a fee they would acquit him. This was a submission of the defensive theory of the case, and the jury found adversely to him.

[3] The contention that the court erred in overruling the application for a continuance cannot be sustained. The application shows the materiality of the testimony of the absent witnesses beyond question, but it fails to show that process of any character had been issued to secure their attendance. Article 608, Code of Criminal Procedure. The indictment in this case was returned March 26, 1914, and the trial was not had until May 13, 1914. No process had been issued for the absent witnesses; no application made for process to issue for them; and no reason stated in the application for continuance why process had not been issued, nor applied for. Under

such circumstances, the court did not err in overruling the application for a continuance, for the law is that the application must not only show the materiality of the testimony, but must also show the diligence used to secure the attendance of the witnesses, or state the reason why process had not been applied for. *Snodgrass v. State*, 36 Tex. Cr. R. 207, 36 S. W. 477; *Sykes v. State*, 53 Tex. Cr. R. 165, 108 S. W. 1179; *Townsend v. State*, 41 Tex. 135; *Hill v. State*, 36 Tex. Cr. R. 441, 37 S. W. 736. As the application for continuance does not show that any process had ever been issued for the absent witnesses, nor any reason shown why process had not been issued, it is insufficient in law, and the court did not err in overruling it.

There is in the record no exception to the admissibility or rejection of any testimony introduced on the trial of this cause. The record does not disclose that there was any objection made to the charge of the court as given at the time it was submitted to counsel for their inspection. The special charges requested and not given were fully covered by the court in his charge to the jury, and under such circumstances we can only affirm the judgment of the trial court.

The judgment is affirmed.

#### On Motion for Rehearing.

This case was affirmed at a former day of this term, and on the motion for rehearing very able and interesting briefs have been filed both by the attorneys who tried the case, and by Judge Norman G. Kittrell, who has been retained since the trial to assist in briefing the case on appeal.

In the motion for rehearing it is not contended that we did not correctly state the law as to the true distinction between the offenses of swindling and theft by fraudulent representations, but it is contended that we misconceived the testimony of Hattie Bullock, and that her testimony does not show that it was not her intention that the title to the money should not pass to appellant at the time it was delivered to him. We have again very carefully re-read the testimony, and, as stated in the original opinion, the defense was that Hattie Bullock had paid appellant the money as a fee. This she denied. That issue was submitted to the jury by the court, as shown in the original opinion, and the jury found against appellant on that contention, and it is not surprising they did so, for the testimony shows that, when appellant learned that Hattie Bullock had reported the matter to the district attorney and had gone before the grand jury, he called her over the telephone and asked her about it, and, upon being informed that she had done so, he told her to call at his office, as he had some money for her. This she declined to do at that time, but later she consulted with the district attorney's office, and was told to accept the money if appellant desired to re-

pay her her money, and, when appellant learned she would accept the money, his wife did pay to Hattie Bullock the money. If appellant was sincere in his contention that he had received the money as a fee in the *Ida Childress* habeas corpus, he would hardly have repaid it to Hattie Bullock as soon as he learned that she had reported the transaction to the district attorney, and had gone before the grand jury. If he had come by the money honestly, and relied on that defense, he would not so hastily have refunded the money, upon learning of her appearing before the grand jury, and the fact that he did refund it when he learned she had been before the grand jury would not relieve the transaction of its criminality, as the offense was committed, if any, at the time he obtained possession of the money by fraudulent representations with the intention to appropriate it to his own use, and which he did for some six months appropriate it to his own use, only refunding it after he was notified that steps had been taken to institute a criminal prosecution.

[4] But appellant's able counsel contend, even if that be true, that the testimony would show a loan to appellant of the money. If that be true, we concede that, if the loan was obtained by fraudulent representations, it would be a swindling as we endeavored to make plain in the original opinion, but evidently did not do so, or counsel have not carefully considered the opinion. What we meant to say was that the testimony did not tend to raise the issue that the money was loaned to him by Hattie Bullock, or that the possession of it was delivered to him to be used as he saw proper as his property. The testimony of appellant's witnesses did not tend to raise that issue, but was wholly on the issue that it had been paid to him as a fee. Neither does the state's testimony tend to raise such an issue, in our opinion. Appellant in his cross-examination of Hattie Bullock asked her if the money was not loaned to appellant, and her answer was:

"He has not borrowed any money from me—never borrowed any money from me. I have never loaned him any money."

As appellant's witnesses do not contend that it was a loan, the authorities where a loan was obtained by fraudulent representations have no application to this case. The testimony of the state's witnesses show that, when Judge Robinson had agreed to discharge *Ida Childress*, appellant did not so tell the negro women, but told Hattie Bullock that *Ida's* bond had been fixed at \$100, and at that time obtained from her \$50; that a few days later he went to Hattie Bullock's home and told her that *Ida's* bond had been increased, and he would have to have \$75 more on the bond, that this money would be returned to Hattie Bullock in 60 days.

Hattie Bullock gave him a check for the \$75, but he did not cash the check, returning it to her, saying the bank would not pay it. Hattie Bullock then went to the bank and got the money and delivered the \$75 to appellant to be used as a bond, to be returned by appellant in 60 days. Under this state of case, we cannot conceive how it can be contended that the money ever became appellant's money, or gave him the right to dispose of it for his own use and benefit. To constitute swindling, the title to the money must have passed to appellant—become his property to be used and disposed of as he saw proper. This testimony does not raise that issue, but shows, if true, that the mere possession of the money was obtained by appellant by the fraudulent representation that it was needed to be used to secure bond for *Ida Childress*, and that the money was only needed temporarily, and would be returned in 60 days. The money would have had to become the property of appellant before the offense of swindling could have been committed, and, in this case, in no event was the money to become the property of appellant.

[5] We are criticized mildly for not passing on some of the grounds presented in the original brief of one of counsel for appellant. These grounds criticized the charge of the court. As no objections were made to the charge when presented to counsel for their inspection, such grounds could not be raised after verdict. The old rule, that errors in the charge, if errors there be, can be presented for the first time in the motion for new trial, is no longer the law in this state, but that rule was changed by chapter 138 of the Acts of the 33d Legislature. That chapter provided:

"Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection."

And then provided that, if such objections are not filed at that time, we shall not reverse the case because of any errors in the charge, unless it appears from the record as a whole that the defendant has not had a fair and impartial trial. The issues raised by the record in this case were presented in the charge given to the jury; no exceptions were reserved to any evidence introduced or excluded, if any. Under such circumstances, we cannot consider the complaints of the charge made after verdict is rendered, and we thought counsel would so understand without us reiterating this rule of law; it having been expressly stated in many opinions heretofore rendered.

We have carefully considered every ground assigned in the case and are still of the opinion that there is no reversible error presented, and the motion for rehearing is overruled.

## COY v. STATE. (No. 3209.)

(Court of Criminal Appeals of Texas. Oct. 28, 1914. State's Rehearing Denied Dec. 2, 1914.)

## 1. BIGAMY (§ 7\*) — EVIDENCE — BURDEN OF PROOF.

Under Pen. Code 1911, art. 52, declaring that on the trial of a criminal action, when the facts have been proven which constitute the offense, it devolves upon the accused to establish the circumstances which he relies on to excuse or justify his act, one accused of bigamy, who admitted a second marriage while a first wife was living, has the burden of proving that he contracted the second marriage while laboring under a mistake of fact.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 34-40; Dec. Dig. § 7.\*]

## 2. CRIMINAL LAW (§ 778\*)—PROSECUTIONS—INSTRUCTIONS—BURDEN OF PROOF.

In a prosecution for bigamy, a charge, which cast upon accused the burden of proving that he contracted a subsequent marriage under a mistake of fact beyond a reasonable doubt, is erroneous, casting upon accused a greater burden than the law imposes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.\*]

## 3. WITNESSES (§ 277\*) — CROSS-EXAMINATION OF ACCUSED.

Where accused, who claimed that he contracted his subsequent marriage under a mistake of fact, believing that his former wife had procured a divorce, took the stand and testified that his former wife wrote him that she had procured a divorce and that he showed the letter to his subsequent wife, etc., it is not improper for the state to bring out on cross-examination that he had children by his former wife, that he knew where they and their mother lived, and that he was traveling near to the place; such matters being material on the question whether his mistake arose from a want of proper care.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

## 4. WITNESSES (§ 277\*)—EXAMINATION—CROSS-EXAMINATION.

Where accused testified that his former wife wrote him that she had procured a divorce, that relying upon this he contracted a subsequent marriage, but that the letter which he showed to his subsequent wife had been lost, accused may be cross-examined as to the contents of the letter to enable the state to show that he was mistaken as to the statements therein contained.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

## 5. BIGAMY (§ 8\*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for bigamy, it appeared that accused had been married three times. His first marriage had been dissolved by a valid decree of divorce, and accused claimed that, relying upon a letter written by his second wife informing him that she had procured a divorce, he celebrated a third marriage. On cross-examination it was brought out that he was informed of the dissolution of his first marriage by his sister, who wrote him that his first wife had procured a divorce and that in the same letter she inclosed a certified copy of the divorce decree. The copy was produced and identified. *Held*, that the copy of the decree, where limited solely to the question whether accused had used due care in ascertaining whether his second wife had procured a divorce before celebrating another marriage, was admissible; such decree not being necessary to show the dissolution of ac-

cused's first marriage, he having testified to that fact himself.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 41-49; Dec. Dig. § 8.\*]

## 6. CRIMINAL LAW (§ 440\*)—EVIDENCE—RECORDS.

For the decree to be admissible for the purpose desired, it was unnecessary to file it and give three days' notice of the filing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1026; Dec. Dig. § 440.\*]

## 7. BIGAMY (§ 13\*) — PROSECUTION — PEREMPTORY INSTRUCTION.

Where the indictment charged that accused, having a wife in New Jersey, unlawfully married another, the fact that he had previously been married in Michigan will not justify a peremptory charge on the ground that the New Jersey marriage was invalid, where accused himself testified that his first marriage had been dissolved by a decree of divorce.

[Ed. Note.—For other cases, see Bigamy, Dec. Dig. § 13.\*]

Davidson, J., dissenting in part.

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Louis J. Coy was convicted of bigamy, and he appeals. Reversed and remanded.

C. G. Krueger, of Bellville, and Mathis, Teague & Embrey, of Brenham, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of bigamy. The indictment charged that he married Nellie May England in Camden county, N. J., on December 4, 1905, and had her for his wife, and while she was living, on May 1, 1912, in Fayette county, Tex., unlawfully married and had for his wife one Irma E. Heilig, and on and afterwards did unlawfully and feloniously have both of said women for his two wives at one and the same time. Appellant's motions for a continuance were overruled, and he was forced to trial on May 11, 1914. On the trial before the court and jury, he admitted the marriage to and having for his wife said Nellie May England as alleged, and while she was living married Miss Heilig, as alleged, and afterwards he had both of said women for his two wives at one and the same time and that both were living and are now living. He made these admissions subject to his defense. The state, upon this admission, which proved its case in full, rested:

[1, 2] Appellant's sole defense was that he was laboring under the mistake of fact that his said wife, Nellie May, had procured a divorce from him before he married Miss Heilig, and that this mistake of fact did not arise from a want of proper care on his part.

Under this condition the burden was on him to establish his said defense, for article 52, P. C., specifically enacts:

"On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission."

See, also, the decisions noted under this article of the Code. There are many others to the same effect.

However, this provision, and no other, of the law requires that an accused shall establish his defense beyond a reasonable doubt. On this subject the court gave this charge:

"You are further instructed that, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant had been informed that his former wife was divorced from him when he married Irma E. Heilig, and if you further find that defendant believed such information to be true, and that such belief did not arise from a want of proper care on the part of the defendant, or if you have a reasonable doubt as to whether the defendant was so informed and so believed, then you will acquit him. However, should you find from the evidence in this case, beyond a reasonable doubt, that such belief, if any, on the defendant's part, arose from a want of proper care on his part, then the defendant cannot be acquitted on the ground of a mistake of fact."

By a timely objection, properly made and evidenced by a proper bill of exceptions, appellant specifically excepted to this charge, among other reasons, because it placed a greater burden upon appellant than the laws of this state do as to the proof of his defense, and because it required greater and more conclusive proof of his defense than the law requires.

There is quite a difference between the burden of proof and the proof establishing a fact beyond a reasonable doubt. While appellant had the burden of proof to establish his said defense, he did not have to do so beyond a reasonable doubt which this charge, we think, clearly required, taken as a whole. For this error the judgment must be reversed.

The disposition of the case makes it unnecessary to pass upon whether or not the court erred in overruling appellant's motion for a continuance and not granting him a new trial after the conviction, because thereof. This matter doubtless cannot arise on another trial. However, the proposed testimony of Miss Heilig and the witness Barton would be admissible, as it was stated in said motion they would give.

[3] The issue being as stated above, and after the state had rested, the appellant took the stand. He testified fully to the same effect as his admissions upon which the state rested. He then further testified, to make out his defense, that after he left his New Jersey wife, and before he married Miss Heilig, his New Jersey wife wrote to him that she had procured a divorce from him. He claims he showed that letter to Miss Heilig and when he married her he turned that, with other letters from his New Jersey wife, over to her, and that that letter and others had been lost or destroyed; that he relied upon and believed the statements in that letter and in good faith married Miss Heilig. As a necessary part of his defense, he had to show that his mistake about his New Jersey wife having procured a divorce

from him did not arise from a want of proper care upon his part to discover the truth. He undertook to do this by his testimony to a considerable extent, unnecessary and probably improper to here state. When he was turned over to the state for cross-examination under such circumstances, clearly the state had the right to show that he had two children by this New Jersey wife, where they and their mother lived, and his knowledge thereof, and his movements with reference to his traveling around and being in close proximity to them, so that the jury could determine whether or not he had the opportunity to ascertain the truth and that his mistake did not arise from a want of proper care on his part. Especially was this true on cross-examination, for this would materially aid the jury in arriving at a correct verdict.

[4] Also, clearly under the circumstances and in view of this testimony on direct examination, and especially as to the contents of the letter he claimed to have received from his wife notifying him that she had procured a divorce from him, did the state have the right to cross him as to the contents of that letter and develop from him, if it could, that he was mistaken about the contents of that letter, and it was not as he claimed, but otherwise.

[5, 6] On his cross-examination, the state further showed by him that before his marriage to his New Jersey wife he had married a woman at Saginaw, Mich., and that prior to his marriage to the New Jersey wife he had been divorced from the Saginaw wife. For the purpose of showing the diligence he had used to ascertain the fact of his divorce from the Saginaw wife, the state, on his cross-examination, had him testify that prior to his marriage to the New Jersey wife his sister had written to him that his Saginaw wife, in effect, had a divorce from him, and that she had remarried, and in the same letter in which she gave him this information she also inclosed to him a certified copy of the divorce decree that his Saginaw wife had procured. The original paper thus sent to him by his sister and received by him was produced, identified by him as that paper, and on the issue, and that only, of whether or not he had used proper care to ascertain whether his New Jersey wife had procured a divorce from him before he married Miss Heilig, the court permitting that paper, the certified copy of the divorce decree by his first wife against him, to be introduced. It was admissible for that purpose, being so limited expressly by the court. It is just the same as if it had not been a decree of the court, but some other information received by him upon which he relied. It would not have been admissible in the condition it was under the act of Congress for the purpose of proving that he was legally divorced from the Saginaw wife before he married the New

Jersey wife, and it was not offered for that purpose, as expressly stated at the time, and the court expressly stated it was not admissible for that purpose, but limited it to the other purposes for which it was admissible. Without reference to the decree, he swore that he had been divorced from the Saginaw wife before he married his New Jersey wife. So that it was unnecessary to introduce it for establishing that fact; he having sworn to it at the time. It was wholly unnecessary to file it and give three days' notice of the filing to introduce it for that purpose or any other. *Clayton v. State*, 149 S. W. 124. So that the court committed no error in any of these matters as complained of by appellant's bills.

[7] The court did not err in excluding from the evidence the doctor's affidavit as to the condition of Miss Hellig, and, of course, did not err in refusing to give a peremptory charge to acquit appellant because of the proof that before he married his New Jersey wife he had been married to the Saginaw wife; the evidence by his own sworn testimony showing that he was divorced from the Saginaw wife before he married the New Jersey wife.

We have not undertaken to take up each of appellant's bills and discuss them, but what we have said applies to all the questions raised by them.

For the error in the charge of the court, the judgment is reversed and the cause remanded.

DAVIDSON, J. I concur in the reversal of the case, but believe my Brethren are in error in not reversing the case on the last proposition discussed in the majority opinion. The state elicited, over the objection of appellant, that when he married the New Jersey wife he had a living wife in Saginaw, Mich. Having proved this over the objection of appellant, the state introduced the decree of some court in Michigan showing the divorce. Various objections were urged to this which are acknowledged to be well taken. This decree was not properly authenticated so as to be used as the judgment of another state, nor was it filed with the records of the court so as to be used as evidence. Therefore it was not evidence in the case. My Brethren seek to avoid this by seeking to show it was introduced to show a want of diligence in ascertaining whether or not he was divorced from his New Jersey wife at the time he married in Texas. I cannot concur with that view. When the marriage in Saginaw was proved, if the decree of the court showing a divorce prior to the time he married the New Jersey wife was relied upon, then it was necessary to have the decree properly certified as required by the statute under the act of Congress, in order to be used as evidence in the trial of this case, and was necessary to have it filed with

the records of the court as required by the statute of this state, three days before the trial. This was fully as damaging as any testimony introduced in the case. When the Michigan marriage was proved, this, of course, preceded the New Jersey marriage. If at the time he married in New Jersey his Michigan wife was still living and undivorced, the New Jersey marriage was bigamous; and, having alleged that marriage in the indictment as a legal marriage, it must be proved. If the Michigan wife was living undivorced at the time he married in New Jersey, that was a bigamous marriage, and that part of the indictment would not be sustained, as it could not constitute a valid marriage. So the importance of this decree as a fact in the case was almost paramount, because, the moment the proof of the Michigan marriage was introduced, the state, in order to prove the valid marriage in New Jersey, was compelled to get rid of, in some way, the Michigan marriage, because if that was existing—a wife living and undivorced—the New Jersey marriage was a nullity and the state would then lose its case at once.

This question was thoroughly adjudicated in *McCombs v. State*, 50 Tex. Cr. R. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72. In that case it was laid down as essential to the crime of bigamy that the preceding marriage, alleged in the indictment, must be a legal one and not illegal; and if that was a bigamous marriage, of course, this was not illegal, and that part of the indictment must necessarily fail. The court, it is claimed, undertook to limit this testimony to the proof of a want of diligence on appellant's part in ascertaining the fact that he was divorced from the New Jersey wife, but it was illegal testimony and, that being true, under all the decisions, the court cannot by the charge limit its effect. The error cannot be thus cured. The illegality of admitted testimony cannot be cured by changing its effect to some particular thought and effect in the case. If that decree had not been introduced, the state, in this particular case, had failed to make out a case against the defendant. I do not care to go over what was said in the *McCombs Case*, supra. That case reviews the authorities and correctly decides the question and is conclusive of this case on that question. Therefore I cannot agree with my Brethren on that particular phase of their opinion. If it only affected this case, perhaps it would not make so much difference, as it is reversed and will go back for trial in view of the decision; but the question may arise again. The ruling of my Brethren ought not to become a precedent.

I think the judgment ought also to have been reversed on these bills of exceptions reserved by appellant. Concurring in the reversal of the case, I dissent from that part of it, and file this brief statement.

**WERTHEIMER v. STATE.** (No. 3315.)  
(Court of Criminal Appeals of Texas. Nov. 25, 1914.)

**1. CRIMINAL LAW (§ 1099\*)—APPEAL—STATEMENT OF FACTS—REVERSAL.**

Where accused, through no fault of his own, but through the refusal of the judge to consider the matter, because leaving on his vacation, is unable to file a statement of facts until after expiration of the 90 days allowed, the judgment should be reversed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

**2. CRIMINAL LAW (§ 1099\*)—APPEAL—STATEMENT OF FACTS—FILING—VALIDITY OF ORDER.**

An order of the trial court that the statement of facts, filed in a criminal case on September 26th, be filed as of July 27th, being unauthorized the clerk properly refused to obey such order.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

Appeal from Criminal District Court, Dallas County; R. B. Seay, Judge.

S. Wertheimer was convicted of embezzlement, and appeals. Reversed and remanded.

W. W. Nelms and A. S. Baskett, both of Dallas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**DAVIDSON, J.** Appellant was convicted of embezzlement; his punishment being assessed at two years' confinement in the penitentiary.

[1, 2] The statement of facts was filed in the trial court on September 26, 1914, "as of July 27, 1914, by order of the court." The record shows that court adjourned on the 4th of July, entering an order allowing 30 days, following a previous order for 30 days, in which to file statement of facts and bills of exception. The previous order reached to July 6th. This would have given appellant until August 6th in which to file his statement of facts and bills of exception. But, conceding he had 90 days from the adjournment of court on June 6th, this would have terminated on September 6th. It is shown without controversy that the statement of facts and bills of exception reached the judge on July 27th. The statement of facts was approved by counsel for both sides before reaching the judge. The judge refused to consider the same because he was leaving the state on his vacation, and about the 28th or 29th of July he left Texas and went to the state of Colorado, returning from that state about the 6th or 7th of September, possibly the 5th. Before leaving the state the judge entered an order authorizing appellant to file a statement of facts by September 15th. This would have been about 10 days beyond the 90 days allowed by law. Without going into further detailed statement of the matter, the showing is made that, with-

out fault of defendant, he failed to get a statement of facts filed until September 26th. To cover his absence the judge extended the time to file the facts of his own volition to September 15th. Returning about the 5th of September, which would have been the end of the 90 days, the judge did not approve the facts until the 26th of September.

The court had no authority to order the statement of facts filed back, and the clerk was correct in not obeying the order. There is some question of diligence on the part of appellant with reference to the bills of exception. It seems these reached the judge in time, but had not been presented to the county attorney for his inspection and approval. There was no want of diligence on the part of appellant's counsel to obtain a statement of facts, and it is shown the statement of facts was filed beyond the 90 days, which, under the authority of *Fowler v. State*, 158 S. W. 1117, could not be done. It is unnecessary to cite further authorities on this proposition. It follows, under all the authorities, that appellant is deprived of his statement of facts without his fault, and entitled to a reversal of the judgment for want of a statement of facts. See Branch's Criminal Law, § 41, for collation of authorities; *Parker v. State*, 145 S. W. 347.

Without the statement of facts, many questions cannot be reviewed, and are therefore not discussed.

The judgment is reversed, and the cause is remanded.

**ALEXANDER v. STATE.** (No. 3339.)  
(Court of Criminal Appeals of Texas. Nov. 25, 1913.)

**CRIMINAL LAW (§ 1134\*)—APPEAL—SCOPE OF REVIEW.**

On appeal from a conviction for unlawfully carrying a pistol on the street, defenses not supported by any evidence will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.\*]

Appeal from Ellis County Court; J. C. Lumpkins, Judge.

Clatie Alexander was convicted of unlawfully carrying a pistol, and appeals. Affirmed.

Clyde F. Winn, of Waxahachie, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was prosecuted and convicted of the offense of unlawfully carrying a pistol.

The evidence offered in behalf of the state clearly shows that appellant had a pistol on her person in the streets of the city of Waxahachie. Appellant testified in her own behalf and admitted that on the occasion when she was arrested for carrying a pistol, she

went to her safe and got a pistol and went to the front door of her store. She says she was greatly excited and mentally disturbed, and if she went out in the streets with the pistol she did so unconsciously. However, Messrs. Carlisle and Hull state positively that she did have the pistol out in the street.

There were no exceptions reserved to the introduction of any testimony. The defense that if she did not go off her premises she would not be guilty was affirmatively submitted by the court, he giving the special charge requested on that issue. Appellant in her brief asks:

"If you are in your own house and have a pistol in your pocket and the house catches fire and you forget about having the pistol and you rush out onto the sidewalk which bounds and adjoins your lot, would you violate the law against carrying a pistol? The chances are that you would involuntarily rush out of the house—would unconsciously carry the pistol onto the sidewalk. If you should be in your own yard with a pistol in your pocket, and an automobile come rushing down the street and you should see a little child in the street that was walking out in front of the automobile, and you should rush out of your front gate and onto the sidewalk and out into the street to rescue the child from danger, you forgetting for the instant about having the pistol in your pocket, would you be guilty of unlawfully carrying arms and thereby subject to a fine of \$100 and costs or 30 days in jail and costs or a fine of \$100 and 30 days in jail and costs? Would this make a criminal out of you? If you should be on your own lot with a pistol and should accidentally back off onto the sidewalk, would you be guilty of carrying a pistol? Or if you were on your own lot and near your own line, with a pistol, and should get overbalanced and fall over onto the sidewalk, would you be guilty of carrying a pistol? Or if you are near your own line with a pistol and the wind should blow and overbalance you or some person should shove you and you fell over on the sidewalk with the pistol, would you be guilty of violating the law against carrying a pistol?"

As there is no evidence that a wind was blowing that day, nor that her house caught on fire, nor that an automobile came running by, or that she accidentally fell off or backed off her lot, we do not feel called upon to answer the questions propounded. If there was anything of that character occurred, appellant ought to have some evidence of it in the record.

The judgment is affirmed.

#### SWAFFORD v. STATE. (No. 3340.)

(Court of Criminal Appeals of Texas. Nov. 25, 1914.)

#### 1. CRIMINAL LAW (§ 359\*)—EVIDENCE—RELEVANCY—ADMISSION OF OTHER EVIDENCE BY ADVERSE PARTY.

Where, in a prosecution for cattle theft, defendant claimed he had bought the animal from N., and on a former trial proved by G. that N. had sought to bribe M. to testify that defendant had admitted to him that he had stolen the animal, but on the trial in question G. testified for the state that his former testimony was untrue, and that he in fact, representing himself as N., went with defendant's brother to M. and

sought to bribe him to testify that defendant had told him he had stolen the steer, the court properly permitted the state to prove by N. that he in fact never went to M.'s house or made any such proposition to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. § 359.\*]

#### 2. CRIMINAL LAW (§ 1170½\*)—APPEAL—PREJUDICE.

Where, in a prosecution for cattle theft, one jointly indicted turned state's evidence, and the case was dismissed against him, and defendant proved that such codefendant's reputation was bad, he was not prejudiced by a question on cross-examination as to why, under such circumstances, he associated with the codefendant, to which he answered that the latter wanted to buy beef, and that he would as soon sell to him as any one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.\*]

#### 3. CRIMINAL LAW (§ 728\*)—TRIAL—INSTRUCTIONS.

Where no objection was made to questions asked by the county attorney during the trial, the court did not err in refusing a special charge that the jury should not consider the questions as any evidence of defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689–1691; Dec. Dig. § 728.\*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Ellis Swafford was convicted of cattle theft, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of cattle theft, and assessed the lowest punishment.

There is much conflict in the testimony. That of the state, and the state's theory of the case, is amply sufficient to show that appellant and one Luther Simpson stole a steer at night, drove it several miles from the pasture out of which they took it, and killed and slaughtered it in an out of the way place. Appellant's defense was that he bought the steer from the young 17 year old son, Roy Naney, of J. M. Naney, the owner. This was the main issue. Appellant introduced sufficient evidence, if believed, to have established his defense. On the contrary, the state introduced ample evidence to the reverse effect.

The court's charge, in addition to requiring the jury to believe beyond a reasonable doubt all the requisites that the appellant stole the steer, as alleged, before they could convict him, in a separate paragraph told the jury:

"If you believe that defendant bought the animal in question from Roy Naney, or if you have a reasonable doubt thereof, you will acquit the defendant."

In addition to this, he charged that the burden of proof was on the state, that defendant was presumed to be innocent until his guilt was established beyond a reasonable doubt, and in case they had a reasonable

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—15

doubt as to his guilt to acquit him, and also told them that they were the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony.

The state, over appellant's objection, was permitted to have Curtis Gorman, one of its witnesses, testify in substance that at appellant's instance and solicitation he went to the home of Mat Manuel with Bill Swafford, appellant's brother, and represented that he (Gorman) was Roy Naney, and offered Manuel \$50 to swear that appellant had told him that he (appellant) stole the alleged stolen animal; that he did do this, as requested by appellant, and reported to appellant that Manuel refused to so swear; that appellant was to pay him (Gorman) whatever it was worth for doing what he did. Over his objections, the state was also permitted to prove by Roy Naney that he did not go to said Manuel's home with Curtis Gorman and offer Manuel \$50 to so testify. The court, in approving one of the bills, explained the matter thus:

"In order that the court may understand the connection and the matter to which this bill refers, it is explained that at a trial of this case at a former term the witness Curtis Gorman was placed upon the witness stand by the defendant, and at that time testified that he went to Mat Manuel's house with Roy Naney, and heard Roy Naney tell Mat Manuel that he was Roy Naney, and would give him (Manuel) \$50 to testify that Swafford had admitted to him (Manuel) that he (Swafford) had stolen the steer. Upon the trial of the case at this time Gorman was placed upon the stand by the state, and he testified that he did not go to Mat Manuel's house with Roy Naney, but in truth and in fact went with a brother of the defendant there at the defendant's request, and represented himself to be Roy Naney. Under this state of the record the court believed it permissible for the state to put Roy Naney upon the stand to show that he in fact had never gone to Mat Manuel's home and made any such proposition. The court believed that this was true, although upon the trial of the case at this time the defendant had offered no testimony that Roy Naney had gone to the home of Mat Manuel."

[1] We take it from these bills that the appellant had sought by this evidence to show that Roy Naney, one of the state's material witnesses, had tried to manufacture testimony against appellant, and that by showing this he would destroy the effect of Roy Naney's testimony before the jury, and thereby lead them to believe that Roy Naney had really sold him the animal, or stolen it, and thereby secured his acquittal. It turned out that, instead of showing that Roy Naney was seeking to manufacture testimony against appellant, appellant was seeking to manufacture testimony for himself and against Roy Naney. Under the circumstances, we think the court committed no error in admitting the testimony objected to.

[2] At the same time appellant was indicted for this theft, the grand jury also indicted Luther Simpson for the theft. Simpson turned state's evidence with the state's consent,

and the case was to be dismissed as to him; he testifying against appellant. Appellant proved by many witnesses that Simpson's reputation was very bad, but also showed that he had known him for several years. The appellant himself testified fully. On cross-examination, the state asked him if he did not know of the bad reputation of Simpson. He answered that he had heard it was bad, but did not know. The state then asked him this question:

"Didn't you know it was; heard people talking it, heard he was unworthy of belief, and so on? What did you want to get tangled up with him for, if he was that kind of a fellow?"

To this latter question the appellant objected, on the sole ground that it was argumentative. He answered the question:

"Simpson wanted to buy a beef, and I had one to sell, and would as soon sell to him as to any one."

This shows no reversible error.

[3] Appellant made no objection to the court's charge, as this record shows. He asked this special charge:

"You are further charged that you must not consider as any evidence of guilt of defendant the insulting questions of the county attorney, such as 'Don't you know it is a lie?' 'Why don't you tell the truth?' etc."

Nothing in the record indicates when this charge was asked. No objection was made to such questions, if they were asked, during the trial. The fact that he asked a charge on the subject, even if he had asked it in the time and manner required by law, would be no evidence that any such questions were asked. The record does not show that the charge was asked at such a time as to authorize this court to review it; but, if it did, the court's refusal to give the charge shows no error.

In one ground of appellant's motion for new trial it is set up that he had been indicted for the offense of subornation of perjury in connection with said Curtis Gorman; that Gorman and other witnesses had gone before the grand jury long prior to that indictment, and it was not returned until June 28, 1914; that at the time he was out on bond in this case; that he was arrested on the subornation of perjury indictment on June 30th, and placed in jail, a short time before his trial in this case, and not brought into court or allowed to see his attorney until this case was called; that the state announced ready in this case, and he also; that he was not served with the indictment for subornation of perjury until convicted in this case; that he was not guilty of subornation of perjury, and with proper opportunity could have so proven; that after his conviction in this case he demanded trial on the other, and had his witnesses present and ready to prove that he was not guilty, when the county attorney with the consent of the court dismissed that case against him. To this ground of his motion he attached what purports to be a copy of the state's motion to dismiss the subornation

of perjury case against him. The ground of the motion to dismiss that case is, in substance, that the state would have to depend upon the testimony of Curtis Gorman, who, in effect, had sworn both ways on the question, and the state was unable to corroborate Curtis Gorman; that the appellant had had him go to Mat Manuel's house and attempt to bribe him to testify, as shown above.

The state made a motion to strike out that paragraph of appellant's amended motion for new trial, on the ground that it was immaterial, irrelevant, and incompetent, threw no light on this case or any feature of it, and only incumbered the record. He also alleged that the matters set out in that ground of the motion were untrue, and did not set out the facts therein referred to. We cannot tell, and the record does not disclose, whether the court heard evidence on this matter. At any rate, the court struck out that ground of the motion for new trial. As the matter is presented, we think it was insufficient to require the court below to grant him a new trial, and that therefore the court did not err in striking out that ground of his motion; at least, that it does not present reversible error.

The judgment is affirmed.

### COOK v. STATE. (No. 3294.)

(Court of Criminal Appeals of Texas. Nov. 25, 1914.)

#### 1. HOMICIDE (§ 309\*)—MANSLAUGHTER—EVIDENCE.

In a prosecution for homicide, evidence held insufficient to present the issue of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

#### 2. HOMICIDE (§ 40\*) — "MANSLAUGHTER" — WHAT CONSTITUTES.

"Manslaughter" is the killing of a human being under sudden passion, by the person accused, before he has time to reflect.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 62-64; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

#### 3. CRIMINAL LAW (§ 829\*)—TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests to charge substantially covered by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 4. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where, in a prosecution for homicide, there was evidence that defendant admitted killing deceased, a charge on circumstantial evidence was not required, under the rule that such a charge should be given only where the evidence is wholly circumstantial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1838, 1922, 1960; Dec. Dig. § 784.\*]

Appeal from District Court, Cooke County; C. F. Spencer, Judge.

Claude Cook was convicted of murder in the second degree, and he appeals. Affirmed.

J. T. Adams, of Gainesville, and Owsley & Owsley, of Denton, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 25 years' confinement in the state penitentiary.

[1] This is the second appeal in this case; the opinion on the former appeal being found reported in 160 S. W. 465. We then held that the evidence did not present the issue of manslaughter, and, although appellant earnestly insists that the issue is raised by the testimony, after a careful perusal of the record, we see no reason to change our opinion. The deceased was named D. B. Hope. Appellant, some five years before the tragedy, had married a daughter of deceased. Two years before appellant killed Mr. Hope, the wife of appellant had left him and returned to her father's home, and deceased had been supporting and caring for his daughter and child. B. F. Black testified that at the time appellant and his wife separated, appellant was at work for him at his hotel, and he "just seemed like he didn't know what he was to do or was doing; he didn't seem to be at himself; all the time he wasn't busy he would talk about his wife and child to me; it hurt him a might lot that he couldn't stay with her; he would talk about his child mostly." This was some year and a half or more before appellant killed deceased, Black testifying that after appellant quit clerking for him in his hotel, appellant worked at Goodwin's, Childs', and other places. The witness Black does say that shortly before the killing, while appellant was working for Childs, he was out hunting, and slept with appellant one night, and that appellant that night talked about his wife and child, and said he had been over there to see them, and Mrs. Hope had closed the door in his face, and appellant made the remark, "I am going to see my son or clean up that hill over there"—meaning the Hope home. Witness says he told him he had better not. It is further made to appear that appellant's wife, some days before the killing, had gone on a visit to a sister in Oklahoma, and carried the child with her; that deceased, her father, carried her to the train.

W. B. McClurkan, a merchant of Denton, testified that, between the time Mrs. Cook left for Oklahoma and the date of the tragedy, he saw appellant and deceased talking in the town of Denton, and heard appellant speak of his wife and child; that appellant seemed excited and mad; and that deceased, Mr. Hope, was trying to pacify him.

W. G. Childs, with whom appellant was staying at the time of the tragedy, testified

that appellant told him that Mr. Hope had sent his wife and child to Oklahoma; that he was considerably worried about it, but he (witness) would not talk to him about it; that he asked appellant, "What could you do; you can't make them bring them back?" appellant replying he "could clean up the whole damn hill; he could do that." This occurred some four or five days before the killing. Witness further testified that on the day of the killing appellant received a letter from a brother-in-law in Oklahoma; that he (witness) read the letter at the request of appellant. Appellant was mad, and after witness read it tore the letter up. This letter from the brother-in-law told appellant where his wife was, and said: "Claude, it seems you blame Daddy Hope for Lou (appellant's wife) and Don being up here; that Hope (deceased) was not to blame, and that the writer of the letter (appellant's brother-in-law) was solely to blame." This witness further testified that after appellant had read this letter, and eaten his dinner, appellant left his (witness') home, carrying a Winchester rifle with him, going in the direction of deceased's home; before a great length of time he saw appellant; that appellant had then been back to his (witness') house and changed his clothes, and was going towards town, and appellant said, "Well, it is all over," and witness asked him, "What's all over?" when appellant replied, "I shot him," and, upon being asked if he had killed Hope, replied "I don't know." He was then asked what, if anything, was said at the time, and appellant replied, "I asked him where Lou and Don was, and he claimed deceased replied, 'Right where I am going to keep them, and you keep off my place.'" Witness replied to this that he had heard it, and he had heard some one say that appellant had shot deceased off the binder, when appellant replied, "Its a damned lie; nobody never seen it." Appellant also said in this conversation that at the time deceased made the remark above attributed to him he (deceased) shook the finger of his left hand at him, and dropped his right hand behind him.

In the above statement we have not related nor referred to the theory of the state as made by the testimony, but, on the issue of whether or not the court erred in failing to submit the issue of manslaughter, we have taken the evidence in its most favorable light to appellant. The record discloses beyond dispute that appellant and his wife had separated some two years prior to this time. There is nothing to indicate that deceased was the cause of the separation, and the record discloses that deceased and appellant had met many times after the separation took place. But it is contended, as appellant puts it, when deceased "shipped appellant's wife and child out of the country, this was a new provocation." The testimony of Mr. McClurkan, brought out by defendant,

shows that from the time deceased's wife left to go to Oklahoma and the killing, that appellant and deceased met in the town of Denton, and had a conversation about the wife and child going away; that appellant was apparently excited about it, and deceased was explaining and trying to pacify appellant. So it was certainly not the first meeting after his wife and child had been "shipped out of the country," as contended by appellant, but which the whole record discloses is not the correct way to put it, for it shows that she had merely gone on a visit to a sister—a trip for which Mr. Hope, deceased, was in no way responsible, he having merely carried her to the train in broad daylight, a fact of which appellant was fully aware, as shown by the testimony of Mr. Childs and others, and is in no way disputed in the record. But it may be contended, even if he did know about his wife going to Oklahoma, and had met Mr. Hope in Denton and talked to him about it, this would not deprive him of his right to arm himself with a Winchester rifle and go to Mr. Hope and inquire about where his wife and child had gone. Granted, if this had been his mission, and he did not know where they had gone to; but the testimony of Mr. Childs shows that appellant had received a letter from his brother-in-law explaining to him that his wife was on a visit to her sister, and that (as he understood, appellant blamed Mr. Hope with their taking the trip) Daddy Hope, deceased, had nothing to do with them taking the trip; that he (appellant's brother-in-law) was responsible for it. Not only this, but the testimony of Mr. Childs and Mr. Black shows that appellant knew where his wife and child were, and had known this fact for several days, and this testimony is in no way denied or disputed in the record.

Again, under the rule of law stated in the Pharr Case, 7 Tex. App. 472, and other cases referred to in the opinion on the former appeal in this case (160 S. W. 463), the court instructed the jury:

"When the confessions of a party charged with crime are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them, unless they are shown by the evidence to be untrue; such admissions or confessions to be taken into consideration by the jury as evidence in connection with all other facts and circumstances of the case. So in this connection you are told that, if the state has not disproved the statement made by defendant to the witness Childs, etc., you will find the defendant not guilty."

Thus it is seen the jury were required to find the statement made by appellant to Childs that "he asked deceased where Lou and Don was," and deceased replied, "Where I am going to keep them, and you keep off this place," shaking his left hand at him, and putting his right hand behind him, was false and untrue before they would be authorized to convict appellant of any offense, and, in addition to this, gave a fair and

full charge on self-defense as made by the testimony.

But did the evidence authorize the jury to find that this statement of appellant was false? In brief, the state's case is that appellant was angry with the entire Hope family because his wife had quit him. Mr. Hope was in his field cutting his wheat. Appellant received this letter from his brother-in-law telling him that Mr. Hope had nothing to do with Lou and Don going to Oklahoma on a visit, but in the letter appellant's brother-in-law used language towards appellant that, Mr. Childs says, made him angry. He takes his Winchester, leaves Childs' place, going in the direction of the Hope farm; he is seen by others going in this direction. At one corner of the wheatfield the weeds were high, and in these weeds is a place where the weeds are mashed down as if some one had been hiding there. As the binder goes to make this turn (just 30 steps from this place of concealment), Mr. Hope is shot, the ball entering the right side, ranging up, going through him, the ball apparently passing through his heart. When found he had fallen to one side of the binder seat, his feet being under the seat. Appellant is seen coming from this direction, and when he meets Mr. Childs, about a quarter of a mile from the place where the killing occurred, Mr. Childs says he did not appear to be the least excited, that he appeared cool and calm; thus making it appear that appellant, becoming angry at what his brother-in-law had said to him in the letter, takes his Winchester and goes a quarter of a mile to where deceased is quietly working in his field, cutting his grain. Appellant conceals himself in the weeds, and as Hope drives by he shoots him, and when he walks back is perfectly calm and collected. This not only authorized the jury to find that his explanation was untrue, but the record, as a whole, excludes the idea that the killing took place under the influence of sudden passion, aroused by anything done or said by Mr. Hope that would be cause, in law, to render the mind incapable of cool reflection.

[2] Manslaughter is a killing under a passion suddenly flaming up, and the act done before the person has time to reflect. No such state of case is even suggested by this record. Not only this, but the evidence shows that several evenings before the killing appellant had been in pastures close to the Hope farm, with his Winchester, sitting down, apparently watching the Hope home as if to get a chance to kill some one.

As the issue of manslaughter was not raised by the testimony, the court's charge defining "implied malice" is in language frequently approved by this court in such a state of case. If manslaughter had been raised and submitted in the charge, there might be some merit in the contention.

[3] Appellant's requested charges on self-defense, insanity, and that the state must show the falsity of the statement of appellant, introduced by the state before a conviction would be authorized, were embodied in the court's charge; therefore, it was unnecessary to again give them as special instructions.

[4] The evidence did not call for a charge on circumstantial evidence, as the state introduced evidence showing that appellant admitted the killing of deceased. It is only in case where the evidence is wholly circumstantial that the court is required to charge on circumstantial evidence.

As hereinbefore stated, there were no exceptions reserved to the introduction of testimony, and, as there is no error in the charge of the court, the judgment should be affirmed, and it is so ordered.

The judgment is affirmed.

### WITTY v. STATE. (No. 3260.)

(Court of Criminal Appeals of Texas. Nov. 4, 1914. On Motion for Rehearing, Dec. 9, 1914.)

#### 1. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUCTION.

In determining the correctness of a charge in a criminal case, the charge should be considered as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

#### 2. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—ERROR—CURE.

Instructions defining murder in the second degree, and its elements, were not erroneous because they ignored the issue of insanity, where such issue was fully and correctly presented in other instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

#### 3. HOMICIDE (§ 308\*)—MURDER IN SECOND DEGREE—INSTRUCTIONS.

An instruction defining murder in the second degree and its elements need not state the facts or circumstances which will extenuate or excuse the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.\*]

#### 4. HOMICIDE (§ 294\*)—INSTRUCTIONS—SUBMISSION OF ISSUES—INSANITY.

Where, in a homicide case, the defense was insanity, and the state's evidence tended to prove that defendant was sane when he killed the deceased, the state had a right, equal to that of defendant, to have such issue submitted to the jury by proper instructions.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.\*]

#### 5. HOMICIDE (§ 23\*)—MURDER IN SECOND DEGREE—"MALICE AFORETHOUGHT"—"MALICE."

The distinguishing characteristic of murder in the second degree is implied malice aforethought. "Malice aforethought" includes all other states of mind under which the killing of a person takes place, without any cause which will in law justify, excuse, or extenuate the

**homicide.** It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from the acts committed, or words spoken. "Malice" in its legal sense denotes a wrongful act done intentionally without just cause or excuse.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, First and Second Series, Malice; Malice Aforethought.]

**6. HOMICIDE (§ 22\*)—"MURDER IN SECOND DEGREE"—"MURDER IN FIRST DEGREE"—MALICE.**

"Murder in the first degree" differs from "murder in the second degree," in that, in the former malice must be proved beyond a reasonable doubt, as a fact, while in the latter malice will be implied from an unlawful killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. § 22.\*]

For other definitions, see Words and Phrases, First and Second Series, Murder in First Degree; Murder in Second Degree.]

**7. HOMICIDE (§ 23\*)—MURDER IN SECOND DEGREE—"IMPLIED MALICE."**

"Implied malice," as an ingredient of murder in the second degree, is that which the law infers from, or imputes to, certain acts however suddenly done.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, First and Second Series, Implied Malice.]

**8. HOMICIDE (§ 270\*)—DEFENSE—INSANITY—QUESTION FOR JURY.**

Where, in a homicide case, the defense was insanity at the time of the killing, evidence of the verdict, judgment, and record of a proceeding wherein defendant was adjudged insane prior to the killing, established his insanity at the time of such proceeding and raised a presumption that he was insane at the time of the killing; but such presumption did not prevent submission of the issue of insanity to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 564; Dec. Dig. § 270.\*]

**9. HOMICIDE (§ 7\*)—"MURDER"—ELEMENTS OF OFFENSE.**

Where a person of sound memory and discretion unlawfully kills another with malice aforethought, he is guilty of "murder," a crime distinguishable from every other species of homicide by the absence of circumstances reducing it to negligent homicide or manslaughter or justifying the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, First and Second Series, Murder.]

**10. HOMICIDE (§ 11\*)—"MALICE AFORETHOUGHT."**

"Malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.\*]

**11. WORDS AND PHRASES—"DEADLY WEAPON"—"PISTOL"—"GUN."**

A "deadly weapon" is one which in the manner used is likely to produce death or serious bodily harm; and, within the meaning of the law, a "pistol" is a "gun."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deadly Weapon; Gun; Pistol.]

**12. HOMICIDE (§ 151\*)—BURDEN OF PROOF—INSANITY.**

Where in a homicide case defendant proved that he was insane at a time prior to the killing, thus raising the presumption that he was insane at the time of the killing, the burden was on the state to prove beyond a reasonable doubt that he was sane at the time of the killing and responsible for his acts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.\*]

**13. HOMICIDE (§ 27\*)—DEFENSE—INSANITY.**

Where it appears from the evidence in a homicide case that at the time of the killing defendant was not of sound mind, but was insane, and that such affection was the efficient cause of the act, he should be acquitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 43½, 44; Dec. Dig. § 27.\*]

**14. HOMICIDE (§ 27\*)—DEFENSE—INSANITY.**

In order that insanity, whether general or partial, continuous or periodical, shall be a defense in a homicide case, the degree must have been sufficiently great to have controlled defendant's will and taken from him the freedom of moral action.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 43½, 44; Dec. Dig. § 27.\*]

**15. HOMICIDE (§ 27\*)—DEFENSE—INSANITY.**

Where the mind of a defendant accused of murder was sufficiently sound to be capable of reasoning and knowing that the act committed was unlawful and wrong and knowing the consequences of the act, and he had the mental power to refrain from its commission, the defense of insanity is not available.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 43½, 44; Dec. Dig. § 27.\*]

**16. HOMICIDE (§ 27\*)—MURDER IN THE SECOND DEGREE—ELEMENTS—"SOUND MIND AND DISCRETION."**

The "sound mind and discretion" which is essential to murder in the second degree means that the person committing the homicide must have capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 43½, 44; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, Sound Mind and Discretion.]

**17. HOMICIDE (§ 294\*)—INSTRUCTIONS—BURDEN OF PROOF—SANITY OF DEFENDANT.**

Where in a homicide case the burden was on the state to establish defendant's sanity, at the time of the killing, the court properly instructed that such burden would be sustained by evidence sufficient to satisfy the jury of defendant's sanity beyond a reasonable doubt, and that to ascertain the state of defendant's mind the jury should look to its condition before the killing and his conduct, acts, and all the surrounding circumstances, and ascertain, if possible, whether his mental condition was such as to enable him to know that he was doing a wrongful and unlawful act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 606; Dec. Dig. § 294.\*]

**18. CRIMINAL LAW (§ 857\*)—FAILURE OF DEFENDANT TO TESTIFY—DELIBERATIONS OF JURY.**

The failure of accused to take the stand as a witness should not be considered against him or alluded to by the jury in their deliberations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2054, 2055; Dec. Dig. § 857.\*]

**19. CRIMINAL LAW (§ 866\*)—DELIBERATIONS OF JURY — DETERMINATION OF PENALTY — QUOTIENT VERDICT.**

On finding the defendant guilty of any degree of murder it is improper for the jury, in fixing the penalty, to decide the same by lot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. § 866.\*]

**20. CRIMINAL LAW (§ 808\*) — BURDEN OF PROOF—REASONABLE DOUBT.**

The burden of proof is on the state, and the defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 808.\*]

**21. CRIMINAL LAW (§ 887\*)—JURY—DELIBERATIONS IN CRIMINAL CASE—EVIDENCE—INSTRUCTIONS.**

While the jurors in a criminal case are the exclusive judges of the credibility of the witnesses and the weight of the testimony, they are bound by the trial court's instructions on the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2004; Dec. Dig. § 887.\*]

**22. CRIMINAL LAW (§ 683\*)—TRIAL—REBUTTAL—DEFENSE OF INSANITY.**

In view of Pen. Code 1911, art. 39, providing that no act done in a state of insanity can be punished as an offense, and of article 40, providing that the rules of evidence known to the common law in respect to the proof of insanity shall be observed in all trials where that question is in issue, where defendant in a homicide case sought to establish his insanity at the time of the killing, by proving various incidents in his life from his birth to the killing and the mental and physical condition of his relatives, and that the woman killed had exercised such baneful influence over his brother as to affect defendant's mind, the state was properly permitted to prove in rebuttal other acts of defendant tending to establish his sanity, though such rebuttal evidence showed the commission of other offenses and grossly improper conduct, where its effect was expressly limited to the question whether defendant was sane at the time of the killing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.\*]

**23. CRIMINAL LAW (§ 1160\*)—EXAMINATION OF WITNESSES—CURE OF ERROR.**

Where a court stenographer was introduced by the state to prove for impeachment purposes that he had taken and transcribed the testimony of a witness on a former trial of the same case, the admission of his statement that the copy of the testimony identified by him was the one filed in the Court of Criminal Appeals, thus disclosing defendant's former conviction, was cured by an instruction that such statement should not be considered for any purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1160.\*]

On Motion for Rehearing.

**24. CRIMINAL LAW (§ 825\*) — INSTRUCTION — REQUESTS—FURTHER INSTRUCTIONS.**

Where defendant in a homicide case requested and secured instructions that the burden was on the state to prove defendant's sanity at the time of the killing, and that he then knew the character of his act and its consequences and had sufficient will power to refrain therefrom, and that if he entertained the insane delusion that deceased had an immediate design on his life, or the life of his mother or brother, and acted thereon, he should be acquitted,

the failure of the court to charge on manslaughter, without request, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

**25. HOMICIDE (§ 43\*) — "MANSLAUGHTER" — ELEMENTS.**

To constitute "manslaughter," as defined by Pen. Code 1911, art. 1128, it is essential that there be not only adequate cause as defined by article 1130, but an existing passion caused by what deceased has said or done.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 61; Dec. Dig. § 43.\*]

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

**26. HOMICIDE (§ 27\*)—INSANITY.**

Since insanity goes only to the punishment and not to the character of an act, it never mitigates a homicide; its only effect being to exempt the slayer from punishment without exonerating him from the charge of committing a homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 35; Dec. Dig. § 27.\*]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

J. B. Witty was convicted of murder in the second degree, and appeals. Affirmed and rehearing denied.

Edgar Harold and Williams & Williams, all of Waco, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder in the second degree and his punishment assessed at 15 years' confinement in the penitentiary.

This is the second appeal. The decision in the first is reported in 153 S. W. 1146.

The crime, if committed, was at the time when our murder statute fixing two degrees was in effect, and the case was tried thereunder. No extended statement of the evidence is necessary. The statement of facts comprises more than 200 typewritten pages. Appellant killed the deceased. No question is made of this. He pleaded not guilty. His sole defense was insanity. His attorney made a clear and forcible oral argument when the case was submitted. He also has an able written brief clearly presenting and forcibly urging what he claims were reversible errors in the trial. His first contention is that the evidence was insufficient to sustain the verdict, in that it failed to establish beyond a reasonable doubt his sanity at the time he killed deceased.

In addition to hearing said oral argument and reading and studying his brief, we have carefully read and studied the whole of the evidence. As stated above, it is unnecessary and altogether too lengthy to recite it. We think it is amply sufficient to sustain the verdict and that the jury and lower court were justified therefrom in believing as they did, beyond a reasonable doubt, that appellant was sane at the time he killed the deceased, and we are not au-

thorized to set aside the verdict and judgment on this ground.

(1) Appellant attacks the charge of the court in some particulars. He also requested several special charges. Some of them were given, others refused. It is elementary that in considering such matters the whole charge must be considered, and not separate and distinct paragraphs of it alone. Therefore, in view of said attacks made and the special charges requested which were refused, we here give the charge of the court in full and also copy those of his special charges which were given.

The court's charge is: After the proper heading and the statement to the jury that appellant was charged with murder in the second degree by the unlawful killing of Lula Ozment, and the place and date, and that he pleaded not guilty, we copy:

"I instruct you that our statute provides that any person of sound memory and discretion who shall unlawfully kill any reasonable creature in being, within this state, with malice aforethought, shall be deemed guilty of murder, and 'murder' is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.

"(2) The distinguishing characteristic of 'murder in the second degree' is implied malice aforethought. 'Malice aforethought' includes all other states of mind under which the killing of a person takes place without any cause which will in law justify, excuse, or extenuate the homicide. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. 'Malice' in its legal sense denotes a wrongful act done intentionally without just cause or excuse.

"(3) 'Malice aforethought' is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act.

"(4) A 'deadly weapon' is one which in the manner used is likely to produce death or serious bodily harm; and, within the meaning of the law, a 'pistol' is a 'gun.'

"(5) Malice is a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing.

"(6) 'Implied malice' is that which the law infers from or imputes to certain acts however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree. And the law does not further define murder in the second degree than if a killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, or which tends to establish any justification, excuse or mitigation on the other, then the law implies malice, and the homicide is murder in the second degree.

"(7) Now if you believe from the evidence beyond a reasonable doubt that the defendant, with a deadly weapon, and that the same was

a gun, and an instrument reasonably calculated and likely to produce death by the mode and manner of its use, in sudden passion, and that he was sane at the time, as hereinafter charged, with the intent to kill, did unlawfully and with implied malice aforethought shoot and thereby kill the said Lula Ozment, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than five years.

"(8) The verdict, judgment, and record of the county court of McLennan county, Tex., which have been introduced in evidence before you, finding that the defendant was insane at the time he was tried in said court, establishes the fact that he was insane at the very time he was tried in said court, and raises the presumption that he was insane at the time he shot and killed Mrs. Lula Ozment, if he did shoot and kill her; but whether he was sane or insane at the very time the fatal shots were fired is a question which it is your exclusive province to determine from all the facts and circumstances which are in evidence before you.

"(9) You are further instructed that the burden of proof is on the state to show by the evidence beyond a reasonable doubt that the defendant was sane at the time he shot and killed Mrs. Ozment, if he did shoot and kill her, and responsible for his acts. In other words, in ordinary cases when insanity is interposed as a defense for the commission of crime on the part of the defendant, the presumption is that he was sane when the crime was committed, until the contrary is shown, and the burden of proof is on the defendant to show that he was insane; whereas, in the case before you the presumption is that this defendant was insane at the time he shot and killed Mrs. Lula Ozment, if he did shoot and kill her, and the burden of proof is on the state to show by the evidence beyond a reasonable doubt that the defendant was sane at the time of said shooting.

"(10) No act committed in a state of insanity can be punished as an offense. While in ordinary cases every person charged with crime is presumed to be sane, that is, of sound memory and discretion, until the contrary is shown by proof, in this case the defendant is presumed to have been insane at the time he shot and killed Mrs. Lula Ozment, if he did shoot and kill her, and not responsible for his acts, until the contrary is shown by the proof beyond a reasonable doubt. If under the law as herein given you in charge, and the testimony before you, the guilt of the defendant has been established beyond a reasonable doubt, it devolves on the state to establish by the evidence his sanity at the time of committing the act beyond a reasonable doubt, in order to fix his legal responsibility for said act; that is to say, the burden of proof to establish the sanity of the defendant by the evidence beyond a reasonable doubt devolves upon the state at the time of the shooting, if any. If the state has, as before explained, proved the facts which constitute the offense charged in the bill of indictment, by the evidence beyond a reasonable doubt, your next inquiry will be: Has the state established by proof his sanity beyond a reasonable doubt at the time he shot and killed Mrs. Lula Ozment, if he did shoot and kill her, or has it been established by proof from any source in evidence before you beyond a reasonable doubt? If it has, the law does not excuse him from criminal liability, and you should convict him. The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the crime, if any, he is amenable to law. As to his mental

condition at the time with reference to the crime charged, it is peculiarly a question of fact to be decided by you from all the evidence in the case before the act, at the time and after. A safe and reasonable test in all cases would be that whenever it should appear from the evidence that at the time of doing the act the defendant was not of sound mind, but was affected with insanity, and that such affection was the efficient cause of the act, and that he would not have committed the act but for that affection, he ought to be acquitted; for in such case the reason would be at the time dethroned, and the power to exercise judgment would be wanting. But this unsoundness of mind or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment and obliterating the sense of right and wrong, depriving the accused of the power of choosing between right and wrong as to the particular act done.

"(11a) Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused and to have taken from him the freedom of moral action, at the time of the commission of the act. Where reason ceases to have dominion over mind proven to be diseased, it then reaches the degree of insanity where criminal responsibility ceases and accountability to the law, for the purpose of punishment, no longer exists.

"(b) Whether that degree of insanity existed in the defendant at the time of the alleged crime is the important question on this issue. If it is true that the defendant took the life of the deceased, and at the time the mental and physical faculties were beyond the control of the defendant, or if some controlling mental or physical disease was in truth the acting power within him, which he could not resist, and he was impelled without intent, reason, or purpose, he would not be accountable to the law. If, on the other hand, his mind was sufficiently sound to be capable of reasoning and knowing the act he was committing to be unlawful and wrong, and knowing the consequences of the act, and had the mental power to resist and refrain from its commission, his plea of insanity would not avail him as a defense.

"(c) It is an essential ingredient of murder in the second degree that the person to be guilty of that crime must be one of 'sound mind and discretion,' the meaning of which is that he must have capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing. Although a man may be laboring under partial insanity, if he still understands the nature and character of his act, and the consequences, if he has a knowledge that it is wrong and criminal, and mind sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for his criminal act. But if the mind was in a diseased and unsound state, to such a degree that for the time being it overwhelms the reason, conscience, and judgment, and the defendant in committing the crime acted from an irresistible and uncontrollable impulse, then it would be the act of the body, without the concurrence of the mind. In such case there would be wanting the necessary ingredient of every crime—the intent and purpose to commit it.

"(d) It is necessary that the sanity of the defendant at the time of the killing, if any, should be established by the state, by the evidence, beyond a reasonable doubt. It is sufficient if it be established to your satisfaction, beyond a reasonable doubt by the weight or preponderance of evidence; that is, such and so much proof as reasonably satisfies you of the ex-

istence of the sanity of the defendant, at the time the act was committed, beyond a reasonable doubt. To ascertain the condition of the defendant's mind at the time of the killing, you should look to its condition before that time; his conduct, acts, and all other surroundings; ascertain, if possible, whether his mental condition was such as to enable him to know he was doing a wrongful and unlawful act. Look to his acts, conduct, and movements before and on the occasion of the crime, if any, his conduct, acts and movements after the crime, if any, and all other facts in the case, to reach a correct conclusion as to whether the defendant was of sound mind or not.

"(e) In case the jury find from the evidence that the defendant committed the act with which he is charged, but at the time of the commission of the act he was in a condition of mental insanity, as above defined, you will say by your verdict: 'We, the jury, acquit the defendant on the ground of insanity.'

"(12) The failure of the defendant to take the stand as a witness and testify in his own behalf shall not be taken by you as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the case or by you in your retirement while deliberating on your verdict. Such failure on his part to testify shall not be alluded to, commented on, or considered by you for any purpose whatever.

"(13) All of the testimony, if any, of the various witnesses in this case prior to the date of the alleged killing introduced in evidence before you by the state as to the various fights and assaults, if any, by the defendant, and his association and connection, if any, and the mode and manner of his life, if any, and all testimony, if any, as to whether he drank or was in the habit of drinking intoxicating liquors or not, and all testimony introduced by the state as to the conduct, actions, and demeanor of the defendant after he was placed under arrest, and after he was confined in jail, and all testimony as to whether he was high tempered or not, are before you, and you are instructed that, if you consider said testimony or any of it at all for any purpose, it is before you for the purpose of aiding you to pass on and determine the question of the sanity or insanity of the defendant at the time of the alleged killing, and is limited to that purpose, and you can consider the same for no other purpose whatever.

"(14) During the trial of this case it has developed that the defendant has heretofore been tried in this court on this same charge. You are instructed that the result of said former trial or trials, if any, is no concern of yours, and you must not when you retire to deliberate on your verdict refer to the same or inquire into it, mention, or consider the same. Your province is to try this case according to the evidence which has been submitted to you under the rulings of the court, and the law applicable thereto, as given you in charge by the court.

"(15) You are further charged that in the event you convict the defendant it is not permissible for you under any circumstances in fixing the penalty to decide the same by lot. It sometimes happens that when juries are unable to agree as to the punishment to be inflicted they decide that each man shall set down the number of years in his judgment the punishment should be, all of which to be added together, and the sum total to be divided by 12, and the quotient so ascertained by that division to constitute the verdict of the jury. This conduct is deciding the case by lot, and is not permissible, and you are instructed in this case that if you convict the defendant you must not consider any propositions of this character, but the punishment, if any, to be assessed, must be determined and agreed upon by each juror on the facts of the case as testified to by the witnesses and the law as given you in charge by the court, and nothing else.

"(16) In all criminal cases the burden of proof is on the state. The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict 'not guilty.' You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you, and in the special charges, and be governed thereby."

The special charges requested by appellant which the court gave are:

Special charge 3: "You are charged that in this case the burden is on the state to prove, beyond a reasonable doubt, that the defendant was at the very time he committed the act charged (if he did so) sufficiently sane and free from mental diseases and delusions as to render him amenable to the law. As to what mental diseases or conditions are necessary to exist to make him amenable to the law, you will look to and be governed by the general and special charges given in this case."

Special charge 9: "You are further instructed that the burden of proof is on the state to prove by a preponderance of evidence and beyond a reasonable doubt that at the time of said act the defendant's mental condition was such that he did know the character of his act, and its consequences, and had sufficient will power to refrain therefrom, and, if it has failed to do so, you will return a verdict of not guilty."

Special charge 11: "If the defendant entertained the insane delusion that the deceased had an immediate design upon his life, or the life of his mother or brother, and acting under any such delusion killed the deceased, in the belief that it was necessary to save his own life, or the life of his mother or brother, he would not be guilty under the law, and in this case, unless the state has shown by evidence beyond a reasonable doubt that he did not entertain any such insane delusion at the time he killed the deceased (if he did kill her), you will find the defendant not guilty."

[2, 3] The first attack on the court's charge is of paragraphs 2, 5, and 6. His attack of paragraph 2, in effect, is that that paragraph does not state to the jury what facts or circumstances extenuate the homicide, nor is the same elsewhere stated in the charge, nor does it state the elements of murder in the second degree, and it wholly ignores the issue of insanity as a part of the definition of second degree murder. His attack of paragraph 5 is specially to that part of it which tells the jury, "In murder in the second degree malice will be implied from the fact of an unlawful killing," which he claims is not only erroneous when the defense is insanity, but is also erroneous as a general statement of the law. And his objections to paragraph 6 are substantially the same.

[4-7] None of appellant's exceptions are tenable. It is elementary as stated, that when objections are made to specific portions or paragraphs of the court's charge it is necessary to consider the whole. No charge in a murder case can be given in one separate paragraph. It is necessary and proper to give it in many. *Christian v. State*, 161 S. W. 103 et seq. and authorities there cited. It is also elementary that the state

has a right to a submission of the issues raised applicable to the evidence in its behalf, as well as the accused has such right in his behalf. The theory of the state in this case was, and a large mass of testimony was introduced tending to show it, that the appellant was sane and not insane when he killed the deceased and the state had a right to have that issue on the state's theory submitted to the jury for a finding. The court, in different paragraphs of his charge which will be readily seen by reading it, made the proper distinction both in behalf of the state and of the appellant along all of these lines. In the second paragraph of the court's charge it was wholly unnecessary to state what facts or circumstances extenuated or excused the homicide. It is a standard form of charge universally approved in murder trials when implied malice and murder in the second degree are raised. In the other portions of the charge the court elaborately, specifically, and repeatedly tells the jury, in effect, that they could not convict appellant if he was insane at the time he killed the deceased, but before they could convict they must believe beyond a reasonable doubt that he was then sane. The only justification, excuse, or extenuation for the killing, claimed or raised by the evidence, was insanity, and that was completely, as stated, charged, taking the charge as a whole. What we have said about paragraph No. 2 equally applies to Nos. 5 and 6. These paragraphs are unquestionably correct and have been held so uniformly by the Supreme Court when it had criminal jurisdiction and by this court down to the present time. We have had occasion recently to investigate this matter and have so held, citing and collating some of the authorities. See *Cooper v. State*, 161 S. W. 1097, 1098.

[8] Appellant's criticism of paragraph 8 of the court's charge is without any merit. So far as that particular paragraph is concerned, it as completely and literally followed the decision of this court on the former appeal of this case as it could well do. However, that paragraph, in considering the criticism, must be considered in connection with all of the other charge of the court on the subject, and, when this is done, we think no just criticism can be made of it. The same may be said of appellant's objections to a part of paragraph 10, and minor paragraphs "b" and "c" of paragraph 11 of the court's charge, and also paragraph 13. In connection with the court's charge must also be considered the three special charges which appellant asked and the court gave. If there was any omission, or what could be considered just criticism of any paragraph of the court's charge as to the question of sanity or insanity, it was fully met and covered by said special charges requested by appellant and given by the court. It may be that the state might complain of the charge in some

particulars, but certainly appellant cannot with any show of reason.

[9-21] Taken as a whole, we think the charge of the learned trial judge, together with the special charges given, is apt in every particular, covers and protects appellant's rights in every possible way raised by the evidence and justified by the law of this case. None of appellant's criticisms of it are tenable, and none of his special refused charges should have been given. We have deemed it unnecessary to take up these several matters and discuss them separately.

The court's charge, as a whole and especially taken in connection with the special charges requested by appellant which were given, is a most admirable presentation of the law of this case applicable to the facts in appellant's favor. It seems to have been prepared with great care and accuracy. It is in conformity with the many charges and a combination thereof expressly and repeatedly and uniformly approved by this court. We refer to some of these cases without discussing and applying them to the charge in this case. A mere reading of them, and of the court's charge, demonstrates the accuracy and correctness of the court's charge. *Hunt v. State*, 33 Tex. Cr. R. 252, 26 S. W. 206; *Jordan v. State*, 64 Tex. Cr. R. 187, 141 S. W. 786; *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351; *Thomas v. State*, 55 Tex. Cr. R. 296, 116 S. W. 600; *Lowe v. State*, 44 Tex. Cr. R. 226, 70 S. W. 206; *Harrison v. State*, 44 Tex. Cr. R. 164, 69 S. W. 500; *Nelson v. State*, 43 Tex. Cr. R. 556, 67 S. W. 320; *Hurst v. State*, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719; *Brice v. State*, 162 S. W. 874; *Anderson v. State*, 148 S. W. 802; *Kirby v. State*, 150 S. W. 455; *Nugent v. State*, 46 Tex. Cr. R. 67, 80 S. W. 84; *Sartin v. State*, 51 Tex. Cr. R. 573, 103 S. W. 876; *Smith v. State*, 55 Tex. Cr. R. 564, 117 S. W. 966; *Williams v. State*, 7 Tex. App. 163; *Clark v. State*, 8 Tex. App. 359; *Tubb v. State*, 55 Tex. Cr. R. 618, 117 S. W. 858; *Leache v. State*, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; *King v. State*, 9 Tex. App. 515.

[22] Appellant has two bills to the introduction of certain testimony over his objections. While we do not copy them, we state them fully. In one, after the proper heading, it states that the state offered its witnesses Y. P. Garrett, A. D. Starling, and Fred Dean, and by each of them proved that some two or three years prior to the homicide appellant had committed an unprovoked assault on each of them at different times and places; and, in addition, Garrett said that he was sick at the time the assault and battery was committed on him; and Dean that appellant had knocked him down in a restaurant and struck him in the face with a ketchup bottle and sugar bowl, while he was down, inflicting very serious injury on him; and Starling, that appellant had

knocked him down, stamped him in the face, and broke his jaw. Appellant's grounds of objection were that said matters were remote, prejudicial, and injecting into the case other offenses than the one upon which he was upon trial, was not material to any issue, and threw no light upon the question of whether he was sane or insane at the time of the homicide. The bill further shows that the court, in passing upon this testimony, and admitting it, and in his charge, instructed the jury that they could consider the same only upon the issue of insanity. This is the whole of this bill.

The other bill, after the proper heading, states that the state introduced its witness Alva Hatch and he was permitted to testify over his objections that he was a police officer in Waco in 1910-11, and as such visited appellant's bedroom on Franklin street just a short time before the homicide and found three lewd women there; that he went to appellant and told him the man who occupied the store under his room was complaining about him having these lewd women up there; that appellant admitted having the women up there and promised to get them out that night, which, so far as the witness knew, he did. Appellant's objections to this evidence was that it tended to show him guilty of other offenses than the one for which he was upon trial, and to degrade him before the jury, and to show that he was guilty of grossly immoral conduct, and was prejudicial to him, not material to any issue, and threw no light upon the issue of his sanity or insanity at the time of the homicide, or any other time. The bill further shows that the court, in admitting this evidence, limited it to consideration in connection with the issue of insanity and so limited it in his charge to the jury.

In this connection we refer to paragraph 13 of the charge copied above.

Our statute specifically enacts (article 39, P. C.) that:

"No act done in a state of insanity can be punished as an offense."

And (article 40, P. C.):

"The rules of evidence known to the common law in respect to the proof of insanity shall be observed in all trials where that question is in issue."

We therefore go to the text-books for the common law. In the recent very able work on Evidence by Wigmore (volume 1, § 228, p. 278), he says:

"Sanity and insanity are terms applicable to the mode of operation of the mind as judged by some accepted standard of normality. The mode of operation of the mind is ascertainable from the conduct of the person in question, i. e., from the effect produced by his surroundings on his mind when responding by action to those surroundings. Virtually, then, the mind is one, while the surroundings are multifold; and the mode of operation cannot be ascertained to be normal or abnormal except by watching the effects through a multifold series of causes. On the one hand, no single act can be of itself decisive; while, on the other hand, any act what-

ever may be significant to some extent. The first and fundamental rule, then, will be that any and all conduct of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for, if a specific act does not indicate insanity, it may indicate sanity. It will certainly throw light one way or the other upon the issue. 'Upon this I believe that no difference of opinion will be found to exist,' said Mr. Justice Patteson, in a celebrated case, 'as to the principle on which such evidence is admissible. Every act of the party's life is relevant to the issue.' There can be no escape from this consequence. There is no distinction in kind (whatever there may be in degree) between one or another piece of conduct as evidence to be considered; some inference is always possible"—citing authorities.

In closing that section, on page 283, he quotes Justice Clifford of the United States Supreme Court, in *United States v. Holmes*, 1 Cliff. 98, 109, Fed. Cas. No. 15,382, as follows:

"One of the suggestions \* \* \* was that the government, in attempting to rebut the testimony offered by the prisoner on this point (of insanity), should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defense. \* \* \* (It) cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange and peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious that if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape, and justice often be defeated, because the means of ascertaining the truth are excluded from the jury. \* \* \* (Whenever the accused has offered his acts, conduct, and declarations, before and after the homicide), the government may offer evidence of other acts, conduct, and declarations of the accused within the same period to show that he was sane, and to rebut the evidence introduced for the defense."

See, also, 2 Greenl. Ev. § 371; *Webb v. State*, 5 Tex. App. 609; *Warren v. State*, 9 Tex. App. 633, 35 Am. Rep. 745; *Burwell on Insanity*, pp. 245-247; 1 *Clevenger, Med. Juris. of Ins.* pp. 184, 267. We have found no authority to the contrary.

In this connection the record shows that the appellant introduced witnesses who testified to many facts and circumstances of what appellant said and did from the time he was born up to the killing. In addition, even testimony to the mental and physical condition of both his father and his mother at the time of his conception. Also, of the insanity of some of his collateral kin, his cousins, even beyond the third degree; that the woman appellant killed was a prostitute and had been continuously for many years; that she had illegitimate children, one 14 or 15 years old at the time of the killing, another some 10 years old then; that for several years before the killing she had, in effect, gotten hold of his younger brother when he was only a good-sized young boy and had lived in adultery with him for years, and that he was about to marry her; that her influence over his young brother was such

that he could not induce him to break up the relationship, although he and his whole family had repeatedly and earnestly tried, themselves, and had officers also to do so; that her conduct was such and her spell and influence over his brother such as that it ran him crazy, and that he entertained the insane delusion that she had immediate designs upon his life and that of his mother and of his said brother, and that he was thus insane from these causes at the time of the killing. The state, in order to refute this and to show that he was not insane, but that he was sane at the time he killed the woman, introduced a large number of witnesses and proved the various acts, conversations, and conduct of the deceased during the same time, but more particularly these matters for several years just prior to the homicide and up to it, and for some time thereafter. These acts objected to by said bills were introduced along the same line and solely on the question of whether or not appellant was sane or insane at the time he killed the woman, expressly so limited at the time of its introduction and again specifically so by the charge of the court. In our opinion they were properly admitted for the purposes limited, and none of appellant's objections thereto were good.

[23] By another bill it is shown that the court stenographer, Hall Etter, was introduced by the state to prove that he had taken and correctly transcribed the testimony of Mrs. V. E. Witty, a witness on the former trial of the case, which he desired to offer for the purpose of impeaching her by contradictory statements, she having been a material witness for appellant on this trial, and held, at the time he was testifying, a copy of the statement of facts which the county attorney had secured from the Court of Criminal Appeals, which had been sent up as a statement of facts on a former appeal of this case. After the witness testified to the correctness of her testimony on a former trial, appellant's attorney crossed him and proved that said copy of her testimony was not in the form of question and answers but a narrative statement. Then the county attorney, in an ordinary tone and as a cross-examination of what had been brought out by appellant's counsel, asked the witness, "This is the same copy that was filed in the Court of Criminal Appeals, is it not?" which was in the presence of the jury and heard by them; to which the witness answered, "Yes," before counsel could object. That appellant then did object to the question and answer because it was an improper reference to the fact that defendant had, on a previous trial, been convicted. The court thereupon instructed the jury that they would not consider said question or answer for any purpose, yet appellant took his bill. In this connection we call attention to paragraph 14 of the court's charge above copied. This certainly would

not be a sufficient ground to authorize this court to reverse this case. *Baines v. State*, 43 Tex. Cr. R. 498, 66 S. W. 847; *Campbell v. State*, 35 Tex. Cr. R. 160, 32 S. W. 774; *Brantly v. State*, 42 Tex. Cr. R. 293, 59 S. W. 892; *Smith v. State*, 52 Tex. Cr. R. 351, 106 S. W. 1161, 15 Ann. Cas. 357; *Arnwine v. State*, 54 Tex. Cr. R. 213, 114 S. W. 796; *Morrison v. State*, 39 Tex. Cr. R. 523, 47 S. W. 369; *Salazar v. State*, 55 Tex. Cr. R. 313, 116 S. W. 819; *Coffman v. State*, 165 S. W. 946.

The judgment is affirmed.

#### On Motion for Rehearing.

[24] The only question necessary to discuss on rehearing is appellant's claim that the court below should have submitted manslaughter. In his objections to the court's charge he based this on the testimony specifically of Mrs. Witty, his mother, Mrs. McDonald, his sister, Barron, Huff, Bobinger, and Corley, therein saying:

"All of whom in effect testified to delusions on the part of the defendant that the deceased was seeking to take his mother's life and life of other members of his family, including himself, and there was eminent danger of his doing so; and that his mother was constantly complaining to him and asking him to take some action in the matter of the association of deceased with his brother, and that he was in a highly excited frame of mind about the situation during the entire day of the homicide, and his mind was in a condition that he could not have been guilty, even though sane, of any higher offense than manslaughter."

In his motion for rehearing on this point he claims:

"Our contention being that, where insane delusions enter into a case through the evidence, those delusions are in fact realities with the person affected, and may, if sufficient, constitute adequate cause equally so as if the delusions had a real existence; that under the law the accused is to be charged upon the same basis as if the insane delusions entertained by him existed in fact. And so, if these delusions, taken as a whole, were of such a character as had they in fact existed they would have raised the issue of manslaughter, then manslaughter is in the case, and the jury should have been so instructed and told that in passing upon this issue they would consider any insane delusions entertained by the accused as existing realities; and that if under all the facts and circumstances of the case they found adequate cause, etc., they would not find the defendant guilty of a higher offense than manslaughter."

#### And contends:

"And so, in this case, the jury, under the general charge of the court, could very readily have decided that though the defendant was not sufficiently insane as to be irresponsible in law for his actions, yet that he did entertain sufficiently insane delusions to partially dethrone his reason and render him incapable of cool reflection, and that these delusions were such that, if they were in fact true as he, under the law, had a right to have them regarded in passing on his case, they would in law amount to adequate cause."

We have thus given in full on this point his objection to the omission of the court's charge and his contention on rehearing. He asked no special charge whatever on man-

slaughter. He did ask, and the court in his instance gave, his special charges Nos. 3, 9, and 11 copied in full in the original opinion herein. By them, and especially by No. 11, he cut himself off from any charge on manslaughter, even if he had been entitled thereto, for by them he had the court specifically tell the jury in No. 3 that:

"The burden is on the state to prove beyond a reasonable doubt that the defendant was, at the very time he committed the act charged, sufficiently sane and free from mental diseases and delusions as to render him amenable to the law."

#### And in No. 9:

"The burden of proof is on the state to prove by a preponderance of the evidence and beyond a reasonable doubt that, at the time of said act, the defendant's mental condition was such that he did know the character of his act, and its consequences, and had sufficient will power to refrain therefrom, and if it has failed to do so, you will return a verdict of not guilty."

#### And in No. 11:

"If the defendant entertained the insane delusion that the deceased had an immediate design upon his life, or the life of his mother or brother, and acting under any such delusion killed the deceased, in the belief that it was necessary to save his own life, or the life of his mother or brother, he would not be guilty under the law, and in this case, unless the state has shown by evidence beyond a reasonable doubt that he did not entertain any such insane delusion at the time he killed the deceased (if he did kill her), you will find the defendant not guilty."

The court having told the jury under those circumstances to acquit, he should not then have told them to convict him of manslaughter.

[25] But even if appellant had not cut himself off from a charge on manslaughter, the evidence in no way showed nor tended to show "adequate cause." As said by this court through Judge Davidson in *Davis v. State*, 155 S. W. 548, it is "an uncontroverted proposition, that two things are requisite to constitute manslaughter: First, adequate cause; second, existing passion." And as we said in *Lamb v. State*, 169 S. W. 1163:

"Neither of these, without the other, is sufficient to raise manslaughter. And the passion must be caused by what deceased does or says. \* \* \* The statute says (P. C. art. 1128) 'manslaughter' is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause. And, defining 'under the influence of sudden passion' (article 1129) says, it means: (1) That the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation. (2) The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation, or provocation given by some other person than the party killed. And then (3) whatever the passion is it must be an emotion of the mind rendering it incapable of cool reflection. By 'adequate cause' (article 1130) is meant such as would commonly produce a degree of such passion or emotion in a person of ordinary temper sufficient to render the mind incapable of cool reflection. Article 1131 expressly states what are not adequate causes, and the next article expressly states what are.

Article 1137 specifically says, in order to reduce a voluntary homicide to manslaughter, it is necessary, not only that adequate cause existed to produce the state of mind referred to, but also that such state of mind did actually exist at the time of the homicide. \* \* \* *McKinney v. State*, 8 Tex. App. 645; *Johnson v. State*, 167 S. W. 736, and cases therein cited and reviewed; *Wilson v. State*, 160 S. W. 85, and cases therein cited and reviewed; *Kelly v. State*, 151 S. W. 309; *Treadway v. State*, 144 S. W. 655, and cases cited and reviewed; *Johnson v. State*, 149 S. W. 165. In the opinions in these cases just above cited many of the older decisions of this court are cited and discussed. We deem it unnecessary to collate all those and the many others to the same effect. We said in *Johnson v. State*, supra, 167 S. W. 737: "In *Treadway v. State*, 144 S. W. 655, and *Kelly v. State*, 151 S. W. 309, supra, we have recently had occasion to review the decisions of this state on this question, and it has always been held that if there be no legal "adequate cause" to produce a state of mind, such as anger, rage, sudden resentment, or terror, even if such state of mind does exist, the offense is not manslaughter but murder in the second degree."

Now, as we understand the testimony of said witnesses, Mrs. Witty, Mrs. McDonald, Barron, Huff, Bobinger, and Corley, it was directed to prove appellant was insane, and his claimed insane delusions at the time and before he killed deceased, and not to prove adequate cause, nor sudden passion at that time by anything deceased then said or did. We have again reviewed their testimony. It is too lengthy, and we think unnecessary, to copy herein.

As we understand from appellant's brief and motion for rehearing, he contends, in effect, that if appellant was partially sane and partially insane because of his claimed delusions, or "that the passing from sanity into insanity is as the passing from day to night, and that there is no definite point at which you may say that a man is sane or insane," that might constitute adequate cause, and he would therefore not be guilty of murder, but of manslaughter only, and relies on Judge Henderson's opinion in *Merritt v. State*, 39 Tex. Cr. R. 70, 45 S. W. 21, wherein he cites and quotes 1 Wharton, Cr. Law, 71. We think he misapprehends said decision. In that case appellant defended on the ground of insanity, claiming that he (*Merritt*) killed Brown under the insane delusion that a mob was after him to kill him, and Brown was the leader of that mob. He sought to introduce evidence that Brown was the leader of the mob. The trial court permitted him to prove his delusion that a mob was after him, but refused to let him prove, as a part of his delusion, that said Brown was its leader, re-

stricting the proof to "merely referring to the leader of the mob as a 'certain person.'" Judge Henderson said:

"The court (below), however, seems to have concluded that the insane delusion could be proved, and a most important feature omitted therefrom. That is, according to the court's idea, it was entirely competent to prove that appellant was deluded as to a mob in pursuit of his life, but it could not be shown in connection therewith who composed the mob. In the view we take of this question, we fail to see of what avail all the proof offered by appellant concerning the mob in pursuit of his life would be to him, if he was not permitted to show who composed that mob. The very essence of appellant's delusion was that the mob was led on by the deceased, if he, indeed, was not the entire mob, and that under such belief he slew him; yet we have seen from the bills of exception above stated that appellant was denied this proof. In our opinion, this was material error on the part of the court."

It is true it was held in that case that "a delusion is a form of insanity." The trial court in this case also expressly so held, and charged specifically at appellant's instance if that was true to find him not guilty. The court in this case admitted all evidence offered by appellant on that subject and excluded none.

[26] This court, in *Cannon v. State*, 41 Tex. Cr. R. 496, 56 S. W. 365, said:

"If appellant at the time he slew deceased was laboring under a delusion, and such delusion deprived him of the capacity to know right from wrong, he was insane. There is no grade of delusion that mitigates crime. In other words, a party cannot be half insane. He is either sane or insane. As aptly said: 'Insanity never operates as mitigation of a homicide, as it goes only to the punishment, and not to the character of the act itself; and its only effect is to exempt the slayer from the punishment prescribed for the homicide, without exonerating him from the charge of committing it.' 9 Am. & Eng. Enc. of Law, 615. The rule is stated in *United States v. Lee* [4 Mackey (D. C.)] 54 Am. Rep. 293, as follows: 'That there is no grade of insanity sufficient to acquit of murder, but not of manslaughter; but above and beyond that the prayer is inconsistent with his, is incongruous, and radically vicious. It rests upon the idea there is a grade of insanity not sufficient to acquit the party of the crime of manslaughter, and yet sufficient to acquit him of the crime of murder. The law does not recognize any such discretion as that in the forms of insanity. The rule of law is very plain that, in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect to the act committed.' This is to say, in another way, that a person cannot be half insane. *Spencer v. State*, 69 Md. 28, 13 Atl. 809; 3 *Whitthaus & B. Med. Jur.* p. 421."

The motion for rehearing is overruled.

## BELL v. STATE. (No. 3289.)

(Court of Criminal Appeals of Texas. Nov. 25, 1914.)

## 1. PERJURY (§ 25\*) — INDICTMENT — SUFFICIENCY.

Under Pen. Code 1911, art. 309, providing that the giving of testimony immaterial to the inquiry is not perjury, an indictment, which failed to state that defendant's testimony was material, was fatally defective, though it stated that it became a material inquiry before the grand jury whether he played or saw others play the games which he testified to not playing or having seen played.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.\*]

For other definitions, see Words and Phrases, First and Second Series, Perjury.]

## 2. PERJURY (§ 25\*)—INDICTMENT—MATERIALITY TO INQUIRY—IMMUNITY—CARD GAMES.

An indictment for perjury committed by defendant, in testifying before the grand jury that he had not played any card games, was not subject to a motion to quash on the ground that his statement could not have concerned a material inquiry because of Pen. Code 1911, art. 582, providing that any person examined before a grand jury shall not be liable to prosecution for any offense about which he may be required to testify.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.\*]

## 3. PERJURY (§ 21\*) — INDICTMENT — SUFFICIENCY.

In view of Code Cr. Proc. 1911, art. 439, requiring a grand jury witness to swear to make true answers to the "questions propounded" to him, and article 440, providing that the grand jury may ask the witness in general terms whether he has knowledge of the violation of any particular law by any person, an indictment for perjury committed in testifying before a grand jury need not state the specific offense which the grand jury was investigating.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 72-75; Dec. Dig. § 21.\*]

## 4. PERJURY (§ 21\*)—INDICTMENT—CONSTRUCTION—SUFFICIENCY.

An indictment, charging that defendant committed perjury in his testimony before the grand jury, where it was a material inquiry whether any game of cards had been played "at any place other than a private residence occupied by a family in C. county," was not objectionable as showing that the grand jury did not confine its investigation to offenses committed in C. county, but instead attempted to extend it to any and all places outside of such county.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 72-75; Dec. Dig. § 21.\*]

## 5. PERJURY (§ 24\*)—INDICTMENT—CONSTRUCTION.

In an indictment for perjury, committed in testifying before the grand jury, an allegation that defendant stated, "I have never played a game of cards in the last two years," did not render the indictment defective on the ground that the words quoted were not susceptible of the construction placed on them by the indictment, which was that he meant to state that he had not played any game of cards at any place other than a private residence occupied by a family, within the two years immediately next preceding, in the county where the grand jury was sitting.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 81; Dec. Dig. § 24.\*]

## 6. PERJURY (§ 26\*)—INDICTMENT—REQUISITES.

An indictment for perjury committed by defendant in testifying falsely before the grand jury, that he had not played any games of cards, was not defective for failure to allege the places and times he had played such games or that he did not know that the players were not in a residence occupied by a family.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90-94; Dec. Dig. § 26.\*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Charley Bell was convicted of perjury, and appeals. Reversed and dismissed.

A. M. Hampton, of De Leon, and Goodson & Goodson, of Comanche, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted and convicted of perjury. In view of the grounds of the motion to quash the indictment, it is necessary to give a substantial copy of it. It has the usual necessary preliminary allegations as to the court, the organization of the grand jury, etc., and that appellant on or about October 24, 1913, in said state and county, at a regular term of said court, naming the presiding judge, appeared before the said grand jury of said court at that time after it had been duly and legally organized, impaneled, etc., with a certain person as foreman thereof, duly appointed as such, and, while that grand jury was in session, presented himself and made his personal appearance to testify as a witness before said grand jury, and the foreman, as he was duly authorized, did administer to him the oath as a witness, said oath being the one required by law and so administered for the ends of public justice, he was then and there duly sworn and took a corporal oath as such witness before said grand jury. It then alleges:

"Whereupon it then and there became and was a material inquiry before said grand jury and necessary for the due administration of the criminal laws of the state of Texas, and the ends of public justice, whether he, the said Charley Bell, had played at any game of cards at any place other than a private residence occupied by a family in Comanche county, Tex., within the last two years next preceding the said 24th day of October, 1913, and whether or not he, the said Charley Bell, had seen any other person play at any game of cards at a place other than a private residence occupied by a family in Comanche county, Tex., within the last two years next immediately preceding the said 24th day of October, 1913, and whether or not he, the said Charley Bell, had bet or wagered any money or other thing of value or the representative of either at any game of cards except in a private residence occupied by a family in Comanche county, Tex., within the last two years next preceding the said 24th day of October, 1913, and whether or not he, the said Charley Bell, had seen any other person or persons bet or wager any money or other thing of value or the representative of either at any game of cards except in a private residence occupied by a family in Comanche county, Tex., within the last two years next immediately preceding the said 24th day of October, 1913. And the said Charley Bell, as such witness before said grand jury,

and under the sanction of said oath so administered to him as aforesaid on the day and date first above written and in the county of Comanche and state of Texas, did deliberately, willfully and corruptly testify and say in substance and effect, 'I have never played a game of cards in the last two years,' meaning thereby to say and state and swear, and thereby saying, stating, and swearing that he, the said Charley Bell, had not in Comanche county, Tex., played at any game of cards at any place other than a private residence occupied by a family within the last two years immediately preceding the said 24th day of October, 1913; (and meaning thereby to say, state, and swear and thereby saying, stating, and swearing that he the said Charley Bell had not bet or wagered any money or other thing of value or the representative of either at any game of cards except in a private residence occupied by a family in Comanche county, Tex., within the last two years next immediately preceding the said 24th day of October, 1913, and meaning thereby to say, state, and swear, and thereby saying, stating, and swearing that he, the said Charley Bell, had not seen any other person or persons bet or wager any money or other thing of value or the representative of either at any game of cards except in a private residence occupied by a family in Comanche county, Tex., within the last two years next immediately preceding the said 24th day of October, 1913); and meaning thereby to say, state, and swear, and thereby saying, stating, and swearing that he, the said Charley Bell, had not played at a game played with cards with Joe Wisdom, Boone Brown, and W. H. Stringfellow in the pasture of T. N. Mohon in Comanche county, Tex., and about the month of August, 1913 (and on which game of cards so played money was bet and wagered), and meaning thereby to say, state, and swear, and thereby saying, stating, and swearing that he the said Charley Bell had not played at another and different game of cards in which other game he, the said Charley Bell, W. H. Stringfellow, and Joe Wisdom, about the month of August, 1913, in the woods just west of De Leon in Comanche county, Tex., and meaning thereby to say, state, and swear, and thereby saying, stating, and swearing that he, the said Charley Bell, had not at another and different time, but about the same time, played in another and different game with cards with W. H. Stringfellow and a man from Cisco in the old Ayers field in Comanche county, Tex., and meaning thereby to say, state, and swear, and thereby saying, stating, and swearing that he, the said Charley Bell, had not played at another and different game of cards about the month of September, 1913, with W. H. Stringfellow, J. Matt Ross, and W. C. (Fat) Scott in a certain rock quarry near De Leon in Comanche county, Tex. Whereas, in truth and in fact, as he, the said Charley Bell, then and there well knew, he, the said Charley Bell, had played at games played with cards within the last two years next immediately preceding the said 24th day of October, 1913, and whereas in truth and in fact he, the said Charley Bell, had played at a game played with cards with Joe Wisdom, Boone Brown, and W. H. Stringfellow in T. H. Mohon's pasture in Comanche county, Tex., and on or about the month of August, 1913, and whereas in truth and in fact he, the said Charley Bell, had at another and different place and about the same time played at another and different game played with cards with W. H. Stringfellow and Joe Wisdom in about the month of August, 1913, in the woods just west of De Leon in Comanche county, Tex., and whereas in truth and in fact he, the said Charley Bell, had played at another and different game of cards with W. H. Stringfellow and a man from Cisco in the old Ayers field about the month of August, 1913, in Comanche county, Tex., and whereas in truth and in fact he, the said Charley Bell, had played at

another and different game of cards with J. Matt Ross, W. C. (Fat) Scott, and W. H. Stringfellow in about the month of September, 1913, at an old rock quarry in Comanche county, Tex. And which said statement and statements so made by the said Charley Bell before and to said grand jury was and were deliberately and willfully made and was and were deliberately false, and he, the said Charley Bell, then and there well knew when he made the same, against the peace and dignity of the state"—which was duly signed by the foreman.

Appellant made a motion to quash this indictment on a great many grounds. His motion is very lengthy and full. We think it wholly unnecessary to copy it. Instead, we will here in substance give all of his grounds. They are: (1) It fails to allege that the grand jury was investigating the violation of any law of the state which they were authorized to investigate, and about which he could be required to testify. (2) The grand jury did not confine its investigation to any offense committed in Comanche county, Tex., but, instead, attempted to extend it to any and all places outside of Comanche county. (3) That from the language appellant is alleged to have sworn before the grand jury, it could not be alleged therefrom that thereby be meant to say, state, and swear the several things that are alleged that he did say, state, and swear in said indictment, and that no such innuendo was deducible from the language used by him. (4) It fails to aver that he knew that the said several places where it alleges he played the several games were not in private residences occupied by a family and that they were not played in said county. (5) That the alleged testimony of appellant, "I have never played a game of cards in the last two years," is insufficient and supports neither of the allegations of perjury and is totally variant from any of the predicates assigned.

In oral argument on the submission of this case, he presented two other grounds not raised nor passed upon in the court below, nor mentioned in his brief. These two questions are: (a) It is not alleged in the indictment that the words used by the witness before the grand jury were material. (b) That the alleged false statement was not a material inquiry, and could not be, since the statute specifically provides that one may not be convicted when he is forced to give testimony about the playing of cards in which he is interested.

[1] We will first take up his grounds made in oral argument.

The statute is: The statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury. P. C. 309. There is no specific allegation in this indictment that the said statement made, or testimony given, by appellant was material. As we understand, the statute, and all the decisions, make this an essential.

In *Smith v. State*, 1 Tex. App. 622, this court held:

"It is alleged and argued, however, among the other reasons in arrest of judgment, that there is no sufficient averment of the materiality of the alleged false testimony, or matter falsely sworn to by the defendant, to the question or matter which was the subject of inquiry at the trial in which the perjury was committed. As a general rule, deducible from the leading authorities, we think that it may be stated that an indictment for perjury must not only show conclusively, but should charge affirmatively, that the testimony given by the defendant and alleged to be false was material to the issue on the trial of which he was sworn. *Weathers v. State*, 2 Blackf. (Ind.) 278; *State v. Flagg*, 25 Ind. 243; *People v. Collier*, 1 Mich. 137 [48 Am. Dec. 699]; *State v. Hobbs*, 40 N. H. 229; *State v. Beard*, 25 N. J. Law, 384; *State v. Hayward*, 1 Nott & McC. (S. C.) 546; *Pickering's Case*, 49 Va. 628; *State v. Davis*, 69 N. C. 495; *Wood v. People*, 59 N. Y. 117; *Nelson v. State*, 47 Miss. 621; *State v. Bowlus*, 3 Heisk. (Tenn.) 29. The exceptions to the rule will be given below. Mr. Wharton, in his work on Criminal Law, says: 'It must appear upon the face of the indictment that the matter alleged to be false was material, but such materiality need not be expressly averred when it appears on record. \* \* \* It is sufficient to charge generally that the false oath was material, on the trial of the issue on which it was taken; it is not necessary to show how it was material.' 3 Whart. Am. Cr. Law, § 2263. See, also, *People v. Burroughs*, 1 Parker, Cr. R. (N. Y.) 223; *Rex v. Souter*, 2 Starkie, 473; *Campbell v. People*, 8 Wend. (N. Y.) 636; *State v. Marshall*, 47 Mo. 378; *State v. Mumford*, 12 N. C. 519 [17 Am. Dec. 573]. And where the materiality of the evidence alleged to be false is shown by the nature of the case, no express averment of its materiality is necessary. *Hendricks v. State*, 26 Ind. 493; *State v. Hall*, 7 Blackf. (Ind.) 29; *Galloway v. State*, 29 Ind. 442; *State v. Biebusch*, 32 Mo. 276; *Lamden v. State*, 5 Humph. [Tenn.] 83."

This case has many times later been expressly approved and followed. *Mattingly v. State*, 8 Tex. App. 349; *Harrison v. State*, 41 Tex. Cr. R. 276, 53 S. W. 863, and other cases. And the same thing held in *Buller v. State*, 33 Tex. Cr. R. 551, 28 S. W. 465; *Cravey v. State*, 33 Tex. Cr. R. 557, 28 S. W. 472. See section 650, p. 417, Branch's Cr. Law, and cases cited by him.

These cases, and all other authorities on this question, clearly establish: (1) That it is necessary to either make this specific allegation—which said testimony, or statement, was material to the issue. Or (2) when this specific allegation is not made, the materiality of the alleged false testimony (or statement) must appear from all the allegations taken together. In either event, the indictment on this point would be good.

The indictment herein does allege that "it then and there became and was a material inquiry before said grand jury and necessary for the due administration of the criminal laws of the state of Texas, and the ends of public justice, whether he, the said Charley Bell, had played at any game of cards at any place other than a private residence occupied by a family in Comanche county, Tex., within the last two years next preceding the said 24th day of October, 1913, and whether or not he \* \* \* had seen any other person play," etc., and then several other such mat-

ters. It was proper to make all or any of these allegations; but they, nor either of them, supply the necessary allegation that what he testified was material to the issue. Nor do all the allegations taken together sufficiently show that what he testified was material to the issue, as held and illustrated in *Buller v. State*, supra; *McMurtry v. State*, 38 Tex. Cr. R. 521, 43 S. W. 1010; *Miller v. State*, 43 Tex. Cr. R. 368, 65 S. W. 908; *Rosebud v. State*, 50 Tex. Cr. R. 475, 98 S. W. 858; *Morris v. State*, 47 Tex. Cr. R. 423, 88 S. W. 1126, and other cases.

Evidently appellant and his attorneys, the trial judge, and district attorney were misled on this point by the form of indictment given by Judge White in section 333, in his Ann. P. C., and also by Judge Willson in section 135, p. 71 (4th Ed.) in his book of Forms. In each of these forms, said necessary allegation—which said testimony, or statement, was material to the issue—is omitted, but each in their next sections contains this specific allegation. We call the attention of the trial judges and prosecuting officers specially to the said omission, so that they will not hereafter follow said forms without supplying said omission. This fatal defect in the indictment necessarily results in the reversal and dismissal of this case.

[2] In view of any subsequent indictment of appellant, we will briefly discuss his other grounds. So far as objection "b" is concerned, we think the statute itself is a perfect and complete answer thereto. It is article 574, P. C.:

"Any court, officer or tribunal, having jurisdiction of the offenses enumerated in this chapter (the gaming laws), or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to the violations of any of the provisions of the foregoing articles (the gaming laws). Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify; and, for any offense enumerated in this chapter, a conviction may be had upon the unsupported evidence of an accomplice or participant."

And article 582, P. C.:

"A conviction for the violation of any of the provisions herein may be had upon the unsupported evidence of an accomplice or participant, and such accomplice or participant shall be exempt from prosecution for any offense under this law about which he may be required to testify."

That the statute and decisions of this state completely and fully protected him from indictment for any offense under the gaming laws, there can be no doubt. *Griffin v. State*, 43 Tex. Cr. R. 428, 66 S. W. 782, and cases therein cited; also, *Elliott v. State*, 19 S. W. 249; *Taylor v. State*, 50 Tex. Cr. R. 183, 95 S. W. 119; *Ex parte Muncy*, 163 S. W. 37. Perjury is not embraced in the gaming laws, and, of course, the statute above would not protect him if he committed perjury in his testimony, nor would it protect from indictment any other person with

whom he played, nor any person whom he saw play.

[3] We now go to appellant's objections to the indictment contained in his motion to quash, and brief. As to his first: Neither the statute nor any decision, known to us or cited by appellant, intimates that in an indictment for perjury is it essential that the indictment shall charge the specific offense which they were investigating. That that may be done may be true. Because it is not does not make the indictment defective and is no ground to quash it.

The oath of the witness is:

"I will true answers make to such questions as may be propounded to me by the grand jury, or under its direction." Article 439, C. C. P.

If "the grand jury \* \* \* think it necessary, they may ask the witness in general terms whether he has knowledge of the violation of any particular law by any person." Article 440; Art. 465, C. C. P.; McDonough v. State, 47 Tex. Cr. R. 227, 84 S. W. 594, 122 Am. St. Rep. 684; Scott v. State, 160 S. W. 960. The cases of Meeks v. State, 32 Tex. Cr. R. 420, 24 S. W. 98, McMurtry v. State, 38 Tex. Cr. R. 521, 43 S. W. 1010, and Higgins v. State, 38 Tex. Cr. R. 539, 43 S. W. 1012, on this point were expressly overruled in said McDonough Case.

We have considered the cases cited by appellant on this point. The first one is Weaver v. State, 34 Tex. Cr. R. 554, 31 S. W. 400. The indictment in that case was held bad because the false testimony did not embrace any offense. The false testimony alleged was that A. Sprinkles "did not play at a game with cards in a house on Sprinkles' place. Whereas, in truth and in fact he did" so play, etc.; the court saying:

"Whether A. Sprinkles had played cards 'in a house' on his own place or not was not material, unless the house was one in which card playing was prohibited by a statute; in other words, in order to constitute this a material question, the card playing must be in violation of the statute. We have no statute which prohibits generally card playing 'in a house.' Games played with cards, to be a violation of article 355 of the Penal Code, must be played in such houses as are therein contemplated; and the indictment should have alleged facts which showed the gaming investigated by the grand jury was an offense against the law, in order to render the testimony material. If such playing occurred in a private residence, no offense would be committed, unless such private residence was a place for retailing intoxicating liquors. Penal Code, arts. 355, 356. Investigations of grand juries should only be directed to violations of law. Statements of persons testifying before such bodies, unless material in some respects to such investigations, cannot be the basis of perjury. The oath there administered, and testimony given in obedience to such oath, is required for the 'ends of public justice,' and the materiality of such evidence, when given, must be measured by the subject-matter under investigation. If the matter being investigated is innocent of the law, then the statement should not be held materially false, though in fact it was untrue."

Our gaming statute has been materially changed since that opinion. It is now an of-

fense to play cards, whether anything is bet thereon or not, at any place "except a private residence occupied by a family." P. C. 548. The indictment herein, as quoted above, plainly avers, among other things, that, by what he said, he meant to say, state, and swear, and did thereby say, state, and swear that he had not in Comanche county played at any game with cards at any place other than a private residence occupied by a family within the last two years, and that he had not played such games with cards with the said several persons at the several times and places alleged therein, thereby supplying the very thing omitted in the Weaver Case and completely in compliance with what is held therein.

So of the case of Moore v. State, 32 Tex. Cr. R. 405, 24 S. W. 95, next cited by appellant. The only thing decided in that case in any way bearing on this is:

"The indictment contains but one count, in which perjury is assigned upon two statements, made before the grand jury at the same time, in regard to the same subject-matter. It is so well settled in this state, that proof of the falsity of either statement, if the statements were both materially and properly assigned, as was the case in this prosecution, will support a general verdict, that we deem it unnecessary to discuss the question."

In another case cited by him, Donohoe v. State, 14 Tex. App. 638, as we understand it, is exactly applicable in this case, and is against, instead of for, appellant. It is needless to discuss the other cases cited by him.

[4] As to his second ground: We think, without doubt, the allegations are not susceptible of the construction he claims, but, instead, it clearly and without doubt shows that they were restricting their investigations to card playing in Comanche county only and excluding such games therein as may have been played at a private residence occupied by a family. A mere reading of the indictment, we think, demonstrates this, and it is unnecessary to discuss it.

[5] As to his third ground: We think his contention is equally without support so far as the allegations of the indictment are concerned. The language he is alleged to use was, "I have never played a game of cards in the last two years." We think from this clearly could be alleged each and every thing that is alleged in the indictment that he meant, which were included in the charge of the court. The court in his charge eliminated all those matters which we have inclosed in parentheses thus ( ) in copying the indictment above. Donohoe v. State, supra. If the statement had been true that he "had never played a game of cards in the last two years," then he would not have committed perjury in so swearing, and it is a most reasonable allegation, from what he did say, that he had never played cards in Comanche county with any person or persons at any time or place not at a private residence occupied by a family.

[6] As to his fourth ground: It was not necessary for the indictment to allege the places and several times he played such games, nor that he did not know that they were not in a residence occupied by a family. That was a matter of proof wholly unnecessary to allege.

So his fifth ground is wholly untenable. It is unnecessary to discuss it.

Because of the fatal omission in the indictment of the one necessary allegation above pointed out, the judgment is reversed and the cause dismissed.

DAVIDSON, J. I concur in the reversal, but further believe there are other fatal defects which render the indictment wholly vicious. Some of these are discussed in *Scott v. State*, this day decided; some of the other questions are not. I deem it hardly necessary now to discuss the remaining questions.

### SCOTT v. STATE. (No. 3230.)

(Court of Criminal Appeals of Texas. Nov. 25, 1914.)

#### PERJURY (§ 25\*)—INDICTMENT—SUFFICIENCY.

An indictment charging that it became a material inquiry before the grand jury whether defendant played any game on which money was bet or saw any such game played, and that he testified that he had not played or seen any such game played, and stating in the traverse that he knew that he had played three different games with certain parties named but not shown to have been inquired about before the grand jury, was insufficient for failure to allege that the testimony given by defendant before the grand jury was material to the inquiry.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 82-89; Dec. Dig. § 25.\*]

Appeal from District Court, Hamilton County; J. H. Arnold, Judge.

Walter Scott was convicted of perjury, and appeals. Reversed and dismissed.

See, also, 160 S. W. 960.

H. E. Trippet, of Hico, and Eldson & Eldson, of Hamilton, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of perjury; his punishment being assessed at two years' confinement in the penitentiary.

The indictment, omitting formal parts, alleges:

"It then and there became and was a material inquiry before said grand jury and necessary to the due administration of the criminal laws of the state of Texas and the ends of public justice whether he, the said Walter Scott," has "theretofore at any time within the last two years next preceding the said 2d day of September, 1912, in Hamilton county, Tex., or within 400 yards of the boundary line between Hamilton county, Tex., and Erath county, Tex., played at any game played with dice upon which money was bet, and whether he, the said Walter Scott, had seen any game played with dice upon which money was bet in Hamilton county, Tex., or within 400 yards of the boundary line between Hamilton county, Tex., and Erath county, Tex.," etc.

Then follows the statement that appellant as a witness before the grand jury did willfully, deliberately, etc., testify as follows, to wit:

"I have been engaged in no gambling of any character either with cards, dice, or betting on the ball game. I threw dice with Bill Cole in the buggy, but we did not bet on the throwing. This was in Hamilton county. I played dice with Acquilla Simmons on the Clairette road about six weeks ago, but we did not bet on the game. I played dice with one of Mollie Bailey's showmen some time ago, but did not bet on that game. These are the only times I have played dice since I returned to this county about 18 months ago."

Meaning thereby, etc., that he had not played at any game of dice upon which money was bet in Hamilton county, or within 400 yards of the boundary line between Hamilton county and Erath county, Tex., since his return to the county. Then follows the traverse wherein it is alleged:

"In truth and in fact as he, the said Walter Scott, then and there well knew, he, the said Walter Scott, had played and did in Hamilton county, Tex., or within 400 yards of the boundary line between Hamilton county, Tex., and Erath county, Tex., and on or about the 1st day of May, 1912, play at a game played with dice, commonly called craps, and especially had he, the said Walter Scott, played at a game played with dice commonly called craps and upon which money was bet with Billie Cole, Billy Rhoades, Vernon Smith, and other persons in Hamilton county, Tex., or within 400 yards of the boundary line of Hamilton county, Tex., and Erath county, Tex., within two years next preceding the said 2d day of September, 1912, to wit, on or about the 1st day of May, 1912; and, whereas, in truth and in fact, as he, the said Walter Scott, then and there well knew, he, the said Walter Scott, had played and did at another and a different game played with dice commonly called craps in Hamilton county, Tex., which said game was played on or about the 1st day of August, 1912, at the compress in the town of Hico in Hamilton county, Tex., with one Vernon Smith, and also money was bet on that game. He had also played at another and a different game played with dice commonly called craps with one Henry Rodgers and Tom Wood in a box car," etc.

Motion was made to quash this indictment on several grounds. We are of the opinion this indictment is totally insufficient under the authorities. It will be noticed that the allegation was that it became a material inquiry that appellant played at a game on which money was bet. This does not allege directly or even indirectly that the alleged false statement was material to the issue. *Buller v. State*, 33 Tex. Cr. R. 553, 28 S. W. 465; *McMurtry v. State*, 38 Tex. Cr. R. 521, 43 S. W. 1010; *Miller v. State*, 43 Tex. Cr. R. 368, 65 S. W. 908; *Rosebud v. State*, 50 Tex. Cr. R. 475, 98 S. W. 858; *Morris v. State*, 47 Tex. Cr. R. 423, 83 S. W. 1126; and for collation of authorities see Branch's Criminal Law, § 650. It could hardly be a material question whether defendant played at a game where money was bet or not. If it was a material question that he did or did not bet, he being a witness before the

grand jury, then the allegation of materiality ought to have alleged directly that he did bet, and not whether he did or did not. It was not material to know whether he did or did not. It is material to know whether the game was played and money bet on it. Nor could it be material, as we understand that appellant did or did not bet on the game. He was a witness before the grand jury, and upon his testimony the grand jury may indict other parties for gambling, but not the defendant, because the statute, where a party to the game testifies, immunes that party from punishment. Nor was it material, as we understand the decisions, that appellant may or may not have seen parties play. The material question was whether the parties played, and not whether defendant saw them play. If it was material and necessary to allege that they did in fact play, then it should have been alleged that he had seen them play. But as we understand the rule in Texas, the grand jury must inquire about offenses, and it was not an offense for defendant to see other parties play. It is an offense that the gaming law was violated, and, if appellant saw the other parties play, the question to be inquired of was as to whether or not these parties played, and the defendant would know whether they played or not. This rule was laid down in *Gallegos v. State*, 50 Tex. Cr. R. 192, 95 S. W. 123. The material questions alleged in the indictment were of the most general nature, confining itself to the following propositions: Whether the defendant had played at a game on which money was bet, and whether he had seen other parties play that character of game within two years prior to the 2d day of September. This is very general, to say the least of it, as to date, and entirely too general as to games, places, and parties. This indictment, we think, is insufficient because it does not allege this testimony given by appellant was material. The only materiality alleged is whether he played himself or had seen others play. Under the cases cited, this is not sufficient allegation of materiality. This identical question was decided in the *McMurtry Case*, *supra*. Quoting from that decision, we find this language:

"In addition to the objections heretofore stated with regard to the indictment, appellant claims that said indictment is defective because it does not allege that the testimony of appellant upon the points in issue was material; and he insists that the allegation in the indictment 'that it became and was a material matter of inquiry before said grand jury whether, at the time and place laid in the indictment, appellant played at a game with cards,' etc., is not sufficient; that the indictment should have further alleged that the testimony given by appellant on said issues was material. This contention seems to be correct. See *Buller v. State*, 33 Tex. Cr. R. 551 [28 S. W. 465]; *Weaver v. State*, 34 Tex. Cr. R. 554 [31 S. W. 400]."

Going to the traverse we find that it is alleged, as a matter of fact, that appellant knew that he had played at least three differ-

ent games with the certain parties named in the traverse. The traverse covers a wider field than the questions asked or the testimony given by appellant. The material questions were very general, to wit, whether appellant had played at any game with dice on which money was bet, or had seen other parties play games at which money was bet. His testimony was that he had been engaged in no gambling with cards, dice, or betting on ball games, admitting that he threw dice with Cole and played with Simmons and one of Mollie Bailey's showmen. These were the matters about which he testified before the grand jury. The grand jury, so far as the indictment is concerned, never asked him about the games with the other named parties set out in the traverse. Of course, in order to hold a citizen to answer a charge of perjury, the facts upon which the state relies as being inquired about before the grand jury must have been inquired about before that body and called to the attention of the witness so he may answer. There is nothing in the indictment indicating that he was asked about games played with parties mentioned in the traverse, and the traverse does not cover or refer to the instances about which he testified before the grand jury. He testified he played with certain parties, but did not bet. In order to make this indictment good, they should have traversed matters about which he testified before the grand jury as set out in the indictment. The material inquiry alleged was whether or not he had played at a game where money was bet or had seen such games. He testified he played with certain parties but had not bet. The traverse covers an entirely different transaction and has no reference to the testimony before the grand jury.

This indictment is so fatally defective in so many ways we deem it unnecessary to discuss it further.

The judgment is reversed, and the prosecution is ordered dismissed.

PRENDERGAST, P. J. In my opinion, the indictment herein is fatally defective in these particulars only:

(1) Wherein it alleges it was a material inquiry, etc., whether appellant within two years before September 22, 1912, "in Hamilton county or within 400 yards of the line between Hamilton county and Erath county played," etc., this should have been "in Hamilton county and within 400 yards," etc. And wherever in this connection the disjunctive "or" is used, the conjunctive "and" should have been used. The rule in *Byrd v. State*, 162 S. W. 362, does not apply. However, proof of either in Hamilton county, or within 400 yards of the line between said counties, would have been sufficient; it would not be necessary to prove both.

(2) No allegation avers that appellant bet in any of the games he played, nor does any

allegation aver who bet in any of the games he saw played. This should have been averred. Or if the games he played in himself alone were relied upon it should have averred he bet thereon. If not those, but the games he saw played alone, were relied on, then it should aver who bet therein.

I think the indictment is not defective in any other particular.

No direct averment was made that the alleged false testimony upon which the perjury was based "was material to the issue"; but, taking all the allegations together, I think they show what is alleged he testified was material to the issue. See the opinion in *Charley Bell v. State*, 171 S. W. 239, this day delivered. However, I think it would always be better to make the specific allegation that what he testified was material to the issue.

On these grounds alone I concur in Judge DAVIDSON'S opinion reversing and dismissing this cause.

HARPER, J. I concur in the reversal and dismissal of the case, because the indictment fails to allege that the testimony given was material to the inquiry, and I have doubts that the allegations are sufficient to supply this omission in the allegations. However, it is no offense to play at dice; it is only an offense to "bet" at a game played with dice. There is no allegation that his statement that he played at games of dice, but had not bet thereon was not true; there should have been, to have rendered the indictment valid, not only an allegation that he played at a game of dice, but that he bet on said same game. The "betting" in the game of dice, and not the mere playing, would be the gravamen of the offense.

The other holdings in the opinion I express no opinion on.

ST. LOUIS, B. & M. RY. CO. et al. v.  
KNOWLES. (No. 5336.)

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 9, 1914.)

1. COURTS (§ 169\*)—JURISDICTION—"AMOUNT IN CONTROVERSY."

The attorney's fee sought to be recovered under authority of Rev. St. 1911, art. 2178, in an action for the value of a mule killed by defendants' train, was a part of the "amount in controversy," within the constitutional and statutory provisions establishing the jurisdiction of courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-425, 428-436, 443, 456, 458, 465; Dec. Dig. § 169.\*]

For other definitions, see Words and Phrases, First and Second Series, Amount in Controversy.]

2. RECEIVERS (§ 183\*)—RAILROADS—KILLING OF STOCK—ACTION AGAINST RECEIVER—PETITION.

Where a petition not excepted to, in an action for the value of a mule killed by a train, though not specifically alleging that the mule was killed while the defendant receiver was

operating the railway, alleged that it was killed through the negligence of defendants' servants and employes in charge of the train, it stated a cause of action against the receiver, based on the ground that the injury occurred after he became receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 361-366; Dec. Dig. § 183.\*]

3. RAILROADS (§ 447\*)—INJURY TO STOCK—REFUSAL OF INSTRUCTIONS.

Where, in an action for the value of a mule killed from being struck by a train, the court instructed merely that plaintiff was required to show that defendants were guilty of negligence, without stating that such negligence must have been the proximate cause of the injury, it was error to refuse instructions defining proximate cause and stating that plaintiff could not recover, unless defendants' negligence was the proximate cause of the injury, though such requested instructions ignored the issue with respect to the necessity of fencing the point where the injury occurred.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642-1650; Dec. Dig. § 447.\*]

4. RAILROADS (§ 441\*)—INJURY TO STOCK—FAILURE TO FENCE—BURDEN OF PROOF.

In an action for the value of a mule killed from being struck by a train after it has gone upon the track where the right of way was not fenced, the burden was on the defendants to show that such place was within the necessary switching and depot limits, where a fence would be a nuisance and was not required.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.\*]

5. RAILROADS (§ 446\*)—INJURY TO STOCK—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

Where, in an action for the value of a mule killed by defendants' train, the evidence conflicted on whether signals were given and in regard to the distance between the locomotive and the mule when the mule approached and ran along the track, the question whether defendants were guilty of negligence, which proximately caused the injury, was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

Appeal from San Patricio County Court; P. A. Hunter, Judge.

Action by J. M. Knowles against the St. Louis, Brownsville & Mexico Railway Company and others. From judgment for plaintiff, defendants' appeal. Reversed and remanded, and rehearing denied.

Claude Pollard, of Kingsville, and Robt. W. Stayton and David M. Picton, Jr., both of Corpus Christi, for appellants. R. L. Evans, of Sinton, for appellee.

MOURSUND, J. J. M. Knowles sued the St. Louis, Brownsville & Mexico Railway Company and Frank Andrews, receiver for said railway company, alleging that the defendants, their agents, servants, and employes in charge of a certain train, had negligently run over and killed a mule belonging to plaintiff. Plaintiff alleged that defendants are indebted to him in the sum of \$220. He alleged that the mule was worth \$200 at the time it was killed, which was on July 2, 1913, and that he was entitled to an attorney's fee of \$20 under the provision of the

Texas statutes. In his prayer he asks for judgment in the sum of \$220, and his interest and costs. Defendants, by their answer, put in issue all of the allegations of the petition. The trial resulted in a verdict and judgment in favor of plaintiff for \$220.

[1] Appellants, though they did not raise the question below, contend that the court was without jurisdiction of the amount in controversy; this contention being based upon the theory that the amount sued for was exactly \$220, and that \$20 of this amount was an attorney's fee provided for by statute, and should be held to constitute no part of the amount in controversy, but to be merely costs.

As our Supreme Court has held in the case of *Railway v. Chambliss*, 93 Tex. 62, 53 S. W. 343, that article 6603 (Rev. St. 1911) limits the recovery for animals killed by railroads in running over their tracks to the value thereof without interest, regardless of whether the suit is based upon the cause of action created by said statute or upon negligence, the prayer for interest cannot be considered, and it is necessary to decide the question whether the attorney's fee is a part of the amount in controversy. Article 2178 (R. S. 1911), in allowing attorney's fees, does not designate the same as costs; in fact, it expressly provides for the recovery of all costs, and in addition a reasonable attorney's fee, not exceeding \$20. It is also provided that in jury trials the jury shall determine what is a reasonable fee. It is true that the right to recover attorney's fees is conditioned upon the jury awarding a recovery of the amount of the claim as presented, but it is clear that it is necessary to allege and prove the facts entitling plaintiff to recover attorney's fee.

We conclude that the attorney's fee sought to be recovered is a part of the amount in controversy, within the meaning of the provisions of the Constitution and statute establishing the jurisdiction of our courts. *Wichita Valley Ry. Co. v. Leatherwood*, 170 S. W. 262; *Railway v. Werchan*, 3 Tex. Civ. App. 478, 23 S. W. 30.

[2] Appellants contend further that fundamental error was committed in rendering judgment against Frank Andrews, receiver of the railway company; such contention being based upon the theory that plaintiff's petition contains no allegation sufficient to support the judgment. It is true the petition does not specifically allege that the mule was killed while the receiver was operating the railway, but it is alleged that said mule was killed through the negligence of the defendants, their agents, servants, and employes in charge of the train. This pleading was not excepted to, nor did appellants deny that the receiver had charge of the properties of the railway company at the time the mule was killed. No objection was raised during the trial, nor in the motion for a new trial, to

judgment being rendered against the receiver on account of the nature of the pleading, nor was it contended that he was not in charge of the railroad at the time the mule was killed. The petition does not show that no cause of action exists against the receiver. On the contrary, it is alleged that his agents and employes caused the injuries, and, indulging every reasonable intendment in favor of the pleading, we hold that it stated a cause of action against the receiver, based upon a ground that the injury occurred after he became receiver. The second assignment is overruled.

[3] The jury were instructed to find for plaintiff, unless they found from the evidence that public necessity, convenience, or commerce required that defendants' railway should be left unfenced at the place where the mule was killed, and if they found, applying such test, that the right of way should be left unfenced at such place, then, in order for plaintiff to recover, it was necessary for him to show, by a preponderance of the evidence, "that the defendants, their agents or employes, were guilty of negligence, or failed to use ordinary care, in the killing of said animal," if they believed said animal was killed. No objection was made to submitting both of these issues nor on account of the failure of the court to submit only those elements of negligence pleaded by plaintiff, but defendants did object to the charge on the ground that it did not require a finding that the negligence must be the proximate cause of the injury in order to entitle plaintiff to recover, and in connection with such objection a special charge was presented in due time, which read as follows:

"You are instructed that if you should find that defendants, or either of them, were guilty of negligence, this would not entitle plaintiff to recover, unless such negligence was the proximate cause of the injury to or death of plaintiff's mule."

Another special charge was requested, defining proximate cause. These charges were refused, and such refusal is assigned as error upon this appeal. Appellee says these special charges should not have been given, because they ignored the issue with respect to the necessity of fencing at the point where the injury occurred. We see no merit in that contention. The charges, if given, would in no way have interfered with a finding in favor of plaintiff, provided the jury found that the right of way should have been fenced at the place where the injury occurred. The special charges related solely to the issue of negligence. It is impossible to say upon what issue the verdict was found, but we conclude, from reading the evidence, that it is highly probable it was found upon the issue of negligence; and, there being evidence to the effect that the mule ran upon the track in front of the engine from a place and at a time making his injury unavoidable, it was very important to appellants to have the spe-

dial charges given. The charge of the court merely required plaintiff to show, by a preponderance of the evidence, that defendants "were guilty of negligence, or failed to use ordinary care in the killing of said animal." In view of said charge, which we do not approve, and of the evidence adduced, we conclude that the failure to give the special charges constitutes error requiring the reversal of the case. *Railway v. Williams*, 39 S. W. 987; *Railway v. Malone*, 37 S. W. 640; *Railway v. Blake*, 43 Tex. Civ. App. 180, 95 S. W. 593; *Railway v. Graham*, 168 S. W. 55; *International & G. N. Ry. Co. v. Matthews Bros.*, 158 S. W. 1048. The fifth and sixth assignments are sustained.

The seventh assignment relates to the sufficiency of the evidence to sustain a recovery for attorney's fee. Appellee admits that such assignment is well taken, and has offered to file a remittitur of the attorney's fees, if the other assignments should be overruled.

[4] The third and fourth assignments question the sufficiency of the evidence to sustain the verdict. These assignments are overruled. The evidence does not show, as a matter of law, that the place where the mule was killed was not required to be fenced by the railway company. While it is admitted that lots have been laid out on each side of the track at such place, there is no evidence that streets crossing the railroad track exist and are used by the public. The testimony with regard to the use of this track by the servants of the company in doing the necessary switching and handling of cars is not as clear as it might be. On another trial these matters should be more carefully developed. The burden rests upon the railroad company to show that said place was within the necessary switch and depot limits at a place where a fence would be a nuisance to the general public or a menace to the safety of the employes and servants of the company in doing the necessary switching and handling of the cars in the transaction of the business of such station. *Louterstein v. Railway Co.*, 144 S. W. 310; *Railway v. Schram*, 138 S. W. 195.

[5] The evidence was conflicting in regard to the giving of signals by bell and whistle, also in regard to the distance between the locomotive and the mule at the time such mule approached and ran along the track. It cannot be said, as a matter of law, that no negligence was shown which proximately caused the injuries to the mule.

The remaining assignments of error are duplicates of those which have been considered; appellants having briefed the paragraphs of the motion for new trial as well as the formal assignments of error. The eighth, ninth, tenth, and eleventh assignments are overruled. The twelfth, thirteenth, and fourteenth are sustained.

The former opinion delivered in this case

is withdrawn. The judgment will remain as rendered by us, namely, that the judgment of the trial court be reversed, and the cause remanded. Appellants' motion for rehearing is overruled.

# SEABROOK et al. v. FIRST NAT. BANK OF PORT LAVACA. (No. 5350.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 18, 1914. Rehearing Denied Dec. 9, 1914.)

## 1. JUDGES (§ 45\*)—DISQUALIFICATION—RELATIONSHIP BY AFFINITY.

Where the wife of the district judge was a first cousin to the wife of one whom defendants were seeking to make a party, and a judgment against such person would affect the community rights of the cousin of the judge's wife, the judge was disqualified, being related to his wife's cousin by affinity, although not being related to her husband, whom defendants were desirous of making a party.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 208-212; Dec. Dig. § 45.\*]

## 2. HUSBAND AND WIFE (§ 268\*)—COMMUNITY INTEREST—NATURE OF.

A judgment recovered against a husband is a charge upon the community estate of the husband and wife, because within the spirit and intent of the Constitution and statutes she is a party to the suit.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 953-967; Dec. Dig. § 268.\*]

## 3. JUDGES (§ 56\*)—DISQUALIFICATION—RULINGS.

A disqualified judge cannot enter a decree or order agreed to by the parties, and any judgment rendered by him must be reversed.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 235-245; Dec. Dig. § 56.\*]

## 4. JUDGES (§ 51\*)—DISQUALIFICATION—OBJECTIONS—METHOD OF RAISING.

The question of the disqualification of the trial judge may be raised by a motion for new trial.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

Appeal from District Court, Calhoun County; John M. Green, Judge.

Action by the First National Bank of Port Lavaca against L. Seabrook and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

R. L. Daniel, of Victoria, for appellants. Wilson & Hamilton, of Port Lavaca, for appellee.

FLY, C. J. This is a suit by appellee against L. Seabrook and J. J. Randle on a promissory note for \$1,500, executed by appellants, and payable to appellee on demand, bearing 10 per cent. interest from date and 10 per cent. attorney's fees. Appellants answered that the execution of the note grew out of a transaction between them and W. C. Noble and Willett Wilson in connection with the purchase, development, and sale of properties which were certain additions to the town of Port Lavaca; that their

agreement with Noble and Wilson, for themselves and as officers of the bank, was that the proceeds from the sale of lots should be deposited in the bank in the name of J. J. Randle, and that all vendor lien notes and other securities should be deposited in the same way, and that the first money received from the sale of lots should be applied to the payment of the note sued on; that large sums of money and securities realized from the sale of lots had been deposited in the bank, and the latter had in its possession more than sufficient funds to pay off the note, and, if such funds were not in the bank, they had been appropriated by Noble and Wilson, and it was prayed that they be made parties. Appellee filed a general demurrer and 33 special demurrers to the answer, which were sustained, and judgment rendered in favor of appellee for the amount of the note, interest, and attorney's fees.

[1, 2] On motion for a new trial, appellants assailed the judgment of the court on the ground of disqualification of the judge. The judge testified:

"I am the district judge of the Twenty-Fourth judicial district, before whom the cause of First National Bank of Port Lavaca v. L. Seabrook and J. J. Randle (No. 1707) was tried. My wife and the wife of W. C. Noble, whom the defendants seek to make a party to said cause, are first cousins."

In other words, the wife of the district judge and Mrs. Noble are related to each other within the third degree, and if Mrs. Noble's interest in the community estate of herself and husband would be affected by a judgment against him, even to the extent of costs, the trial judge was disqualified. Her interest in any community property would undoubtedly be affected by a judgment against her husband. *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Duncan v. Herder*, 57 Tex. Civ. App. 542, 122 S. W. 904; *Jirou v. Jirou*, 136 S. W. 493. In the case of *Duncan v. Herder* the Court of Civil Appeals declined to follow the case of *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768, and a writ was refused by the Supreme Court. The *Winston-Masterson* Case seems to be in conflict with other opinions of the Supreme Court on the same subject.

Noble was not related to the district judge by affinity. Speaking on this subject, the Supreme Court held, in the cited case of *Schultze v. McLeary*, that the trial judge was not related by affinity to the husband of his wife's sister in any degree. It was also held in the Ohio case of *Chinn v. State*, 47 Ohio St. 575, 26 N. E. 986, 11 L. R. A. 630:

"Affinity is that tie which arises in consequence of marriage betwixt one of the married pair and the blood relations of the other; and the rule of computing its degrees is that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity, which rule holds also e converso, in the case of the wife's

relations. Thus, where one is brother by blood to the wife, he is brother-in-law, or by affinity, to the husband. But there is no affinity between the husband's brother and the wife's sister, which is called by the doctors *affinitas affinitatis*, because then the connection is formed, not between one of the spouses and the kinsmen of the other, but between the kinsmen of both."

While it is true that the trial judge was not related by affinity to Noble, whom appellants sought to make a party to the suit, he was related within the third degree by affinity to Mrs. Noble, and if her interests would have been affected in any way, even to the extent of costs, by a judgment against Noble, then the judge would be disqualified to pass on the question of making Noble a party to the suit. Her interest would be affected by any judgment obtained by appellants against Noble, as it would be a charge upon the community property of Noble and wife, because she, within the spirit and intent of the Constitution and the statute, would be a party to the suit. *Jordan v. Moore*, 65 Tex. 363; *Schultze v. McLeary*, herein cited; *Railway v. Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410.

[3, 4] It was undoubtedly a ruling on the interests of Noble, when the court sustained the exceptions to the answer wherein it was sought to make him a party, and this court has no authority to inquire into the propriety or impropriety of the ruling. The court may have ruled correctly, but disqualification of the judge is not tested by the correctness of his rulings. It has been held that a disqualified judge cannot even enter a decree or order agreed to by all parties. *Jouett v. Gunn*, 13 Tex. Civ. App. 84, 35 S. W. 194. The question of disqualification could be raised on motion for new trial. *Railway v. Looney*, 42 Tex. Civ. App. 234.

The judgment is reversed, and the cause remanded.

#### DENTON v. ENGLISH. (No. 5335.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 4, 1914. On Motion for Rehearing. Dec. 5, 1914.)

#### 1. BOUNDARIES (§ 46\*)—BOUNDARY AGREEMENTS—FRAUD—CONCEALMENT OF FACTS.

If defendant, who knew that the state surveyor had surveyed and established plaintiff's boundary line some distance east of a fence, failed to tell plaintiff of his survey in obtaining a boundary agreement fixing the boundary line at the fence, thereby depriving plaintiff of a quantity of land, he was guilty of fraud justifying a rescission of the boundary agreement, and hence, where there was evidence of this fact, the jury were justified in finding that the boundary agreement was procured by fraud.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.\*]

#### 2. EVIDENCE (§ 333\*)—DOCUMENTARY EVIDENCE—PUBLIC RECORDS—SURVEYS.

Under Rev. St. 1911, art. 3094, providing that copies of the records of all public officers and courts certified by the lawful possessor

thereof shall be admitted as evidence, article 5397, donating the excess in surveys to the public free school fund and requiring the Commissioner of the General Land Office to ascertain the existence and extent of such excesses and to provide and direct necessary surveys or corrected surveys, and the article providing that all books, papers, etc., required by law to be kept, filed, or deposited in any office of the executive department shall constitute a part of the archives of such office, the report of the state surveyor concerning a survey made by him of the boundary of a railway survey which made it apparent that there was vacant land adjoining such survey, which report was filed in the General Land Office, was an archive therein and was admissible in trespass to try title between private parties involving the location of such boundary line.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.\*]

### 3. EVIDENCE (§ 333\*)—DOCUMENTARY EVIDENCE—PUBLIC RECORDS—SURVEYS.

Where a document containing a report of the acts of the state surveyor concerning a survey made by him also contained argument and opinions, such argument and opinions were not admissible in evidence in trespass to try title and should have been excluded if properly objected to.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.\*]

### 4. TRIAL (§ 85\*)—RECEPTION OF EVIDENCE—EVIDENCE ADMISSIBLE IN PART — OBJECTIONS.

Where in trespass to try title, though a report of the acts of the state surveyor concerning a survey made by him also contained argument and opinions not admissible in evidence, the only objections to the report went to the report as a whole and did not call the court's attention to the objectionable parts thereof, no duty rested upon the court to exclude such objectionable parts, especially where the assignments of error on appeal attacked the whole report, since, when a writing is offered in evidence, parts of which are admissible and parts inadmissible, the whole writing should be admitted unless the inadmissible parts are specifically pointed out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.\*]

### 5. APPEAL AND ERROR (§ 499\*)—BILL OF EXCEPTIONS—MATTERS TO BE INCLUDED—OBJECTIONS TO TESTIMONY.

Assignments of error complaining of the admission of testimony will not be considered, where the objections to the testimony are not stated in the bills of exception reserved to its introduction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

### 6. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.

Where, in an action involving a disputed boundary, a witness for defendant testified that he went with the county surveyor to properly locate surveys, plaintiff was entitled to cross-examine him as to his knowledge of the matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

### 7. EVIDENCE (§ 317\*)—ADMISSIBILITY—HEARSAY EVIDENCE.

In an action involving a disputed boundary, the testimony of a witness that he was with the surveyor who made a survey and that he found the corner of the survey by trees called for in

the field notes was not hearsay, but related to knowledge gained by him on the ground.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

### 8. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Such testimony could not have been prejudicial, where other witnesses testified to the same matters and such corner was unquestioned and was established beyond a reasonable doubt to be where such witness said he found it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

### On Motion for Rehearing.

### 9. APPEAL AND ERROR (§ 994\*) — REVIEW — QUESTIONS OF FACT.

The Court of Civil Appeals is not the judge of the credibility of the witnesses or the weight to be given their testimony; that prerogative belonging to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.\*]

Appeal from District Court, Dimmit County; J. F. Mullally, Judge.

Action by Ed English against G. Denton. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 157 S. W. 264.

W. H. Davis, of Crystal City, and R. E. Hannay, Jr., and R. P. Ingram, both of San Antonio, for appellant. Vandervoort & Johnson, of Carizo Springs, N. A. Rector, of Austin, and West & McMillan, of San Antonio, for appellee.

FLY, C. J. This is, in form, an action of trespass to try title to a strip of land 5,700 varas long by 491 varas wide, alleged to be off of the east ends of surveys 39, 46, and 51 in block 6, International & Great Northern Railway Company lands in Dimmit county, Tex. It is in reality a controversy over the location of a boundary line. Appellant claimed that the land in controversy did not form any part of the surveys named, and also pleaded a boundary agreement to fix the line along a certain fence between the lands of W. H. Warner on the west of the fence and the lands of appellant on the east of the fence. Appellee pleaded, in reply to the allegations of appellant, the fraud of appellant in procuring the boundary agreement from him; that neither he nor Warner, his immediate vendor, knew anything of the true location of the line; and that appellant knew that the true boundary line was in a different place from that agreed upon. The cause was tried by jury, resulting in a verdict and judgment for appellee. This is a second appeal, the former opinion of this court being reported in 157 S. W. 264, which is referred to as containing a full statement of the issues in this case.

The testimony justified the jury in finding that the boundary agreement was obtained by fraud and that the true boundary line is

5,700 varas long and 491 varas east of the fence at the north end and 475 varas at the south end, and that it belonged to appellee, and was a part of surveys 39, 46, and 51 in block 6, International & Great Northern Railway lands.

[1] The first and second assignments of error are overruled. Appellant knew that the state surveyor had surveyed the land and had established a boundary line different from the one in regard to which he afterwards procured the agreement from appellee. He knew of the boundary established by Leckie, who made the survey for the state, because he applied for and purchased from the state the vacant land made apparent by the survey. He knew that the Leckie survey threw the east lines of block 6 and block 10, 475 to 491 varas further east than they were thought to be when appellee built his fence, and he knew that when he obtained the agreement from appellee that the boundary line was not along the fence and that he was depriving appellee of about 490 acres of land. Appellee did not know that Leckie had placed the line where he did and appellant failed to disclose that fact to him. The evidence showed that the Leckie survey fixed the true boundary line. The question of fraud was raised by the testimony and was properly submitted to the jury. This question was fully determined on the former appeal of this case. As said in our opinion:

"A failure to disclose a material fact affecting the subject-matter of a contract, however unintentional and blameless, often constitutes a sufficient ground for the annulment of a contract procured thereby. When there is intentional fraud connected with the concealment of the fact, equity will always relieve the party who has been injuriously affected by it. If, as appears from appellee's testimony, appellant, who knew about the Leckie survey, concealed that fact from appellee and thereby induced him to sign the agreement as to boundary, his action would amount to such fraud as would justify a rescission of the contract."

Appellant applied for and obtained the survey and knew where the lines were placed in that survey, but he told appellee that the true line was along the fence. His attorney advised him to obtain the boundary agreement from appellee, and he did it. He claimed to have told appellee about the survey, but appellee denied it, and it is highly improbable that appellee would have agreed to a boundary which deprived him of nearly 500 acres of land, if he had known the same facts that appellant knew. The jury were justified in finding that the boundary agreement had been procured by fraud.

[2] The report of the state surveyor was filed in the General Land Office and became an archive therein. The survey was made by the state and had reference to public lands of the state. The report of the surveyor was one permitted, if not required, to be filed in the General Land Office. "All the books, papers, records, rolls, documents, returns, reports, lists, and all other papers that have

been, are now, or that may hereafter be required by law to be kept, filed or deposited in any of the offices of the executive department of this state, shall constitute a part of the archives of the offices in which the same are so kept, filed or deposited." The survey was made under orders of the land commissioner, given by virtue of the authority vested in him by the statutes of the state. Article 5397, Rev. Stats. That statute makes it the duty of the land commissioner to ascertain by all means practicable the existence and extent of all excesses in surveys and to provide for surveys or corrected surveys. The reports of those surveys, as a matter of course, are kept, filed, or deposited in the General Land Office. The report was admissible in evidence. Article 3694.

[3, 4] There were portions of the document, however, that were not a report of the acts of the surveyor, but consisted of argument and opinions, and those parts of the paper were not valid testimony and no doubt would have been rejected by the court if they had been called to his attention. The only objections urged to the admission of the report were:

"Because the aforesaid report constituted but mere declarations of the surveyor, was hearsay and argumentative, and because it was not shown that it was an official survey, nor was it shown that the surveyor was dead; but, on the other hand, it was admitted that W. H. Leckie, the surveyor, was still living at Runge, Tex., and for the further reason that the report offered in evidence was not in itself complete in that the report calls for a map attached called 'Green's Map' and marks the same 'Exhibit B.'"

The objections were aimed at the whole report, and no effort was made to call the attention of the court to the hearsay or the argument in the report. In the propositions under the two assignments of error the whole report is attacked as being hearsay and argumentative. All of the report is not hearsay, all is not argumentative. It was not the duty of the court to cull the objectionable parts of the report; that duty rested upon appellant. Even in this court the objectionable portions of the report are not pointed out.

In the case of *Schunior v. Russell*, 83 Tex. 83, 18 S. W. 484, cited by appellant, the court mentions the fact that each part of the report of the surveyor that was objected to was specifically pointed out. The rule is well established that when a writing is offered in evidence parts of which are admissible and parts inadmissible, unless the latter are specifically pointed out, the whole should be admitted. *Railway v. Gallaher*, 79 Tex. 685, 15 S. W. 694; *Railway v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894; *Schulze v. Jalonick*, 18 Tex. Civ. App. 293, 44 S. W. 580; *Sanford v. Finnigan Co.*, 169 S. W. 624, not yet officially reported. For the reasons given, the third, fourth, and fifth assignments of error will be overruled.

[5] The sixth, seventh, ninth, and tenth

assignments of error will not be considered because the objections made to the introduction of the testimony sought by appellant are not stated in the bills of exception reserved by appellant. This is the uniform practice of the higher courts of Texas, from the earliest reports of the Supreme Court down to the present day. *Styles v. Gray*, 10 Tex. 503; *Saunders v. Kincaid*, 188 S. W. 977; *Solomon v. National Bank*, 188 S. W. 1029.

[4-8] The witness Cartledge stated that he was with the surveyor at "Cathedral Rock," a well-known object situated on one of the surveys; that he found the southwest corner of the survey by mesquite bearing trees called for in the field notes. This was objected to by appellant. Cartledge had testified for appellant and the evidence referred to was brought out on cross-examination. He had testified that he went with the county surveyor to properly locate the surveys, and appellee had the right to cross-examine him on his knowledge of the matter. His testimony was not hearsay, but was as to knowledge gained by him on the ground. The answers of Cartledge could not have injured appellant because the same matters were testified to by Barker, Maddox, and Vandervoort. The southwest corner of survey 6, in block 7, was unquestioned and was established beyond a reasonable doubt to be where Cartledge said he found it.

The charge of the court is not attacked, nor is the sufficiency of the evidence to sustain the verdict brought in question, except on the issue of fraud. Appellant does not claim that the southwest corner of survey 6, being the northwest corner of survey 7, was not situated in the place in which it was located by Cartledge; but, on a mere technical objection to testimony which could not have influenced the verdict, a reversal of the judgment is sought.

The judgment is affirmed.

#### On Motion for Rehearing.

[9] This court was fully justified in finding that the attorney of appellant advised him to obtain the assent of appellee to the boundary agreement. It is inconceivable that an attorney should go with his client to Austin to ascertain the details of the survey made by the state, and should then prepare a boundary agreement and still not advise his client as to getting it executed. This court did not hold expressly or by innuendo that the attorney was guilty of fraud in advising a boundary agreement and preparing the same for his client. The fraud, if any, did not consist in advising the client to obtain a boundary agreement, but in the suppression of facts intentionally or innocently. There is nothing in the record that indicates that the attorney advised his client to suppress facts that would have placed appellee upon his guard.

Appellant testified to facts which show that

there was no suppression of the facts, but he is contradicted by appellee, and the jury chose to believe appellee. This court has not made any charge of fraud against appellant. He may be perfectly innocent, but in compliance with law we have merely held that the testimony of appellee, which the jury credited, showed that appellant was in possession of facts bearing upon the boundary line, of which appellee was ignorant, and which, if known to him, would have prevented him from signing the boundary agreement. They were not dealing with each other on equal terms, and, however innocent appellant may have been, the fact remains that the jury found that appellee was induced to sign an agreement which he would not have signed had he known the facts. This court does not charge litigants with fraud, but merely declares the effect of evidence and sustains the verdict of a jury finding fraud, as it is compelled to do if there is any evidence to sustain it. The members of this court are not made the judges of the credibility of the witnesses or the weight to be given their testimony; that prerogative belonging to the jury alone.

The motion for rehearing is overruled.

#### MILLER et al. v. CAMPBELL. (No. 347.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 12, 1914. Rehearing Denied  
Dec. 8, 1914.)

#### 1. BOUNDARIES (§ 3\*)—CALLS FOR CORNER OR LINE—CALL FOR DISTANCE.

The rule that a call for a corner or line of an adjoining survey controls a call for distance is not of absolute application in all cases.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

#### 2. TRIAL (§ 296\*)—INSTRUCTIONS — CURE OF ERROR.

Any error, in an instruction in a boundary case in laying too much weight on the beginning corner of a description, was cured, where another paragraph of the charge expressly stated that no one corner had any greater force or dignity than another.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

#### 3. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—INSTRUCTIONS.

Error, in an instruction, cannot be complained of on appeal, where invited by plaintiff in error in special charges requested by him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### 4. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

Error in the charge is not reversible, under the express provisions of Court of Civil Appeals rule 62a (149 S. W. 2), unless it probably caused an improper judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**5. TRIAL (§ 240\*)—ARGUMENTATIVE INSTRUCTIONS.**

A requested charge, which is argumentative, and which, so far as proper, is covered by the main charge, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.\*]

**6. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF THE EVIDENCE.**

A requested charge, which is on the weight of the evidence, and which, so far as proper, is covered by the general charge, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

**7. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.**

It is not error to refuse a requested charge covered by the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**8. APPEAL AND ERROR (§ 690\*)—QUESTIONS REVIEWABLE—EXCLUSION OF EVIDENCE—BILL OF EXCEPTION—SUFFICIENCY.**

The exclusion of evidence cannot be reviewed on appeal, unless the bill of exception shows that the witnesses would have testified to the facts sought to be proved, but excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.\*]

**9. APPEAL AND ERROR (§ 1075\*)—QUESTIONS REVIEWABLE—ABANDONMENT OF ASSIGNMENT OF ERROR.**

An assignment of error abandoned by plaintiff in error, in open court, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4253; Dec. Dig. § 1075.\*]

Error from District Court, Harris County; Norman G. Kittrell, Judge.

Trespass to try title between Charles Miller and another and Ben Campbell. There was a judgment for the latter, and the former bring error. Affirmed.

S. H. Brashear, W. G. Love, and W. J. Armstrong, all of Houston, for plaintiffs in error. Campbell, Sonfield, Sewall & Myer and W. J. Howard, all of Houston, for defendant in error.

**HIGGINS, J.** This was an action in trespass to try title to a tract of land patented to defendant in error, Campbell, and involved a question of boundary; the issue being the location of the east line of the S. W. Allen survey in Harris county.

The original field notes of the Allen survey called to begin at the northwest corner of John Austin's two league grant; thence north 89 east with Austin's north line at 1,905 varas to stake in prairie, being also the southwest corner of the John W. Lawrence survey; thence north at 110 varas past Lawrence's northwest corner, crossing Montgomery road at 1,185 varas, etc. The Allen was surveyed about 1850. The O. P. Kelton survey lies east of the Allen and north of and adjoining the Austin. It is an older survey than the Allen. The John W. Lawrence was

a survey in conflict with the Kelton, lying across the south end thereof. It was never patented and was abandoned. The west lines of the Lawrence and Kelton were coincident. The southwest corners of the Lawrence and Kelton were likewise coincident. The land claimed and sued for by Campbell was surveyed and patented to him about 1909, and consists of a tract of 50 acres lying north of and adjoining the Austin grant and west of and adjoining the Kelton.

The first and sixth assignments question the sufficiency of the evidence to support the verdict and judgment in Campbell's favor; the contention, in effect, being that the call in the Allen field notes for the southwest corner of the Lawrence (which was likewise the southwest corner of the Kelton) and the northwest corner of the Lawrence (which was on the west line of the Kelton) must control the distance call of 1,905 varas for the south line of the Allen. In other words, the calls for those corners in the Lawrence would place the east line of the Allen at a point coincident with the west line of the Kelton, without regard to the distance call mentioned. If this contention be well founded, it is manifest no vacancy existed between the Allen and Kelton, and the Campbell survey conflicted with the former.

[1] A detailed discussion of the evidence is unnecessary, and we deem it sufficient to say that a careful consideration thereof has led to the conclusion that it was sufficient to warrant the jury in giving controlling effect to the distance call and locating the southeast corner of the Allen 1,905 varas east of the Austin northwest corner. This would leave a vacancy between the Allen and Kelton, which is covered by Campbell's patent. Under certain circumstances, a call for a corner or line of an adjoining survey, as a matter of law, will prevail over and control a call for distance; but it is not a rule of absolute application in all instances, and it is not deemed to be applicable, under the evidence presented by this record. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898; *Crosby v. Stevenson*, 156 S. W. 1110.

[2] Error is assigned to a portion of the court's charge which reads:

"There is no dispute as to where the west line of the Kelton survey is, and you will determine from all the evidence where the northwest corner of the John Austin survey is located, as the survey of Allen begins at that point."

The proposition urged is:

"Where the location of the east line of the Allen survey was in controversy, and there was much evidence of other matters from which its location could be determined, as well as from the northwest corner of the Austin survey, or even regardless of said Austin northwest corner, it was error for the court to single out said location of the northwest corner of the Austin survey and call attention of the jury to the fact that the survey of the Allen begins at that point; the beginning corner being of

no more dignity or importance necessarily than any other corner."

For the sake of argument, it may be conceded that, standing alone, it is subject to the objection urged, but, in such event, it is not an error of a reversible nature for the following reasons:

First. The error was corrected by the fifth paragraph of the charge, which reads:

"In this connection, you are instructed, however, that no one corner of any survey has any greater dignity or force than any other corner, and that it is your duty to endeavor from all the evidence admitted before you, whether by witness upon the stand or from depositions or from instruments or copies of instruments or maps offered in evidence (all of which you should consider), to ascertain and follow the footsteps of the original surveyor, so as to determine where he placed the east line of the Allen survey."

[3] Second. The error was invited by plaintiffs in error in special charges 1 and 2, requested by them.

[4] Third. Under the provisions of rule 62a (149 S. W. x), it should not be treated as reversible error. *Wells Fargo v. Benjamin*, 165 S. W. 120; *Railway Co. v. Geary*, 169 S. W. 201.

The third, fourth, and fifth assignments, complaining of other portions of the court's charge, are without merit.

Assignments 7 to 16, inclusive, complain of the refusal of various requested special charges. They were all properly refused for reasons which will be briefly indicated.

[5] Charges Nos. 3 and 4, because they were argumentative, and in so far as proper, were covered by the main charge.

Charge No. 5 stated an incorrect proposition of law.

Charge No. 7 was improper, because it treated a distance call as of no force, and in effect was an instruction to wholly disregard the same.

[6] Charge No. 8 was upon the weight of the evidence, and, in so far as proper, was covered by the fifth paragraph of the general charge.

Charge No. 10 was argumentative, and the idea which it presents was made obvious by the general charge.

[7] Charges Nos. 11, 12, and 16 were sufficiently covered by the general charge.

Charge No. 13 was upon the weight of the evidence, and embodied an incorrect legal proposition, as applied to the facts in this case.

[8] The seventeenth assignment complains of the exclusion of certain testimony, and is overruled because the proffered testimony was irrelevant and immaterial; and, further, the bills of exception taken to its exclusion do not definitely show that the witnesses would have testified to the facts expected to be proven by them. The action of the trial court in excluding the evidence cannot be reviewed, unless the bill of exception definitely shows that the witnesses would

have testified to the facts sought to be proven.

[9] Plaintiffs in error, in open court, announced that their eighteenth assignment of error was abandoned; hence is not considered.

Affirmed.

MILLER et al. v. FLATTERY et ux.  
(No. 357.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 12, 1914. Rehearing Denied  
Dec. 3, 1914.)

1. VENDOR AND PURCHASER (§ 92\*)—RESCISION BY VENDOR—FRAUD.

A vendor in a deed reciting a cash consideration of \$2,200, who delivered it for a consideration part cash and part notes, assigned by the purchaser without recourse, on his agent's assurance that he had a purchaser for the notes, upon the agent's failure to have the notes cashed, could not rescind as against the purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 92.\*]

2. HOMESTEAD (§ 38\*)—ACQUISITION—OCCUPANCY.

When a homestead dedication has not been effected by actual occupancy, such effect must be accorded to ownership and visible acts of preparation to use it for a home.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 57; Dec. Dig. § 38.\*]

3. HOMESTEAD (§ 57\*)—ACQUISITION—SUFFICIENCY OF EVIDENCE.

Evidence held to warrant a finding that premises were impressed with a homestead status at the time of their conveyance by plaintiffs.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 83-85; Dec. Dig. § 57.\*]

4. HOMESTEAD (§ 118\*)—JOINDER OF WIFE—AVOIDANCE FOR FRAUD.

Title to a homestead could not pass without the wife's joinder in the conveyance, untainted by fraud of any kind upon her rights; and, if the deed was delivered by her husband in fraud of her rights, she would not be precluded from asserting them against the purchaser.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

5. HOMESTEAD (§ 118\*)—CONVEYANCE—FRAUD UPON WIFE.

Where a wife signed a deed of her homestead, reciting a consideration of \$2,200, with the understanding that it was to be paid in cash, and where her husband, without her knowledge or consent, delivered it for a part cash consideration and notes assigned to him without recourse, the substitution of the notes in part payment was a fraud upon the wife's rights, entitling her to rescind as against a purchaser with notice of the recited consideration, who made no inquiry to ascertain the husband's authority to deliver on other terms of payment.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

6. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASER—NOTICE.

One claiming title to land is charged with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of his title, and also with notice of whatever he would have learned by any inquiry which the recitals therein required him to make.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

**7. HOMESTEAD (§ 129\*)—BONA FIDE PURCHASER—NOTICE—FRAUD, ON VENDOR.**

One purchasing for value from a purchaser of homestead premises, charged with notice of a recited consideration of \$2,200 and constructive notice of the wife's understanding, when she signed the deed, that payment was to be in cash, and having actual notice that notes assigned without recourse had been substituted as a part of the consideration, was justified in assuming that the substitution was authorized or ratified by the vendor, was not bound to make any inquiry as to such substitution, was not chargeable with constructive notice of the fraud practiced upon the vendor, and was entitled to the protection of an innocent purchaser.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 233, 234; Dec. Dig. § 129.\*]

**8. HOMESTEAD (§ 122\*)—RESCISSION BY VENDOR—STOPPEL.**

In such case, where the subsequent purchase was made several months after delivery of the deed to the first purchaser, during which time he had been in peaceable possession, collecting the revenues, and the subsequent purchaser had no notice or reason to think that the vendor was dissatisfied with the substitution of the notes instead of an entire cash consideration, such vendor was estopped to rescind as against the subsequent purchaser.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 220-222; Dec. Dig. § 122.\*]

Error to District Court, Harris County; Wm. Masterson, Judge.

Action by T. F. Flattery and wife against J. W. Miller and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

G. W. Tharp and Barkley & Green, all of Houston, for plaintiffs in error. W. W. Kirkpatrick and R. L. Whitehead, both of Houston, for defendants in error.

**HIGGINS, J. T. F. Flattery and wife, Hattie L. Flattery**, executed a deed to J. W. Miller for a recited consideration of \$2,200 cash, covering a parcel of land with improvements, dated and delivered March 4, 1911. By deed dated in August, 1911, Miller conveyed same to his daughter, Maggie E. Moore, for a recited consideration of \$2,500 cash, but the true consideration was the release of an indebtedness of \$2,985, due by Miller to his daughter and of a mortgage securing such indebtedness upon a plantation in Louisiana.

This suit was filed by Flattery and wife, several months subsequent to the last-mentioned conveyance, against Miller and wife and Mrs. Moore and her husband, seeking a recovery of the premises based upon fraud alleged to have been perpetrated by Miller in securing delivery of the deed first mentioned. The material facts upon which the claim of fraud is predicated, in brief, are that Flattery and wife placed the property for sale in the hands of an agent Hurlock. Miller agreed to purchase for \$2,200, paying \$1,200 in cash, and transferring to Flattery, without recourse, notes to the amount of \$1,000. Mrs. Flattery signed the deed with the understanding that the consideration was to be paid in cash as the deed recited, and

her husband was without authority from her to deliver the deed, except upon payment in cash of the consideration stipulated therein. The husband, without her knowledge or consent, delivered the deed upon payment by Miller of \$1,200 cash and transfer to him of the notes mentioned. The agent Hurlock represented to Flattery that he had a purchaser for the notes who would cash same, and upon the faith of this representation the notes were accepted by Flattery. The prospective purchaser, however, failed to consummate the purchase thereof.

[1] In so far as the husband is concerned, the allegation of fraud is wholly unsupported by the evidence. There is no evidence whatever of any fraud practiced by Miller upon him, and it clearly appears that Flattery delivered the deed and accepted from Miller the \$1,200 cash and transfer of the notes without recourse, with full knowledge of all the facts, and relying simply upon Hurlock's promise to have same cashed. Manifestly Hurlock's failure to have the notes cashed does not warrant a rescission of the conveyance, so far as concerns the husband.

[2-4] But if it was the homestead of the parties, and the deed was delivered in fraud of the wife, she would not be precluded from asserting her rights.

It is urged that the facts do not show the premises to have been impressed with the homestead character. It had never been actually occupied as such, but the lot had been purchased for homestead purposes, and, in pursuance of this purpose, the house thereon had been erected and just completed a short time prior to the conveyance. The failure of the parties to move into it was explained by the fact that they had paid rent on the house they were occupying, and their month was not up. When a homestead dedication has not been effected by actual occupancy, such effect must nevertheless be accorded to ownership, intention, and visible acts of preparation to use it for a home. *Archibald v. Jacobs*, 69 Tex. 251, 6 S. W. 177; *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; *Foley v. Holtkamp*, 28 Tex. Civ. App. 123, 66 S. W. 891.

Applying this rule, the court or jury might find, from the testimony, that the premises were impressed with the homestead status at the time of the conveyance, and, if it be so found, it follows that title could not pass without the joinder of Mrs. Flattery in the conveyance, untainted by fraud of any kind upon her rights.

[5] Plaintiffs in error next advance the proposition that no fraud upon Mrs. Flattery's rights is shown, but the recitals in the deed placed Miller upon notice that she undertook to convey for a cash consideration of \$2,200; and the substitution of notes in payment of a portion of this amount by her husband and Miller was a fraud upon her.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In *Cole v. Bammel*, 62 Tex. 108, the husband had accepted a less amount than that stipulated in a deed conveying separate property of the wife. Discussing the effect of such act, it is said:

"The acceptance by her husband of a different sum, under such a state of facts and without her special authority, would not be binding upon her, nor amount to a ratification of the fraud in which he participated. The purchaser need not be an active participant in such a transaction in order to vitiate it, but it is sufficient if he had notice of its character before he parted with the purchase money. In principle, the false reading of a wife's deed, so that it shall appear to be upon a different consideration for what it actually recites, or the changing of the deed in this respect, does not differ from the fraudulent act of receiving from the purchaser a less amount of money than the wife had agreed to take for the land when examined by the officer. Such a proceeding imposes upon the wife a different contract from that which she had explained to her, and, in effect, forces upon her a conveyance she may have been unwilling to execute. A wife, unwilling to sell her separate estate for the price offered her, might be induced to part with it for a much larger sum. The larger sum is inserted in the deed, and she executes it willingly, and so acknowledges to the notary. This deed is placed in the hands of her husband to deliver to the purchaser on receipt of the consideration. Contrary to her wishes, it is delivered upon payment of the very price she had refused for the land; she is, in effect, defrauded into the execution of an instrument she was unwilling to sign, and the beneficial design of the statute is frustrated. \* \* \* By placing in Stockton's hands a deed with an expressed consideration of \$1,500, she notified all persons proposing to purchase that this was the price she was willing to take for the property. The instrument itself was the only evidence of the agency of the party having it in possession. It was the charter of his authority, and gave him no greater rights than would a power of attorney restricting the agent's power of sale to the event of his being able to do so for a specified sum. No one, upon reading it, had a right to conclude that the agent had a right to make any other terms than were made by the deed itself. It was a case of special agency to do a particular thing in a particular way. Persons dealing with such an agent must know that if a different act is done, or the one authorized is done otherwise than the power describes, he, and not the principal, must suffer if damage ensues to the latter in consequence of disobedience to his directions. *Story on Agency*, §§ 126, 224. \* \* \* The statement of the consideration in the deed put him upon inquiry as to the power of Stockton to take a different sum. Had he pursued such inquiry to the proper source of information, he would have learned that Mrs. Cole had given Stockton no such authority, but was unwilling to take \$1,000 for the land; and he must be held to have had full knowledge of that fact before he bought it. *Wade on Notice*, § 17."

To the same effect is *Stallings v. Hullum*, 79 Tex. 421, 15 S. W. 677, and *Scoggin v. Mason*, 46 Tex. Civ. App. 480, 103 S. W. 833.

In the light of the authorities noted, it must be held that the deed was delivered in fraud of the wife's rights.

[8-1] But it appears that the property has passed to Mrs. Moore, a purchaser for value, who acquired same in good faith, without any actual notice of the fraud practiced upon Mrs. Flattery, and the determination of her rights presents a question of greater difficulty. One claiming title to land is charged

with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of instruments through which he derives his title, and also with notice of whatever matters he would have learned by any inquiry which the recitals in those instruments made it his duty to pursue. Mrs. Moore is thus charged with notice of the recital of a cash consideration in the Flattery deed, and she testifies that she knew her father used the notes in question in paying for the property. At first glance, it would seem that she was thus placed upon inquiry and the duty imposed of ascertaining whether or not Mrs. Flattery had consented to and authorized the substitution of the notes in part payment of the cash consideration recited in the deed. In other words, that she was in exactly the shoes of her grantor. Miller had constructive notice only of the wife's understanding of the terms upon which she was conveying. Mrs. Moore likewise had this constructive notice. Having this notice, the courts have held, as indicated above, that Miller was charged with the duty of making inquiry and ascertaining the authority of the husband to depart from the terms of the wife's contract of conveyance, as evidenced by her deed. Mrs. Moore knew that her grantor had used these notes in part payment of the recited consideration, and, as stated, it would at first seem that she, too, was charged with a like duty of making inquiry and ascertaining the authority by which this substitution was made, but in one respect her position was quite different from that of her father. Her purchase of the property was made several months after the execution and delivery of the deed to her father, during which time he had been in peaceable possession and collecting the revenues thereof, and she had no notice or reason whatever to suspect that Mrs. Flattery was in any wise dissatisfied with the substitution of the notes. Under such circumstances, was not Mrs. Moore justified in assuming that such substitution was authorized by Mrs. Flattery, or at least that she had ratified the same? It seems to us, under such circumstances, that any reasonable person would not have deemed it necessary to make inquiry concerning the substitution.

In *Hussey v. Moser*, 70 Tex. 42, 7 S. W. 606, in discussing the question of estoppel upon a similar state of facts, Judge Gaines said:

"Knowing that, as a result of her own negligence, the deed had gone forth with all the appearances of a valid conveyance, it was her duty to denounce the fraud for the protection of third parties. Not having done this, and innocent third parties having purchased upon the faith of the deed, it would seem that the transaction combines all the elements essential to the estoppel, even of a married woman."

And in *Link v. Page*, 72 Tex. 592, 10 S. W. 699, it was said:

"We think, also, where the owner of real property negligently clothes another with the appar-

ent title to it, although the execution of the instrument which purports to convey the title may be obtained by fraud, and third parties being misled thereby innocently purchase and pay value for the property, he should be held estopped to deny the validity of the conveyance. This principle was announced by this court in the case of *Steffian v. Bank*, 69 Tex. 513 [6 S. W. 823], in which it is held that one who signs and acknowledges a conveyance to be delivered only upon condition may be estopped to set up the nondelivery by negligently permitting it to pass into the hands of the grantee."

To the same general effect is *Spotts v. Whitaker*, 157 S. W. 422, and *Houston v. Hubbard*, 37 Tex. Civ. App. 546, 85 S. W. 474, where it is held that innocent purchasers will be protected in case of unauthorized delivery of escrow deeds, where the negligence of the grantor brought about the unauthorized delivery. Applying the principles of estoppel recognized in the cases noted, we think the evidence shown by this record indicates that Mrs. Moore was entitled to protection as an innocent purchaser, and, under the facts, the trial court should have found that she had no constructive notice of the fraud practiced upon Mrs. Flattery, and, upon retrial, judgment should be rendered in her favor, unless some new facts be adduced to affect her with notice.

Under our view, a reversal and rendition of the judgment might properly be made, but, upon consideration of the record as a whole, it occurs to us that the end of justice will be better served by remanding for retrial; and it will be so ordered.

Reversed and remanded.

#### ADAMS & GARRETT et al. v. RANDLE. (No. 5331.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 4, 1914. Rehearing Denied  
Dec. 9, 1914.)

#### BROKERS (§ 73\*)—COMMISSIONS—PERSONS ENTITLED.

Where a partner of a real estate firm obtaining an exclusive contract to procure a purchaser of real estate for a commission placed the property before a third person, who examined the property and bought from the owner, who knew that the partner had assisted in bringing about the sale, the partner purchasing the copartner's interest could recover the commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 59-61; Dec. Dig. § 73.\*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by J. J. Randle against William Adams and another, composing the firm of Adams & Garrett. From a judgment for plaintiff, defendants appeal. Affirmed.

Jno. C. Scott, of Corpus Christi, for appellants. Jas. M. Taylor and Pope & Sutherland, all of Corpus Christi, for appellee.

CARL, J. Appellee, J. J. Randle, brought this suit against William Adams and H. W. Garrett, composing the firm of Adams & Gar-

rett, and alleged substantially: That about March 17, 1907, appellee and one C. W. Gibson were in the real estate business in Corpus Christi, doing business under the name of Randle-Gibson Realty Company; that about said date Adams & Garrett entered into a contract with said company whereby they listed for sale 7,103 acres of land near Alice, in what is now Jim Wells county, at \$10.50 per acre; that there was no time limit placed thereon; and that the company was to receive as "commission for any sale or purchaser procured through them or their efforts the sum of 50 cents per acre, the land to be sold at \$11 per acre; that the Randle-Gibson Realty Company was to have the sole and exclusive agency for the sale thereof, subject only to the right of the owners to sell the same to any one to whom said land had not been offered or put up to by the said Randle-Gibson Realty Company."

It is alleged that about April 7, 1907, J. J. Randle, a member of said firm, offered or put up said land for sale to one Clark Pease, who was then acting for himself and S. Guggenheim and H. Cohn, at said price of \$11 per acre, and gave the said Pease the names of the owners of the land, and the said land was also put up to said Clark Pease at the same price by subagents of Randle-Gibson Realty Company, and that about April 14, 1907, the said Pease called upon Adams & Garrett, without the knowledge of the realty company, and entered into a contract to purchase the land for himself, Guggenheim, and Cohn; that Adams knew at the time of the sale that Pease and his associates were the customers produced by the realty company, and that said land was so sold to Pease and associates at \$10.50 per acre. It is also alleged that Gibson sold his interest in the commission claim to Randle.

The said Adams & Garrett joined the issue on all these matters, and impleaded Clark Pease, S. Guggenheim, and H. Cohn on a bond of indemnity they gave Adams against the payment of the commission sued for. The suit as to Garrett was dismissed, and in a trial before a jury judgment went for Randle against Adams for the full amount sued for, and in favor of Adams over against the said Pease, Guggenheim, and Cohn on the bond. These sureties alone appeal.

#### Conclusions of Fact.

In deference to the finding of the jury, we conclude that the Randle-Gibson Realty Company had an exclusive contract of agency for the sale of the 7,103 acres of land; that J. J. Randle placed same before Clark Pease, who was acting for himself and Guggenheim and Cohn, and induced Pease to look at the ranch and did what he could to bring about a sale thereof; that Pease and associates did buy said land, and Adams, the owner of same, knew that Randle had assisted in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bringing about the sale before the contract was made, and on that account exacted a bond of indemnity of the purchasers before he would close the sale. We find that J. J. Randle, acting for Randle-Gibson Realty Company, was the procuring cause of the sale to the said Pease and associates. Gibson sold his interest in the commission claim to Randle.

#### Conclusions of Law.

Since the Randle-Gibson Realty Company, through J. J. Randle was the procuring cause of the sale, and had an exclusive contract, appellee, having purchased the claim, was entitled to recover as found by the jury. The judgment is in all things affirmed.

#### DAWSON v. KING et al. (No. 5832.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 4, 1914. Rehearing Denied Dec. 9, 1914.)

#### 1. APPEAL AND ERROR (§ 997\*)—REVIEW—DIRECTED VERDICT—EVIDENCE CONSIDERED.

On an appeal by plaintiff from a judgment on a verdict directed for defendant, the plaintiff's evidence must be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.\*]

#### 2. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Where a servant was injured by a ginhouse door falling upon him and there was no evidence that he knew of the defect in the hanging of the door which was the cause of the fall, or that the defect was so obvious as to give him implied knowledge thereon, he did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant who fell from the upper to the lower floor of a ginhouse when the door by which he was attempting to pull himself up fell with him, evidence held not to show that the servant was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 4. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The contributory negligence of a servant is a question of fact for the jury, unless the act is a violation of some law, or the facts are undisputed and admit of but one reasonable conclusion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 5. MASTER AND SERVANT (§ 284\*)—INJURIES TO SERVANT—EXISTENCE OF RELATION—QUESTION FOR JURY.

In a personal injury action by one who had been sent by one defendant to install a cotton gin on the premises of the other defendant, evidence held sufficient to take to the jury the

question whether the plaintiff was the servant of both or either of the defendants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.\*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by Ed Dawson against Mrs. H. M. King and another. Judgment for the defendants on a directed verdict, and plaintiff appeals. Reversed and remanded.

Jno. C. Scott and E. B. Ward, both of Corpus Christi, for appellant. Jas. B. Wells and Harbert Davenport, both of Brownsville, G. R. Scott and Boone & Pope, all of Corpus Christi, and Rembert G. Watson and J. J. Eckford, both of Dallas, for appellees.

FLY, C. J. This is a suit by appellant against Mrs. H. M. King and the Murray Company to recover damages arising from personal injuries alleged to have been received through the negligence of appellees in not furnishing a safe place in which appellant could work for appellees. Upon the verdict of a jury, judgment was rendered in favor of appellees. This is a second appeal, the cause being reversed on the first appeal because exceptions were sustained to appellant's petition. 121 S. W. 917. Appellant alleged that he was an employé of appellees and was engaged in installing a cotton gin and cotton press in a building in Kingsville, Kleberg county, then a part of Nueces county; that a safe place in which to prosecute his labors was not furnished him by appellees, but that the same was insecure and unsafe; that an opening had been cut in an upper floor of the frame building in which the gin was to be installed, but no steps had been built although, in the prosecution of his work, it was necessary for appellant to reach said upper or elevated floor; that there was a large doorway through the side or wall of the building, the lower edge of which was about level with said floor, and said doorway was closed by a large rolling door. It was further alleged that the door had been rolled along its runway so that continuously for many days it had hung suspended against the wall above one of the sides of the opening; that during his labors it became necessary for appellant to get a hammer which lay on the floor overhead, and while engaged in getting it he caught hold of the door and pulled it, and it gave way and fell from its runway, causing appellant to fall to the joists of the floor beneath and the door fell on him. Appellees pleaded contributory negligence, and that the danger was obvious and plain. A verdict was instructed for appellees.

[1] Appellant introduced evidence which, under the present status of the case, must be taken as true, showing that he was sent by the Murray Company to Kingsville to install

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—17

the gin and press for Mrs. King. She agreed to and did pay him for his services. The house in which the plant was installed belonged to Mrs. King. The gin was to be installed on the lower floor and the press on the upper floor. There was an opening through the upper floor three by six feet, which had been left for a staircase, which had not been built. There was no way to get on the upper floor except through that opening. Appellant tried several times to get the carpenter of Mrs. King to erect the stair steps, but he would not do so. Appellant, in order to reach the upper floor, where his duties compelled him to go, would put his foot on a cleat fastened by him on a post and, taking hold of a post on one side of the opening and the rolling door on the other side, would pull himself up. The door was a heavy one, and was only fastened at the top by two rollers. The door was not blocked, as it should have been, to prevent it from running off the runway, and when appellant reached out to get a hammer he needed, the door fell, precipitating him to the uncovered joists of the lower floor. In its descent the door fell upon appellant, and he was seriously injured. Appellant did not know that the door was not fastened. He had been pulling up by the door, the only way in which he could reach the upper floor, for two or three days, and thought it was fastened. He would not have pulled up by it had he known it was not fastened. The door was about 13 feet by 6 feet and was placed in the upper wall so that when the cotton was pressed the bales could be carried out through the door. It was close by the hole left for the stair steps. Such doors are on all ginhouses, and they are always blocked to keep them from running off and falling. The door in question was not blocked. In going up through the hole it was absolutely necessary to take hold of the door: If it had been blocked, one man could not have pulled it off the rollers. Johnson, who was installing a round bale plant, went up through the hole just as appellant did.

[2] The question of assumed risk does not arise under the facts of this case, but if appellant is precluded from a recovery it must be on the ground of contributory negligence. An essential element of assumed risk upon the part of the servant is knowledge of the defect in the appliance furnished by the master, and without such knowledge no risk can be assumed. It may be that the defect is so apparent as to charge knowledge, but in the ultimate analysis of assumed risk there must be knowledge. It may be implied, but it must exist, and thus an intelligent choice be evinced. There was no other way for appellant to reach the upper story, to which he was compelled to go in the prosecution of his work, except through the hole in the manner in which he went. He was compelled to grasp the door on one side and

the post on the other. He was ignorant of the unblocked condition of the door, and therefore could not assume the risk of it falling. His use of it for two or three days merely confirmed him in the belief that it was securely fastened, and he acted on that belief. Labatt, Mast. & Serv. §§ 956, 957. Most certainly the case was not, under the circumstances, one that showed assumed risk as a matter of law. No duty of inspection devolved upon appellant, but he could act upon the presumption that the door was made like all other roller doors for ginhouses.

[3] The failure to furnish stair steps made it absolutely necessary for appellant to pull himself up through the hole by laying hold of objects on either side of the hole. If he had not gone up as he did, then he could not have reached the upper story and could not have installed the press. It cannot be maintained that appellant was guilty of contributory negligence as a matter of law in climbing up as he did, but it would be purely a question of fact for a jury to determine.

[4] The question of negligence is one peculiarly of fact for the determination of a jury, and of course under the term, "negligence," is included contributory negligence, and ordinarily it should be submitted to the jury. It is only when the act is done in violation of some law, or when the facts are undisputed and admit of but one reasonable conclusion regarding the care of the party in doing the act in question, that the cause can be taken from the jury and decided by the court. As said by the Supreme Court in *Lee v. Railway*, 89 Tex. 583, 36 S. W. 63:

"To authorize the court to take the question from the jury, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it."

See, also, *Western Assurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661; *Oil Co. v. Burns*, 96 Tex. 573, 74 S. W. 758; *Railway v. Tirres*, 33 Tex. Civ. App. 362, 76 S. W. 806; *Railway v. Slinkard*, 17 Tex. Civ. App. 585, 44 S. W. 35. As said by Justice Nell, in *Railway v. Tirres*, cited:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them. A case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish."

The petition has substantially the same allegations as when on a former appeal this court held the allegations made out a case that should be heard by a jury. The allegations were substantially proved as alleged, and the former opinion of this court should have guided the trial court and have caused a submission of the case to the jury, and thus, perchance, have avoided the trouble and expense of another trial.

[5] Appellant had installed a number of gins and presses for the Murray Company, and he was sent by that company to Kings-

ville to install the plant for Mrs. King. That company fixed his compensation, and Mrs. King paid the bills. She furnished the place in which the work was performed and the Murray Company furnished the expert workman to install the plant. That the Murray Company maintained control over appellant while he was installing the gin and press is evidenced by the fact that Mrs. King was required to sign a paper directed to the Murray Company, to the effect that the machinery had been erected in a workmanlike manner in accordance with the terms of the contract, and by the fact that the company retained control of him to the extent that it was to be advised if his work was in any way unsatisfactory. He was described by the company as "one of our best and most experienced mechanics." One person may stand in the relation of master to another although the former does not compensate the latter for his services. *Labatt, Master & Servant*, p. 60 et seq.; *Lipscomb v. Railway*, 95 Tex. 5, at page 20, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804. Appellant was not withdrawn from the service of his general employer, the Murray Company, and did not act under the order of Mrs. King. The evidence tended to show a common employment of appellant by appellees. *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328.

Mrs. King treats appellant in her pleadings as her servant, and only defends on the ground of his contributory negligence, although much of her brief is devoted to the subject of assumed risk. If that defense had been pleaded by Mrs. King, it was still, as hereinbefore stated, a matter to be determined by a jury.

The judgment is reversed, and the cause remanded to be tried in accordance with this opinion.

# MISSOURI, O. & G. RY. CO. v. PLEMMONS. (No. 7197.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 7, 1914. Rehearing Denied  
Nov. 28, 1914.)

## 1. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—ACTION—EVIDENCE—SUFFICIENCY.

In a suit by a brakeman, who claimed to have suffered severe injuries by reason of the breaking of a handhold on a car, which precipitated him to the ground, evidence held sufficient to justify a finding that the injuries claimed were suffered in the manner asserted.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

## 2. DAMAGES (§ 185\*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a personal injury action, evidence held sufficient to sustain an award of \$4,500 damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 503-508; Dec. Dig. § 185.\*]

## 3. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—STATUTES.

Under Acts 31st Leg. c. 26, § 5, and Acts 31st Leg. (1st Ex. Sess.) c. 10, § 3, declaring that no carrier engaged in intrastate commerce shall use cars not provided with secure handholds, etc., and that no employé injured shall be held to assume risk or to have been guilty of contributory negligence, if the failure of the carrier to equip the cars with such appliances, or to comply with any statute for the safety of employes, contributed to the injury, and together with *Safety Appliance Act Cong. 1893* (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1913, §§ 8605-8612]), and Act Cong. April 22, 1908, c. 149 (35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), which contain similar provisions, a railroad company, sued by brakeman for injuries caused by the giving way of a defective handhold, cannot escape liability on the ground that the car was one belonging to different company, and that it was only bound to inspect it for apparent defects.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

## 4. EVIDENCE (§ 127\*)—ADMISSIBILITY—PRESENT SUFFERING—RES GESTÆ.

Evidence of declarations of present pain and suffering in the nature of verbal acts is admissible to show that a party suffered personal injuries.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

## 5. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Under Acts 31st Leg. c. 26, § 5; Acts 31st Leg. (1st Ex. Sess.) c. 10, § 3, requiring railroad cars to be equipped with secure handholds, and declaring that an employé injured by reason of the failure of the railroad company to comply with such provisions does not assume the risk of his employment; a brakeman injured by the giving way of a defective handhold does not assume the risk although he knew of the defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by H. W. Plemmons against the Missouri, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Suggs, of Denison, and Head, Smith, Maxey & Head, of Sherman, for appellant. McReynolds & Hay, of Sherman, for appellee.

TALBOT, J. Appellee instituted this suit against the appellant, Missouri, Oklahoma & Gulf Railway Company, and Missouri, Oklahoma Railway Company of Texas, to recover damages for injuries sustained by him on or about March 13, 1913, while employed as a freight brakeman. It is alleged, in substance, that while so employed it became necessary for him to climb down the side of a car while moving, for the purpose of signaling the engineer, and that while so engaged a grabiron or handhold gave way, resulting in his fall to the ground and the infliction of the alleged injuries. It is further alleged that the hand-

hold and surrounding parts were defective, which caused it to give way; that defendant failed to properly equip the car and to maintain the handholds in proper condition, and that it negligently failed to inspect the car and handhold, and that he did not know of the defects and omissions alleged and complained of; that as a result of appellant's negligence, causing him to fall, his back, shoulders, sides, and hips were bruised; the bones, tendons, nerves, muscles, and ligaments of his spinal cord were lacerated, torn, and otherwise injured, his kidneys and nervous system disordered, his eyesight impaired, and a rupture on his right side caused. It is further alleged that defendants were partners, their lines constituting one system, and that they were engaged as carriers by railroad for hire engaged in interstate commerce, and were agents for each other. Defendants answered by general demurrer, denial of partnership and agency, and alleged that they were separate corporations organized under the laws of different states. They denied the negligence alleged, that plaintiff fell, and that he sustained any injuries and had thereby been damaged. They pleaded affirmatively, but not under oath, that plaintiff, prior to the receipt of his injury, knew or was properly chargeable with knowledge of the matters and defects complained of by him. No denial was filed by plaintiff with respect to such affirmative allegation. Trial was had before a jury, special issues being submitted to them, and upon their findings judgment was rendered in favor of plaintiff for \$4,500 against appellant on November 24, 1913. The jury were peremptorily instructed to find in favor of defendant, the Missouri, Oklahoma & Gulf Railway Company of Texas. Appellant filed exceptions to the findings of fact by the jury; and a motion for new trial. This motion being overruled, appellant accepted and appealed to this court.

[1] By its first assignment of error appellant contends that the verdict of the jury and the findings of fact with respect to the plaintiff having been injured by falling from the car as alleged are so greatly against the preponderance and great weight of the testimony that such findings and the judgment rendered thereon should be set aside. This contention is based upon the assertions: (1) that the testimony of the appellee was unsupported by that of any other witness, and was to the effect that he attempted to climb down off the side of a car, a part of a train in motion, running from 8 to 15 miles per hour; that the roof handhold gave way while a portion of his body was above the car, so that the distance he fell was greater than the height of the car; that he weighed 235 pounds; that he fell backward, with no opportunity to attempt to break the force of his fall with hand or foot; (2) that the undisputed evidence shows that upon examination of plaintiff at various times thereafter, the first time

immediately after such fall, there were disclosed no broken bones, no bruise, no cut or abrasion of the skin, or even a reddened skin, and no visible evidence of any kind or character to show that plaintiff had fallen as he claims to have done; (3) that aside from the incredible character of the statements, based on the common knowledge of ordinary men, there was a large amount of evidence that it would be impossible for a man of plaintiff's size and weight to sustain such a fall under the circumstances detailed without there being any evidence of injury visible. This assignment will be overruled. We think the evidence sufficient to authorize and sustain the findings of the jury and judgment rendered.

Among other things appellee testified:

"We had some work to do at Durant, and when we got ready to leave we picked up a car off the house track and put it in the train. It was an N. O. & N. E. car. When the engineer whistled for Kenefick I started over the train to signal the engineer in regard to dropping this car. The train was going about 15 miles an hour, and there was a higher car ahead of this car that I couldn't step up on, and I decided to sit down on the car back of the high car and give the signals. I took hold of the handhold and started to climb off, the handhold being on top of the car. The handhold pulled off and threw me to the ground. The handholds are of iron, and are used for the purpose of ascending and descending cars. When I started to get off this car I intended to attract the engineer's attention and signal him to drop the car into the south end of the house track. I couldn't see him very well from where I was, and I was climbing off so I could see him. The handhold pulled off and threw me backward, and I fell to the ground. I suppose I fell 14 or 15 feet, and was knocked unconscious. A man came up the track and pulled me out of the mudhole I was lying in. I was numb all over, and felt that way until they came and picked me up. When they put me in the caboose I had an awful pain in my back and shoulders. I was lying against a rock. There was a big, long cushion in the caboose and they carried me into the caboose on it. I lay there some little time and was then removed to the hotel near by. I stayed there until they picked me up at night at 8 o'clock, I suppose. I suffered untold agony there in that hotel all evening. I suffered with pain in my back and shoulders and through my hips, and in fact I was sore all over from my head to my feet. I reached Denison about 2:30. An ambulance took me to my room. Dr. Long, the company surgeon, came to see me, and examined to see if he could locate the trouble and left some kind of tablets. That was about 3 o'clock a. m., and he came back about 10 a. m. I was in awful pain during this time. I couldn't turn over; I couldn't move any way. I just lay on my back. Couldn't move in the bed. Right here in my lower privates was giving me an awful lot of pain, hurt me awful bad. I noticed that next morning worse than any other time. Commenced hurting after they got me to my room. It hurts all the time. Its just a sharp pain in there. Dr. Long said he would come back Sunday, and he didn't come, and I had Dr. Acheson come over. Dr. Acheson relieved my pain and has been my physician since. Dr. Long never came back any more. The first time I sat up was the 3d of April; I couldn't sit up. I couldn't raise up until that time. The soreness in my shoulders had gone down in the lower part of my back. The pain in my private parts was hurting me very much and has been ever

since. It has hurt every day and every night since. In bad weather it is worse. The worst pain is in the small of my back. At night I can't sleep. Hardly ever have a good night's sleep since I was hurt. I am up and down all night with my back, and it has been that way all the time. I take a little exercise every day. I feel very good as long as I am stirring a little. If I go uptown and stay a few hours. I am restless all night. During this time my groin has been awfully tender and sore. Sharp pains hit me occasionally. It is worse when I am standing. My kidneys give me an awful lot of trouble. I am up three or four times a night, and there is a pain follows after making water. My left eye has hurt me all summer. It hurts worse than my right eye. My right eye gives some trouble but I can't read with my left eye at all, can't see anything with it hardly. It was the middle of summer when my eyes first began hurting. A skim came over my left eye now at times and I have to wipe it out with my handkerchief. My eyes are worse now than they were in July. They are getting worse. I have suffered pain through my head. Yesterday I had an awful pain through my head here. My eyes hurt and I can't see out of my left eye. It waters a good deal of the time. When I close my right eye I can hardly see at all with my left eye. There was nothing the matter with me before I received this injury as I have been as strong a man as there was in the country. I can't do anything at all. I can hardly sit around the house in good shape, much less work. I am using crutches to walk with. I am able to walk without them, but I have awful pains in my back."

On cross-examination appellee said:

"At the time this accident occurred I guess I weighed 235 pounds. I never saw a bruise or scratch or red place or any other kind of mark on my skin or person following that fall. I couldn't see my back."

This witness further testified:

"Prior to the time I received this injury, I had been as strong a man as there had been in this country, I suppose. My occupation had been that of a railway man—brakeman and conductor. I had never been injured before this time. I had never had any claims or suits against any company. Business was pretty dull at the time I was hurt. I did not know what I was earning. I suppose I was earning \$50 or more per month when I got hurt. I was working every day I could. I was extra brakeman. From extra brakeman you are promoted to regular brakeman, and from there you are promoted to conductor. The average earning capacity of a regular brakeman in the employment of the Missouri, Oklahoma & Gulf was about \$100 per month, I suppose. Since I have been hurt, I have not been in condition or able to do any work. I have been incapacitated because I have pains in my body so that I cannot do anything at all. I can hardly sit around the house in good shape, much less work, without pain."

Dr. Acheson, called by the appellee, testified:

"I have been a physician and surgeon since 1867 and graduated from the University of Pennsylvania. I know H. W. Plemmons. I began to treat him last March. He was in bed in a rooming house on the north side of Main street. I examined him then and subsequently. I found him crippled and suffering pain. I gave him medicine to moderate the pain. He was complaining with his back and of pain in the right groin. I found in the right groin an incomplete rupture, or total rupture and incomplete hernia. I found a tearing of the inguinal ring that was sufficiently large to admit the tip of the finger, surrounded by the skin. I have seen him since probably two or three dozen

times. At one time he had a little bit of fever, not much. Didn't amount to quite a degree. I found that his pulse ranged from 132,000 a day to 155,000 a day; normal pulse is about 103,000 a day. The respiration was about 51,000 a day where the natural respiration is about 24,000. The blood pressure was low, being about 102 when lowest normal blood pressure is about 110. His blood pressure has increased as high as 220. Blood pressure means the pressure exerted by the heart to drive the blood through the arteries. His blood pressure kept coming up. I found that the kidneys had been injured. Blood made its appearance in the urine. The specific gravity of the urine was from 1,020 as high as 1,030. It contained no albumen at the beginning, but did later. It was also alkaline. The presence of albumen indicated a derangement of the kidneys, which permits the escape of albumen. I found something else in the urine. I found crystals of oxalate of calcium, both letter form and dumb bell. This indicated a degeneration of the kidney tissue; that is, a diseased condition of the kidney tissue. That will deteriorate a man's general system. I made the tests microscopically and by chemical analysis. The presence of cysteine crystals always denotes degeneration of the kidneys. I took photographs of his urine, and this photograph represents cysteine crystals that are escaping from the system and blood is escaping through the urine. That condition is such as would deplete a man's general system. It causes high pulse and respiration by the injury to the kidneys acting on the heart. The loss of blood makes the remainder of the blood watery and thin. Mr. Plemmons' heart is injured. The apex beat is outside the left nipple when it should be inside the left nipple. There is a diastolic murmur of the heart. The man has some cyanosis, a redness of blueness of the surface of the body. That is due to the condition of the heart resulting from the injury to the kidneys. I tested his eyes. A man ought to read a black letter a quarter of an inch square in a good light at 15 feet; the best he can do is to read a letter that is  $\frac{3}{8}$  of an inch square. The field of vision is  $\frac{9}{13}$  of what it ought to be in the right eye. In the left eye it is  $\frac{3}{8}$  of what it ought to be. I examined his eyes with an instrument called a perimeter. Anesthesia is a loss of sensibility. Mr. Plemmons' right leg is benumbed. I tested his strength with a dynamometer. Mr. Plemmons' injuries are permanent. I don't think he will ever be able to work as a brakeman or conductor. When I examined him there was some swelling in his back. There was no tearing of the skin or anything on the back. It wasn't discolored any. I found no bruises, and I found no abrasions or roughening of the skin of the back. The man is on the verge of neurasthenia, lack of nerve strength. His right leg is numb."

This witness further testified:

"A man with a high pulse might be in condition to do some physical labor, light work, but not such work as is incident to the duties of a brakeman or conductor on a railroad. This man has had his kidneys injured, and is passing blood through his urine which is depleting them. His kidneys are affected and show that the blood is impure. The impure blood is affecting his heart and has diseased it. The affection of the kidneys is closely associated with the function of the eyes, and his vision is affected; is imperfect. The man is weak and on the verge of neurasthenia. His respiration is disturbed. It is twice as fast as it ought to be, and his pulse is entirely too rapid. Neurasthenia is lack of nerve strength. I say in my opinion the plaintiff's condition is permanent. I do not believe he will ever get well of any of the troubles that I have mentioned. I do not think that he will get well of that from 132,000 to 155,000 pulse rate. The loss of blood

from the kidneys is what causes the pulse rate, and it depletes any man to lose blood. I don't think his pulse rate will ever be any less as long as that blood keeps up. I said I thought the conditions I testified to were permanent. I meant his disability was permanent."

Dr. T. W. Crowder, who made a specialty of eye, ear, nose, and throat practice, testified that he had examined the appellee's eyes by request, and that from his examination, independent of what appellee said, there was no defect in his vision that he could find. He said that he had appellee to read letters across the room 15 feet; that "there was a discrepancy in the answers of appellee with respect to his ability to see with one eye and both eyes, by which he said he meant that, with both of his eyes tested together, appellee read type at 15 feet that he should have read at 20, with his right eye he read the same type, most of the letters, with his left eye he called only part of the letters at 15 feet, which he should have read at 30 feet." This witness further testified:

"Assuming that a man was injured the 15th day of March and along about the 1st of July he commenced to have dimness of vision and pain in his eyes and can't see well and his eyes give him pain when he reads, a condition of that kind could result from a diseased condition of the kidneys. A great many things cause a weak condition of the eyes; a rundown condition of the whole system would cause it, or any special disease that would pull you down in a general way. Anything that is depleting could cause a weakened condition of the eyes. If a man's kidneys are weakened and caused to do excessive work, that is a depleting condition, and that would cause a rundown condition and weakened condition of the eyes, or could cause an organic condition there. With reference to the weakened condition we have got to depend almost entirely on what the patient tells us."

Mrs. Plemmons, appellee's wife, testified:

"I heard of Mr. Plemmons complaining of having been injured. I was in Chattanooga at that time. I noticed a difference in his appearance when I met him here to what it was when I saw him in February. When I saw him here he complained of his back and kidneys and the small of his back. His back was swollen and rigid, and swelling over the kidneys on each side. The swelling comes and goes. At times there is a swelling, and again there is not, but generally there is. There is no difference in the swelling now as compared to what it was when I saw him in April. He does not rest at night. He gets up during the night three or four times. His condition about getting up had been worse in the last three months. He says his eyes burn and hurt. He does not read very much. His eyes look red. After he has taken any exercise he does not rest."

We have not, of course, attempted to quote all the testimony bearing upon the nature and extent of appellee's injuries. It is too voluminous to do so. With respect to them the evidence is conflicting, but sufficient to support the judgment. Clearly, we would not be authorized to say that the judgment is so greatly against the preponderance of the evidence, if so at all, that it is clearly wrong, and under the uniform decisions of this state, unless we can so say, it should not be disturbed.

[2] The next contention is that:

"The verdict of the jury for \$4,500 is not supported by the evidence, and is so grossly excessive as to show the jury were influenced by some improper motive, and it should not be permitted to stand. With this contention we do not agree. The evidence quoted above, together with other testimony in the case, if true—and the jury have said in effect, by their verdict that it is—is amply sufficient to justify and support the finding of the jury that appellee, as the direct result of appellant's negligence, had sustained damages in the amount awarded him."

[3] The third, fourth, and fifth assignments of error complain, respectively, of the court's action in submitting to the jury the fifth, sixth, and seventh questions propounded to them. The fifth question is:

"Was defendant, Missouri, Oklahoma & Gulf Railway Company, guilty of negligence, as that term has been defined to you, in permitting the fastenings of said handhold to be in a defective condition, if it did, and out of repair, if it did, at the time plaintiff attempted to descend from said car?"

To which the jury answered "Yes."

The sixth question is:

"Did the defendant use ordinary care, as that term has been defined to you, to maintain the fastenings of said handhold in a reasonably safe condition for brakemen to ascend and descend from said car at the time plaintiff claims to have received said injuries?"

To which the jury answered "No." The seventh question is:

"Was the negligence of said defendant, if any there was, in failing to use ordinary care to maintain the fastenings of said handhold in a reasonably safe condition, if it did so fail, the direct and proximate cause of plaintiff's injuries, if any he received?"

To which the jury answered "Yes." The contention is, in substance, that the submission of these questions was error, because the undisputed evidence shows that the car from which appellee alleges he fell was a "foreign car," and the only duty of appellant was that of inspection and not the duty of maintaining said handhold in a safe and secure condition, and because the seventh question assumes negligence on the part of the appellant and submits an issue not raised by the pleadings. There was no error, at least of which appellant can complain, in the submission of either of the foregoing issues. The evidence doubtless showed that the car from which appellee fell was not owned by appellant, but belonged to another railway company, therefore a "foreign car," but that fact, under the law as it exists now and as it existed at the time appellee was injured, did not relieve appellant of the duty of maintaining the handhold upon said car which gave way and caused appellee to fall in a safe and secure condition. The statute of this state, passed in 1909 (Acts 1909, p. 65, §§ 5, 7), provides:

"That from and after January 1, 1910, it shall be unlawful for any common carrier engaged in commerce as aforesaid [intrastate commerce] to use, in moving intrastate traffic within said state any locomotive, tender, car or similar vehicle which is not provided with sufficient and secure grabirons, handholds and foot

strutts"; and "that any employé of any common carrier engaged in commerce as aforesaid who may be injured or killed, shall not be held to have assumed the risks of his employment or to have been guilty of contributory negligence if the violation of such carrier of any provision of this act contributed to the injury or death of such employé."

Likewise the Safety Appliance Act of Congress, enacted in 1893 and amended in 1896, provides "that it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds," and provides that any employé injured on any car in use contrary to the provisions of this act shall not be deemed to have assumed the risk, although he had full knowledge. The act of Congress of 1908 made contributory negligence also unavailable as a defense, which under the prior acts had remained a defense. *Schlemmer v. Railway*, 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596; U. S. Comp. St. 1913, § 8659. Another of our state statutes (Laws 1909, p. 280, § 3) enacts:

"That any action brought against any common carrier under and by the provisions of this act to recover damages for injuries to or the death of any of its employes, such employé shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé."

In *Railway Co. v. Kurtz*, 147 S. W. 658, the foregoing statutes are quoted, and it is held that they make it the absolute duty of railway companies to have the cars in use equipped with secure handholds, regardless of the question of reasonable care to have and keep them secure, and that where an injury to an employé happens from an insecure handhold, said statutes deny to the employer the defenses of assumed risk and contributory negligence, citing *Delk v. St. Louis & S. F. Ry. Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590. In the case cited it is further held that where the accident complained of happened after the statutes referred to took effect, it is immaterial whether or not the train of the railway company was engaged at the time the accident occurred in state or interstate traffic; that "railway companies, under these statutes, are required to do more than exercise ordinary care to have and maintain secure handholds, etc. They are required to do more than exercise a high degree of care. They are required to do all things that are possible to that end, even if they have for that purpose to keep inspectors on every train they move. Under these statutes there would seem to be no defense available unless it be that the plaintiff himself deliberately caused the handhold, which gave way and injured him, to be insecure." The accident resulting in appellee's injuries happened March 13, 1913, and at that time the statutes quoted were in force. The train upon which appellee was at

work was engaged in interstate commerce, and it was appellant's duty to have the car from which he fell equipped with secure handholds. This duty the jury have said it failed to perform, and, the law being as stated, there was no error of which the appellant can complain in submitting the question under consideration for the determination of the jury.

[4] There was no error in the admission of the testimony of the witnesses Pope and Diggs to the effect that appellee was "complaining with his back and shoulder." At least none appears either from the bill of exception reserved to the court's ruling or any statement of the evidence made in the brief. Our examination of the statement of facts, however, leads to the conclusion that the declarations of the appellee of pain and suffering, as detailed by the witnesses Pope and Diggs, were declarations or expressions of present pain and suffering and admissible in evidence. *Railway Co. v. Johnson*, 95 Tex. 409, 67 S. W. 768; *Railway Co. v. Hibbits*, 49 Tex. Civ. App. 419, 109 S. W. 228.

[5] Under the statutes quoted above and the decision made in *Railway Co. v. Kurtz*, supra, if it be conceded that appellee knew the handhold which gave way and caused him to fall, was defective, he did not assume the risk of using it. There is no pretense that he produced the defective condition of the handhold, and it seems that in no other event would the defense of assumed risk be available to appellant. The evidence, however, does not show that appellee knew of the defective condition of the handhold before the accident.

The verdict of the jury is sustained by the evidence.

None of appellant's assignments of error disclose any ground for a reversal of the case, and the judgment of the court below is therefore affirmed.

#### MURPHY v. MURPHY. (No. 366.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 19, 1914. Rehearing Denied  
Dec. 10, 1914.)

#### APPEAL AND ERROR (§ 302\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Under Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), providing that the assignments made as grounds for a new trial in a motion duly filed shall constitute the assignments of error on appeal, where a motion for a new trial purported to give a history of the proceeding, but contained no charges of error on the part of the trial court and nowhere alleged that the evidence was insufficient to sustain the verdict, it was insufficient to present any error for review on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Mary H. Murphy against William J. Murphy. Judgment for defendant, and plaintiff appeals. Affirmed.

R. H. Holland and E. H. Bailey, both of Houston, for appellant. Monta J. Moore, of Los Angeles, Cal., for appellee.

**HARPER, C. J.** This is an appeal from a decree of divorce in favor of appellee, upon the grounds of abandonment.

Appellant's brief cannot be considered by us for the reason that it does not comply with the statutes and rules for the courts of Texas in presenting assignments of error.

Article 1612, Revised Civil Statutes, 1911, as amended by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), reads as follows:

"The appellant or plaintiff in error shall in all cases file with the clerk of the court below all assignments of error, distinctly specifying the grounds on which he relies, before he takes the transcript of the record from the clerk's office; provided, that where a motion for new trial has been filed that the assignments therein shall constitute the assignments of error and need not be repeated by the filing of the assignments of error, and provided further, that all errors not distinctly specified are waived, but an assignment shall be sufficient which directs the attention of the court to the error complained of."

The motion for a new trial now constitutes the assignments of error and, to be sufficient, the assignments therein must be distinctly specified, or else they are waived.

The motion for a new trial found in the record in a narrative form gave the history of the disagreements and troubles, etc., of the parties to the suit from the date of separation up to the time of filing the motion. It nowhere charges that the court erred, and nowhere charges that the evidence was insufficient to sustain the verdict.

And the brief filed in no way complies with rules 29, 30, etc., applicable to briefs to be filed in this court.

There being no error apparent of record, the cause is affirmed.

### SOUTHERN PAC. CO. et al. v. WALKER. (No. 362.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 12, 1914. Rehearing Denied  
Dec. 10, 1914.)

#### 1. RAILROADS (§ 350\*)—COLLISION WITH AUTOMOBILE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Evidence, in an action for collision at a crossing of a car, backed by a switch engine, with an automobile, held to make the question of contributory negligence one for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 2. RAILROADS (§ 350\*)—COLLISION WITH AUTOMOBILE — DISCOVERED PERIL — QUESTION FOR JURY.

Evidence, in an action for collision with an automobile, at a crossing, of a car backed by a

switch engine, held to make a question for the jury on the issue of discovered peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 3. RAILROADS (§ 350\*)—CROSSING ACCIDENT— NEGLIGENCE—FAILURE TO MAINTAIN FLAGMAN.

Evidence, in an action for collision, at a railroad crossing, with an automobile, held to make a question for the jury on the issue of negligence in failing to maintain a flagman at such point, under the rule that such question is properly submitted in the case of a crossing unusually dangerous, because of large travel or operation of cars, or obstructions or noises calculated to mislead or confuse those crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 4. APPEAL AND ERROR (§ 1027\*)—REVIEW—IMMATERIAL MATTERS.

Defendants may not complain of the insufficiency of evidence of grounds of negligence alleged in the petition, other than those which were submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Annie Walker against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Affirmed on condition of remittitur.

Baker, Botts, Parker & Garwood, Lane, Wolters & Storey, W. A. Vinson, and Paul Kayser, all of Houston, for appellants. H. Masterson and A. L. Jackson, both of Houston, for appellee.

**HIGGINS, J.** The appellee brought this suit to recover damages of the appellants, alleged to have resulted from personal injuries sustained in a collision between an automobile driven by her and a switch engine operated by appellants. Verdict and judgment was rendered in her favor in sum of \$5,665 and in favor of Mannheim Insurance Company, intervener, for \$300 damages to the automobile.

The two grounds of recovery embraced and submitted in the charge were: (1) The failure to maintain a flagman at a crossing of extraordinary danger; and (2) the failure of the switching crew to stop the engine and avert the injury after plaintiff's peril had been actually discovered by them.

The sufficiency of the evidence to support the verdict is questioned; the contention being made that the injury appears to have been proximately caused by plaintiff's negligence.

The accident occurred in the city of Galveston, at the intersection of Twenty-Ninth and Strand streets, between 3 and 4 o'clock in the afternoon. Plaintiff had driven in her car from Houston, and was traveling upon Twenty-Ninth street, going north, to the steamship piers. She was not familiar with the crossing, having never been there before. Defendants' switch engine was on Strand street, approaching from the west. It was

backing and had a passenger coach attached. On the south side of Strand and west side of Twenty-Ninth street was a brick wall and shed which obstructed the view of trains upon Strand approaching from the west. There were gongs at the crossing which would ring constantly while an engine was approaching the same. It appears that the crossing is a very busy one and more or less noise and confusion there. Miss Walker testified she approached the crossing very slowly, at rate of five or six miles an hour. Did not hear bell or whistle or see train, and, as she approached and neared the crossing, her attention was attracted by men shouting, which confused and startled her. She looked to her right (east), and then turned and looked to the left (west), and just as she did so, the engine coming from the west struck her car.

[1] Under the facts detailed, we are of the opinion that the question of plaintiff's negligence was an issue properly submitted, and the jury's finding must be sustained. The margin, however, is very close.

[2] But, if her negligence should be conceded, the general verdict in her favor is amply supported on the issue of discovered peril. The engineer operating the engine with which she collided testified: That he was traveling five or six miles an hour. The engine was in perfect working condition, and there was no difficulty in applying and taking the air, and he could have stopped in 12 or 15 and possibly 8 feet, because he shoved the automobile about 8 or 10 feet. That he got the stop signal as the west end of the engine got about even with the west sidewalk of Twenty-Ninth street. Twenty-Ninth street is 80 feet wide between property lines and 48 feet between curb lines. The jury might have found that the engineer made no effort to stop until his engine was in actual contact with the automobile, if they accepted as true his statement as follows:

"Going at the rate of speed that I was traveling at that time, I guess I could have stopped my engine with the appliances that I had at hand in possibly about eight feet. I guess I stopped possibly in about eight feet, because I shoved the automobile about eight or ten feet."

In any event, he got the stop signal as the west end of the engine got about even with the west sidewalk of Twenty-Ninth street, and he traveled from that point about 40 feet before stopping on the opposite side of the street. Furthermore, according to the testimony of one of the switchmen, he probably received the stop signal when the eastern end or footboard of the engine passed a point 15 or 18 feet west of the western sidewalk. So it must be held that the issue of discovered peril was clearly raised.

[3] It is next asserted the evidence discloses that the engine, in approaching Twenty-Ninth street, was operated with all due care and caution, and therefore the failure to maintain a flagman at the crossing should not have been submitted as a basis of recovery.

The rule is recognized in this state, in cases of unusually dangerous crossings and intersections of wagon roads or streets with railroad tracks at grade, arising from the large travel or operation of cars, or the existence of obstructions or conflicting noises calculated to mislead or confuse those passing over such crossings, that it is proper to submit the failure of the railroad company to maintain a flagman at such point as actionable negligence predicated on the hypothesis that a person of ordinary prudence, operating trains under such circumstances, would have done so. *Railway Co. v. Magee*, 92 Tex. 616, 50 S. W. 1013; *Railway Co. v. Magee*, 49 S. W. 156; *Thompson v. Railway Co.*, 11 Tex. Civ. App. 307, 32 S. W. 191; *Railway Co. v. Gibson*, 35 Tex. Civ. App. 66, 79 S. W. 352; *Railway Co. v. Gibson*, 83 S. W. 862, affirmed by Supreme Court 99 Tex. 98, 87 S. W. 814; *Railway Co. v. Moore*, 107 S. W. 658.

It is shown by the evidence that a great number of engines and trains were operated over this crossing every day and the travel there was heavy. The obstructions to vision and noisy character of the crossing have been noted, and the evidence fairly raised the issue of negligence in failing to maintain a flagman at that point.

[4] There is no merit in the third proposition subjoined to the first assignment for the reason that the only issues submitted as grounds for recovery were the alleged negligence in failing to have a flagman and in failing to use proper care to avert the injury after the engine crew had discovered the peril. Hence it is needless to review the evidence in its various aspects relating to grounds of negligence alleged in the petition, but not submitted in the charge.

This disposes of all questions raised, except the third assignment, complaining of the amount of the verdict in Miss Walker's favor.

A careful review of the evidence upon this phase of the case, and considering the extent and evident temporary nature of her injuries disclosed thereby, clearly indicates that the amount of the verdict is excessive, and a remittitur of \$2,000 should be required as a condition of affirmance.

If, within 20 days from this date, a remittitur of that amount be entered, the judgment will be affirmed; otherwise it will be reversed and remanded.

**WILLIAMS et al. v. WATT et al. (No. 5348.)**

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 18, 1914. Rehearing Denied  
Dec. 9, 1914.)

**1. CORPORATIONS (§ 556\*)—RIGHTS OF STOCKHOLDERS—RECEIVERS.**

Under Rev. St. 1911, art. 2128, providing that where a corporation is insolvent, or is in imminent danger of insolvency, a receiver may be appointed, a stockholder of a corporation is not entitled to the appointment of a receiver on the ground that it is insolvent, or in imminent danger of insolvency, unless he has cause of action against the corporation independent of his interest as a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2219-2226; Dec. Dig. § 556.\*]

**2. CORPORATIONS (§ 553\*) — STOCKHOLDERS — RIGHTS OF—RECEIVERS.**

Courts of equity will not appoint a receiver of a corporation at the suit of a stockholder on the ground of fraud, mismanagement, etc., on the part of the corporate authorities, but will merely enjoin or forbid the wrong complained of.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

**3. RECEIVERS (§ 35\*)—APPOINTMENT—NOTICE.**

While notice of an application for the appointment of a receiver is not required by statute, notice should be given, save in case of emergency.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 54-60; Dec. Dig. § 35.\*]

**4. RECEIVERS (§ 35\*)—VACATION OF APPOINTMENT—NOTICE.**

Though a petition did not warrant the appointment of a receiver without notice, such appointment will not be vacated on appeal for that reason, where an answer was filed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 54-60; Dec. Dig. § 35.\*]

**5. APPEAL AND ERROR (§ 101\*) — DECISIONS APPEALABLE.**

No appeal can be taken from an order denying a motion to vacate the appointment of a receiver, but the appeal must be from the order making the appointment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 681-687; Dec. Dig. § 101.\*]

**6. INJUNCTION (§ 27\*)—ENJOINING RECEIVER—GROUNDS FOR.**

That a receiver is unfit, or is not properly discharging the duties of his office, is no ground for enjoining him from acting, or enjoining parties on whose petition he was appointed from further prosecuting their suit, for the surety on the receiver's bond is liable for any misconduct.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.\*]

**7. INJUNCTION (§ 27\*)—ENJOINING RECEIVER.**

That a receiver was surety upon the cost bond of the plaintiff, at whose suit he was appointed, and that such plaintiff was indebted to the corporation for which a receiver was ordered, is no ground for enjoining the receiver from acting; the court never having been asked to remove him nor to order him to sue plaintiff.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.\*]

**8. INJUNCTION (§ 27\*)—ENJOINING RECEIVER.**

That a receiver is selling property of a corporation to himself is no ground for enjoining him from continuing to act, for his bond will protect those injured.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.\*]

**9. INJUNCTION (§ 27\*)—ENJOINING RECEIVER.**

Where a receiver of the assets of a corporation was ordered by the court to sell them, he will not be enjoined from selling because the assets may be sacrificed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.\*]

**10. INJUNCTION (§ 27\*)—ENJOINING RECEIVER—GROUNDS FOR.**

Where a receiver of a corporation was appointed, the fact that the trial court refused to hear the plea in abatement of those objecting to the appointment until he tried the case upon the merits is no ground for enjoining the receiver from acting, and those who instituted the receivership suit from continuing to prosecute it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.\*]

**11. INJUNCTION (§ 128\*)—RECEIVERSHIP PROCEEDINGS—EVIDENCE.**

In a suit where it was sought to enjoin a receiver, appointed at the suit of stockholders of a corporation, from continuing to act, and the stockholders from prosecuting their suit, evidence held insufficient to show that the stockholders were guilty of such fraud in procuring their stock that the receivership should be set aside.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.\*]

**12. INJUNCTION (§ 7\*)—SCOPE OF REMEDY.**

Where a party could have procured relief by appeal from an order of which he complained, he is not entitled to an injunction to give him the same relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 6, 34; Dec. Dig. § 7.\*]

**13. INJUNCTION (§ 27\*) — RIGHT TO ENJOIN RECEIVER.**

That a receiver of a corporation is conducting the business at a loss, while it had been before conducted at a profit, is no ground for enjoining him from continuing to act as such.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 50, 51, 53; Dec. Dig. § 27.\*]

**14. INJUNCTION (§ 152\*) — TEMPORARY INJUNCTION—ORDERS.**

It is proper, upon the hearing for a temporary injunction to restrain a receiver from acting, to refuse to restrain the parties at whose suit he was appointed from continuing to prosecute their suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 337, 343; Dec. Dig. § 152.\*]

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Action by J. A. Williams and others against R. F. Watt and others. From an order denying a temporary injunction, plaintiffs appeal. Affirmed.

T. Wesley Hook, of Kingsville, for appellants. Pope & Sutherland, of Corpus Christi, and Pollard & Crenshaw, of Kingsville, for appellees.

**MOORSUND, J.** This is an appeal from an order made by Hon. W. B. Hopkins, judge of the Twenty-Eighth judicial district, refusing to grant a temporary injunction. The injunction was applied for by J. A. Williams, the Kingsville Planing Mill & Manufacturing Company, a Texas corporation, and about 15 other persons and companies, and it was alleged that plaintiffs comprise all the stockholders of said corporation, except

Don Payne and E. M. Crawford, two of the defendants, and comprise the holders of eight-tenths of the liabilities of said corporation, exclusive of what is due stockholders for their stock. The petition is long, and, together with the exhibits attached thereto, comprises about 160 pages of typewritten matter. It was alleged that on February 21, 1914, upon the petition of Don Payne and E. M. Crawford, a copy of which was attached as an exhibit, and without notice to plaintiffs, R. F. Watt was appointed receiver for said corporation; that on March 4, 1914, said J. A. Williams and the said corporation, through their then counsel, Judge Reese, prepared a motion to vacate said receivership proceedings, and sought a hearing upon the same, but the judge did not grant a hearing until the district court met in Kleberg county on May 19, 1914, when he granted a hearing upon an amendment to said motion and overruled it; that evidence was introduced upon said hearing, a copy of which was attached as an exhibit, as well as copies of the motion and answer thereto.

It was further alleged that the said evidence showed the following: (a) That the stock issued to Payne and Crawford had been issued without their having paid anything into the corporate funds, and consequently they were not stockholders, and not entitled to maintain a stockholders' action for a receiver for said corporation; (b) that neither of said stockholders had a cause of action against Williams, or any one else, other than that they wished the said corporation's affairs wound up, and the appointment of a receiver for such reason only was not justified at the instance of a stockholder; (c) that no creditor has asked for the receivership, but eight-tenths of the creditors opposed the same, and the assets of said corporation, if sold, would just pay the creditors, and there would be nothing left for the stockholders, and the latter, therefore, had no real interest in the proceeding; (d) that the receiver was an interested party, because he was one of the bondsmen on the cost bond filed in the proceeding for a receiver, and said receiver will probably be called upon to pay such costs; (e) that one of the bondsmen of the receiver had withdrawn from the bond; (f) that the receiver had been appointed on a petition false as to all material allegations.

It was further alleged that thereafter both parties announced ready on these petitioners' plea in abatement and demurrers to the petition for said receivership, and, a jury being demanded, the court refused to hear said plea, but that it should have been granted because said evidence showed: (a) That Payne and Crawford had stock issued to them without paying therefor, and the same should be canceled, and then they could not maintain a stockholders' action for receivership proceedings, and, not being 25 per cent. of the creditors, could not maintain a

creditors' action therefor; (b) that Payne and Crawford had no interest in the property of the corporation now, and therefore could not maintain an action for a receiver for it against the opposition of eight-tenths of the creditors thereof.

It is further averred that the demurrers were overruled, but should have been granted; that the court, after announcing that the cause had been continued, fixed the receiver's salary at \$100 per month, without giving petitioners an opportunity to object; that the receiver was given notice of the withdrawal of one of his bondsmen; that the receiver is selling the assets of the company, consisting of a stock of lumber, in order to pay his salary, and is hiring a man to run the mill of the company, paying him \$4 per day, and is selling lumber to himself for 21 per cent. less than it is worth, and is constantly depleting the assets of the corporation to pay his salary and the other running expenses of the business; that the mill does not pay running expenses and the receiver is running same at a loss of \$150 per month, and the receiver's salary should be but \$25 per month as mere custodian of the property, as many other receivers could be procured for that amount; that the action being prosecuted by Payne and Crawford is maintained for the sole purpose of forcing plaintiff to buy them out; that their stock is worthless; that they will not submit any "give or take proposition," nor accept such a proposition made by plaintiffs, to the effect that plaintiffs will pay all the creditors if the assets of the corporation are turned over to them, or will turn over the assets to Payne and Crawford if they will pay all the creditors; that plaintiffs have no adequate remedy at law; that the time for appealing from the order appointing the receiver expired without any appeal being taken, and plaintiffs believe no appeal will lie from the order overruling the motion to vacate the receivership; that there are 8 civil cases on the docket of the district court of Kleberg county ahead of this case, and there are 15 criminal cases on said docket; that said court holds but one week every six months; that it will take a week to try this case, and the court will not take up the plea in abatement until he tries the case; that the assets of the corporation are constantly being depleted; that the total assets of the corporation consist of about \$1,500 worth of machinery and "some \$3,000" worth of lumber, material, etc., and a drain upon the same of \$250 per month on account of the receivership will soon deplete such assets; that the liabilities amount to just about the same sum of money, but if the assets were sold during this time of money stringency plaintiffs could not raise sufficient money to bid them up to their face value, and besides such purchase would amount to a recognition of the receivership, but the assets, with careful handling and with the line of business and

credit the corporation had built up, would have been worth more than the said sum, and to a degree the result is still obtainable if the property of the corporation is turned back to it; that the evidence adduced upon the hearing of the motion to vacate shows that plaintiff Williams, while manager of the corporation, conducted the business in a manner so satisfactory to the creditors that none of them have ever concurred in the application for a receiver, and enhanced the assets to the extent of \$1,000, comparing same with the liabilities, and had an active business and a nice line of credit; that the property should be turned back to the corporation, because the receiver is unable to conduct the business successfully, and in fact is running same at a loss of about \$150 per month. Plaintiffs prayed that Watt be restrained from acting longer as receiver, that Payne and Crawford be restrained from further prosecuting their suit for a receiver for said corporation, that the sheriff deliver the property of the corporation back to it, that the stock issued to Payne and Crawford be canceled, and for general relief.

Defendants answered, but their answer was not verified as required by law. Plaintiffs excepted to the sufficiency of the verification, but the court overruled such exception.

[1, 2] In this state a court of equity has no power to appoint a receiver of a corporation ancillary to a stockholder's suit to wind up its affairs. Article 2128, Statutes of 1911, does not entitle a stockholder to the appointment of a receiver for the corporation upon the ground of insolvency, or imminent danger of insolvency, alone; but a stockholder urging such ground must, in addition thereto, show that he has a cause of action against the corporation independently of the receivership, and that his interest as such stockholder requires the appointment to be made. *People's Investment Co. v. Crawford*, 45 S. W. 738; *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509; *Iron Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 828. In said case of *People's Investment Co. v. Crawford*, the court held further:

"Courts of equity, by virtue of their general equitable jurisdiction, will not appoint a receiver of a corporation, and assume control and management of its affairs, at the suit of a stockholder alleging fraud, mismanagement, and collusion on the part of the corporate authorities, or ultra vires acts of the directors or of the corporation itself, but in such cases will limit the redress granted to the specific wrongs charged, and will go no further than to enjoin or forbid the misconduct complained of. *Land Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 832-834; *High, Rec. § 288*; 2 *Cook, Stockh. & Corp. Law*, §§ 746, 747, and 863, at page 1414; *Mor. Priv. Corp. § 281*."

The petition for receiver in this case alleges certain irregularities on the part of the officers in control of the corporation with respect to the holding of meetings and conduct of the affairs of the corporation. Such acts, under the authorities cited, did not entitle

the Payne and Crawford to have a receivership instituted. Payne alleged in one part of his petition that the capital stock of the corporation, amounting to \$15,000, was fully paid up; further on he alleges that \$5,000 thereof has not been paid for, and that he and Crawford and Huber, who owned all the stock, made a contract with appellant Williams to transfer Williams \$8,000 worth of their stock if he would pay the \$5,000 into the corporation in lumber, and that Williams breached the contract and only paid in \$1,000 worth of lumber. The corporation is in no manner liable to them by reason of their sale of stock to Williams. It was further alleged that the corporation had for a valuable consideration assumed the payment of a note upon which there was due \$3,640, signed by Payne and Crawford, which was past due and unpaid, and a note for \$316, signed by Payne, which had not matured. As Payne and Crawford were contracting with Williams to pay \$5,000 to the corporation, the unpaid portion of the stock, it is apparent they owed that amount to the corporation, and could not be injured by having to pay the sums above mentioned for the corporation. The petition further shows that the corporation had property of the probable value of \$9,500, and debts of about \$6,656; but no importance is attached to the fact that Payne and Crawford owed it \$5,000 for stock. There were no allegations that Payne or Crawford paid out anything for the corporation, or that it is indebted to either of them in any amount.

[3, 4] The court entered an order without notice to the corporation or other defendants appointing a receiver. While the statute does not require notice of such applications, our courts have uniformly held that notice thereof should be given, except in cases of emergency. *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342; *Cotton v. Rand*, 92 S. W. 266; *Haywood v. Scarborough*, 41 Tex. Civ. App. 448, 92 S. W. 815; *Sachs v. Goldberg*, 135 S. W. 600. In this case the petition failed to allege facts going to show that plaintiffs would probably suffer irreparable loss if the appointment had been delayed. *Security Land Co. v. S. T. Development Co.*, 142 S. W. 1191. It has, however, been held that when an appeal is taken, and it appears that an answer was filed, the same will be considered by the appellate court, and the order will not be reversed for want of notice. *Smith v. Lamon*, 143 S. W. 804. In this case no appeal was taken from the order appointing the receiver. The petition in this injunction case shows that a motion to vacate said appointment was prepared about 11 days after such order was made, but that the then attorney for appellants was unable to get the court to grant a hearing thereon. Instead of appealing from the order granting the receivership, appellants, by their present counsel, prepared an amended motion to vacate the same, which

was overruled several months after the order was made granting the receivership. Upon the hearing of said motion evidence was introduced as follows:

The affidavit, attached to the charter of the corporation, showed that Payne and Crawford each subscribed for \$7,000 of the capital stock and Huber \$1,000; that they turned over their interests in a planing mill business, which they swore had a net value of \$9,000, and that paid-up capital stock amounting to 90 shares was to be issued therefor, of which Crawford was to receive 46 shares, Payne 38 shares, and Huber 6 shares. This affidavit stated the value of the machinery at \$5,000, and the lots at \$3,000. The uncontradicted testimony was that the machinery was worth about \$1,500 installed, while witnesses disagreed as to the value of the lots, one placing such value at \$1,200 to \$1,500, while another estimated the value at \$850. It was proved that the note for \$3,500, signed by Payne and Crawford, mentioned in the petition for receivership, was secured by deed of trust upon the house and lots recited in affidavit to the charter to be the property of the corporation. There was a prior lien against the lots of \$675, and the holder of the \$3,500 note proposed to take the property for his debt and assume payment of the \$675 note; the two claims aggregating about \$4,500. This proposition was agreed to and accepted by all parties; it being authorized by an order entered by the court. By means of said deal Payne and Crawford became relieved of all liability upon the note for \$3,500 mentioned in his petition.

Attorney for appellants testified that he owned the \$316 note mentioned in said petition for receivership, and had sued to foreclose same, and that he was willing to take the machinery securing same in cancellation of the note, so that there should be no liability thereon upon the part of Payne. Payne admitted that said note was secured by about one-third or one-fourth of the machinery, worth \$5,000 according to his affidavit attached to the charter. Williams testified that Payne, Crawford, and Huber own the stock; that the indebtedness of the corporation was about \$7,000 when Payne left, and at the time application for receiver was filed about \$9,000, but had about \$3,000 more stock and lumber on hand. He admitted the business was in a failing condition when he took charge. He testified that, when they took stock after he went into the business, he told Payne and Crawford there was only \$2,000 more assets than liabilities, that they had put in \$1,000 and he \$1,000, that he wanted his money back, and offered to take it in lumber, but they refused to do so.

Minutes of a meeting of stockholders held August 28, 1913, showed that for certain indebtedness owing by Payne and Crawford they transferred to the corporation \$1,000 worth of its stock held by them; Payne

transferring to amount of \$850, and Crawford to the amount of \$150. These shares were then issued proportionately among all stockholders, as follows: J. A. Williams, 5 shares; Crawford,  $2\frac{1}{2}$  shares; Payne, 2 shares; and Huber,  $\frac{1}{2}$  share. J. A. Williams was elected president, Payne first vice president, R. S. Williams second vice president, S. S. Williams secretary, and Crawford treasurer, and said parties were elected directors. These minutes were signed by Crawford. Payne admitted his presence at the meeting, but said he was not in the room when the officers were elected. Minutes of a meeting of directors held September 30, 1913, show that J. A. Williams acted as chairman and S. S. Williams as secretary, and Payne was present.

Upon this hearing no attention appears to have been paid to the fact that Payne was liable to the corporation for \$3,200 for his stock subscription and Crawford for \$2,400. It appears from Payne's own testimony that at the time of the stockholders' meeting Williams held \$8,000 stock, Payne \$2,350, and Crawford about \$3,800. As Huber held \$1,000 worth, it is evident that all the \$15,000 stock was issued. The hearing developed the further fact that all the indebtedness of the corporation for which Payne and Crawford were liable had been adjusted, and that the \$316 note described in their petition was amply secured by lien upon machinery. But the court refused to vacate the receivership, evidently upon the theory that the corporation was insolvent, or in imminent danger of insolvency, and that such condition was alone sufficient to justify the receivership; and, in justice to the court, it is to be noted that the fight waged for the vacation of the receivership appears to have been based upon the theory that Payne and Crawford should be held not to have paid anything for their stock, and it should therefore be held that the order for a receiver was procured fraudulently. The court refused to vacate the receivership. The next step taken by attorney for the appellants herein was to present a plea in abatement upon the theory that Payne and Crawford were not entitled to any stock in the corporation, and were therefore not entitled to sue. The court declined to submit this plea to a jury until he was ready to try the main case, and such refusal, together with the condition of the docket, is relied upon by appellants as a part of the grounds upon which they asked for an injunction.

[5] The question before us upon this appeal is not whether the court erred in holding the petition sufficient to authorize the appointment of a receiver, nor whether the court should have vacated the order upon hearing the motion to vacate same. No appeal was taken from the first order, and none could be taken from the one refusing to vacate the receivership. The only question is

whether the record shows appellants to be entitled to relief by injunction as prayed for. We will take up the allegations from the standpoint of their sufficiency as grounds for relief by injunction, bearing in mind that the exhibits are made part of the petition.

[8-9] 1. The allegations directed at the fitness of the receiver to discharge the duties of his office, and his manner of discharging same, must be disregarded, because such matters furnish no ground for an injunction. The surety upon the receiver's bond is not released. While the propriety of appointing a receiver who is surety upon the cost bond of plaintiff, who appears to owe the corporation, may be seriously doubted, such fact furnishes no ground for injunction. The court was never asked to remove the receiver, nor to order him to sue Payne and Crawford, nor to return an inventory into court, nor to cease selling to himself, and besides, if he sells to himself, his bond will protect those interested in the property from such unlawful acts.

[9] 2. No injunction was prayed for to restrain the receiver from selling the property of the corporation, and if there had been such a prayer it should be denied, because it appears from the exhibits attached to the petition that the court had ordered such sale. Under such circumstances an application should be made to the court for an order setting aside the order of sale. *Beach on Receivers*, § 745, page 795; *High on Receivers*, § 196.

[10] 3. The refusal of the court to hear the plea in abatement until he gets ready to try the case upon the merits is no ground for injunction.

[11] 4. Payne and Crawford, according to the admission in the petition for injunction, and according to the evidence contained in Exhibit B, were stockholders in the corporation. The record fails to disclose any such fraud on their part as would authorize a suit to set aside the order appointing the receiver. Even if they had not paid value for any part of the stock held by them, we are not prepared to say that such fact would show a fraud authorizing the setting aside of the order appointing the receiver; but it is unnecessary to pass upon that point, as the evidence fails to sustain appellants' contention to that effect. Appellants have figured the matter out to their own satisfaction, and made an exhibit showing their theory; but, in order to arrive at the result, they took the least valuation of the lots testified to, instead of the highest, and took a statement furnished by Crawford to Williams as to the value of the house. It is not shown that said statement was in any way an admission, even so far as Payne was concerned. The statement was furnished Williams by Crawford on August 5th, the year not being stated, but it is evident that it was in 1913, and just three

days before the charter was filed. We realize that the testimony shows that the property was turned over to the corporation at a greatly inflated value, but it does not show that the liabilities exceeded the actual value of the business.

[12] 5. If it be conceded that the allegation, to the effect that neither Payne nor Crawford has a cause of action against the corporation, other than that they want the corporate affairs wound up, is sustained by the allegations of the petition for the appointment of a receiver, nevertheless the fact remains that no appeal was taken from the order appointing such receiver. It is well settled that, when a party has had an opportunity to avail himself of a legal remedy by an appeal and has neglected to make use of it, relief by injunction should be denied him. *G., H. & S. A. Ry. Co. v. Ware*, 74 Tex. 49, 11 S. W. 918; *Kansas City Life Insurance Co. v. Warbington*, 113 S. W. 988.

[13] 6. The allegation to the effect that the receiver is conducting the business at a loss of about \$150 per month, and that Williams, while in charge of the business, conducted the same in a successful manner, constitutes no ground for granting the injunction prayed for.

[14] 7. To restrain Payne and Crawford from further prosecuting their suit would be equivalent to requiring them to dismiss the case. We do not think the court erred in refusing to do this upon the hearing for a temporary injunction. *Courchesne v. Santa Fé Fuel Co.*, 155 S. W. 684. If the court found that a fraud had been practiced upon him in procuring the appointment of a receiver, or that for any other reason the receivership should be vacated, it was within his power to grant the necessary relief, without using the remedy of a temporary injunction. We do not know upon what theory of the law he considered the petition sufficient to justify the appointment of a receiver; but as no appeal was taken from his order, and the law permits none from his refusal to vacate the same, he cannot be required to revise his ruling by means of a temporary injunction, which would require the dismissal of the case and the vacation of the receivership. We conclude that the court did not err in refusing to grant the temporary injunction prayed for.

The judgment is affirmed.

HOOPER et al. v. LOTTMAN et al. (No. 364.)  
(Court of Civil Appeals of Texas. El Paso.  
Nov. 19, 1914. Rehearing Denied  
Dec. 10, 1914.)

1. COVENANTS (§ 77\*) — RESTRICTIVE COVENANTS—RIGHT TO ENFORCE.

Whether a person, not a party to a restrictive covenant, may enforce it depends upon the intention of the parties making the covenant.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 77-89; Dec. Dig. § 77.\*]

## 2. COVENANTS (§ 21\*) — RESTRICTIVE COVENANTS—INTENTION OF PARTIES.

The intention of the parties to a covenant restricting the use of land is to be ascertained from the deed itself, construed in connection with the circumstances existing at the time of execution.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 20; Dec. Dig. § 21.\*]

## 3. COVENANTS (§ 79\*) — RESTRICTIVE COVENANTS—ENFORCEABILITY.

Where the owner of a tract of land, intended to be sold for residence purposes, imposed restrictive covenants, calculated to preserve the residential character of the property, in the deeds to the several grantees, the restriction is for the benefit of all of the lots, and individual lot owners may enforce compliance with the covenant.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 78-82; Dec. Dig. § 79.\*]

## 4. COVENANTS (§ 84\*) — RESTRICTIVE COVENANTS — ENFORCEMENT — PERSONS AGAINST WHOM.

A covenant restricting the use of lots which were part of a tract divided and sold for residence purposes may be enforced against the grantee of an original purchaser, where he bought with actual or constructive knowledge of the purpose of the covenant, to benefit all of the lots.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 90-92; Dec. Dig. § 84.\*]

## 5. COVENANTS (§ 79\*) — RESTRICTIVE COVENANTS—ENFORCEABILITY.

While uniformity in the restrictions imposed upon the several lots in a residential district is one of the strongest proofs of the existence of a building scheme, it is evidentiary only, and the fact that covenants prohibiting purchasers from building stables within certain distances of the streets varied with the various lots does not render such covenants unenforceable by individual purchasers.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 78-82; Dec. Dig. § 79.\*]

## 6. COVENANTS (§ 74\*) — RESTRICTIVE COVENANTS—ENFORCEABILITY.

That a covenant restricting the use of lots in a residence subdivision was omitted in conveyances of land to a water company will not prevent purchasers from enforcing the covenant; the furnishing of water to persons living in the district being an absolute necessity, and the necessary use of land by a water company being inconsistent with covenants applicable to residence property.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 73; Dec. Dig. § 74.\*]

## 7. INJUNCTION (§ 113\*)—RIGHT TO—DELAY.

Persons desirous of enforcing a covenant restricting the use of land will not be denied an injunction for that purpose, where they made protest upon discovering it was about to be violated, and instituted suit as soon as the protests were shown to be unavailing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by J. C. Hooper and another against H. W. Lottman and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Sam, Bradley & Fogle, of Houston, for appellants. Ellis P. Collins and S. H. Brashear, both of Houston, for appellees.

HIGGINS, J. J. C. Hooper and the Hyde Park Water Company, a corporation, brought this suit against H. W. Lottman and Norbert Lottman, owners of the east half of lot 3 in block 19 in Hyde Park addition to the city of Houston, and against R. J. Rochow, a contractor and builder, to restrain and enjoin them from erecting, completing, or using a barn upon said premises within a distance of 60 feet from Fairview avenue.

Hooper resided and owned property in the Hyde Park addition, and the Hyde Park Water Company owned the west half of said lot 3 and other property therein. The Hyde Park Improvement Company, a corporation, was the common grantor of the plaintiffs and Lottmans. Said company was the owner of the Hyde Park addition to the city of Houston, and subdivided and laid same out in lots, blocks, and streets. The company, having disposed of all its holdings, was dissolved and is no longer in existence. The addition was designed and intended by the company to be an exclusively residential district, and in furtherance of this design a resolution was adopted by its board of directors, providing certain building restrictive clauses should be contained in the deeds to property sold by the company. One of the restrictive clauses reads: "No barn or building of similar nature shall be erected closer than ——— feet to any street." Not more than two deeds to purchasers were executed without this restrictive clause. The blank space was filled in differently in the various deeds, so that there was not absolute uniformity in the distances from streets within which the prohibited class of buildings might be erected. The deed the Lottmans claimed under stipulated that the prohibited buildings should not be erected closer than 60 feet to the street.

There has been much judicial writing upon the subject of restrictive covenants of the kind here considered, and as may be anticipated, from the very nature of the topic, the cases abound in fine and subtle distinctions. Many of the decisions upon this branch of the law appear to be in hopeless conflict, but are usually reconcilable when the facts peculiar to each are understood. In fact, the courts seem to have had no special difficulty in ascertaining and declaring the controlling general principles of the law, but, in their application to concrete facts, it may well be said that the decisions are in hopeless conflict and confusion, and individual cases are without value as precedents, except as general principles are recognized and declared. No attempt will therefore be made to analyze the decisions, as applied to the various state of facts upon which they are based.

[1-4] Whether a person not a party to a restrictive covenant has the right to enforce it depends upon the intention of the parties in imposing it. This intention is to be ascertained from the language of the deed it-

self, construed in connection with the circumstances existing at the time it was executed. The vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including the nature of the restrictions. If the general observance of the restriction is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restriction for the benefit of all the lots. The most familiar cases in which courts of equity have upheld the right of owners of land to enforce covenants to which they were not parties are those in which it has appeared that a general building scheme or plan for the development of a tract of land has been adopted, designed to make it more attractive for residential purposes by reason of certain restrictions to be imposed on each of the separate lots sold. This forms an inducement to each purchaser to buy, and it may be assumed that he pays an enhanced price for the property purchased. The agreement therefore enters into and becomes a part of the consideration. The buyer submits to a burden upon his own land because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual. The equity in this particular class of action is dependent as much on the existence of the general scheme of improvement or development as on the covenant, and restrictions which contemplate a general building plan for the common benefit of purchasers of lots are recognized and enforced by courts of equity at the instance of the original grantor or subsequent purchasers. So the general rule may be safely stated to be that where there is a general plan or scheme adopted by the owner of a tract, for the development and improvement of the property by which it is divided into streets and lots, and which contemplates a restriction as to the uses to which lots may be put, or the character and location of improvements thereon, to be secured by a covenant embodying the restriction to be inserted in the deeds to purchasers, and it appears from the language of the deed itself, construed in the light of the surrounding circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject thereto, and to have the benefit thereof, and such covenants are inserted in all the deeds for lots sold in pursuance of the plan, a purchaser and his assigns may enforce the covenant against any other purchaser, and his assigns, if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase. *DeGray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388; *Hano v. Bigelow*, 155 Mass. 841, 29 N. E. 628.

The facts in the case at bar bring it with-

in the scope of the general rules stated, and we will but briefly advert to the contentions made by appellees in support of the judgment rendered in their favor.

[5, 6] It is asserted, first, that a general plan of improvement is not shown because the restrictions in some deeds vary as to the distance from streets within which barns and similar buildings may be erected; also that in two instances deeds to lots were made without restrictions.

Uniformity in the restrictions imposed on the lots is one of the strongest proofs of the existence of a building scheme. It is an evidentiary matter only, however, and any deviation from uniformity, as to restrictions imposed on any of the grantees, is often seized upon, as a defense to an action to enforce the covenant, on the theory that a general plan of improvement is not shown. There may, however, be departures from the usual restrictions in individual cases without destroying the integrity of the scheme of development as a whole. A want of absolute uniformity for reasons readily apparent does not militate against the view that the restrictions in the deed were in pursuance of a general scheme for improvement of the property. *Coates v. Cullingford*, 147 App. Div. 39, 131 N. Y. Supp. 700; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369. And although some of the lots may have written restrictions imposed upon them and others may not, yet if the general plan has been maintained from its inception, without material departure therefrom, and if it has been understood and relied upon by those concerned, it is binding and enforceable *inter sese*. *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890.

So it would seem that absolute uniformity in the establishment of the building line, as well as the fact that in two instances lots were sold without any restrictions, does not necessarily destroy the general plan or scheme of improvement. In this connection stress is laid upon the fact that the west half of lot 3 was also conveyed by the Hyde Park Improvement Company to the Hyde Park Water Company, plaintiff, without any restrictions. It seems that the latter company was wholly subsidiary to the former, having the same officers and stockholders, and was formed for the purpose of supplying water to the addition. The property of the water company was conveyed to it by the improvement company in consideration of stock issues by the water company and prorated among the stockholders of the improvement company in proportion to the stock owned by them. The business of the water company was to furnish an absolute necessity to the inhabitants of the addition, and the necessary use of its real estate was inconsistent with restrictions thereon of the nature imposed upon that sold to private individuals, and the fact that this land was

conveyed to the water company without restriction does not at all militate against the consistency of a general plan of improvement by the imposition of building restrictions upon other lots sold and conveyed.

[7] We think, too, there is no merit in the view that Hooper is estopped to complain by reason of the construction of improvements upon property owned by him in violation of the restriction. The evidence discloses that his building was not a barn or of a similar nature. But, if Hooper should be estopped, there is no estoppel whatever against the water company, his complainant. Nor are the parties precluded from asserting their rights by delay in pursuing same. Complaint was made to the Lottmans as soon as it was discovered that they were about to violate the restriction, and legal action was taken as soon as it was discovered protests were unavailing, and that they were determined to violate the covenant in their grantor's deed. Nothing more was required of the plaintiffs to protect their rights.

Reversed and remanded.

#### MONTGOMERY v. BOYD. (No. 668.)

(Court of Civil Appeals of Texas. Amarillo. Nov. 14, 1914. Rehearing Denied Dec. 5, 1914.)

##### 1. PRINCIPAL AND SURETY (§ 116\*)—RELEASE OF ONE SURETY—EFFECT.

The discharge of one of several sureties on a joint and several obligation does not release the others from liability for the released surety's portion of the debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 269-282; Dec. Dig. § 116.\*]

##### 2. PRINCIPAL AND SURETY (§ 116\*) — DISCHARGE OF COSURETY BY LIMITATIONS—EFFECT.

One surety on a joint and several obligation is not discharged because the creditor permits the cause of action against his cosurety to become barred by limitations, but is liable for the whole debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 269-282; Dec. Dig. § 116.\*]

Appeal from Floyd County Court; Arthur B. Duncan, Judge.

Action by R. M. Boyd against W. T. Montgomery. From judgment for plaintiff, defendant appeals. Affirmed.

A. P. McKinnon, of Floydada (C. S. Williams, of Plainview, of counsel), for appellant. Chas. H. Veale, of Floydada, for appellee.

HALL, J. This is an appeal from the county court of Floyd county. On the 24th day of May, 1908, Tom P. Steen, as principal, and E. C. Henry and appellant, as sureties, executed and delivered to appellee a note in the sum of \$400, due one year after date. Upon the maturity of this note, the note sued upon was executed by Steen, as principal,

and appellant, as surety. Henry refused to sign the renewal note. Appellant did not know of this fact until two years thereafter. After the execution of the note sued on, and prior to the institution of the suit, at a time not shown by the record, the original note, together with the renewal note, was sent to appellee. Thereafter appellee sent both notes to his agent at Floydada, with instructions to collect only one of them, and at a time not shown by the record the agent delivered to Steen the original note. Appellant interpleaded Henry. Upon a trial before the court without a jury, Henry's plea of limitation was sustained, and the court rendered judgment in favor of appellee, Boyd, against Steen and Montgomery, jointly and severally, for the full amount of the debt and costs.

[1] The controversy is presented for review upon two assignments of error, raising the same question, viz.: That the court erred in rendering judgment against appellant for the entire debt sued upon. The proposition is urged under these assignments that, when the obligation of the sureties is joint and several, discharge of one of them does not release the others from payment of their proportion of the claim, and that the surety not released is liable for only his pro rata share of the debt. This proposition cannot be sustained, and the authorities cited by appellant are against his contention, if, indeed, they are on the point presented for consideration.

[2] The real question presented by the pleadings and evidence is: Is one surety discharged because a cause of action against his cosurety is permitted by the creditor to become barred by limitation? It is said in Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435:

"It is suggested by counsel that appellant was released by laches of the holder of the note and mortgage, in that he did not proceed with diligence to collect the indebtedness after the same became due. The conclusive answer to that is, as counsel for respondent suggests, the payee of an instrument having a principal obligor and surety owes no duty of active vigilance to the latter to enforce collection of the indebtedness. The way is open to the surety at any time after default of his principal to pay the debt and reimburse himself by enforcing the obligation of such principal and the cosureties, if there be such. Harris v. Newell, 42 Wis. 687; Updike v. Lane, 78 Va. 132; Alexander v. Byrd, 85 Va. 690 [8 S. E. 577]. 'The surety has no right to say that he is discharged from his debt, \* \* \* if all he rests upon is the passive conduct of the creditor in not suing. He must use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him (the surety) the means of suing.' Lord Eldon in Eyrie v. Everett, 2 Russ. Ch. 381. So, as it is said, the duty of activity is imposed by law on the surety to protect himself rather than on the creditor to protect him."

In People v. Whittemore, 253 Ill. 378, 97 N. E. 683, the court said:

"Finally, it is claimed that neglecting to file claims against the estates of Jones and Tracy

released appellants to the extent that those estates should contribute to discharge the liability of the bonds. If the claim had been filed against either of those estates, it would have been paid in full, and the estate paying it would have been compelled to resort to Whittemore in his lifetime or his estate after his death. No authority for the position of counsel is cited by them, and the settled rule is that a surety is never discharged because a cause of action, either against the principal or a surety, is barred by the statute of limitations. The estate of Whittemore was not released by the fact that the statute of limitations barred the claim against the other estates."

Levy, Justice, in *First National Bank v. Rusk Pure Ice Co.*, 136 S. W. 89, said:

"And it is also the well-known rule that ordinarily the payee in the note, in order to preserve his rights against the surety, is not bound to active diligence, and if he only remains passive his rights are unimpaired. It is not contended that there was any agreement expressly stipulating that the note sued on should be extended for any definite time."

Under such conditions the surety is not only not released, but he is liable for the whole debt. *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Davis' Adm'r v. Auxler*, (Ky.) 41 S. W. 767; *Staples v. Gokey*, 34 Hun (N. Y.) 289; *Martin v. Frantz*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; *McVean v. Scott*, 46 Barb. (N. Y.) 379. *National Bank of Commerce v. Gilvin*, 152 S. W. 652.

The judgment is affirmed.

### J. D. FIELDS & CO. v. ALLISON. (No. 5340.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 4, 1914. Rehearing Denied  
Dec. 9, 1914.)

#### 1. PLEADING (§ 293\*)—VERIFICATION—PLEA IN ABATEMENT.

In trespass to try title by a partnership in which the petition alleged that the title to two of the three surveys involved was in one of the partners and that title to the other survey was in the other partner, it was not necessary that a plea in abatement for misjoinder of parties and causes of action should be sworn to, as the matters called to the court's attention were apparent from the pleadings.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 882-884; Dec. Dig. § 293.\*]

#### 2. ABATEMENT AND REVIVAL (§ 81\*)—PLEAS IN ABATEMENT—TIME FOR FILING.

Rev. St. 1911, art. 1909, providing that pleas shall be filed in the due order of pleading and heard and determined in such order under the direction of the court, does not prescribe a cast-iron rule, and the court may, in its discretion, hear exceptions before trying a plea in abatement, and a party who under such circumstances submits exceptions before submitting a plea in abatement does not waive his plea.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 10, 22, 175-177, 225, 499-504, 506; Dec. Dig. § 81.\*]

#### 3. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where, in trespass to try title by a partnership composed of J. and W., it was alleged that J. held the legal title to two of the surveys involved and W. the title to the third and a plea in abatement for misjoinder of parties and

causes was sustained, but J. was permitted to proceed as plaintiff for the recovery of the surveys to which he claimed title, the sustaining of the plea, if prejudicial at all, was prejudicial only to the partnership and W., and was harmless as to J. individually.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

#### 4. ADVERSE POSSESSION (§ 19\*)—STATUTORY PROVISIONS—APPLICATION.

Under Rev. St. 1911, art. 5673, providing that possession of land belonging to another by a person owning or claiming 5,000 acres or more inclosed by a fence in connection therewith or adjoining thereto shall not be the peaceable and adverse possession contemplated by article 5675, requiring actions for the recovery of lands against one in peaceable and adverse possession to be brought within ten years, unless such land so belonging to another shall be segregated and separated by a substantial fence from such lands connected therewith or thereto adjoining, or unless one-tenth thereof shall be cultivated and used for agricultural purposes or used for manufacturing purposes, or unless there be actual possession thereof, the ten-year statute of limitations had no application to a dispute concerning the boundary of certain surveys embraced in a pasture containing over 5,000 acres upon which there were no improvements except a fence around it.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 99-105; Dec. Dig. § 19.\*]

For other definitions, see *Words and Phrases*, Second Series, *Peaceable and Adverse Possession*.]

#### 5. ADVERSE POSSESSION (§ 68\*)—BOUNDARIES—STATUTES OF LIMITATION.

The three and five year statutes of limitation had no application to a boundary dispute, where plaintiff only claimed the land paid for by him and claimed up to a fence only because he thought his deeds embraced the land up to the fence.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 387-393; Dec. Dig. § 68.\*]

#### 6. TRIAL (§ 350\*)—VERDICT—SPECIAL ISSUES—LOCATION OF BOUNDARIES.

In trespass to try title involving a boundary dispute, the court, in addition to submitting an issue as to whether a certain fence was on the true boundary line, should have submitted an issue as to where the true boundary was, if not at the fence, as, the jury having found that the fence was not on the line, an officer executing a writ of restitution would have nothing to guide him.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 823-833; Dec. Dig. § 350.\*]

#### 7. TRIAL (§ 260\*)—INSTRUCTION COVERED BY SPECIAL ISSUES SUBMITTED.

In trespass to try title, an instruction embraced in and covered by the special issues submitted was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 8. TRIAL (§ 350\*)—SPECIAL ISSUES—MATTERS NOT IN DISPUTE.

In trespass to try title involving a boundary dispute, where the question in issue was whether a fence was on the boundary line and there was no dispute as to the existence of such fence or how long it had been there, the court properly refused to submit issues as to these matters.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 823-833; Dec. Dig. § 350.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**9. TRESPASS TO TRY TITLE (§ 38\*)—BURDEN OF PROOF—"PRIMA FACIE CASE."**

In trespass to try title involving a boundary dispute, in which it appeared that by reason of the size of plaintiff's inclosure and the lack of improvements he had not acquired title by limitation, though proof of a possessory title in plaintiff made a "prima facie case," which is such established facts as the law recognizes as sufficient to overcome the inertia of the court and to authorize affirmative action by the court in the absence of evidence on the other side, it did not change the burden of proof, and, evidence having been introduced in rebuttal, the burden was on plaintiff to prove a legal title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 53; Dec. Dig. § 38.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Prima Facie Case*.

**10. COSTS (§ 32\*)—TRESPASS TO TRY TITLE—BOUNDARY DISPUTE.**

Where, in trespass to try title to certain surveys which plaintiff alleged were separated from defendant's land by a fence, defendant admitted plaintiff's title to such surveys, but denied that the fence was on the boundary thereof, and the jury found that the fence was not on the true boundary, costs were properly taxed to plaintiff.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 108-132; Dec. Dig. § 32.\*]

Appeal from District Court, Sutton County; J. W. Timmins, Judge.

Action by J. D. Fields & Co. against George S. Allison, which after a plea in abatement had been sustained, proceeded in the name of J. D. Fields as plaintiff. From a judgment in his favor for insufficient relief, Fields appeals. Reversed and remanded.

Hill, Lee & Hill, of San Angelo, for appellant.

CARL, J. J. D. Fields & Co., a firm composed of J. D. Fields and W. J. Fields, brought suit for damages against George S. Allison and J. T. Owens and also for an injunction. The suit originally was in the name of the partnership, and it was alleged that said partnership was engaged in the ranch business in Sutton county, Tex., owning a large body of land, and that the legal and equitable title to surveys 59 and 61, block B, H. E. & W. T. Ry. Co., was in J. D. Fields, and that the legal and equitable title to survey 60, block B, H. E. & W. T. Ry. Co., was in W. J. Fields, and that said surveys, together with a large number of other surveys which they were the legal and equitable owners of, were inclosed by a good fence made of post and wire which surrounded their said pasture, and which separated it from all other lands from any one else adjoining their said pasture, and that plaintiffs were the owners of and had been in possession of all the lands within their said inclosure for more than 20 years; that the fence inclosing said pasture of plaintiffs was constructed in the year 1889, and that said fence had been continuously used by plaintiffs where the same is now located and situated since the year 1889, and that the defendants had cut

and torn down said fence on the north line of said surveys 59, 60, and 61 and was removing same.

"In the seventeenth, eighteenth, and nineteenth paragraphs of said amended original petition, plaintiffs pleaded the statutes of five and ten years' limitation as to Surveys 59, 60, and 61, and in each and all of said subdivisions it is alleged that the legal and equitable title to said survey 60 was in W. J. Fields, 'said lands being held, owned, used, and occupied by said firm and partnership of J. D. Fields & Co.'; the field notes of the outside lines of said three surveys being set out by metes and bounds, giving specifically a marked corner for the beginning corner. Plaintiffs prayed that the injunction heretofore granted be made perpetual and for title and possession of said lands. On March 30, 1914, the defendant George S. Allison answered by demurrers and answer. In the last paragraph of said answer said defendant denies all of the allegations in plaintiffs' petition, except that J. D. Fields has the legal title to surveys 59 and 61 and W. J. Fields has the legal title to survey 60 wherever they may be located. On March 31, 1914, the defendant Allison filed a plea in abatement, alleging that the pleadings of plaintiff, as amended, had changed the cause of action and was seeking to recover two sections of land for J. D. Fields and one section for W. J. Fields, said plea in abatement setting up a misjoinder of parties and causes of action, which plea in abatement was sustained by the court as to the recovery of sections 59, 60, and 61 in the same suit. After said plea in abatement had been by the court sustained, it was ordered that the cause proceed in the name of J. D. Fields for the recovery of surveys 59 and 61, and it was agreed in open court that J. D. Fields could proceed as plaintiff without filing new pleadings as to surveys 59 and 61. Plaintiff J. D. Fields thereupon in open court dismissed said cause of action as to defendant J. T. Owens. The cause resolved itself into a boundary suit involving the north boundary line of surveys 59 and 61."

The court submitted but one issue to the jury, and it was as follows:

"Gentlemen of the jury, you will return a plain answer in writing to the following question: Do you find from a preponderance of the testimony that the line of fence separating the pasture of plaintiff J. D. Fields on the south from the pasture of defendant G. S. Allison on the north is located upon the true and correct boundary line of surveys 59 and 61, belonging to plaintiff J. D. Fields?"

"To the above question we answer: ..... Foreman."

"The jury are the exclusive judges of the credibility of the weight to be given to their testimony."

To this, the jury answered "No," and upon this verdict the court rendered judgment that J. D. Fields recover of George S. Allison (Owens having been dismissed) sections 59 and 61, and that plaintiffs have judgment for title and possession of said lands, and that a writ of restitution issue in favor of plaintiff against defendant for said lands. And it is further provided in said judgment that Allison recover as against Fields all costs of the suit. J. D. Fields alone has perfected his appeal.

[1-3] The first assignment of error complains of the action of the court in sustaining the plea in abatement filed March 31, 1914, because it is said the same came too late, the

parties having announced ready for trial before same was presented and acted upon by the court, and because said plea was not verified. It was not essential that the motion be sworn to, because the matters called to the court's attention were apparent from the pleadings. *Compton v. Stage Co.*, 25 Tex. Supp. 67. Article 1909 of the Revised Statutes reads:

"Pleas shall be filed in the due order of pleading, and shall be heard and determined in such order under the direction of the court."

In the language of Judge Brown, 91 Tex. 86:

"The statute does not prescribe a cast-iron rule upon this subject, but the court may, in its discretion, as it did in this case, hear the exceptions before trying the plea in abatement, which involves a question of fact; and the party who under such circumstances submits exceptions before he submits a plea in abatement will not be held to have waived his plea" (citing *Trawick v. Martin-Brown Co.*, 74 Tex. 522, 12 S. W. 216; *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 961).

But *W. J. Fields and J. D. Fields & Co.* are not appealing, and we do not see how *J. D. Fields* has been injured individually by the court's ruling. The undisputed evidence shows that title to sections 59 and 61 was in him, and that title to section 60 was in *W. J. Fields*. If any one was injured by this holding it was *J. D. Fields & Co.* or *W. J. Fields*, or both, and they do not prosecute an appeal. This assignment is overruled.

[4, 5] The court did not err in refusing to submit the ten-year statute of limitation, because it was admitted that the *Fields'* pasture, bounded on the north by the fence in dispute, contained over 5,000 acres, and there are no improvements on the land except the fence around it. This being true, this case would fall within the exception stated in article 5678 of the Revised Statutes. *Flack v. Bremen*, 45 Tex. Civ. App. 473, 101 S. W. 537; *Dunn v. Taylor*, 102 Tex. 80, 113 S. W. 265. Neither would the three and five year statutes of limitation apply, because this is a boundary suit and *Fields* does not claim any land called for in *Allison's* deed. He says he only claims what he paid for, and he claims what is under his fence because he thinks his deeds for sections 59 and 61 embrace same. In other words, he believes his fence is on the line. *Alexander v. Newton*, 11 Tex. Civ. App. 618, 33 S. W. 305; *Mooring v. Campbell*, 47 Tex. 39. The second assignment is overruled.

[6] We do not think the court erred in refusing the charges complained of in the third assignment, since the same merely deal with evidence which would tend to establish the true line. Certainly the first two are such, and the third might be said to be covered by the issue submitted; and the jury found that the fence is not on the line. There is no more reason to single out the *Dod* survey and charge as to whether it is correct than there is as to whether the *Vickery* or *Saunders*

surveys are correct. But we do think the court should have submitted to the jury the further issue, viz: If the fence is not on the true boundary of sections 59 and 61, then where is such true boundary with reference to the fence? The finding made establishes nothing except that the fence is not on the true boundary line. Then where is it? Upon that important matter we are left to take our choice from the ideas of the other surveyors. Nothing is settled by this suit, for when the officer goes with his writ of restitution he has absolutely nothing to guide him. The only thing he would know is that the fence is not where it should be, but where he is to put it is more than we can tell. Since we shall reverse the case, we merely make these observations, feeling sure that the trial court will deal with the subject properly upon another trial.

[7, 8] The fourth assignment is overruled because the fact that the fence along sections 59 and 61 was placed there about 1889 and has been there since is established by the undisputed evidence. The fifth clause in this requested charge was properly refused, because it is embraced in and covered by the issue submitted. As to whether the fence is there and how long it has been there was not an issue, because no one disputes these facts. As to whether it is on the true line is another matter, and that was submitted, and the jury found that it is not on the line. That which was in dispute was submitted, and there is no necessity of submitting matters about which there is no controversy.

[9] This is a trespass to try title suit which resolved itself into a boundary dispute. The plaintiff alleged that he was in peaceable and adverse possession of all of the lands in his inclosure (which included sections 59 and 61, the north boundary of which is involved herein), and, further, that the fence upon the north side of the pasture is on the north line of said surveys 59 and 61. The defendant *Allison* denied that the fence is on the north line, and joined issue as to whether the plaintiff had acquired title by limitation to that part of sections 10, 8, and 5 which might be south of the fence. The appellant insists that, in view of the fact that he had the land under fence and showed a possessory title, the court should have instructed the jury that the burden of showing that the true line is inside appellant's fence was on the appellee.

This is not to be confused with title by limitation to this strip of land, for we have seen that appellant had none, under the facts proven; but since appellant showed that he had so had the land fenced and had possession thereof since 1889, would the prima facie case made upon showing such possessory title shift the burden of proof to the other party to show title in himself to the disputed strip of land? Appellant insists that the burden would so shift, and bases his

contention on *Watkins v. Smith*, 91 Tex. 591, 45 S. W. 560, and cases therein cited. In that case Judge Gaines says:

"We are thus brought to the question whether, under the established facts of this case, the plaintiff was entitled to recover by reason of his possession of the premises at the time of defendant's entry. In *Keys v. Mason*, 44 Tex. 140, Chief Justice Moore says: 'It is true the possession of the defendant entitles him to a judgment against the plaintiff, unless the latter shows a prima facie title. He does this when he derails title from the sovereignty of the soil down to himself, or if he shows title out of the government and subsequent possession for sufficient length of time to toll the right of entry, or merely a prior possession to that under which the defendant claims with a regular chain of title connecting himself with such possession,' etc. The remark as to prior possession was made merely by way of argument, and is a dictum, but it is in our opinion a correct statement of the rule. The rule there announced has been frequently applied in this court. *House v. Reavis*, 89 Tex. 626 [35 S. W. 1063]; *Duren v. Strong*, 53 Tex. 379; *Caplen v. Drew*, 54 Tex. 493; *Parker v. Railway*, 71 Tex. 133 [8 S. W. 541]; *Pacific Express Co. v. Dunn*, 81 Tex. 35 [10 S. W. 792]; *Linard v. Crossland*, 10 Tex. 462 [60 Am. Dec. 213]. But it is ingeniously argued that the rule is not applicable to a case where the defendant enters without actual force under a claim of right, for the reason that one who takes possession under claim and color of title cannot be deemed a naked trespasser. It is true that the proposition is most usually announced under the form that prior possession is prima facie evidence of title against a naked trespasser or a mere intruder. But we have been cited to no case, nor have we found any, in which it has been decided that possession is not evidence of title against any wrongdoer. It is not a rule of property. It is a mere rule of evidence, and is founded upon the principle that since ownership is a usual concomitant of possession, it is a reasonable prima facie inference that the possessor of property is the owner of such property."

So it may be taken as the established law of this state that when one presents and proves a possessory title to land, he would be entitled to recover on the strength of the prima facie case so made out. *Burke v. Braumiller*, 150 S. W. 206; *Adels v. Joseph*, 148 S. W. 1154; *Teagarden v. Patten*, 48 Tex. Civ. App. 571, 107 S. W. 912; *Austin v. Land Co.*, 107 S. W. 1142; *Mumme v. McCloskey*, 28 Tex. Civ. App. 83, 66 S. W. 853; *Lockett v. Glenn* (Sup.) 65 S. W. 482.

The law of this state places the burden of proof, in trespass to try title, on the party asserting ownership or on the plaintiff, and if we were to hold that mere proof of possession would make out such a case as to shift the burden of proving title on the other party, it virtually would be abrogating the statute. All any one having possession of land would be required to do would be to show that fact and then, although plaintiff himself, he would shift the burden to the other party. This was never the purpose of our law.

A prima facie case is such established facts as the law recognizes as being sufficient to overcome the inertia of the court and to authorize affirmative action by the court, in the absence of evidence on the other side.

Such a case, and only such a case, is made by proof of possession. In *Chamberlayne*, Mod. Law of Evidence, vol. 2, p. 1173, § 992, it is said that:

"A ruling that such prima facie case has been made out has several important consequences: (1) It shifts the burden of evidence, etc."

But in the first part of the section just quoted the author's meaning is made plain. In speaking of a prima facie case, it is said:

"In other words, it covers a presentation of evidence such as will warrant the judge, in case of a proposition or fact within his function, in announcing as a matter of administration that, until further evidence is produced, he will regard the fact as established, or, in case of a proposition within the decision of the jury, in ruling that, in the absence of further evidence, the jury would be warranted as a matter of reason, i. e., of law, in feeling that their own inertia had been overcome and deciding in accordance with the case submitted."

But "when evidence is introduced to rebut the prima facie case so made by proof of possession, the assumption of law is *functus officio* and drops out of sight." 16 Cyc. p. 1073. The inference of fact which has been assumed to be correct continues to have its legal weight in the case made, but no more. The gist of the whole matter seems to be that while certain facts may, when untested, establish a prima facie case, still the very moment rebutting testimony is introduced, the prima facie case so made is destroyed, and the facts which went to establish the same are only of value in so far as they may have probative force along with other facts upon the trial of the case. And the original party having the burden of proof would still have that burden. So that, while appellant's proof of possession made out a prima facie case of ownership in him, and in the absence of rebutting evidence would have justified the court in rendering judgment for him, still when such rebutting evidence was introduced, he had the same burden of proof as to legal title that he had before such prima facie case was made out by proof of occupancy and possession. The burden of proof did not shift.

The fifth and sixth assignments are overruled.

The seventh assignment is overruled because the court's charge was correct as far as it went; but, in the view we take of the case, it did not go far enough, and did not cover the case being tried. The court should give a charge sufficiently comprehensive to embrace the whole case, and, as given, the charge in this case only covers one side of the case. The objection is that the charge is incorrect. We do not think so, but it is incomplete, an error of omission rather than one of commission.

The ninth assignment is sustained.

"The verdict rendered in this case settled nothing, and was wholly insufficient as the basis of a judgment which would settle the boundary issue." *Government Hill Co. v. Mundy*, 165 S. W. 80.

[10] There was no error in taxing the costs against appellant, because in his pleadings the defendant admitted that appellant owned sections 59 and 61, which is equivalent to a disclaimer of any interest in these surveys on part of appellee. And if Allison in fact owned a strip of land inside Fields' fence and the jury intended to give it to him, that is a recovery by him which would carry with it the costs. Appellant was properly taxed with the costs, and the tenth assignment is overruled.

The judgment is reversed, and the cause remanded.

### GALVESTON DRY GOODS CO. v. MITCHELL et al. (No. 5333.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 25, 1914.)

VENUE (§ 22\*)—PRIVILEGE—COUNTY OF DOMICILE—JOINDER OF PARTIES AND CAUSES.

Defendant W., who alone owed plaintiff on a note, not being a necessary party to the sole cause of action asserted against defendant G. for money which had come into its hands for the benefit of plaintiff, though it had received it by virtue of an arrangement with W. that it should pay it to plaintiff, joinder of W. as defendant did not deprive G. of right to assert its privilege of being sued in the county of its domicile.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.\*]

Appeal from Hidalgo County Court; James H. Edwards, Judge.

Action by the Planters' State Guaranty Bank against T. W. Mitchell and another. Judgment for plaintiff, and defendant Galveston Dry Goods Company appeals. Affirmed in part, and in part reversed, with instructions.

Claude Pollard and E. H. Crenshaw, Jr., both of Kingsville, and I. Lovenberg, Jr., of Galveston, for appellant. Robt. J. Smith, of Mercedes, for appellees.

**MOURSUND, J.** The Planters' State Guaranty Bank sued T. W. Mitchell and the Galveston Dry Goods Company, alleging: That May 20, 1913, said Mitchell executed and delivered to E. R. Edwards his promissory note for \$214.30, which was on the same day, for a valuable consideration, sold and transferred to plaintiff; that subsequently, in the year 1913, the Galveston Dry Goods Company collected \$3,000 upon a fire insurance policy in favor of said Mitchell, upon the promise and agreement of said company to distribute said sum pro rata among certain creditors of said Mitchell; that plaintiff was designated as one of said creditors under the description "Mercedes Bank," or "the bank at Mercedes," and plaintiff was thereupon immediately notified by Mitchell of said arrangement, and plaintiff thereupon acquiesced in said arrangement and agreed thereto, it being understood and agreed that

claims aggregating \$3,900 should share in such distribution, each to the extent of 80 per cent. of its amount; that said company, in disregard of such agreement and arrangement, distributed said fund without paying plaintiff anything, or at least so advised plaintiff, and now refuses to account to plaintiff for any part thereof. Plaintiff prayed that it have judgment for its debt, interest, and attorney's fees.

Mitchell answered, by alleging the same agreement with the Galveston Dry Goods Company set up by plaintiff; that plaintiff had agreed to such arrangement, and to accept its proportionate part of its debt in full settlement of its claim against Mitchell; that said company had informed him that it had distributed the fund as agreed; and he therefore averred that plaintiff had been paid by said company 80 per cent. of its claim. He prayed that plaintiff take nothing by its suit.

The Galveston Dry Goods Company filed a plea of privilege to be sued in Galveston county. Its answer consisted of a general demurrer, two special exceptions, and denials sufficient to put in issue all allegations in the petition except that it collected the \$3,000 and greed to distribute pro rata among certain creditors of Mitchell. It specially denied that plaintiff was designated as one of said creditors, either by its proper name, or as the Mercedes Bank, or as the bank at Mercedes, and that it was directed by Mitchell to pay any part of said sum to plaintiff, and alleged that it distributed the fund among the creditors listed by Mitchell, with the exception of one creditor, William D. Cleveland & Sons, who refused to accept their pro rata, amounting to \$201.05, and thereupon it paid said sum to Mitchell.

The plea of privilege and exceptions were overruled, and upon a trial before the court judgment was rendered in favor of plaintiff against both defendants for \$177.15. The Galveston Dry Goods Company appealed.

It is contended that the plea of privilege should have been sustained; also that special exceptions should have been sustained, which set up that the petition shows a misjoinder of parties and causes of action, in that the cause of action by plaintiff against Mitchell is wholly severable and distinct from and independent of the cause of action as alleged against the company, and that therefore the county court of Hidalgo county did not have jurisdiction to try said cause as between plaintiff and the company, a resident of Galveston county.

The only cause of action which the bank had against Mitchell was that upon the promissory note. The Galveston Dry Goods Company was not responsible as a maker, indorser, or guarantor of the promissory note. The cause of action asserted against the Galveston Dry Goods Company was for mon-

ey which had come into its hands for the benefit of the bank. It had received this money by virtue of an arrangement with Mitchell; but, in order to recover, it was only necessary for the bank to show that the Dry Goods Company had received a sum of money upon the agreement to pay the same to the bank. Mitchell was not a necessary party to a suit of that kind.

We therefore conclude that, upon the cause of action asserted against the Galveston Dry Goods Company, the latter was entitled to be sued in the county of its domicile; it having been shown that the dry goods company was a corporation whose principal office was situated in Galveston county, Tex., that it had no agent or representative in Hidalgo county, that the cause of action did not arise in Hidalgo county, and that it had not promised to pay the money in said county. The privilege to be sued in the county of the domicile is a valuable one, and litigants cannot be deprived thereof by the joinder of causes of action which are separate and distinct. *Thomas v. Walsh*, 44 Tex. 160; *McDaniel v. Chinski*, 23 Tex. Civ. App. 504, 57 S. W. 922; *Williams v. Robinson*, 63 Tex. 576; *First State Bank of Flatonia v. Valenta et al.*, 33 Tex. Civ. App. 108, 75 S. W. 1087; *Hartford Fire Ins. Co. v. City of Houston*, 102 Tex. 317, 116 S. W. 36; *Behrens Drug Co. v. Hamilton*, 45 S. W. 622; *Lumpkin v. Blewitt*, 111 S. W. 1072; *Moorhouse v. King County Land & Cattle Co. et al.*, 139 S. W. 883; *Stephens v. First Nat. Bank*, 146 S. W. 620; *Ft. Worth Horse & Mule Market v. Smith*, 149 S. W. 200.

As between the bank and the defendant Mitchell, the judgment appealed from is affirmed; but as between the bank and the Galveston Dry Goods Company, it is reversed, with instructions to sustain the plea of privilege and dismiss that part of the case.

Affirmed in part, and in part reversed, with instructions.

#### SOTO et al. v. STATE. (No. 411.)

(Court of Civil Appeals of Texas. El Paso. Nov. 25, 1914. Rehearing Denied Dec. 10, 1914.)

#### 1. INTOXICATING LIQUORS (§ 274\*)—DISORDERLY HOUSE—NUISANCE—ABATEMENT—WHAT CONSTITUTES—ILLEGAL SALE OF LIQUOR.

Pen. Code 1911, art. 496, defines a "disorderly house" as one where spirituous, vinous, or malt liquors are sold or kept for sale, without a license. Article 503 provides that habitual, actual, threatened, or contemplated use of any premises to keep a disorderly house shall be enjoined. *Held*, that a petition alleging defendants' possession and control of a house commonly known as the "Ureka Club and Socorro Mutua Mexicana," and that defendants were habitually using the premises as a disorderly house, and contemplate continuing such use in that therein spirituous, vinous, and malt liquors were sold in quantities of one gallon and less, to be drunk on the premises, and so kept for sale without a license to retail such liquor, and that there was no person or corporation

having a license under the law to retail liquor on the premises, was sufficient to justify an injunction against the maintenance of the place.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 410; Dec. Dig. § 274.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Disorderly House*.]

#### 2. PLEADING (§ 35\*)—SURPLUSAGE.

Where suit was instituted in the name of the state to enjoin the keeping of an alleged disorderly house, used for the sale of liquors, against three persons as individuals, averments of the petition that the alleged house was known as the "Ureka Club and Socorro Mutua Mexicana" were superfluous, and did not show that defendants were dispensing liquor to members of a bona fide club under circumstances dispensing with the necessity of a license.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 76-80; Dec. Dig. § 35.\*]

#### 3. INTOXICATING LIQUORS (§ 260\*)—WRONGFUL SALE—CLUBS—"PERSON ENGAGED IN SELLING LIQUOR."

While a bona fide club situated in a district where liquor may lawfully be sold, organized for purposes sanctioned by law, and selling liquor to its members, and not to the public as a mere incident to its organization and without profit, is not engaged in the occupation or business of selling intoxicating liquors, under the laws of the state, and cannot be enjoined under Penal Code 1911, arts. 496, 503, providing for injunction against houses where liquor is illegally sold as disorderly houses, yet such protection does not extend to clubs not organized in good faith for purposes authorized by law but merely as a subterfuge to evade the law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 399; Dec. Dig. § 260.\*]

#### 4. INTOXICATING LIQUORS (§ 274\*)—NUISANCE—PRELIMINARY INJUNCTION—PRAYER.

Where, in a suit to enjoin a liquor nuisance as a disorderly house, the petition prayed an injunction restraining defendants from using the premises to sell spirituous, etc., liquors, and from keeping for sale therein such liquors and from selling the same on the premises, it was sufficient to justify the issuance of a preliminary injunction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 410; Dec. Dig. § 274.\*]

#### 5. INJUNCTION (§ 143\*)—PRELIMINARY INJUNCTION—EX PARTE ISSUANCE—RESTRAINING ORDER.

A preliminary injunction should not ordinarily be granted without notice; the status quo being maintained in the meantime by the issuance of a restraining order.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 315; Dec. Dig. § 143.\*]

#### 6. INTOXICATING LIQUORS (§ 274\*)—NUISANCE—INJUNCTION—PETITION—VERIFICATION.

Under Pen. Code 1911, art. 503, providing that the procedure to enjoin the maintenance of a liquor nuisance as a disorderly house shall be the same as in other suits for injunction, as near as may be, except that the petition need not be verified, a verified petition is not necessary to a preliminary injunction in such cases.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 410; Dec. Dig. § 274.\*]

#### 7. INTOXICATING LIQUORS (§ 277\*)—WRONGFUL SALE—INJUNCTION—"DISORDERLY HOUSE."

Under Pen. Code 1911, art. 496, defining a "disorderly house" to be any house in which liquors are sold or kept for sale without a license, and article 503, providing that the habitual use of premises for the keeping of a disorderly house shall be enjoined, etc., an injunc-

tion restraining defendants from selling or keeping for sale spirituous, etc., liquors on the premises, was too broad; the court being only authorized to restrain defendants' use of the house for the sale of liquor without a license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 413; Dec. Dig. § 277.\*]

**8. COSTS (§ 238\*)—COSTS OF APPEAL—SUCCESSFUL PARTY—MODIFICATION OF JUDGMENT.**

While ordinarily, on the reformation and affirmance of a judgment on appeal, the costs are taxed against the appellee, yet they may be taxed against the appellant for cause, and will be so taxed where the objectionable feature would doubtless have been corrected by the trial court had its attention been called thereto.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 908-919; Dec. Dig. § 238.\*]

**Appeal from District Court, El Paso County; Dan M. Jackson, Judge.**

Suit by the State against Miguel Soto and others. Decree for complainant, and defendants appeal. Reformed and affirmed.

Coldwell & Sweeney, of El Paso, for appellant. W. W. Bridgers, of El Paso, Dist. Atty., for the State.

**HIGGINS, J.** The state of Texas by its district attorney filed suit against Miguel Soto, R. Salazar, and A. P. Brunswick, alleging: That they were in possession and control of a house in the city of El Paso, the said place being commonly known as the "Ureka Club and Socorro Mutua Mexicana," which purports to have its headquarters and place of business in said house. That defendants have been habitually using said premises as a disorderly house, and threaten and contemplate continuing to so use same; that said premises is a disorderly house in this: That therein spirituous, vinous, and malt liquors were sold in quantities of one gallon and less to be drunk on the premises and so kept for sale, without defendants having first obtained a license under the laws of this state to retail such liquors, and there is no person or corporation having a license under the law to retail liquor on said premises. An injunction was prayed restraining defendants from using said premises for the purpose of selling spirituous, vinous, or malt liquors and from keeping for sale therein such liquors and from selling same on said premises. Upon an ex parte hearing a temporary injunction was ordered issued in all things as prayed for, such injunction to be subject to the further order of the court. From this order this appeal is prosecuted.

[1] Article 496, Penal Code, defines a "disorderly house" to be "any house in which spirituous, vinous or malt liquors are sold or kept for sale, without first having obtained a license under the laws of this state to retail such liquors." Article 503, Penal Code, provides that:

"The habitual, actual, threatened or contemplated use of any premises, place, building or part thereof, for the purpose of keeping \* \* \* a disorderly house, shall be enjoined at the suit of either the state or any citizen thereof."

And by article 505 of the Penal Code it is provided that the procedure in such cases shall be the same as in other suits for injunction, as near as may be, except that the petition need not be verified.

The facts alleged relating to the past and threatened and contemplated use of the house plainly show that such use is for purposes which bring it clearly within the definition of a disorderly house as defined above.

There are no facts stated in the petition from which it might be reasonably deduced—under other supposable facts connected with the subject—that the defendants were dispensing liquors to members of a bona fide club under circumstances which dispensed with the necessity of a license.

[2, 3] The suit is against Soto, Salazar, and Brunswick as individuals, and the averments that the alleged disorderly house is known as the Ureka Club and Socorro Mutua Mexicana, etc., are wholly superfluous. In this connection, it may be remarked that while a bona fide club, situated in a precinct, city, or town where liquor may be lawfully sold, organized for purposes permitted and sanctioned by law, and which, as a mere incident to its organization and without profit, furnished liquor to its members and not to the public generally, is not a person, under the laws of this state, engaged in the occupation or business of selling intoxicating liquors and cannot be enjoined under the provisions of the law here considered, but in respect to clubs not organized in good faith for purposes authorized by law, but merely as shifts, shields, or subterfuges, such sales would not be permitted, and under such circumstances they would and should be held to be disorderly houses and as such may be enjoined. *State of Texas v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385; *Adams v. State*, (Cr. App.) 145 S. W. 940.

The allegations of the petition are not subject to the objection that they lack the directness, certainty, and particularity required in petitions for injunction.

[4] The fifth assignment complains of the issuance of a preliminary injunction upon the ground that it was not prayed for. The prayer in this respect was not as certain as it should have been, but, considered as a whole, it sufficiently appears that a preliminary injunction was being sought.

[5] Error is also assigned to the action of the court in granting the injunction without notice to the defendants. This was a matter within the discretion of the trial court, and, no abuse of this discretion being apparent, its action in so doing is not reversible. *Commissioners, etc., v. Nichols*, 142 S. W. 37; *Holbein v. De La Garza*, 126 S. W. 42.

In this connection, however, it is desired to express our disapproval of the practice of granting temporary injunctions without notice.

In *Holbein v. De La Garza*, 126 S. W. 42, it is said:

"As to the issuance of the prohibitory injunction without notice, much must be left to the sound discretion of the judge. Article 2904, Revised Statutes [1895], provides: 'Upon application for any writ of injunction, if it appears to the judge that delay will not prove injurious to either party and that justice may be subserved thereby, he may cause notice of such application to be served upon the opposite party, his agent or attorney, in such manner as he may direct, and fix a time and place for the hearing of such application.' The petition in this case, we think, discloses no reason why notice should not have been given before the issuance of a writ so sweeping in its character as was ordered in this case. 'Audi alteram partem' is one of the maxims of the old civil law, and the doctrine that a man should not be condemned without a hearing is not only the instinct of justice, but this spirit breathes through the whole system of common law and specially through our system of equity, as distinguished from law, which seeks to temper the harshness of the common law and bring it more in harmony with the principles of abstract justice. It is rarely, under our equity procedure in regard to the issuance of injunctions, that it becomes necessary to issue a temporary writ of injunction, even a merely prohibitory writ, without a hearing. If it appears necessary from the allegations of the petition that a defendant be stopped at once and without the delay necessary to give notice and an opportunity to be heard, a temporary restraining order may in all cases be issued compelling immediate cessation of the threatened injury until such time as may be reasonably required to allow the defendant to present his side of the case, which may change the whole aspect of the controversy. If it be said, in answer, that a defendant may obviate this difficulty by a motion to dissolve, wherein he may fully present his objections to the issuance of the writ, the reply is apt and conclusive that, under the peculiar rule adopted by the Legislature allowing appeals from an order granting a temporary injunction, but not to an order refusing to vacate on motion to dissolve, a defendant would ordinarily lose, by lapse of time, his right to appeal from the order granting an injunction if he delayed until his motion to dissolve could be heard. It is, we think, a serious omission in the law on this subject that no appeal is given from an order overruling a motion to dissolve."

Again, in *Holman v. Cowden*, 158 S. W. 571, it is said:

"Appellant also makes objection to the order granting the injunction, on the ground that it was granted without notice. As we have taken occasion to say several times, while the district judge had the power to grant an injunction without notice to the other party, it is only in the rarest cases that it is proper to do so. In every conceivable case, no matter how pressing the emergency, a temporary restraining order (well known in our practice as distinguished from a temporary injunction), restraining the defendant and preserving the status until such time as the application for temporary injunction can be heard after notice to the defendant, is all that is necessary. In this way both parties can be heard before passing upon the application, and many times a serious mistake avoided. In addition, in case of an appeal, the appellate court will have something more before it than the naked ex parte allegations of the petition. There can be no possible objection to the course here suggested: and, in the interest of justice, it is earnestly to be desired that trial judges would adopt this course."

We concur in the remarks quoted and trust the trial judges in this Supreme Judicial

District will observe the rule of practice there clearly shown to be proper and desirable. It will accord much better with the spirit of our jurisprudence, which contemplates an opportunity to be heard before determining one's rights. Serious mistakes will often be avoided, and no doubt many appeals from the issuance of preliminary injunction will be obviated. The great number of appeals from orders of this nature is in large measure due, we think, to the practice of making such orders upon ex parte hearing. The distinction between a temporary injunction and a restraining order, effective only pending notice and hearing, of the application for a temporary injunction, is clearly stated in *Riggins v. Thompson*, 98 Tex. 154, 71 S. W. 14. See, also, upon the subject, *Hartzog v. Seegar Coal Co.*, 163 S. W. 1055; *McWilliams v. Commissioners, etc.*, 153 S. W. 368; *Ex parte Zuccaro* (Sup.) 163 S. W. 579; *Cole v. Forto*, 155 S. W. 350.

The Ureka Club and Socorro Mutua Mexicana are not necessary parties. As pointed out above, the averments in regard thereto may all be regarded as surplusage.

[6] Under article 506, above noted, it was not necessary that the petition in this case should be verified in order to authorize the issuance of a preliminary injunction.

[7] What has been said disposes of all assignments, except the tenth, which is to the effect that the court erred in enjoining defendants from selling or keeping for sale spirituous, vinous, and malt liquors on the premises, because under the law an injunction was only authorized to restrain the keeping of a disorderly house, i. e., a house for the sale of liquor without a license; whereas, the injunction actually issued restrains the defendants from using the premises for selling liquor even if they had or should procure a license.

An inspection of the judge's fiat and injunction issued thereon discloses that it is subject to the further order of the court, and, if it should be brought to the attention of the lower court that defendants had a license, the injunction would doubtless be dissolved. It is perhaps true, however, that the injunction granted is too broad and comprehensive in its scope, and the order of the lower court will therefore be reformed so as to meet the objection noted.

[8] Ordinarily, upon the reformation and affirmance of a judgment, the costs are taxed against the appellee. *Brown v. Montgomery*, 19 Tex. Civ. App. 548, 47 S. W. 803; *Clark v. Cyclone, etc.*, 22 Tex. Civ. App. 41, 54 S. W. 392. But for cause, the same may be taxed against the appellants, and, had this objectionable feature of the order been of any importance to appellants' rights, the lower court would doubtless have corrected it, if its attention had been directed thereto. This appellants have not done. The costs will therefore be taxed against

them. See cases cited 4 Ency. Dig. of Texas Reports, pp. 1017, 1018.

Reformed and affirmed.

**JOHNSTON et al. v. ROCKHOLD.**  
(No. 7226.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 28, 1914.)

**HUSBAND AND WIFE (§ 274\*) — COMMUNITY PROPERTY — RIGHTS OF SURVIVING CHILDREN—LIABILITY FOR DEBTS.**

Where a widow continued to live on community property, which was the homestead, after the death of her husband, the interest of the children therein was subject to her homestead, and so long as that existed the children could claim no homestead rights, and their interests were therefore subject to sale on execution.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1026-1031; Dec. Dig. § 274.\*]

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Action by Hammon Johnston and others against Alfred Rockhold. Judgment for defendant and plaintiffs appeal. Affirmed.

J. C. Patton and Lee Richardson, both of Dallas, for appellants. Cockrell, Gray & McBride and Tarlton Morrow, all of Dallas, for appellee.

**RAINEY, C. J.** This is an action of trespass to try title, brought by appellants against appellee for  $\frac{2}{12}$  of 117½ acres of land situated in Dallas county, Tex. Defendant answered by general demurrer and plea of not guilty. A trial resulted in a verdict and judgment for appellee, and appellants appeal.

The appellants claim the land as their homestead. Appellee claims the land under sheriff deeds in pursuance of execution sales of said  $\frac{2}{12}$  interest by virtue of judgments against the appellants. The facts are that in October, 1904, T. J. Johnston died, leaving a wife and six children; the appellants being three of them. Said T. J. Johnston owned 117½ acres of land, which was the homestead of himself and wife. At his death the appellants were living on the land with him. One of them had rented the place for 1904, and moved off at the end of the year. The other two of the appellants lived on the place one or two years as tenants of their mother, who occupied it as her homestead. In 1910 the First National Bank of Mesquite, Tex., recovered judgment against each of the appellants, they being of age, executions issued thereon, and levied on the interest of each appellant. Same was sold, and deeds made to said bank; said bank conveying to appellee. The mother of appellants, Sarah Johnston, would not let appellants stay on the land, and they never occupied it after their father died, except as above stated. They each testify that their mother would

not permit them to live on the land is the reason they did not occupy it, and that as soon as they could they intended to move on it and occupy it as their homestead; that they each had that intention since they left the place, which intention had never been abandoned.

The 117½ acres of land was community property of T. J. Johnston and wife. At his death the title to his one-half of the land vested in his children, subject to the homestead interest of the wife, so long as she might live and so long as she saw proper to use it as such. She did use it as a homestead until after the interest of appellants was sold under execution. No homestead right ever attached to appellants in the land, for the reason that they could not claim such homestead right so long as their mother continued to use and occupy it for homestead purposes. Their interest in the land under the circumstances was liable to execution and sale for the payment of their debts, subject to the homestead rights of Sarah Johnston, the mother, and the sales made of their interests by virtue of the bank's judgment against them divested them of any title to the land. *Hampton v. Gilliland*, 23 Tex. Civ. App. 87, 56 S. W. 572; *Loessin v. Washington*, 23 Tex. Civ. App. 515, 57 S. W. 990. The judgment is affirmed.

**SAN ANTONIO & A. P. RY. CO. v. SMITH.**  
(No. 5329.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 11, 1914. Rehearing Denied  
Dec. 16, 1914.)

**1. TROVER AND CONVERSION (§ 8\*)—ACTS CONSTITUTING CONVERSION.**

Where possession of personality was lawfully obtained by defendant, and no demand was made by plaintiff for the property, there was no conversion, unless possession was obtained on condition that payment would be made for it.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 8.\*]

**2. TROVER AND CONVERSION (§ 44\*)—MEASURE OF DAMAGES.**

The measure of damages for conversion is the market value of the property at the time and place of conversion, with interest thereon to the time of trial.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 260, 261; Dec. Dig. § 44.\*]

**3. CARRIERS (§ 94\*)—DELIVERY OF FREIGHT—CONVERSION BY BUYER—DAMAGES.**

Where an article, shipped by a seller to himself with directions to notify the buyer, came into possession of the buyer, without the consent of the carrier, the buyer appropriating the article was liable to the carrier for its market value at the time and place of the appropriation, the price not having been paid by the buyer.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

**4. CARRIERS (§ 94\*)—DELIVERY OF FREIGHT—CONVERSION BY BUYER—DAMAGES.**

Where a buyer obtained from a carrier with its consent article shipped by the seller to

himself with directions to notify the buyer, and no demand was made for a return thereof, and possession was not obtained on a promise to pay the charges on it, he was not liable for conversion, and the carrier could not pay a draft drawn by the seller and make the buyer liable therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367–395, 456; Dec. Dig. § 94.\*]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by the San Antonio & Aransas Pass Railway Company against Zay Smith. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Taliaferro, Cunningham & Birkhead and F. R. Williams, all of San Antonio, for appellant. McFarland & Lewright, of San Antonio, for appellee.

FLY, C. J. This suit was instituted in the justice's court on the following pleading:

Zay Smith

Dr.

Cr.

To San Antonio & Aransas Pass Ry. Co.,  
Zay Smith bought of the White Company  
1 Model F repaired generator..... \$225 00  
Less 25 per cent..... 56 25

\$168 75

Shipment was made 10/30/09 to the "White Company, San Antonio, Texas, notify Zay Smith, 108 Crockett St.," and surrendered to the said Zay Smith without bill of lading being surrendered by defendant Zay Smith, and that the above amount of \$168.75 was paid to the White Co. by the plaintiff, San Antonio & Aransas Pass Ry. Co.

On that pleading the justice of the peace rendered judgment against appellant for the full amount of the claim. There could not be, under that plea, any pretense that the generator was not delivered to appellee by appellant. The case was appealed to the county court, and there, for the first time, in an oral plea, it was alleged that Smith in some manner got possession of the generator without paying a draft or receiving bill of lading, that Smith refused to return the generator on demand, that it was worth \$168.75, and that Smith was guilty of conversion of the generator. In other words, the suit was changed in the county court from one on an account to one of conversion, and that, too, without objection upon the part of any one. Appellee filed a cross-action against the White Company, alleging that the company had agreed to send him the generator in exchange for his old generator and not exceeding \$50 in cash, and that he had sent the generator and the money to the White Company. The cause was tried without a jury, and judgment rendered in favor of appellees.

The facts in this case are very unsatisfactory, leaving the matters in controversy in grave doubt. It may be inferred, perhaps, that the generator disappeared from the warehouse of appellant without its knowledge or consent, and was delivered by some

unknown person to appellee without his knowledge or consent. As soon as appellee discovered that in some mysterious manner he had come into possession of a generator, and that there was a draft on him for \$126.75 at a local bank, he repaired to his attorney, and after consultation with him took his old generator from his automobile and put the new one therein. He then sent the White Company \$50 and the old generator. He swore that the old generator was as good as the one sent him by the White Company. No demand was made by appellant for the return of the generator. Johnson, the agent of appellant, swore that he did not ask appellee to return the generator, but asked him to pay for it. There is no testimony that the amount of the draft was ever paid to the White Company, and it can only be surmised that appellant paid the money to the connecting carrier, which paid it to the White Company.

[1] The case was considered in our former opinion as based on the pleading in the justice's court, and not as one for conversion, as the oral pleading escaped the notice of the court. From the pleading in the justice's court, it can be inferred that appellant surrendered the generator to appellee, and, from the fact that no demand was made for its return, it could be inferred that appellant did not question appellee's right to the possession of the property. Under the facts of this case, if appellee came into possession of the generator with the consent of appellant, he was not guilty of conversion. Under some conditions, where a person comes into possession of property lawfully, he may be afterwards guilty of conversion—for instance, where he hires or borrows it, and afterwards appropriates it. In this case, however, if the possession was lawfully obtained, and no demand was made for the property, there was no conversion, unless possession was obtained upon condition that appellee was to pay for it. It is the rule, where the defendant has come into the possession of property lawfully or without fault, that it is necessary to make demand of possession of him before suit will lie. Cooley on Torts, p. 870; Moore v. Monroe Ref. Co., 128 Ala. 621, 29 South. 447; Phelps v. Halsell, 11 Okl. 1, 65 Pac. 340.

[2] Where there is a complete conversion of property, the measure of damages is the market value at the time and place of conversion, with interest thereon to time of trial. It would not be the amount that some person might claim was due on it.

[3, 4] If the generator came into the possession of appellee without the consent of appellant, and it was appropriated by him, he would be liable for the market value of the generator in San Antonio at the time he converted it, and if he obtained the generator with the consent of appellant, and no demand was made upon him for the property, and he

had not obtained possession upon a promise, express or implied, to pay the charges on it, he would not be liable for conversion. Under those circumstances appellant could not pay off a draft drawn by the seller of the property and make appellee liable for a debt he had not contracted to pay.

It can scarcely be credited that the generator could have been taken from appellant's warehouse without its consent, and by some one unknown to appellant or appellee, who only took the generator to deliver it to appellee. An air of mystery surrounds the whole affair, which could be dispelled by a proper investigation of the facts. In a case of conversion the circumstances under which the property is taken are very important, and yet very little effort was exerted in this case to inquire into such circumstances. The case has been poorly developed, and will be remanded for a full investigation.

Our former opinion is withdrawn, and our former judgment set aside, and the judgment will be reversed, and the cause remanded.

### MEMPHIS COTTON OIL CO. v. GOODE. (No. 651.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 31, 1914. On Motion for Rehearing, Dec. 5, 1914.)

#### 1. EVIDENCE (§ 119\*)—COMPETENCY—"RES GESTÆ."

In a action to recover an amount paid under a contract to furnish feeding pens for stock, where the issue was whether the contract price was to be paid per month, or for the feeding term of three months, evidence that when plaintiff contracted he knew the price for feed at other oil mills, and in particular one in Oklahoma, and that he then gave defendant a telegram from that place, showing the feeding price there, offered to show plaintiff's knowledge and his representation to defendant, was admissible as original evidence, part of the transaction, or "res gestæ."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303-306; Dec. Dig. § 119.\*]

For other definitions, see Words and Phrases, First and Second Series, Res Gestæ.]

#### 2. APPEAL AND ERROR (§ 882\*)—PARTY ENTITLED TO ALLEGE ERROR—PARTY INVITING ERROR.

Where plaintiff, on his direct examination, did not testify as to the contents of a telegram, but that was brought out by defendant on cross-examination, error, if any, in admitting the evidence was one of which defendant could not complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### On Motion for Rehearing.

#### 3. WITNESSES (§ 393\*)—IMPEACHMENT—DEPOSITIONS.

In an action to recover money paid under a contract for feeding cattle, where a witness for plaintiff deposed that he had heard a conversation between plaintiff and defendant as to the contract for the feeding of stock, and stating the agreed price, his former deposition that he had heard "the latter part" of the conversation, stating the same agreed price, was not to impeach the witness, since in both questions

the matter sought was the conversation or agreement as to the price, and since there was no contradiction in the answers.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.\*]

#### 4. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ADMISSION OR EXCLUSION OF EVIDENCE.

Error, if any, in the admission of impeaching evidence, which tended to strengthen the theory of the appellant, held not reversible error on his complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

Appeal from District Court, Hall County; J. A. Nabers, Judge.

Action by Wallace Goode against the Memphis Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Taylor & Humphrey, of Henrietta, and Presler & Thorne, of Memphis, for appellant. Madden, Trulove & Kimbrough and R. E. Underwood, all of Amarillo, and J. M. Elliott, of Memphis, for appellee.

HUFF, C. J. The appellee, Goode, brought suit against appellant, Memphis Cotton Oil Company, upon an alleged contract, to the effect that appellant agreed to furnish feeding pens for 1,000 head of steers at 60 cents per head, for the feeding term, which is alleged to be about 90 days. He alleges further, after the cattle had remained on feed for about that term, he attempted to ship them out, but that appellant refused to permit him to do so unless he would pay 60 cents per month, which they claim was the contract price for the use of the pens, amounting to the sum of \$1,892.44; that, in order to get possession of his cattle, he entered into an agreement with appellant to deposit that sum in the bank to abide a settlement and adjustment of the controversy, but they had failed or refused to adjust it, and hence the suit.

The appellant answered that the contract price to be paid for the use of the pens was the sum of 60 cents per head per month while said steers remained in said pens. The case was submitted to a jury upon special issue, which was as follows:

"What agreement, if any, was made between the parties hereto as to what plaintiff should pay for the use of the pens and water and other facilities testified about? That is to say: Was it understood between plaintiff, Goode, and A. C. Hall that plaintiff would pay 60 cents per head per month for the use of said pens and water and yard facilities testified about; or was it the understanding between said parties that plaintiff would pay 60 cents per head for the term for the use of said pens, water, and facilities?"

The jury answered:

"We, the jury, find that the price to be paid for the pens, etc., was 60 cents per head for the term."

Upon this finding the court entered judgment in favor of plaintiff, appellee herein.

against the defendant, appellant, for the sum of \$1,261.62, and from this judgment the appeal is prosecuted.

The first assignment of error is substantially that the court erred in overruling and in not sustaining the defendant's objections to the testimony of the plaintiff, Wallace Goode, which is hereinafter set out by us. Goode had testified that he went to Memphis to see about procuring pens and making the contract, and that while there he called upon A. C. Hall, the manager of the company, and entered into the contract as claimed by him. The testimony objected to is set out in the bill of exceptions as follows:

"Q. Did you know, at the time you contracted for the feed at Memphis, what you could get feed pens for at other oil mills in this country? A. Yes, sir. Q. Did you know at that time what you could get feed pens for at Chickasha, Okl.? A. Yes, sir. Q. What could you get feed pens for there?"

And thereupon the defendant objected to the last question and the answer thereto for the reason that it was bound to be based on hearsay—was not tending to prove any issue in the case. It was not shown that the same conditions existed at Chickasha that existed at Memphis, and it was wholly irrelevant and immaterial, and the proper predicate had not been laid for the introduction of such testimony, and the court overruled all such objections, to which ruling the defendant then and there excepted, and thereupon plaintiff's counsel asked the said plaintiff, Goode, the following question:

"Did you inform Mr. Hall what you could get feed pens for at Chickasha? A. Yes, sir; and showed him a telegram from there. Q. What could you have gotten pens for at that season at Chickasha, Okl.?"

And thereupon defendant's counsel objected to said last question and the answer thereto for the reasons heretofore stated, and the court overruled said objection and permitted the witness to answer as follows:

"A. Fifty cents per feeding term. Q. Did you know at what price you could get feeding pens for at other places?"

And thereupon defendant objected to the said question and the answer thereto for the reason heretofore stated in this bill, and the court overruled said objection and permitted the witness to answer said question as follows:

"Yes, sir; two or three other places. Altus, Okl., was one, and Hobart another. I did not tell Hall what I could get the pens for at these places so much as I did the one I got the telegram from. I let him have the telegram. I asked him to retain the telegram and show his company."

To which questions and answers the appellant reserved its bill of exceptions.

It appears upon cross-examination by appellant the witness testified as follows:

"The only information I gave Mr. Hall about what I could get the pens at Chickasha was based upon that telegram and nothing else. It was purely information I received by a telegraph message signed by some one else; signed by the mill company—somebody over there at

Chickasha. That telegram stated that I could have the pens for fifty cents per head for the term, I think."

Upon redirect examination the witness testified substantially the same as he did upon his direct examination, but there appears to have been no bill of exceptions taken to his testimony upon redirect examination.

[1] The issue in this case was, not the value of the use of the feed pens per head, but what was the contract per head? Was the contract price to be paid per month or per term? This was the issue. Perhaps if the issue had been its value, the objection might then be tenable that the statement was hearsay. We think if what others paid or offered to pay was considered by the parties at the time and entered into the negotiations of the parol contract, it would be original testimony. It is not every declaration made by others that is hearsay. As for instance: Parents suing for damages for the death of their son, his statement before his death that he would remain and take care of them is admissible, as showing a desire and the intent to support the parents, and hence probable pecuniary aid which he would have given. *Railway Co. v. Knight*, 45 S. W. 167; *Railway Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 206; *Railway Co. v. Van Belle*, 26 Tex. Civ. App. 511, 64 S. W. 397.

"So where proof is to be made of a parol contract, or where, for other reasons, the statements of a person are relevant, such statements may be proved by third persons, who were present, the same as by the one who used the language." *Elliott on Evidence*, § 328, vol. 1.

Mr. Jones on Evidence says:

"It is hardly necessary to cite authorities to the obvious proposition that when proof is to be made of a parol contract, or when, for other reasons, the statements of a person are relevant, such statements may be proved by third persons who were present as well as by one who used the language. In such case the statements are not hearsay but substantive evidence." *Jones on Evidence*, § 300.

"When declarations or acts accompany the fact in controversy, and tend to illustrate or explain it, they are treated, not as hearsay, but as original evidence; in other words, as part of the *res gestæ*. \* \* \* It is hardly necessary to add that when the declarations form part of the contract, or the performance of a contract, they are relevant and will be received." *Jones on Evidence*, §§ 344 and 235.

In *Goldman v. Blum*, 58 Tex. 630, 641, the court said:

"What was said and done by the parties while the business was being arranged, and while the transaction was then depending *et dum fervet opus*, is admissible in evidence as part of the *res gestæ*, and is considered as well calculated, in the absence of direct evidence, to shed light on the real character of the transaction."

We cite the following cases as illustrating the rule: *Ft. Worth Publishing Co. v. Hitson*, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551; *Sparks v. De Bord*, 110 S. W. 757; *Fellman v. Smith*, 20 Tex. 99; *Britt v. Burghart*, 16 Tex. Civ. App. 78, 41 S. W. 389.

It will be observed from the bill of exceptions that the witness did not answer

what he could get feed pens for at Chickasha until he testified he informed Hall, who made the contract with Goode, of that fact. He testified he showed and gave Hall the telegram, who kept it to show his company; but the witness did not testify as to its contents on direct examination. On cross-examination, in order to show the witness had no knowledge of the price for the use of pens at Chickasha, and that what he knew was based upon the telegram, appellant sought to show that such knowledge was based alone upon the telegram, and it was then he stated, in answer to appellant's cross-examination, the contents of the telegram.

[2] If the witness could not have testified under the predicate laid to the contents of the telegram upon his direct examination, which we do not at this time decide, he did not testify on direct examination thereto, but such testimony was brought out by the appellant upon cross-examination, of which we do not think it can complain at this time.

Facts happening just before and after the principal transaction, and tending to show knowledge or intent of the party, are relevant. *Horton v. Reynolds*, 8 Tex. 284. The testimony was not offered, as we understand, to prove the value for the use of the pens at Chickasha, but to show at that time Goode knew and represented to Hall that he did. This representation to Hall was not hearsay but was part of the transaction—the inducement to the contract part of the *res gestæ*. It is a circumstance incident to and connected with the contract, explaining why the price was fixed at 60 cents per head for the term, instead of 60 cents per head per month. The declarations or statements were not made by others out of hearing of appellant, but were made to appellant, which induced the making of the contract for the term, instead of by the month. We overrule the first assignment of error.

The second assignment of error is also overruled. If there was error in the particulars complained of, which we do not now decide, it was immaterial and could not have affected the case.

The case will be affirmed.

#### On Motion for Rehearing.

It is earnestly insisted that we were in error in holding that the trial court properly admitted the testimony set out in the original opinion. Appellant cites us to the case of *Chilson v. Oheim*, 171 S. W. 1074, the opinion in which was rendered by the Court of Civil Appeals, Second Supreme Judicial District, October 31, 1914. A copy of that opinion has been furnished us by appellant. We do not think that case in point on the issues here involved. That court held certain checks not admissible, which had been given by Chilson to one Moore, who was the tenant of Chilson, and who had been furnished the item sued for by O'Heim, which Chilson had

promised to pay. The checks were held not admissible because falling under the rule excluding testimony *res inter alios acta*. Such is not the nature of the testimony here. The declarations here admitted were facts or statements between the parties to the contract. True one of the parties purported to quote the price for which feed pens could be had elsewhere, but he used this price as a means to procure the agreement as he contended it was; at least it was a circumstance tending to show that fact.

Appellant apparently overlooks the fact that the price for which pens could be obtained elsewhere was made a part of the negotiations between the parties at the time of making the oral contract in question. Neither do we think our statements in the former opinion in conflict with the cases of *Carver v. Power State Bank*, 164 S. W. 892; *Paine v. Argyle, etc., Co.*, 133 S. W. 895; *Kocher v. Mayberry*, 15 Tex. Civ. App. 342, 39 S. W. 604. We did not hold that in no case could the value of pens elsewhere be shown if the suit was one for the reasonable value of the pens, but we said that, if this had been a suit for its value instead of the contract price, the objection made might then have been tenable. We referred to the "objection" that the same conditions were not shown at the other places, and not to the fact that "value" under the proper predicate could be proven. We refer to this matter for the reason that appellant appears to misconstrue our views as we tried to express them, and to prevent a like construction by others. This identical testimony, the admission of which was assigned as error, was given by Goode upon his redirect examination, without exception thereto, and is in this record without objection. For this reason, as well as for the reasons heretofore given, we adhere to our former holding.

[3] Appellant urgently insists on its second assignment of error in its motion for rehearing, and urges that we should hold the action of the court, in admitting the testimony complained of, as error. We saw no necessity for discussing or deciding the rule on the question of practice presented by the assignment, as we then found that no injury could have resulted to appellant therefrom. The matter complained of in the second assignment relates to the answer of the witness A. D. Wilson to the sixth interrogatory, in his deposition, taken the 2d day of August, 1913, and also his answer to the sixth interrogatory, taken July 17, 1912, both of which were offered by the plaintiff, appellee herein. The latter interrogatory and answer thereto had been therefore read in evidence by the defendant, appellant herein. It was stated by appellant's counsel, at the time the two answers were offered, that they were offered for the purposes of impeaching the witness. The principal objection to such action was that a proper predicate had not been laid; that it

was immaterial, etc. The question in the second deposition asked the witness if he heard a conversation between appellee and A. C. Hall, the manager of appellant, at the house of Hall, in Memphis, Tex., with reference to appellant company furnishing pens for the cattle, etc., and, if so, state what it was. In answer to the question in the first deposition, "I heard such a conversation;" and then testified that the price agreed upon for the use of the pens, etc., was 60 cents per head per month. In the second deposition he answered, "Yes, I heard a portion of such conversation; I heard the latter part of this conversation;" and proceeded to give what each said with reference to the price, and gave the price as agreed upon for the pens the same as that stated in answer to the first deposition. The appellee claimed that the impeaching part of the statement, or the contradiction therein, was in saying in one that he heard such a conversation and in the other that he heard a part or the latter part of the conversation. When the interrogatories are considered in connection with the answer, there was no contradiction. In both questions the matter sought was to get at the conversation or agreement as to the price of the pens. The fact that appellee's counsel contended that one impeached the other, and that he offered it for the purpose of impeachment, did not make it impeaching testimony. The evidence offered by appellee operated to the benefit of appellant. The jury could not have found that one impeached the other. The trial court doubtless regarded the evidence as being in the interest of appellant and as proving the issue contended for by appellant. The testimony, if considered by the jury, could not possibly have injured the appellant. The jury was not warranted in disregarding the evidence because of any contradictory statement in the two answers. There is none as is apparent when the questions and answers are read together. There was nothing in either of the answers that discredited the witness. Simply because a lawyer asserts black is white, we will not presume a jury accepted such a statement as true when the evidence is that it is black.

[4] If, therefore, the court was in error in admitting the two interrogatories and the answers thereto, it was not necessarily a material one. *Railway Co. v. Bath & Co.*, 17 Tex. Civ. App. 697, 44 S. W. 595; *Brewster v. State*, 40 Tex. Civ. App. 1, 88 S. W. 858; *Railway Co. v. Fitzpatrick*, 91 S. W. 355, 359. The admission or exclusion of evidence tending to strengthen the theory of the complaining party should not reverse the case upon the complaint of appellant. *Ingalls v. Orange Lumber Co.*, 56 Tex. Civ. App. 543, 122 S. W. 53. We cannot believe the admission of the testimony, of which complaint is here made, could possibly have injured the appellant. The testimony in this case we think amply

sufficient to sustain the verdict of the jury, aside from Goode's testimony of the terms of the contract made with Hall for appellant. Appellant, after Hall had made the contract, sent to appellee a telegram confirming the contract, and, as we interpret the message, it recognized the contract as sworn to by the appellee, especially so when interpreted in the light of the facts proven surrounding the transaction.

The motion for rehearing is overruled.

JONES v. VELTMANN et al. (No. 5353.)  
(Court of Civil Appeals of Texas. San Antonio.  
Nov. 18, 1914. Rehearing Denied Dec.  
16, 1914.)

1. COUNTIES (§ 182\*)—BONDS—CUSTODY.

Under Rev. St. 1911, art. 632, providing that county and district bonds shall remain in the custody of the commissioners' court until sold to the highest bidder for cash at not less than par, an order of the commissioners' court transferring the custody of the bonds to the county attorney, and giving him unrestricted authority to sell, is void.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 285; Dec. Dig. § 182.\*]

2. COUNTIES (§ 182\*)—POWERS—DELEGATION TO AGENTS.

A county, being a government agency of limited authority, cannot, in the absence of statute conferring the power, give the custody of bonds issued by it to the county attorney with absolute discretion in him to make a sale, even though it might employ him to assist at such sale.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 285; Dec. Dig. § 182.\*]

For other definitions, see Words and Phrases, First and Second Series, County.]

3. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COUNTY ATTORNEY—COMPENSATION.

Under Const. art. 5, § 21, providing that a county attorney shall receive only the compensation prescribed by law, and Rev. St. art. 356a, requiring the county attorney to give information to county and precinct officers, an order of the commissioners' court employing for one year at the salary of \$1,200 the county attorney to advise the county judge and the commissioners' court in preparing and issuing road bonds, and to assist in selling the bonds, is invalid, as an evident attempt to increase the compensation of the attorney for services which he was bound to render, especially where there was no evidence that the county attorney performed any services in connection with the bond issue, except to present the bonds to the attorney general for approval, and he was paid for that service.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

4. COUNTIES (§ 182\*)—DELEGATION OF POWERS—SALE OF BONDS—"SELL."

A contract by which the commissioners' court gave to the county attorney the custody of certain bonds, with authority to sell them for the best price obtainable, authorized the attorney, not merely to negotiate the sale, but to deliver the bonds and bind the sale, since the rule that power to sell land does not authorize an agent to convey, does not apply to a power to "sell" personal property, where possession is given to the agent, but such agent has full authority to consummate the sale,

and the contract is therefore void under Rev. St. 1911, art. 632, providing that the bonds shall remain in the custody of the commissioners' court until sold at auction for the best price obtainable at not less than their par value. [Citing Words and Phrases, Sell.]

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 285; Dec. Dig. § 182.\*]

**5. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*) — COUNTY ATTORNEYS — COMPENSATION—RETAINER.**

The commissioners' court has no authority to employ and compensate the county attorney at a yearly salary to defend suits that may be brought against the county, although it may employ him to represent it in a pending suit.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

**6. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COUNTY ATTORNEY—COMPENSATION—SERVICES PREVIOUSLY RENDERED.**

Where the only services shown to have been rendered by the county attorney in connection with certain road bonds was the taking of the bonds to the capitol to be approved by the attorney general, for which the attorney had been paid, the subsequent order of the commissioners' court that he be paid \$1,200 a year for services in connection with the bond issue is contrary to Const. art. 3, § 53, prohibiting extra compensation after the services have been performed.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

**7. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COUNTY ATTORNEYS—COMPENSATION—VOID ORDER.**

The fact that the legal compensation of a county attorney affords no remuneration for the service required of him does not authorize the commissioners' court to pay him further compensation in violation of law or the courts to sustain an order for such compensation, but relief must be sought from the Legislature.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

Appeal from District Court, Kinney County; W. C. Douglas, Judge.

Suit for injunction by John Jones against Joseph Veltmann and others. From a judgment denying the injunction, plaintiff appeals. Reversed and remanded, with instructions to grant the injunction.

E. A. Jones, of Brackettville, and Martin & Martin, of Uvalde, for appellant. Frank Lane, of Brackettville, and John J. Foster, of Del Rio, for appellees.

FLY, C. J. Appellant applied for and obtained a temporary injunction on April 1, 1914, against appellees, Joseph Veltmann, county judge, Commissioners Hans Peterson, A. M. Slater, N. L. Lewis, and Albert Schwander, county clerk H. E. Veltmann, and county attorney Frank Lane, restraining the payment to Frank Lane of \$1,200, salary ordered to be paid him by the commissioners' court. An appeal was taken from the granting of the temporary injunction, and the judgment reversed and cause remanded, on account of the affidavit for the injunction being defective and insufficient. Lane v. Jones, 167 S.

W. 177. The cause was tried on April 18, 1914, by the court, and judgment rendered denying the injunction.

The facts show that appellant is a resident taxpayer of Kinney county, and owns both real and personal property in said county subject to taxation; that Joseph Veltmann is the county judge and together with the named commissioners constitute the commissioners' court of Kinney county; that H. E. Veltmann is the county clerk and Frank Lane the county attorney. The following order was made by the commissioners' court on February 11, 1914:

"The court after due consideration is of the opinion that the attorney's fee allowed the county attorney for legal services rendered to the court and county officials, to wit, \$600 per annum payable in monthly installments of \$50 per month, is inadequate for the amount of work such as the service requires. Therefore it is ordered by the court upon its own motion that the county attorney be and is allowed an attorney's fee of \$1,200 per annum payable in monthly installments of \$100 per month beginning on the 1st day of February, 1914, for legal services to be rendered to this court and the county officials as may be required, and the county clerk is hereby ordered to issue scrip of the county to the county attorney for the sum of \$100 per month beginning on the 1st day of February, 1914, until further ordered by the court. It is further ordered by the court that all fees allowed to the county attorney in fines from criminal cases or prosecutions in the different justice courts of the county and county courts accruing since the 1st day of February, 1914, be collected by the constable or justice of the peace, sheriff or county judge and turned over to the county judge."

After the temporary injunction was granted, the commissioners' court, on the request of the county attorney, set aside the foregoing order, and made another, as follows:

"It is hereby ordered by the commissioners' court, at a regular term in regular session on this the 9th day of March, 1914, at 2:10 o'clock p. m.: That the county judge of Kinney county be authorized to secure the services of Frank Lane, attorney at law, to assist said county judge and commissioners' court in properly preparing the issue of the road bonds voted by a majority of the qualified property taxpaying voters of Kinney county on the 14th of November, 1913, to advise said county judge and commissioners' court in the proper preparation and issuing of said road bonds, and other legal matters in connection therewith; to sell or assist in selling said issue of bonds at the best price obtainable therefor; to do and perform such other services as shall be required of him in advising said commissioners' court and county judge with reference to said bond issue, and in reference to all other matters not contemplated or covered by the said Frank Lane's official duties as county attorney of Kinney county. That said employment by the county judge and commissioners' court to be for a period of one year from date of this order, said Frank Lane to receive as such compensation for said services to be performed, as above set forth, the sum of \$1,200 payable \$100 per month, for a period of 12 months. It being understood and agreed to by the said Frank Lane that, should he be instrumental in selling said bonds or finding a buyer therefor, said sum of \$1,200 shall be full compensation for his services, and that no compensation shall be expected by or paid to said Frank Lane

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for such services. That said county judge is hereby authorized and empowered to enter into a contract with the said Frank Lane embodying the terms of the above order securing his services as special counsel in all civil matters in connection with said bond issue, and other legal matters not contemplated or covered by the said Frank Lane's official duties as county attorney of Kinney county."

Commissioner Albert Schwander voted against both orders. Prior to the two orders hereinbefore copied, an allowance of \$100 was made to defray the expenses of Lane to Austin to obtain approval of certain road bonds that had been voted by the people. It was required that he make an itemized account of his expenses, which he did, showing them to have been \$32.80; but he failed to return the balance of \$67.20, and retained the same. Other pertinent facts are found in the course of the opinion herein.

The court had before him, at the time he granted the temporary injunction, the order of March 9, 1914, upon which order a permanent injunction was afterwards refused. In the opinion of the court on granting the temporary injunction it is forcibly shown that at least a portion of the services sought to be paid for were required by law and that, if any part of the salary was authorized, the evidence failed to separate the legal from the illegal portions. The same state of case is here presented.

[1] The order of the commissioners' court of Kinney county, made on December 9, 1913, was:

"That Frank Lane be authorized to take and have charge of said bonds pending their investigation by the Attorney General and upon their approval shall have authority to negotiate their sale."

Article 632, Revised Statutes 1911, provides for examination of county and district bonds by the Attorney General and registry by the comptroller of public accounts, and further:

"Such bonds, when so issued, shall continue in the custody of, and under the control of the commissioners' court of the county in which they were issued, and shall be by said court sold to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value, and the purchase money therefor shall be placed in the county treasury of such county to the credit of the available road fund of such county, or of such political subdivision or defined district of such county, as the case may be."

It will be noted that the order of the commissioners' court not only placed the bonds in charge of Lane, but sought to give him absolute authority to sell them in any way and for any sum; no limitations of any kind being placed upon his powers in connection therewith. The court sought to confer on him authority that the court itself did not possess. There is no reference in the order to any legal limitations upon the sale, but untrammelled discretion is confided to him in the custody and sale of the bonds. Could such power be delegated to any one by the commissioners' court? We think not.

[2] It is a well-settled principle that the

public powers or trusts devolved upon a council or governing body of any subdivision of a state, to be exercised by it when and in such manner as it shall deem best, cannot be delegated to others. Dillon, Mun. Corp. § 244. No direct authority is found in the statutes for the employment of an agent to have the custody of and sell county or district bonds, and the principle should be always remembered that a public corporation is a governmental agency of very limited powers, hedged about with restrictions, and the authority to employ agents to assist in the performance of duties devolved on the governmental agency must be expressly given or strongly implied from the language of the statute. It has been held that power of a municipality to issue and sell bonds carries with it the implied power to secure such reasonable and necessary assistance as may be requisite to make an advantageous sale. *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116; *Slayton v. Rogers*, 128 Ky. 106, 107 S. W. 696. In the case of *Davis v. City of San Antonio* (Civ. App.) 160 S. W. 1161, this court placed the authority of the city to employ agents to sell bonds on the language of the charter which permitted the employment of agents when "deemed necessary for the good government and interest of the city." But we are of opinion that the authority to sell lodged in a governmental agency would carry with it the authority to employ agents to assist in such sale, but at the same time it would not carry the authority to place the sale of the bonds at the absolute discretion of any one. *Blair v. Waco*, 75 Fed. 800, 21 C. C. A. 517. In the employment of such agencies, the most absolute good faith would be required, and no pretended agency to sell bonds could be made the basis of an increase of an officer's salary. There could have been no necessity for releasing the custody of the bonds to Frank Lane, in the very teeth of the statute, because, if his assistance in selling the bonds had been demanded, he could have given that assistance fully as well with the bonds in the custody provided by law.

The commissioners' court not only was guilty of an infraction of law in divesting itself of the custody of the bonds, but attempted to give Lane the absolute right of disposal of the bonds in any manner and for any price he might desire. It was sought to give him authority which could not be exercised by the court, and of course the order was invalid. Lane was charged with the knowledge that his employment was in violation of the plain terms of the statute, and, being void, it cannot form the basis of a recovery for services rendered. *Dillon, Mun. Corp. § 895; Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973.

[3] The first order passed by the commissioners' court recited:

"That the attorney's fee allowed the county attorney for legal services rendered to the court

and county officials, to wit, \$600 per month, is inadequate for the amount of work such as the service requires."

Provision was made in the order for raising the amount to \$100. That order was made on February 11, 1914, and a temporary order restraining payment of the salary was issued on February 24, 1914. No doubt recognizing the illegality of the order, the county attorney, on March 9, 1914, requested the revocation of the order by the commissioners' court, and on the same day it was as recited in the order that the former order was "revoked, repealed, annulled and held for naught," but was followed by an order to employ the county attorney "to advise said county judge and commissioners' court in the proper preparation and issuing of said road bonds, and other legal matters in connection therewith; to sell or assist in selling said issue of bonds at the best price obtainable therefor; to do and perform such other services as shall be required of him in advising said commissioners' court and county judge with reference to said bond issue; and in reference to all other matters not contemplated or covered by said Frank Lane's official duties as county attorney of Kinney county." It was further provided that the employment should be for a year on a salary of \$1,200, payable monthly at the rate of \$100 per month. On December 9, 1913, the commissioners' court passed the following order:

"It is also ordered that Frank Lane be authorized to take and have charge of said bonds pending their investigation by the Attorney General and upon their approval shall have authority to negotiate their sale."

On the same date as the order quoted, a hundred dollars was appropriated to pay the county attorney's expenses to Austin to present the bonds to the Attorney General. The facts clearly indicate a determined purpose upon the part of the commissioners' court to evade and thwart the provisions of article 5, § 21, of the Constitution and the statutes of the state. The very services enumerated in the order as to advice to be given by the county attorney to the county judge and commissioners' court are provided for in article 356a. It was as much the duty of the county attorney to advise the county judge and commissioners' court in regard to properly preparing and issuing the road bonds as in regard to any other matter in which the county was interested, and it was his duty to advise them in regard to all county matters. There could be no county matters about which advice was required that was "not contemplated or covered" by his official duties as county attorney of Kinney county.

There was no testimony tending to show that the county attorney performed any services in connection with the bonds, except to present them to the Attorney General for approval, and he was given, under the guise of expenses, an extra hundred dollars for that service.

If the sums paid for advice, already provided for by law, could be separated from any imaginary services rendered in connection with the bonds, there is no testimony indicating that the county attorney rendered any services in selling the bonds if they were ever sold. Surely such services could not endure for 12 months. The testimony indubitably stamps the whole affair as a deliberate attempt to increase the salary of the county attorney for services required of him by the laws of the state. As said by the trial judge in his conclusions on granting the temporary injunction:

"It appears from said order that the commissioners' court is undertaking to pay said county attorney additional compensation for services which he is required, by virtue of his office, to perform. \* \* \*"

If the judge was in possession of any more facts than on the hearing of the temporary injunction, the record fails to indicate them. The order passed to meet the judgment on granting the temporary injunction did not meet the exigencies or the demands of the law.

[4] In the order approving the contract made by the county judge with Lane it is recited that:

"The purpose and intent being to compensate said Frank Lane for his services in aiding this court to get the Kinney county road bonds approved by the Attorney General including trips to Austin in connection with the said bond issue, and to sell said bonds and protect the county against the payment of exorbitant charges for the sale of said bonds, and commissions and to defend any suit that might be filed to restrain the sale of said bonds or delay the sale of same by any taxpayers opposed to said bond issue."

The object appears to be, from that part of the order, not only to pay the county attorney for his advice and aid in selling the bonds, but to provide a retainer for his services in any case that might arise about the validity of the bonds. And if there was any doubt as to the authority to "negotiate," meaning the authority to sell the bonds, it is fully removed by the language of the contract and the order approving it.

Not only did the contract authorize Lane to sell the bonds, but, regardless of the requirement of the statute that the bonds be sold at par, the contract and last order authorized him "to sell said bonds at the best price obtainable therefor." Having possession of the bonds, he could deliver them and bind the "sale," if such delegated authority had been supported by law.

Appellees seek to apply the rule that a power to sell land does not give authority to convey, to a case in which an agent is placed in possession of personal property, but it does not apply, as one of the cases given under the word "sell," in Words and Phrases, to which we are referred, abundantly shows. *Thacher v. Moors*, 134 Mass. 163. The power to sell bonds by an agent in possession of them carried with it the power to deliver the

bonds and thereby fully consummate the sale. The commissioners' court could no more delegate that authority to an agent than it could delegate the power to sell and convey land to an agent, and that has been condemned by the Supreme Court and this court. *Logan v. Stephens County*, 98 Tex. 283, 83 S. W. 385; *Brazoria County v. Rothe*, 168 S. W. 70. As said by the Supreme Court in the *Logan Case*:

"It is not intended to limit the power, which has been granted by the Constitution to the commissioners' court, to manage, according to its discretion and to the best advantage, the lands held in trust for the public free schools; but simply to hold, as we do, that the commissioners' court cannot commit their discretion in making sale to an agent."

If the right to sell bonds, of which he had the possession, at the best price he could get for them, did not commit the discretion of the commissioners' court to the county attorney, such discretion could not be committed.

[5] It has been held that commissioners' courts may employ county attorneys to represent the county in pending suits, but we have seen no case in which a commissioners' court is given authority to employ an attorney and pay him a retainer of \$100 a month for 12 months to defend suits that might possibly be instituted against the county. In the case of *Lattimore v. Tarrant county*, 124 S. W. 205, it was held that a contract to pay the county attorney for written advice was not inhibited by law; that, however, was before the passage of article 356a, which makes it one of the duties of the county attorney to give such advice, and for which he cannot receive additional remuneration.

If additional pay could be allowed county attorneys for advice given the commissioners' court, for the possible prosecution or defense of suits not in existence, and which may never arise, the Constitution and laws as to their salaries are nullities, and the salaries they might receive would be measured by the generosity or extravagance of the commissioners' court. Suits may possibly arise in any county, although they seldom occur, but such possibility would form the excuse for a large salary to any county attorney in the state, and the Constitution overridden.

[6] In this case, so far as the record discloses, no extra service whatever was rendered by the county attorney for the \$1,200 voted him out of the county finances. If he gave any advice, if he defended any suits, if he sold any bonds, the statement of facts does not show it. All that the record shows that he did was to make a trip to Austin to present the bonds to the Attorney General for approval, and that was long before the contract was made with him, and he was given

\$100 for that trip. In article 3, § 53, of the state Constitution, it is provided that no extra compensation shall be allowed any public officer, agent, servant, or contractor after service has been rendered, and yet in the face of that provision the commissioners' court voted the \$1,200 "to recompense said Frank Lane for his services in aiding this court to get the Kinney county road bonds approved by the Attorney General, including trips to Austin in connection with the said bond issue," etc. The Constitution in positive terms provides, also:

"County attorneys shall receive as compensation only such fees, commissions, and perquisites as may be prescribed by law."

No such remuneration as was voted by the commissioners' court is provided by law, and the Constitution cannot be set aside by a subterfuge, but must be obeyed. If the bonds have been sold, it did not require a salary for 12 months to sell them, and if they have not been sold no service has been rendered. As said by this court:

"In special matters, and cases where the interest of a county may require the services of an attorney, its commissioners' court may contract for them. \* \* \* But such court cannot make an order which will warrant the payment of the people's money to an attorney for services neither required nor performed." *Grooms v. Atascosa County*, 32 S. W. 188.

[7] As to the plea that the fees and emoluments of county attorneys being so meager "as to afford no fit remuneration for the office" in some counties, it is doubtless true, but that can offer no justification for a generous commissioners' court to relieve the necessities of the occasion by violating laws and disregarding the Constitution. There are few officers, executive, judicial, or legislative, that receive adequate remuneration for their services; but the only appeal is to the people and their Legislatures. Courts, however willing, have no power to raise salaries of county attorneys or any other officer unless so empowered by the Constitution or legislative act.

If the opinion of the majority of the Supreme Court in *Dallas County v. Lively*, 167 S. W. 219, be sound, still the facts of that case render it inapplicable in this case. The statute as to ex officio services of the county judge has no reference to a county attorney. Provision had been made for the salary of the county attorney before orders herein referred to were made.

The judgment is reversed, and the cause remanded to the district court with instructions to set aside the orders of the commissioners' court and issue a permanent injunction against appellees as prayed for in the petition.

**HOUSTON & T. C. R. CO. v. SMALLWOOD.**  
(No. 7200.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 21, 1914. Rehearing Denied  
Dec. 12, 1914.)

**1. MASTER AND SERVANT (§ 288\*)—ACTION FOR INJURIES—QUESTION FOR JURY—ASSUMPTION OF RISK.**

On evidence in a railroad servant's action for injury from falling from a car load of lumber which he was trying to straighten, *held*, in view of the opportunity and capacity of the servant, an uneducated negro, for discovering the risk, that whether he knew or ought to have known that the pinch bar furnished him with directions to use it was defective, and appreciated the danger of using it as directed, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**2. MASTER AND SERVANT (§ 217\*)—ACTION FOR INJURY—ASSUMPTION OF RISK—"UNSAFE"—"DANGEROUS."**

In a railroad servant's action for injury from falling from a car load of lumber which he had been directed to straighten and arrange, where plaintiff knew that the work was dangerous and the danger of attempting to do it without help, and where the jury found that the defective condition of the pinch bar furnished him, with directions to straighten the lumber, was such that it could be seen by merely looking at it, and that plaintiff knew, or, by ordinary care, could have known, that it was unsuitable and "unsafe" for doing the work, the latter finding being equivalent to a finding that it was "dangerous," the facts found established the defense of his assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

For other definitions, see Words and Phrases, First and Second Series, Dangerous; Unsafe.]

**3. JUDGMENT (§ 256\*)—SPECIAL VERDICT—EFFECT—REJECTION.**

When a special verdict has been returned, the trial court, in rendering judgment, cannot disregard a finding on a material issue, even though such finding has no support whatever in the testimony.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.\*]

**4. MASTER AND SERVANT (§ 297\*)—ACTION FOR INJURY—FINDINGS—ASSUMPTION OF RISK.**

In a railroad servant's action for injury from falling from a car load of lumber which he was trying to straighten with a pinch bar, where the common-law doctrine of assumed risk applied, findings that he knew that the pinch bar furnished him was unsafe, and that his attempt to do the work without help was dangerous, established that his injury was from an assumed risk, even though he was inexperienced and had not been warned, as such warning would not have given him any information which he did not have; and the finding that his injury did not result from any risk assumed when he entered the service did not alter the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.\*]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by C. H. Smallwood against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, of Houston, and Head, Dillard, Smith, Maxey & Head, of Sherman, for appellant. E. J. Smith, of Denison, and Freeman & Batsell, of Sherman, for appellee.

**TALBOT, J.** The appellee instituted this suit in the district court of Grayson county, Tex., against the appellant to recover damages for personal injuries which he alleges he sustained as the result of a fall from a car load of lumber; he being engaged at the time in straightening and arranging the lumber on said car. The petition alleges, in substance, that appellee was in the employ of appellant in the capacity of a common laborer and porter at its station and offices in the city of Denison, Tex.; that there was standing on one of appellant's tracks, in said city, on September 21, 1912, a car of lumber; that the lumber on this car had become badly disarranged in transportation, and not in a condition to be further transported; that appellee was directed by C. M. Kirk, appellant's agent, to straighten and arrange the lumber on said car, and was furnished by said agent with a pinch bar and maul to use in doing said work; that he was inexperienced in doing the work; that the lumber was heavy, and one man was not sufficient to safely do the work; that at least two men were required and reasonably necessary to do it; that the pinch bar was defective and unsuitable, worn at the point, and would not take hold and stick in the lumber, and slipped and caused him to fall from the car and sustain serious and permanent injuries. The grounds of negligence alleged were: (1) Directing appellee to do the work at the place and under the circumstances, and failure to provide him a reasonably safe place in which to do said work; (2) placing appellee in a place of danger, and directing him to do dangerous work, with knowledge of his inexperience, without warning him of the danger, and without instructing him as to the manner of doing the work; (3) failure to furnish sufficient number of men to safely do the work; and (4) furnishing him a defective pinch bar. Appellant answered by specific denial of the allegations of appellee's petition, and alleged the facts to be that appellee was familiar with the work he was doing at the time of the accident; that one man was sufficient to safely do it; that appellee was engaged in interstate commerce; that appellant's agent directed him to do the work, and he (appellee) selected the pinch bar to use in doing it; that he (appellee) knew all about what danger there was incident to the work; that, if more than one man was required to do it, plaintiff knew it, and knew the danger of one man alone doing the work; that the pinch bar was a simple tool, and, if defective, its defects and the danger, if any, in using it were open and obvious, and as well known

to plaintiff as to defendant, and the injuries, if any were sustained by plaintiff, resulted from a risk assumed by him. The case was tried December 10, 1913, before a jury, and was submitted on special issues. Plaintiff and defendant each filed motion for judgment on the findings of the jury. Plaintiff's motion was granted, defendant's overruled, and judgment rendered for plaintiff in the sum of \$2,500, and appellant appealed.

The first assignment of error complains of the court's refusal to give appellant's requested charge instructing the jury to return a verdict in its favor. The proposition under the assignment is that the undisputed evidence showed that appellee was engaged in work in connection with interstate commerce; that he knew whatever danger there was incident to doing the work in which he was engaged; that he knew the danger incident to doing the work without help; that the defects, if any, in the pinch bar were open, obvious, and known to appellee, and that he therefore assumed all the risks and danger incident to doing the work without assistance, and to using the pinch bar in the condition it was, and appellant was entitled to have the jury instructed to return a verdict in its favor.

After a careful examination of the evidence and the authorities bearing upon the proposition asserted, we have reached the conclusion that the charge under consideration was properly refused. This is especially true, we think, in view of the decision of our Supreme Court in the case of *Drake v. Railway Co.*, 99 Tex. 240, 89 S. W. 407.

[1] It is doubtless true that the undisputed evidence showed that plaintiff knew when he undertook to do the work of arranging the lumber on the car that he could not do it safely without help and that he appreciated the danger incident to undertaking to do the work without assistance, but we do not believe it can safely be said from the evidence, as a matter of law, that he knew before he was injured, or ought to have known, that the pinch bar furnished him by appellant with directions to use it in arranging the lumber was defective, and appreciated the danger of using it as directed. In the case cited, which the court said was a very close one, it is said:

"If there was negligence on the part of the defendant in furnishing a tool which, because of its unfitness for the use to which it was to be put, exposed the plaintiff to danger which the exercise of ordinary care in doing his work would not have brought to his knowledge, he cannot be held to have assumed the risk resulting from his employer's negligence. Whether or not the condition of a tool is so obvious that a servant necessarily assumes the risk of using it must depend, in some cases, not merely upon the simple character of the instrument itself, and the openness of the defects in it, but also upon the situation and condition of the servant himself, his opportunity and capacity for discovering that condition, and the circumstances calculated to withdraw his attention from it; and the test in doubtful cases is the judg-

ment of a jury upon the question whether or not persons of ordinary prudence similarly situated would have discovered the risk."

The appellee was an uneducated negro, and these remarks of the Supreme Court are, in our opinion, peculiarly applicable in the case at bar, and make it plain that "the degree of mental capacity and knowledge of tools and machinery possessed by the servant," and "his right to rely upon the master to protect him from danger and injury and in selecting the agent from which it may rise," are proper to be considered in determining whether he assumed the risk, and that in such cases the assumption of the risk becomes one of fact for the jury.

[2] The next assignment is that the court erred in overruling the appellant's motion, filed in the trial court, for judgment and in entering judgment for the appellee. It is urged that this action of the court was error, because, under the undisputed evidence, no negligence was shown against the appellant in any respect; (2) because, under the undisputed evidence and findings of the jury, appellee knew the number of men required according to his contention to safely perform the work that he undertook to do and assumed the risk of whatever danger there was incident to one man attempting to do the work; (3) because, under the undisputed evidence and findings of the jury, the appellee, at the time he was injured, was engaged in interstate commerce in doing the work that he was attempting to do, the pinch bar, a plain simple tool, and its defect, if any, open and obvious and actually known to appellee, or must necessarily have been known to him in the performance of his work, and appellee knew, before or at the time he was injured, the danger incident to the use of the pinch bar, if any, or, by the exercise of ordinary care for his own safety, would have known it, and therefore assumed the risk of danger incident to working with said pinch bar.

The contention that, according to the undisputed evidence, no negligence whatever was shown against appellant will not be sustained. As was held in the case of *Drake v. Railway Co.*, supra, we hold in this case, that whether or not the appellant furnished the appellee the pinch bar in question under circumstances showing a want of ordinary care for his safety was a question of fact for the determination of the jury. That the appellee knew the work he attempted to do was dangerous and knew the danger incident to his attempt to do the work required of him without assistance is very conclusively established by his own testimony, and the findings of the jury on that question are to that effect, and, notwithstanding the views expressed in discussing appellant's first assignment of error, that the evidence was sufficient to entitle appellee to have a jury determine the issue of whether or not he should be charged with

first be exhausted before issuing as to individuals does not vitiate the judgment, because it is a matter controlled by statute (article 6153, supra), and plaintiff is not bound to prove that all the defendants are bound in order to recover against any one of them. *Stevens & Andrews v. Gainesville National Bank*, 62 Tex. 499. And the general rule is that the indebtedness of a joint-stock company will be charged pro rata to the solvent members. *Cameron v. First National Bank*, Decatur, 34 S. W. 178. But there is nothing in this record to show that all the individuals against whom this judgment was rendered are not equally solvent; nor, in fact, that the assets of the association are not sufficient to satisfy the judgment.

[4] The seventh and eighth assignments assert that the citation shows that W. O. Robertson was not served and that J. Heard was dead. The citation is not evidence for our consideration, unless it comes up in a proper statement of facts; besides, the judgment contradicts the citation, in that it recites the parties came and announced ready for trial.

[5] The ninth and tenth assignments complain of the refusal of court to give special charges requested. In the absence of a statement of facts, they will not be considered, and are therefore overruled.

The eleventh complains that the court erred in refusing a new trial because the judgment is not supported by the pleadings, and is disposed of by discussion under first to fifth assignments.

There being no error apparent of record, the cause must be affirmed.

Affirmed.

#### BAUER et al. v. CROW. (No. 349.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 5, 1914. Rehearing Denied  
Dec. 3, 1914.)

#### 1. APPEAL AND ERROR (§ 395\*)—JURISDICTION—APPEAL BOND.

Under Rev. St. 1895, art. 1025, providing that, where there is a defect of substance or form in any appeal or writ of error bond, the court may allow it to be amended, a defective bond gives the Court of Civil Appeals jurisdiction on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064–2070, 2085, 2086, 3127; Dec. Dig. § 395.\*]

#### 2. BROKERS (§ 86\*)—COMMISSIONS—AGREEMENT FOR DIVISION—EVIDENCE.

In an action for a share in commissions which plaintiff claimed he and defendant were to divide, evidence held to establish the agreement that the two who were real estate brokers should equally divide any profits or commissions earned in a certain sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116–120; Dec. Dig. § 86.\*]

#### 3. BROKERS (§ 66\*)—COMMISSIONS—RIGHT TO.

An agreement between two brokers that they should equally divide commissions in the event of effecting a certain sale is enforceable

by one of them, even though he had no agency to sell the lands involved.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. § 66.\*]

#### 4. BROKERS (§ 66\*)—COMMISSIONS—RIGHT TO.

Where two brokers agreed that in the event of making a certain sale they would divide the commissions, and one of them introduced the parties and started the negotiations, he is entitled to his share of the commission, though he performed no further act; it appearing that nothing else was required of him.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. § 66.\*]

#### 5. BROKERS (§ 66\*)—COMMISSIONS—RIGHT TO.

Where plaintiff and another broker agreed to divide commissions from a stipulated sale, plaintiff's rights in a note for the commission are superior to those of one who became the partner of the other broker after the agreement as well as to rights based on a decree in an action between the other broker and his partner to which plaintiff was not a party.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. § 66.\*]

Harper, C. J., dissenting, on rehearing.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by J. W. Crow against Paul Bauer, William Barbee, and another, in which the First National Bank and another filed separate interventions. From a judgment for plaintiff, William Barbee and another appeal. Affirmed.

John B. Warren, N. G. Kittrell, Jr., and Moody & Boyles, all of Houston, for appellants. Stewarts, S. H. Brashear, and R. W. Houk, all of Houston, for appellee.

WALTHALL, J. [1] Appellee's first position in his brief filed in this court questions the jurisdiction of this court to hear and determine this cause on its merits, for the reason that the judgment in the trial court was rendered in favor of appellee against Paul Bauer, individually, for \$3,812.50 and for a lien on a \$2,000 note and for the foreclosure of same against defendants Paul Bauer, Wm. Barbee, and J. W. Hazzard, receiver, and against Mrs. N. W. Johnson and the First National Bank of Houston, Tex., while the appeal bond of appellants, Hazzard and Barbee, the only defendants appealing, was not made payable to Paul Bauer, who did not appeal and whose interests, appellee claims, are adverse to appellants appealing. It is suggested that, if the said note is adjudged to appellee, his judgment to the extent of the value received on the note will be reduced to that extent, while, if it is adjudged to the bank, the judgment against Bauer will receive no credit. We think it unnecessary to enter into a discussion of the sufficiency of the appeal bond to give this court jurisdiction. Revised Statutes 1895, art. 1025, provides that when there is a defect of substance or form in any appeal or writ of error bond, on motion to dismiss the appeal for such defect,

the court may allow the same to be amended by filing in the Court of Civil Appeals a new bond on such terms as the court may prescribe. In *Hugo et al. v. Seffel et al.*, 92 Tex. 414, 49 S. W. 369, our Supreme Court, in construing article 1025, said that:

"Since the passage of the statute quoted, a defective bond is sufficient to give the Court of Civil Appeals jurisdiction over the appeal."

We are of the opinion that, should appellee desire to question the sufficiency of the appeal bond or the jurisdiction of the court on account of any supposed defect in the bond, the article of the statute referred to and Court of Civil Appeals rules 8 and 9 would require that a motion be filed in calling in question the sufficiency of the bond, so that appellants, in the event the court sustained appellee's contention, could file a sufficient bond on such terms as the court might require.

This suit was brought by the appellee, J. W. Crow, in the district court of Harris County, Tex., and, after a number of amendments, resulted in making defendants Paul Bauer, W. L. Barbee, the firm of Paul Bauer & Co., composed of W. L. Barbee and Paul Bauer, and John W. Hazzard, as receiver of the partnership assets of Paul Bauer & Co.; Mrs. N. W. Johnson and the First National Bank of Houston filed separate interventions. Plaintiff alleged, in substance, that on May 7, 1909, he and the defendant Paul Bauer were engaged in the real estate brokerage business in Harris county and formed a special partnership under an agreement that they would share equally the profits on any sale that might be made by either party (Crow or Bauer) to F. A. Ogden; that Crow submitted to Bauer a proposition of sale of the Milton H. Smith land, of which land Chas. V. Moling was then the agent and that Bauer remarked that the land was just what he wanted for Ogden; that a meeting between Moling, Bauer, and Crow was had, at which it was agreed that in case a sale of the Smith land should be effected the profits should be divided one-third to each; that the price asked by the agents for the land was \$63,000, which would give \$13,000 net profits to Moling, Bauer, and Crow; that thereafter, on or about the 25th day of May (1909), and after the land had been offered to Ogden, and while the sale was pending with him, the agreement for a division of profits was modified and readjusted, whereby Bauer was to receive \$4,000, the Moling Company \$4,000, Crow \$3,000, and A. B. Mays \$2,000; that thereafter the securities offered in part payment by Ogden were found to be not acceptable to the seller, and the sale on the terms contemplated was not consummated, but the efforts to sell the same land to the same purchaser were not abandoned; that after the securities offered by Ogden were found to be not acceptable to the seller, about June 9 (1909), Bauer stated to Crow that by making a reduction in the price to be paid for the

land he was still satisfied they could get Ogden to raise the money and take land; and that it was agreed that he, Bauer, and Crow, would continue in their partnership agreement, and, acting in conjunction, would make efforts to sell said land to Ogden and be in the deal together and divide equally between them whatever profit was made by either party. Plaintiff further alleged that, as a result of their joint efforts, the sale of the Smith land to Ogden was shortly thereafter consummated, for \$61,000, which gave a profit of \$11,000 to the agents; that out of said profits Bauer paid to Moling \$2,625 as his share, leaving the net amount received to be divided between Bauer and Crow of \$8,375, and that no part of it had ever been paid to him. Plaintiff further alleged that, during the transactions covering the sale of the land, defendant Wm. Barbee was a silent partner of Bauer in conducting a real estate brokerage business under the names of Paul Bauer and Paul Bauer & Co.; that Barbee authorized and ratified all of said agreements made between Bauer and Crow; that said agreements were made for the use and benefit of said Bauer and Barbee, and that Barbee participated in the profits of the sale; that the partnership relation between Bauer and Barbee was unknown to plaintiff until after the sale to Ogden had been closed and the commission earned. Plaintiff alleges that said \$11,000 profit on the sale of said land was paid by Ogden as follows: \$9,000 in cash, and \$2,000 in the form of a promissory note executed by Ogden and payable to Smith (the owner of the land) and indorsed by Smith; that, after paying Moling as stated, there remained to be divided in cash the sum of \$6,375 and the \$2,000 note. Plaintiff alleges that about July 6, 1909, defendants Bauer and Barbee collected and wrongfully appropriated to their own use of said profits the sum of \$6,375 in cash, which plaintiff alleges to be \$2,187.50, in excess of Bauer and Barbee's half of the whole profit, for which plaintiff prays judgment, and, in addition, plaintiff prays judgment for the said \$2,000 note now in the hands of John W. Hazzard, receiver. Plaintiff alleges that, by reason of the defendants having received to their own use all of the cash paid, they are now estopped from asserting any interest in or title to the said note, which plaintiff alleges was worth its face value, and that said note rightfully belongs to plaintiff; that he has an equitable lien on said note; and that he elects to take same at its true value at the time of the closing of the sale as part of his share of the commission of said sale. Plaintiff alleged that the partnership of Barbee and Bauer was at an end; that since the filing of this suit the court in which this suit was pending rendered judgment in another cause, to wit, No. 49,330, *Barbee v. Bauer*, and in which plaintiff was not a party and in which cause John W. Hazzard was appointed receiver, and directed to take charge of said note and

dispose of same; that said note and other partnership effects of said Barbee and Bauer are now in the possession of said receiver and should be applied to the satisfaction of any judgment rendered herein. Plaintiff dismissed as to the Houston National Exchange Bank.

Defendants Bauer and interveners Mrs. N. W. Johnson and First National Bank of Houston do not appeal, and it will be unnecessary to state their pleadings or issues made on the trial.

Defendant W. L. Barbee presented general and special exceptions to Crow's petition and answered alleging, in substance, as follows: Denies partnership between plaintiff and Bauer; denies partnership between plaintiff, Bauer, and himself; denies that he was a silent partner of Bauer; alleges a general partnership with Bauer on and after June 10, 1909; denies authority of Bauer to the agreement alleged by plaintiff with reference to the disposition of profits; denies that he authorized or ratified agreement alleged; denies that he participated in the profits of said sale with knowledge that Bauer had made alleged agreement with plaintiff; that the contemplated sale to Ogden had been abandoned before his partnership with Bauer; alleges that the contract of June 21st, between Bauer and Moling, was made on behalf of himself and Bauer, and that by their efforts sale was made to Ogden and profits received (except note) without any knowledge on his part of any agreement between Bauer and Crow; alleges that, after his partnership with Bauer was dissolved, all assets of the firm by decree of court were placed in hands of Receiver Hazzard, who still retains same; that in cause No. 49,330, Barbee v. Bauer, an accounting was had between himself and Bauer, and it was adjudged that Bauer was indebted to him in the sum of \$2,506.96; that he was jointly interested in and owned the partnership assets, including the said \$2,000; that by said decree it was kept open and receiver ordered to pay all costs, the creditors of the partnership as established to pay one-half of the funds to him (Barbee), and such remaining moneys not to exceed Bauer's indebtedness to him on said accounting; alleges that Bauer and himself on their own responsibility obtained from Moling an option on the Smith land for a consideration of \$2,625, and by their joint efforts sold to Ogden at a profit of \$5,625 cash and the \$2,000 note; alleges debts in excess of said note, and defendant asserts a superior equitable lien on said note in that it was a partnership lien; alleges that after paying partnership creditors there would be no funds in hands of receiver or himself belonging to Bauer; denied the authority of the court to interfere with the possession of said note or to render any decree subjecting said note to a judgment in the case; alleges that if Crow ever had any agreement with Bauer it was with-

out consideration, as he had no interest in the Smith lands and had no right to sell or offer same for sale; that Bauer with the knowledge of Crow entered into said partnership with him (Barbee), and that Crow remained silent and permitted him and Bauer as partners to negotiate for and obtain due right to sell said lands and to sell same at their own expense and that Crow never at any time informed him (Barbee) of his right to participate in the profits arising from the sale until after same had been consummated and the moneys collected; denies that Crow ever had any agreement with Bauer other than expressed in the writing attached to the answer and that all prior negotiations were merged in said writing, that the deal of May 25, 1909, for the sale of said lands, in which Moling & Co. agreed to pay Crow \$3,000 out of the profits accruing to said Moling & Co., was declared off and the contract annulled; alleges that, a few days before the Moling Company abandoned the said contract of May 25th, Moling individually bought the land from Smith by contract of date May 29, 1909; alleged that without any knowledge of Crow's connection with or interest in the sale of said lands he (Barbee) and Bauer, on June 21, 1909, obtained from Moling in open market an assignment of such interest as he had in said lands by reason of his (Moling's) contract of purchase from Smith, and made the sale to Ogden; and defendant Barbee says that by reason of the facts alleged Crow had no interest in the said note or assets of Paul Bauer & Co. and no right to subject same to any demand he may have against Bauer.

Receiver Hazzard adopted the answer of Barbee as his own in part and pleaded the orders of the court in the matters affecting his receivership and said note. The court submitted the case to the jury on special issues, and the jury answered, in substance:

(1) That the plaintiff Crow and defendant Paul Bauer, on June 9, 1909, agreed between themselves that they would work together and close the deal and divide equally whatever profit or commission was made by them on the trade with Ogden.

(2) That the plaintiff Crow, after the execution of the written contract of May 29, 1909, between Milton H. Smith and C. B. Moling, did not have or obtain any authority to sell or to offer for sale the Milton H. Smith lands.

(3) That defendants Barbee and Bauer formed a partnership in the real estate business on June 10, 1909.

(4) That the plaintiff Crow knew of the existence of the partnership in the real estate business of Bauer and Barbee at and prior to the execution of the contract between Moling and Bauer on June 21, 1909.

(5) That the defendant Barbee did not know at the time of the making of the contract of June 21, 1909, between Bauer and

Moling, of any agreement between Crow and Bauer to divide the profits of that deal.

(6) That Barbee did not know on June 21, 1909, or prior thereto, of any right of Crow to participate in the profits on the sale made to Ogden for the Smith lands other than as set out in the written contract of May 25, 1909, between the Charles B. Moling Company, party of the first part, and Paul Bauer, party of the second part.

(7) That Barbee did not know of the agreement, if any, between Crow and Bauer to divide the profits on the sale of the Smith lands to Ogden at the time he (Barbee) divided with Bauer the cash received on the deal.

(8) That Crow did nothing personally towards effecting the actual sale made to Ogden of the Smith lands subsequent to June 9 and prior to June 21, 1909.

(9) That Barbee and Bauer, acting together and alone, made the sale of the Smith lands to Ogden.

In addition to the findings of the jury on the special issues submitted to them, we make the following additional findings, which we think the pleadings and the evidence warrant, and the trial court in effect found: That Bauer and Crow entered into an agreement on May 7, 1909, modified and readjusted at different times to suit the changes and circumstances, as they arose, but always referring to the division of the profits on the sale of lands to Ogden; that Crow and Bauer at once acted upon the agreement they had made on May 7th, in selling lands to Ogden, and on the same day by mutual parol agreement specified the Smith lands as the lands they would sell to Ogden; that Crow at once found the agent Moling who had for sale the Smith lands; that the proposition of the sale of the lands to Ogden was submitted to him (Moling) before Barbee formed his partnership with Bauer; that the Smith lands were sold to Ogden at a profit of \$9,000 cash and the \$2,000 note; and that, after paying Moling his part of the commission, there remained of the net profits to be divided \$5,625 and the \$2,000 note; that defendants Bauer and Barbee collected and appropriated the \$5,625 cash; that the \$2,000 note is now in the custody of Receiver Hazzard by agreement of the parties until further ordered by the court in this cause; that the note has never been in the custody of either Bauer or Barbee, but was in the possession of the bank where originally placed and turned over by the bank to the receiver, Hazzard, by agreement of the parties to this suit. The several contracts of May 7th, between Crow and Bauer, and the parol agreements between Crow and Bauer specifying the Smith lands as the lands mentioned in their contract to be sold to Ogden; the contract of May 25th, between Moling, Bauer, and Crow, recognizing and dealing with Moling as agent of the Smith lands to be sold to Ogden and stating terms of sale; con-

tract between the Chas. B. Moling Company, acting by C. B. Moling, and Bauer, reciting conditional sale of the Smith lands to Bauer and reciting certain securities to be given as part of the purchase money in event of sale; that Moling refused to accept the securities when offered; the contract of May 29th between Smith and Moling for the option, contract, or sale of the Smith lands to Moling; the contract of June 21st with the addenda, reciting the Moling option contract for sale of the Smith lands, and that Bauer had a prospective buyer on the option contract terms, and reciting the commission to be paid Moling in event of a sale, assigned the option contract to Bauer, that Moling took the option contract from Smith on the representation of Bauer and Crow that they could sell the land, evidently to Ogden.

Defendants Barbee and Hazzard filed motion for judgment which the trial court overruled, and on plaintiff's (Crow's) motion the court entered judgment in favor of plaintiff Crow against Bauer, personally, for \$3,812.50 interest, and that plaintiff have judgment against Barbee and Bauer individually and as partners and against Hazzard as receiver of the \$2,000 note, subject to the orders of the court, and against Mrs. Johnson and the First National Bank of Houston, fixing and foreclosing a lien on said note in favor of plaintiff, to secure the payment to plaintiff of said \$3,812.50, and judgment against Bauer for any balance remaining unpaid, ordered Hazzard to deliver the note into the registry of the court, appointed special commission to sell the note and apply the proceeds to payment of the judgment, and that Mrs. Johnson and the First National Bank of Houston take nothing, and awarded costs.

The appellants, by proper assignments of error, call in question the action of the court in overruling the general and special demurrers of defendants and in refusing to give peremptory instruction to jury to find for defendants, and calling in question the sufficiency of the evidence to support the judgment against Barbee for foreclosure of a lien on the \$2,000 note; action of the court in excluding as evidence the pleadings and evidence of Barbee in his suit with Bauer for an accounting as partners, claiming that the evidence was material, in that it would show that upon an adjustment of equities between Barbee and Bauer as partners there would be no moneys due Bauer from the partnership assets, and that the result of the accounting would show a judgment in Barbee's favor and that he owned the partnership assets including the \$2,000 note involved in this suit. Appellants' contentions presented in their several assignments of error are: (1) That Crow, not having the agency for the lands, did not acquire any right to or interest in any profits or commissions growing out of a sale of the Smith lands to Ogden by reason of any contract or partnership

relation he sustained to Bauer in the sale of the Smith lands; (2) that, if he did at any time have such contract or partnership relation with Bauer, such contract or relation ended before the sale was consummated by reason of the changes in relation to each other growing out of the changes in the several contracts made, and because Crow did nothing to effect the sale under any of the agreements; (3) that because he (Barbee), on the 10th day of June, and before any sale was made, formed a partnership with Bauer for the sale of lands, including a sale of the Smith lands to Ogden, and assisted in making a sale of the lands, all of the profits or commission for the sale of the Smith lands to Ogden should go to Bauer and Barbee; (4) that after the sale was closed and the money, including the commissions, and the \$2,000 note, were deposited in the bank, and after he (Barbee) and Bauer had divided the cash part of the commission (\$5,625), and while the \$2,000 note was still in the bank and undisposed of, in a suit by him (Barbee) against his partner, Bauer, in which Crow was not a party, for an accounting, a decree was entered in the Barbee-Bauer suit for \$2,596, and that he (Barbee) was jointly interested in and owned the partnership assets of the firm of Bauer and Barbee, including the \$2,000 note, and Hazzard was appointed receiver of the assets of said firm and directed to take possession of the assets and convert them to cash. The court refused to hear the evidence as to the issues made in the Barbee-Bauer suit or the decree entered, and appellants assign as error the exclusion of the evidence, and claim that, because of the decree in the Barbee-Bauer suit, the issues and decree were material evidence in this suit, and that the receiver should take possession of the note as an asset of Bauer and Barbee, and apply it as directed.

[2-4] The facts are practically undisputed. We think the evidence and the facts clearly show an agreement between Crow and Bauer from the very beginning of their dealings with each other that both would share equally in any profits or commissions earned by either or both in any sale of the Smith lands to Ogden. It was not a fact necessary to the agreement for a division of commissions between Crow and Bauer, or between any of the parties subsequently entering into the several contracts looking to a sale of the Smith lands to Ogden, that Crow should have been an agent for the Smith lands, or should have had any right or authority to sell from Smith or Moling, the sole agent of Smith. It is evident that Bauer knew at the time of making the agreement with Crow that Crow did not have the agency for the Smith lands. It is equally evident that, at the time of the agreement between Crow and Bauer, Bauer knew nothing of the Smith

lands or that Moling was the agent for them. Crow was the first to suggest to Bauer the sale of the Smith lands to Ogden, and Bauer thought the Smith lands just what his client Ogden wanted. Crow then introduced Bauer to Moling, the sole agent for Smith, and they at once commenced a vigorous effort to make the sale to Ogden, which was accomplished within a very short time. It is true that several contracts between the parties trying to effect a sale were made, Moling becoming the owner of an option contract to buy from Smith and Bauer an assignee of the option contract, Moling at one time agreeing to pay Crow a part of his commissions, and Bauer agreeing to pay a part of his commissions to Mays; but neither the evidence nor the facts found by the jury shows that the agreement between Crow and Bauer to divide between the two whatever commissions they should make was ever expressly or impliedly changed or abandoned by either. The contracts of May 25th, between Moling and Bauer and to the terms of which Crow agreed, provided for the payments to Moling and Bauer of all commissions received in the event a sale was made on the terms stated, and in that event Moling was to pay Crow out of his part of the commission \$3,000, and Bauer was to pay Mays out of his part of the commission \$2,000. But the sale was not made on the terms stated in that contract, and that contract was abandoned, but the effort between the same parties to sell the same lands to same party continued. Had the sale been made under that contract, it might have been claimed with some plausibility that Crow had accepted to take his profits from Moling and could not require a pooling of his profits with those of Bauer and a division of the entire profits of Crow and Bauer. But that is not the question before us. The agreement did not stipulate what part Crow was to perform and what part Bauer was to perform in making the sale of the Smith lands to Ogden. On the same day, but after his arrangement with Bauer, Crow brought the two agents together, the one representing the seller and the other the buyer, and all three discussed and outlined a plan of action. What more could Crow then do? It seems that his part was then accomplished, in the absence of evidence that there was something assigned him that he should or could have done which he failed to perform. It is clear to us that Crow was entitled to receive a part of the commission from Bauer on the sale to Ogden.

[5] If we are right in our conclusion on that proposition, it would necessarily follow that his right to the \$2,000 note would be superior to and take precedence over any claim that Barbee would have to the note by reason of any subsequent partnership or agreement with Bauer to which Crow was not a party, or to any decree of the court

in a suit with Bauer to which he was not a party.

The above seems to us to dispose of the other issues presented.

We believe the case should be affirmed, and we so hold.

On Rehearing.

PER CURIAM. Rehearing denied.

HARPER, C. J. (dissenting). In order for plaintiff Crow to recover any portion of the commission or profit on the sale of the land, he must not only have had a contract with Bauer to work with him in consummating the sale, as found by the jury in reply to the special issue, but he must show, and the jury must find, that he (Crow) did something toward bringing about the sale. This is not of that class of contracts wherein a tender of services is sufficient to enable a party to a contract to participate in profits growing out of it, but this contract required some affirmative act in furtherance of the thing to be accomplished before participating in the profits.

It is true that there is evidence that Crow brought the parties together, and that alone is sufficient to enable him to recover, if the jury believed him, so the point to be determined in this case is: Was that question submitted to the jury, and, if so, was it determined for or against appellee Crow? I am of the opinion that the special issues submitted, in the form in which the questions were framed, did submit the question, and especially the question and answer No. 9 quoted in the original opinion, "That Barbee and Bauer, acting together and alone, made the sale of the Smith lands to Ogden," is a direct finding that Crow did nothing toward consummating the sale; therefore constitutes a verdict for the defendant. And the judgment of the lower court should have been entered accordingly. This question having been presented by the twenty-second and twenty-third assignments of error, they should have been sustained. The motion for rehearing now pending should be granted, and the cause reversed and remanded. Wherefore I, at this time, enter my dissent to the majority opinion.

# MIDGLEY & CURTSINGER v. TAYLOR. (No. 5354.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 25, 1914. Rehearing Denied  
Dec. 16, 1914.)

## 1. EVIDENCE (§ 419\*) — PAROL EVIDENCE — CONSTRUCTION OF CONTRACT.

A written contract for the sale of goods at the invoice price is not varied by evidence that the invoice price on one article was less than that represented by the seller and paid by the buyer, since a written contract is not varied by

proof that the consideration was other than that stated in the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

## 2. SALES (§ 393\*) — REMEDIES OF BUYER — FRAUD—CASUAL DAMAGES.

Where the seller of goods at the invoice price represented that the price of a certain article was \$2,000, which was paid by the buyer, whereas in fact the price was \$1,500, the measure of damages is the difference between the invoice price and that represented and collected.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1137-1139; Dec. Dig. § 398.\*]

## 3. SALES (§ 75\*)—CONSTRUCTION OF CONTRACTS —INVOICE PRICE.

Where a firm sold certain articles at the first invoice price, a buyer was required to pay only such price thereof, even though the seller may have paid more than that price for the article.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 204; Dec. Dig. § 75.\*]

Appeal from Zavala County Court; O. A. Stubbs, Judge.

Action by E. B. Taylor against Midgley & Curtsinger. Judgment for the plaintiff, and defendants appeal. Affirmed.

W. D. Love, of Uvalde, for appellants. M. L. Harkley, G. B. Fenley, and Ivy H. Burney, all of Uvalde, for appellee.

FLY, O. J. This is a suit for damages in the sum of \$500, instituted by appellee against appellants; the allegations being in substance that appellants sold to appellee certain property at invoice prices, among the rest a soda fountain which they represented cost at the factory \$2,000, and they were paid that sum for the fountain, when in truth and fact the invoice price was \$1,500. All of this was denied by appellants, but the court on hearing the evidence rendered judgment in favor of appellee for \$500.

The evidence sustains the conclusion that appellants agreed to take the first invoice price for the soda fountain, which they represented was \$2,000. Upon the faith and credit of that representation, appellee paid appellants \$2,000 for the fountain, but afterwards discovered that the invoice price for the fountain was only \$1,500.

[1] The petition was not open to attack by a general demurrer. There was no allegation in the petition indicating that in order to sustain the suit evidence would necessarily be introduced to vary the terms of the written contract. The allegations show that more was obtained for the property than the contract price agreed upon, by means of the representations of appellants. A written contract is not varied by proof that the real consideration was different from that set forth in such contract. This is an old common-law rule, and it is a rule not based on allegation and proof of fraud, accident, or mistake. In the case of Taylor v. Merrill, 64 Tex. 494, the defendants when sued upon promissory notes, given for certain land, al-

leged that \$2,000 in money was paid as part consideration for the property; that the money was paid on account of representations made by the plaintiffs that certain personal property went with the land which were untrue. The Supreme Court held that the answer did not seek to vary the contract. That case has often been cited with approval.

[2] Under the facts alleged and proved in this case, there could be but one measure of damages that could apply. Appellants agreed to accept in payment for the soda fountain the amount of its first invoice cost, and represented at the same time to appellee that the fountain cost \$2,000. Appellee, after he had paid the money, discovered that the real cost was \$1,500. Reason and common sense plainly indicate that he was damaged in the sum of \$500, and the difference between the value of the fountain and price paid for it could have no more applicability than to try to ascertain a certain quantity of water by linear measure. The amount of damages was clearly stated and proved. It is not a question of what the real value of the fountain may have been, but what appellee agreed to pay for it. He agreed to pay the factory invoice price, and that price was \$500 less than appellants had collected. He wanted his money back, and the court, in justice and good conscience, gave it to him.

[3] It is true, as stated in appellants' brief, that Midgley swore that the firm bought the fountain from Curtsinger at \$2,000, but that cannot control this case, because under the contract appellee was to pay only the first invoice price for the fountain. The uncontroverted evidence shows that the first invoice price was \$1,500, and that was the price appellants agreed to take for the fountain, regardless of what they may have paid some other party. The fact that Curtsinger may have sold a secondhand soda fountain to the partnership for \$500 more than he gave for it when new does not authorize appellants to breach their contract. Curtsinger was not called as a witness but remained discreetly silent.

There is no merit in the assignments of error, and the judgment is affirmed.

**POLLARD v. ALLEN & SIMS.** (No. 361.)  
(Court of Civil Appeals of Texas. El Paso.  
Nov. 25, 1914.)

**1. APPEAL AND ERROR (§ 282\*)—ASSIGNMENTS OF ERROR—TRIAL BY COURT.**

Under Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), requiring appellant to file with the court below his assignments of error, distinctly specifying the grounds on which he relies, declaring that errors not so specified are waived, and making the assignments of error in the motion for a new trial the assignments of error on appeal, where findings of fact and conclusions of law were not filed by the trial court, and appellant did not file a motion for a new trial therein,

there were no valid assignments of error which could be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. § 282.\*]

**2. APPEAL AND ERROR (§ 760\*) — BRIEFS — PROPOSITIONS AND STATEMENTS.**

Where the brief on appeal did not comply with rule 31 for Courts of Civil Appeals (142 S. W. xiii), requiring that to each proposition there shall be subjoined a brief statement of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to understand and support the proposition, with reference to the pages of the record, the assignments of error will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.\*]

**3. APPEAL AND ERROR (§ 753\*) — REVIEW — FUNDAMENTAL ERROR.**

Where there are no valid assignments of error in the record, and where the purported assignments are not properly briefed, the Court of Civil Appeals is confined to the consideration of fundamental errors, or errors apparent on the face of the record, of which it must take notice without assignments and briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.\*]

Error from District Court, Harris County; N. G. Kittrell, Judge.

Action between W. H. Pollard and Allen & Sims. Judgment for Allen & Sims, and Pollard brings error. Affirmed.

R. H. & A. S. Tiernan, of Houston, for plaintiff in error. Campbell, Sonfield, Sewall & Myer, of Houston, for defendants in error.

**WALTHALL, J.** [1] This case was tried before the court. In this case findings of fact and conclusions of law were not filed by the trial court. Plaintiff in error failed to file a motion for a new trial in the court below. In this condition of the record, there are therefore no valid assignments of error which we can consider. Acts 1913, c. 136, p. 276 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612); American, etc., v. Mercedes, 155 S. W. 286; Cooney v. Dandridge, 158 S. W. 177, 178; Moore v. Rabb, 159 S. W. 85; Dees v. Thompson, 166 S. W. 56.

[2] Furthermore, the brief filed by plaintiff in error in this case fails to comply with rule 31 (142 S. W. xiii), which requires that to each proposition there shall be subjoined a brief statement in substance of such proceedings or part thereof, contained in the record, as will be necessary and sufficient to understand and support the proposition with reference to the pages of the record. Colorado Canal Co. v. McFarland & Southwell, 50 Tex. Civ. App. 92, 109 S. W. 435; Walker v. International & G. N. R. Co., 54 Tex. Civ. App. 406, 117 S. W. 1020; St. Louis & S. F. R. Co. v. Lane, 118 S. W. 847; Gulf, C. & S. F. R. Co. v. Wafer, 130 S. W. 712; Broussard v. South Texas Rice Co., 120 S. W. 587; Kirby Lumber Co. v. Chambers, 41

Tex. Civ. App. 632, 95 S. W. 607; Johnson v. Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57; Galveston H. & N. Ry. Co. v. Olds, 112 S. W. 787; Johnson v. Hulet, 56 Tex. Civ. App. 11, 120 S. W. 257.

[3] Since there are no valid assignments of error in the record, and since the purported assignments which were filed by plaintiff in error in the court below are not properly briefed, we are therefore confined in the consideration of this case to those errors which are fundamental in their nature, or else such errors apparent upon the face of the record as we are required to notice without assignments and briefs.

We have carefully examined the record, and find no errors of this nature, and the judgment of the lower court is therefore affirmed.

**GALVESTON, H. & S. A. RY. CO. v. TERRAZAS. (No. 391.)**

(Court of Civil Appeals of Texas. El Paso. Nov. 25, 1914.)

**COURTS (§ 497\*)—JURISDICTION—PROPERTY IN BOND—CUSTODY OF LAW.**

Under Act Cong. March 2, 1833, c. 57, § 4 Stat. 632 (U. S. Comp. St. 1913, § 1560) providing that all property taken or detained by any officer under any revenue law shall be irrepleviable and shall be deemed in the custody of the law subject only to the orders of the federal courts, and Act Cong. Feb. 23, 1887, c. 215, § 24 Stat. 411 (U. S. Comp. St. 1913, § 5698), providing that merchandise transported in bond shall not be unladen or transhipped between the ports of first arrival and final destination, unless authorized by the regulations of the Secretary of the Treasury, property introduced from without the United States and in the possession of a carrier for transportation in bond, is beyond the jurisdiction of the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404-1406; Dec. Dig. § 497.\*]

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by Luis Terrazas against the Galveston, Harrisburg & San Antonio Railway Company. From an order granting a temporary injunction, defendant appeals. Reversed and remanded, with directions.

Coldwell & Sweeney and Beall & Kemp, all of El Paso, for appellants. Davis & Goggin, of El Paso, for appellee.

HIGGINS, J. Terrazas sued the Galveston, Harrisburg & San Antonio Railway Company to recover the title and possession of 1,158 bundles of hides. It was alleged that the hides had been introduced into the United States from the Republic of Mexico, and were then situate in El Paso county in the possession of defendant, whose purpose it was to transport same out of the state and county and beyond the jurisdiction of the court. It sufficiently appears from the allegations of the petition that the hides were in defendant's possession as a carrier, for

transportation in bond, and the plaintiff averred that he was willing and able to pay any import duties which might be due upon said hides, and held himself ready to do so upon the surrender thereof to him, and he offered to enter into bond to protect the railway company or the government of the United States against loss of any kind arising by reason of the detention of said hides in the possession of the company under injunction. A preliminary injunction was asked, restraining defendant from removing the hides from the county and state and from delivering same to any other person. The injunction was granted, and defendant appeals, assigning as error that same was improperly issued, because the property was in custody of the law, being taken and detained by defendant under authority of the revenue laws of the United States, and was subject only to the orders and decrees of the courts of the United States having jurisdiction and because such injunction interfered with and prevented the transportation and disposition of said property in accordance with the national revenue laws.

By the second section of "an act further to provide for the collection of duties on imports" approved March 2, 1833, it was provided that:

"All property taken or detained by any officer or other person under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." 4 U. S. Statutes at Large, 632.

This was carried forward in section 67 of the act of July 13, 1866, chapter 184, 14 U. S. Statutes at Large, p. 98, at 172. It was also incorporated into the Revised Statutes of 1878 under title 13, relating to the judiciary, and there appears as section 934.

By the act of February 23, 1887, it was provided:

"That merchandise transported under the provisions of this act shall be conveyed in cars \* \* \* under the exclusive control of the officers of the customs. \* \* \* Such merchandise shall not be unladen or transhipped between the ports of first arrival and final destination, unless authorized by the regulations of the Secretary of the Treasury in cases which may arise, \* \* \* or from legal intervention \* \* \*." 24 U. S. Statutes at Large, 411.

The assignment is well taken. The language of the statute is plain. Property introduced into the United States and in possession of a carrier for transportation in bond is within its purview and to allow state courts to interfere therewith or control its disposition by injunction or other process would be in direct conflict with the declaration that it should be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. Counsel have cited no case in point, and we have

been unable to find any, but in support generally of the views here expressed, see *Ableman v. Booth*, 21 How. 508, 16 L. Ed. 169; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 380; *Harris v. Dennie*, 3 Pet. 202, 7 L. Ed. 682; *The Marion* (D. C.) 99 Fed. 448; *McCullough v. Large* (C. C.) 20 Fed. 312; *May v. Hoaglan*, 72 Ky. (9 Bush.) 171.

The status of goods in bonded warehouses is quite, if not wholly, analogous to goods transported in bond, and that the United States Treasury Department regards property in a bonded warehouse as in no wise amenable to process of state courts is evidenced by an official communication of the assistant secretary, dated May 12, 1898, and to which reference is made as throwing some light upon the subject here considered. The material portion thereof reads:

"Sir: The department is in receipt of your letter of the 6th instant, with accompanying exemplified copy of a judgment roll, relating to the case of Dwight P. Cruikshank against G. I. E. Geisderver and A. E. Noe, trading as Hegelmaier & Co., in an action for breach of contract.

"It appears from the facts submitted by you as attorney for Mr. Cruikshank that a certain importation had been consigned by Hagelmaier & Co., who are Holland merchants, to your client, in pursuance of an arrangement by which he was to make payment within sixty days. The bill of lading, however, was forwarded to Messrs. Knauth, Nachod & Kuhne, of New York City, with instructions to deliver the same upon payment of cash only, which latter proposition was refused by your client, Mr. Cruikshank, on the ground that it was contrary to the terms upon which the purchase was made, and he, therefore, refused to take the bill of lading on the above terms, and the goods were then sent to 'Campbell's Stores,' in Hoboken, N. J., under 'general orders.'

"Suit was brought in the circuit court for Hudson county, in the state of New Jersey, with the result that judgment was rendered in the said court in favor of the plaintiff, Cruikshank, against the said defendants for \$2,566.32 and costs.

"Execution was issued on the judgment, and the sheriff attempted to levy on the goods in question while in warehouse under general order, but recognition of the writ of execution upon the judgment was refused, and your request, in behalf of your client, that the customs officials be instructed to release the goods, alleging that the merchandise is free of duty, and that there are no charges against the importation except for storage, which your client is willing to settle on receipt of the goods.

"In reply, you are informed that the so-called Customs Administrative Act of June 10, 1890, provides, among other things, 'that all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to whom the merchandise may be consigned; but the holder of any bill of lading consigned to order and indorsed by the consignor shall be deemed the consignee thereof,' and section 934 of the Revised Statutes, after declaring that 'all property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable' provides further that all such property so taken or detained 'shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having juris-

isdiction thereof.' You will perceive, therefore, that merchandise in bonded warehouse, or in customs custody, is not subject to the orders, judgments or decrees of any state court, and no state officer has any control over it; such liens or executions can only attach upon a full discharge of the goods from such custody."

See Decision No. 19340, vol. 1, Synopsis of Decisions, Treasury Department, p. 721.

Our attention has been directed to *Conard v. Pacific Insurance Co.*, 6 Pet. 262, 8 L. Ed. 392, which contains expressions not wholly in accordance with the views expressed, but this case was decided in 1832, prior to the enactment of the statute here considered.

*Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630, is also cited. D. and J. Maguire were the principal defendants. Chase, Leavitt & Co. were joined as trustees. The property which the trustees held was in a bonded warehouse, and it was simply held that this circumstance afforded no reason why it was not subject to trustee process, since it was in the constructive possession of, and subject to the control of, the trustees. In some of the New England states garnishment proceedings are denominated a trustee process, and is in substance an equitable proceeding to determine the ownership of funds or property in dispute. 20 Cyc. 978. Conceding this holding to be correct, it is nevertheless apparent that the case is readily distinguishable from a proceeding to render such property directly subject and amenable to state process.

The injunction is dissolved, and cause reversed and remanded, to be disposed of in a manner conformable to this opinion.

WALTHALL, J., did not sit in this case.

## HENDERSON & GRANT v. GILBERT. (No. 669.)

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 21, 1914.)

### 1. APPEAL AND ERROR (§ 262\*)—RESERVATION OF GROUNDS OF REVIEW — EXCEPTIONS — "FUNDAMENTAL ERROR."

The failure of the court to submit a case to the jury, where there is sufficient testimony to authorize such submission is a "fundamental error"; and hence the giving of a peremptory instruction may be reviewed, though not excepted to, notwithstanding the act of the Thirty-Third Legislature (Acts 33d Leg. c. 59) relative to exceptions to instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1582-1589, 1593-1595; Dec. Dig. § 262.\*]

For other definitions, see Words and Phrases, First and Second Series, Fundamental Error.]

### 2. BROKERS (§ 57\*)—COMPENSATION—VARIANCE BETWEEN CONTRACT PROCURED AND CONTRACT AUTHORIZED.

Defendant on May 25th listed land with plaintiffs for sale, for a period of 60 days, the terms of sale to be "\$23 per acre, 5 per cent., commission included, on basis of all cash," plaintiffs to have as compensation for their services all over the listed price. On July 8th they executed a contract of sale on behalf of defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig., Key-No. Series & Rep'r. Indexes

ant for a consideration of "\$14,720 (\$28 an acre), less 5 per cent. commission," \$1,250 to be paid at the signing thereof as earnest money, and the balance when the deed was delivered, December 1st. The contract required defendant to execute a deed within 15 days, which, with the earnest money, was to be placed in escrow until the title was approved. Held that, under the listing contract, the selling price was \$23 an acre, plus the commission, and the commission was not a part of the \$23, and hence the contract of sale which required the owner to accept \$23 an acre, less the commission, was not authorized by the listing contract, nor was the sale made a cash sale within the listing contract, as the purchaser might wait until December 1st before paying the balance of the price, and hence, unless defendant ratified the contract of sale with full knowledge thereof, plaintiffs were not entitled to commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.\*]

**3. BROKERS (§ 49\*) — EARNEST MONEY PAYMENT—CHECKS.**

If one of a firm of brokers who executed on behalf of a purchaser a contract of sale executed by the firm for the vendor had a right to draw a check on a deposit by the purchaser, and if there was such a fund on deposit, and the check was an assignment of the amount thereof, his check placed in escrow with the contract was a sufficient deposit under the contract of sale requiring an earnest money payment to be placed in escrow with the deed until the title was approved.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

**4. BROKERS (§ 58\*) — COMPENSATION — ENFORCEABILITY OF CONTRACT—NECESSITY.**

To entitle brokers to commissions, a contract negotiated by them need not be enforceable, if the purchaser is ready and willing to perform it and the sale is defeated by the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 90; Dec. Dig. § 58.\*]

**5. BROKERS (§ 49\*)—COMPENSATION—OPTION OR SALE.**

In a contract for the sale of land made by brokers, providing for an earnest money payment to be placed in escrow until the title was approved, and that, if the purchaser should fail to comply with the contract, the earnest money should be declared forfeited and paid over to the vendor, the forfeiture clause did not render the contract a mere option, rather than a sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

**6. BROKERS (§ 58\*)—COMPENSATION—ACTING FOR BOTH PARTIES.**

A contract of sale made by brokers was not void because one of the brokers executed it for the proposed purchaser, if he acted in good faith and with fairness towards the vendor, and the vendor knew that he was acting for the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 90; Dec. Dig. § 58.\*]

**7. BROKERS (§ 57\*)—COMPENSATION—AMOUNT — RATIFICATION OF UNAUTHORIZED CONTRACT.**

Where brokers authorized to make a sale of land for \$23 an acre, plus their commission, made a sale under which their commission was to be deducted from the purchase price of \$23 an acre, if such contract was ratified, they were entitled to the agreed percentage on the purchase price.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.\*]

Appeal from District Court, Hale County; L. S. Kinder, Judge.

Action by Henderson & Grant against C. L. Gilbert. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

L. C. Penry and Randolph & Randolph, all of Plainview, for appellants. Mathes & Williams, of Plainview, for appellee.

**HUFF, C. J.** The appellants, Henderson & Grant, instituted this suit against C. L. Gilbert for the sum of \$736, and interest, alleged to be due appellants as commission for the sale of land belonging to appellee. We adopt the following statement as to the appellants' pleadings from their brief:

"Plaintiffs allege necessary facts showing agency under written contract to sell said land within 60 days from May 25, 1912, at a stipulated price, on the 'basis of all cash,' for which services plaintiffs were to receive 5 per cent. of the consideration therefor; that sale was made to Pacific Security Company for the price specified, to be paid on delivery of the title 'on or before' December 1, 1912, said sale being evidenced by contract signed by said firm of Henderson & Grant for defendant, and by M. V. Henderson, one of said firm, for the purchaser, dated July 8, 1912, which contract provides that the deeds shall be made to any person said Security Company might designate; that a copy of said sales contract last referred to was at once delivered to defendant, and no objection was urged thereto by defendant, but, on the contrary, defendant proceeded to carry out its provisions by submitting his abstracts for examination to the attorneys designated in said contract; the title was directed to be taken in the name of certain persons as trustees, said direction being made before the listing contract expired; that the purchaser so secured was ready, able, and willing to take and pay for said land. Plaintiffs also alleged a right of recovery upon the ground that, as agents for defendant, they sold the land at the price fixed by defendant to H. C. Randolph and J. H. Slaton, trustees, who were ready, willing, and able to take and pay said price for said land in cash, and that usual and reasonable compensation for such services and the reasonable value thereof was \$736; that defendant was advised of the sale and terms thereof, and that he made no objection thereto, but proceeded in part to execute the same by delivering the abstract for examination; that afterwards defendants refused to close the deal and convey the land without lawful excuse therefor, and prays for judgment."

The defendant answered the petition, which is not necessary, as we deem it, to set out. We state the facts from the appellants' view point alone, as the trial court instructed a verdict for appellee.

On the 25th day of May, 1912, the appellee, Gilbert, listed the land in question with the appellants, designating the instrument a "listing contract," which has the following provision:

"I hereby constitute and appoint Henderson & Grant my authorized exclusive agents, and list for sale for a period of 60 days from date the land." (Then follows the description.) "The terms of sale for the above-described property to be as follows: \$23 per acre, 5 per cent. commission included on basis of all cash. It is further agreed that I will execute deeds conveying to the purchaser of said land and furnish a

complete abstract showing clear title to said property whenever sold, and to allow Henderson & Grant, my authorized agents, as compensation for their service, all over and above listed price as their commission for furnishing the purchaser or making the sale," and giving the agents one-half of any money put up as a forfeit should the proposed purchaser forfeit it, and authorizing the agents to sign contracts of sale for him upon the above basis and terms.

On the 8th day of July, 1912, Henderson & Grant, acting as agents for appellee Gilbert and M. D. Henderson, acting as the agent of Pacific Security Company, entered into a contract for the sale of the land, by which appellee agreed to convey to the Pacific Security Company, or to any one it might direct, by a good and sufficient deed, with good merchantable title, the land in question, which contained 640 acres, "for a total consideration of \$14,720, less 5 per cent. commission, to be paid as follows: \$1,250 at the time of signing thereof as earnest or forfeit money, to bind this contract and to constitute a part of the cash payment, if the trade is fully consummated, and \$13,450 additional to said earnest money to make the full cash payment when deed is delivered December 1, 1912." Gilbert was given thereby 15 days from that date to furnish abstract, which was to be approved by H. C. Randolph, the company's attorney, within 15 days of its delivery to him, Randolph. Gilbert was to execute a deed within 15 days from the date of the contract to the company or to any one it should direct. The deed and earnest money to be placed in a named bank in escrow to be held until the title was approved, the company agreeing to pay full cash payment and execute notes as above provided; "it being fully understood and agreed that the closing up of this contract and the making of the full cash payment shall be on or before December 1, 1912; it being understood that, if said second party (the company) shall fail or refuse to comply with the terms of this agreement within the time specified, then the earnest money put up shall be declared forfeited, and the bank is hereby authorized to pay over the same to the said first party (Gilbert) or his authorized agent as full liquidated damages;" but, if title was not good, the money should be returned to the company. The evidence of the appellants tends to show that, immediately upon the execution of the contract for the sale of the land, they mailed a copy of that contract, together with a letter of date July 8, 1912, to the appellee, in which they informed him that they had made the contract of sale securing all cash December 1, 1912, with a handsome forfeit to make the contract good, and appellee to retain the crops on the place for that year. On July 31, 1912, appellants mailed a deed and the opinion of the selected attorney on the title, asking that he (appellee) execute the deed inclosed. The title was pronounced good, except the failure to produce interest receipts from the state of

Texas, and appellee was requested to furnish such receipts. On the 13th day of July, 1912, the appellee delivered to Randolph, the attorney for the company, an abstract of title to the land for his examination. The abstract showed that it had been brought down to July 12th, the day previous. Gilbert received the letters above mentioned and the copy of the contract. The deed prepared and sent to appellee conveyed the land to Randolph and Slaton, as trustees, and was prepared to be signed by Gilbert and his wife. Gilbert took the deed and went to the office of Randolph with it, and informed Randolph that it was not necessary that he and his wife sign it. Randolph explained why his wife should sign the deed, but appellee declined to have the deed so executed at that time. Some time afterwards a deed was sent to him to be signed by himself alone. This Gilbert refused to execute. The appellants show that the company had authorized Henderson to make such a contract for it and that it had another agent, however, to examine and pass upon the quality and value of the land; that the company then had on deposit \$300,000, for the purpose of placing up forfeit money on contracts of this kind, and that before December 1, 1912, had a million dollars on deposit to pay for lands contracted to be purchased—this land, amongst others. It directed that the land be deeded to Randolph & Slaton, as trustees for it. The testimony tends to show that the company, as well as the trustees, were ready, willing, and able to take and pay for the land by December 1, 1912. The evidence further shows that the actual cash was not put up in the bank with the contract, but that Henderson's check for \$1,250 was attached to the contract and placed in the bank as specified in the contract of sale, and tends to indicate that Henderson had the right to check on the \$300,000 deposited in the bank by the company to secure forfeiture stipulations in the contracts.

[1] At the conclusion of the evidence, the trial court instructed a verdict for Gilbert, the appellee. In this case the appellant did not except to the charge of the trial court peremptorily instructing a verdict, on the ground that there was testimony tending to prove ratification of the contract made by the agents. The appellee in this case objects to the assignments of error of the appellants on that ground. This court has heretofore held that, where the trial court peremptorily instructs a verdict, when there is testimony authorizing the submission of the case to the jury, that it is not necessary to file an exception to the charge of the court so given under the amendments to the statute with reference to instructions by the Thirty-Third Legislature (Acts 33d Leg. c. 59); that, if there is sufficient testimony authorizing the submission of a case to the jury, a failure to do so would be fundamental error, and for

that reason it is not necessary to except to the charge of the court. The statute as amended it is not believed by us was intended to apply to cases of that kind, but only to instructions where from informality or for failure to properly charge the law of the case, and then exceptions should be taken as pointed out in the statute. At any rate, we have concluded to consider the case upon the assignments presented.

The first assignment complains of the action of the court in instructing a verdict for the appellee, because it is insisted that the evidence with reference to ratification was sufficient to raise that issue, and should have been submitted to the jury for their findings.

[2] Without noticing further the assignments of appellants, we shall give our views upon the case as presented by the record. We have reached the conclusion that the contract of sale was not authorized by the contract of agency in at least two particulars: The contract appointing appellants as agents has the stipulation: "The terms of sale for the above-described property to be as follows: \$23 per acre, 5 per cent. commission included on a basis of all cash." It further provides for the compensation of the agents which was "all over the above listed price as their commission for furnishing the purchaser or making the sale." In the contract of sale the appellee agreed to convey the land for the total consideration of \$14,720, less 5 per cent. commission. \$14,720 for 640 acres of land is exactly \$23 per acre. The purchaser therein agreed to pay the consideration \$1,250 at the time of signing the contract, and \$13,450, "the full cash payment, when deed is delivered December 12th." The amount \$13,450 is evidently a mistake. It should be \$70, instead of \$50. It is pleaded as a mistake, and the proof sustains the plea. The agents were not authorized to sell for less than \$23 per acre and to contract that the owners should take less. We think that the list price, as evidenced by the contract, is \$23 per acre, and 5 per cent. commission included. It is \$23 plus 5 per cent. and not minus 5 per cent. This conclusion is rendered reasonably certain by the clause following, which stipulates the agents were entitled as compensation to "all over the above list price." They were not entitled to any compensation under the contract, unless they received something over that price. The listed price of the land was \$23, but the 5 per cent. commission was to be included in the terms of sale, and all over the list price, \$23, the agents were entitled to as compensation. In making the contract of sale the agents obligated Gilbert to take \$1.15 per acre less than he authorized them to sell the land for. True, the contract obligates the purchaser to pay \$23 per acre, but by the contract Gilbert does not get that amount, but the 5 per cent. is taken from the amount as the com-

mission. Under the instruments in evidence, clearly this was not the agreement. Whether the commission was to be added to the \$23 or compose only a part of that amount, if the amount of 5 per cent. was deducted, it was not in either event in accordance with the agreement; but, as above suggested, we think the agency contract clearly contemplated that the agents were required to include 5 per cent. with the \$23 per acre, and not as part of the \$23. Under the contract of sale, the purchaser paid the \$23 per acre, but Gilbert took \$1.15 less for the land than he listed it, thereby paying the commission to the agent out of the price asked by him, and not out of the amount over the list price.

Again, the consideration was to be all cash, and we do not consider the sale so made. The \$1,250 was paid down; the residue was payable on or before December 1, 1912—more than 4 months from the date of the contract. If the deed had been delivered within a day or 30 days, appellee could not have forced a payment of the residue before December 1, 1912. It was optional with the purchaser to pay before that date or wait until the last day. The agents executed a contract in the name of the owner, thereby binding him to sell on at least 3 or 4 months' credit. The agents were not authorized to make such a contract. *Gough v. Coffin*, 55 Tex. Civ. App. 550, 120 S. W. 210; *Colvin v. Blanchard*, 101 Tex. 231, 106 S. W. 323; *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959; *Evans v. Fuqua*, 102 Tex. 430, 118 S. W. 132, 132 Am. St. Rep. 854; *Id.*, 50 Tex. Civ. App. 201, 111 S. W. 675; *Hagler v. Ferguson*, 102 Tex. 432, 118 S. W. 133, 132 Am. St. Rep. 895; *Id.*, 50 Tex. Civ. App. 191, 111 S. W. 673. From the authorities and our construction of the contract in question, the appellants cannot recover, unless, after the execution of the contract, with full knowledge thereof, the owner ratified the sale as made by the agents. *Wilson v. Burch*, 162 S. W. 1018; 2 *Wilson, Civ. App.*, § 593; *Thornton v. Moody*, 24 S. W. 331; *Evans v. Gay*, 74 S. W. 575; *McDonald v. Cabiness*, 100 Tex. 615, 102 S. W. 721; *Id.*, 98 S. W. 943.

[3] We have concluded the facts in this case raise the issue of ratification and are sufficient to take the case to the jury. Whether the check was cash or not, and whether the appellee knew that the check was so placed, we think also a question of fact. If Henderson had the right to draw the check on the fund deposited in the bank, and at that time there was such a fund on deposit, and if the check was an assignment of the amount thereof, we think that such facts, if so found, would be sufficient to show a deposit as called for by the contract of sale.

[4] Whether the Pacific Security Company could make a binding contract or not is not

here so presented by the record as would authorize a holding on that question. If properly presented, it would be an interesting question. The appellants contend the company selected two trustees to whom the deed was to be executed and who were authorized and had the money to pay on the land according to the contract, and that they were ready, willing, and able to do so. If it should be held that the contract by the Pacific Security Company was not an enforceable one, because the company was a nonresident, or because not known whether incorporated or a partnership or the like, such question became immaterial; and if appellee had offered to complete the trade, and the purchaser or trustee designated had refused on their part, then—

"in such case there would have been neither a willingness to buy nor an enforceable contract to buy; one or the other of which conditions would be essential to the broker's right to compensation. But the latter condition (enforceable contract) is not essential where the first exists (willingness), and the sale is defeated by the owner of the property. The question whether or not the plaintiff performed the services called for by the contract is not wholly dependent upon the writing executed between the owners of the property and the proposed purchaser. The fact that the latter really was willing and able to buy, and would have bought, notwithstanding he was at liberty not to do so, had he not been prevented by the defendants' failure to produce proper evidence of title, must be regarded as controlling, and as dispensing with the necessity of a binding contract to purchase, which might otherwise have existed." *Hamburger v. Thomas*, 103 Tex. 230, 126 S. W. 561.

[5] It is urged by the appellee that the forfeiture clause rendered the contract not one of sale, but that it was an option given to the proposed purchaser. We believe this case falls under the rule announced in the case of *Moss v. Wren*, 102 Tex. 567, 113 S. W. 739, declared in the original opinion, and is not such a contract as falls under the opinion of the Supreme Court in the above case upon rehearing. 102 Tex. 567, 120 S. W. 840; *Heath v. Huffhines*, 152 S. W. 176. The case of *Crum v. Slade*, 154 S. W. 352, when rightly understood, is to the same effect. If the purchaser was ready and willing to perform the contract, then, under the rule announced in the case of *Hamburger v. Thomas*, supra, it would not be essential that the contract was enforceable, if the sale was defeated by the owner of the property.

[6] The contract of sale would not be void if the appellee knew that Henderson, who was then a member of the partnership agency of Henderson & Grant, was, at the time of making the contract, acting for the proposed purchaser, if he acted in good faith and with fairness towards the appellee in the transaction. Upon the record in this case, we do not feel justified in declaring, as a matter of law, because he (Henderson) was acting for the seller and purchaser, that the contract for that reason is void.

[7] The question of quantum meruit is presented by the pleadings in this case. It is doubtful whether the facts are sufficient to authorize the submission of that issue. We do not deem it necessary to decide that question at this time, and we are not fully agreed upon this issue. If the \$23 per acre was the list price, and the agents were to have all over that sum as compensation for their services, and the contract for the sale of the land having been made for that amount or less, it is suggested nothing was due the agent, whether or not the trade was consummated. The appellants, by the contract, had earned nothing, and the appellee's refusal to make the deed lost them nothing. The following cases, and others, appear to support this theory: *McCarty v. Bristow*, 145 S. W. 1029; *Evans v. Gay*, 74 S. W. 575. This, however, is not deemed necessary to a decision of this case, as we view it. If the jury shall find that appellee ratified the contract of sale, then by the contract he was to have \$14,720, less 5 per cent. commission; the purchaser was to pay the full sum of \$14,720. There was therefore \$736, as commission stipulated for in the contract, which both appellee and appellant recognized as being provided for in the contract. Under the contract, if ratified, appellants would be entitled to that sum.

We think the court was in error in refusing to submit the question of ratification to the jury, and for that reason the case is reversed and remanded.

#### GLOBE LOAN CO. v. BETANCOURT.

(No. 5398.)

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 5, 1914. Rehearing Denied  
Dec. 16, 1914.)

#### APPEAL AND ERROR (§ 65\*)—JURISDICTION OF COURT OF CIVIL APPEALS—AMOUNT IN CONTROVERSY.

Where plaintiff in justice's court, demanding judgment for \$104, recovered judgment for \$76, and, on appeal by defendant, filed in the county court an amendment reducing the demand to \$76, the amount in controversy in the county court was \$76, and the Court of Civil Appeals has no jurisdiction of an appeal from a judgment for that amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 315-328; Dec. Dig. § 65.\*]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by Ireneo Betancourt against the Globe Loan Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Chambers & Watson, of San Antonio, for appellant. Fred N. Cowen, Wm. H. Russell, and McCollum Burnett, all of San Antonio, for appellee.

FLY, C. J. This is a suit for double the alleged amount of usurious interest paid by appellee to appellant, which in the justice's

court was placed at \$104. The cause was tried by the justice of the peace, and judgment rendered in favor of appellee for \$76. The cause was appealed by appellant to the county court. During the trial in the county court, appellee filed an amendment, in which the amount claimed was reduced to \$76, and the jury found in favor of appellee for that amount.

By the amendment in the county court the amount in controversy was reduced from \$104 to \$76, a sum from which an appeal could not be prosecuted to this court. *Bishop v. Lawson*, 47 Tex. Civ. App. 646, 105 S. W. 1008.

The appeal is dismissed.

# MEMPHIS COTTON OIL CO. v. TOLBERT. (No. 659.)

(Court of Civil Appeals of Texas. Amarillo. Nov. 7, 1914. Rehearing Denied and Request to Certify Refused Dec. 5, 1914.)

## 1. APPEAL AND ERROR (§ 750\*) — ASSIGNMENT OF ERROR—ISSUE RAISED.

An assignment of error that under a defense pleaded, the evidence introduced, and the verdict thereon, it was error to render judgment for plaintiff does not raise the issue that the answer undenied was a bar to recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.\*]

## 2. PLEADING (§ 182\*) — SPECIAL MATTERS OF DEFENSE—FAILURE TO ANSWER.

Rev. St. 1911, art. 1829, as amended, providing that specially matters of defense not answered shall be taken as confessed, does not apply to matters anticipated by the petition; so that the allegations of the answer are the mere converse of those of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 387, 388; Dec. Dig. § 182.\*]

## 3. PLEADING (§ 412\*) — WAIVER OF OBJECTIONS — WANT OF REPLY.

Any right of defendant to judgment on the pleadings, because of absence of reply to allegations of the answer, is waived by proceeding to trial without claim thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. § 412.\*]

## 4. STATUTES (§ 114\*) — SUBJECT AND TITLE—WORKMEN'S COMPENSATION ACT.

The Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) has but one subject, and that expressed in the title, in compliance with Const. art. 3, § 35; the ends to be reached, while more than one, all relating to the employer's liability, and the proceedings for compensation of certain employes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145, 147-149; Dec. Dig. § 114.\*]

## 5. CONSTITUTIONAL LAW (§ 245\*) — EQUAL PROTECTION OF THE LAWS — WORKMEN'S COMPENSATION ACT.

The Workmen's Compensation Act is not violative of the equal protection clause of the United States Constitution. Const. U. S. Amend. 14, § 1.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 245.\*]

## 6. CONSTITUTIONAL LAW (§ 301\*) — DUE PROCESS—WORKMEN'S COMPENSATION ACT.

The Workmen's Compensation Act is not violative of the due process of law clause of the United States Constitution (Const. U. S. Amend. 14, § 1) and Const. Tex. art. 1, § 19.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 843-850, 857; Dec. Dig. § 301.\*]

## 7. MASTER AND SERVANT (§ 16½, New, vol. 16 Key-No. Series)—WORKMEN'S COMPENSATION ACT—POLICE POWER—PUBLIC POLICY.

The Workmen's Compensation Act is within the police power, and not contrary to public policy.

## 8. STATUTES (§ 64\*) — PARTIAL INVALIDITY — WORKMEN'S COMPENSATION ACT.

Even if the sections of the Workmen's Compensation Act, authorizing creation and regulation of the Texas Employers' Insurance Association, violate Const. art. 12, §§ 1, 2, as to creation of private corporations, they may be eliminated without impairing the sections as to contributory negligence, assumed risk, and fellow servants, complete within themselves and capable of being executed in accordance with the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 59-66, 195; Dec. Dig. § 64.\*]

## 9. DAMAGES (§ 221\*) — INJURIES TO SERVANT — TRIAL — VERDICT — SUFFICIENCY — CERTAINTY.

A verdict finding that \$7,000 would fairly compensate plaintiff for his injuries, that his earning capacity was decreased by his injuries \$5,000, and that the first amount should be diminished two-fifths on account of his contributory negligence, is sufficiently certain to sustain a judgment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 563-566; Dec. Dig. § 221.\*]

## 10. MASTER AND SERVANT (§ 87½, New, vol. 16 Key-No. Series)—INJURY TO SERVANT—ASSUMPTION OF RISK—WORKMEN'S COMPENSATION ACT.

Assumption of risk is, under the Workmen's Compensation Act, not a defense to a servant's action for injury.

## 11. APPEAL AND ERROR (§ 742\*) — GROUPING ASSIGNMENTS—BRIEFING.

An assignment complaining of the granting of plaintiff's motion for judgment for \$7,200 because excessive, and because the jury's finding authorized one for only \$4,200, and one complaining of refusal of defendant's motion for a judgment for only \$4,200, because there was no pleading or evidence to support one for more, relate to the same question, and so may be grouped in the brief and considered together.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 12. APPEAL AND ERROR (§ 742\*) — ASSIGNMENTS OF ERROR—PROPOSITIONS.

Neither the proposition that the jury's finding in answer to an issue requested by plaintiff was not signed by the jury nor one that defendant's plea of contributory negligence, assumption of risk, and fellow servant, not having been denied by supplemental petition, should have been taken as confessed is germane or relevant to, or included in, assignments complaining of the granting of plaintiff's motion for judgment for \$7,200, because excessive, and because the jury's finding authorized one for only \$4,200, and of the refusal of defendant's motion for a judgment for only \$4,200, because there was no pleading or evidence to support one for more.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**13. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.**

Assignments of error not propositions in themselves, and followed by no propositions, but referring merely to propositions under another assignment, not germane to them, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**14. APPEAL AND ERROR (§ 742\*)—GROUPING ASSIGNMENTS—BRIEFING.**

Assignments of error, one that plaintiff failed to plead diminished earning capacity as an element of damages, and that there was no evidence thereon, and therefore the judgment was \$3,000 excessive, another that the judgment should not have been \$7,200, but not to exceed \$4,200, because the pleadings, evidence, and jury's findings did not authorize it, and another that the jury's findings show they did not intend to find for plaintiff in excess of \$4,200, and that the judgment was \$3,000 in excess of what they intended to return, present questions so related that the assignments may be grouped in the brief and considered together.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**15. DAMAGES (§ 221\*)—INJURIES TO SERVANT—TRIAL—SUBMISSION OF ISSUES—DIMINISHED EARNING CAPACITY.**

The issue submitted to the jury, "What sum, \* \* \* if now paid, would fairly compensate plaintiff for such injuries as he received in the loss of his arm, part of his ear, the injuries \* \* \* to his head, neck, \* \* \* side and \* \* \* foot, and to his hearing, \* \* \* and to his mind and memory," with a direction that, "In answering this question, you may take into consideration the physical and mental pain \* \* \* suffered by plaintiff, because of his said injuries, and whether or not and to what extent his injuries are permanent," includes a consideration of diminished earning capacity in the future.

[Ed. Note.—For other cases, see Damages, Century Dig. §§ 563-566; Decennial Dig. § 221.\*]

**16. APPEAL AND ERROR (§ 274\*)—OBJECTIONS RAISED BY EXCEPTION—INSTRUCTIONS.**

Objection that a charge permits a double recovery is not presented by an exception: "It is not the law; there is no pleading, and no evidence to support the issue."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605-1607, 1624, 1631-1645; Dec. Dig. § 274.\*]

**17. APPEAL AND ERROR (§ 273\*)—REVIEW—INSTRUCTIONS—WAIVER OF OBJECTIONS.**

A charge not having been excepted to as authorizing a double recovery, objection to it on that account is waived under the law with reference to charges, as amended by Acts 33d Leg. c. 59.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.\*]

**18. DAMAGES (§ 221\*)—INJURIES TO SERVANT—TRIAL—VERDICT AND JUDGMENT.**

Where, under issues submitted, the jury find the whole amount of plaintiff's damages from his injury to be \$7,000, and the amount of his damages from diminished earning capacity to be \$5,000, the latter being included in the former, only the \$7,000 can be considered in rendering judgment.

[Ed. Note.—For other cases, see Damages, Century Dig. §§ 563-566; Decennial Dig. § 221.\*]

**19. DAMAGES (§ 159\*)—TRIAL (§ 311\*)—DIMINISHED EARNING CAPACITY—PLEADING AND PROOF.**

Alleging and proving physical and mental condition which would necessarily result in loss of earning capacity is sufficient pleading and proof of diminished earning capacity, which may be ascertained by the jury from their common knowledge of men.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 429-438, 440-444, 447, 449-453; Dec. Dig. § 159; Trial, Cent. Dig. § 739; Dec. Dig. § 311.\*]

**20. EVIDENCE (§ 471\*)—OPINIONS.**

Testimony of persons who knew plaintiff before and after his injury that thereafter they noticed a changed condition in his ability to remember things and talk connectedly, relating what they observed, is not opinion evidence as to his mental condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**21. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—NEGLIGENCE—PLEADING AND PROOF.**

Though a servant's petition for injury from a belt coming off a pulley merely charged negligence in the belt being too short, condition of a shaft, though not admissible to show negligence in that respect, is admissible as bearing on the fact that the belt, if too short, would be thrown from the pulley.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**22. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The court having only submitted to the jury the negligence charged in the petition, any admission of evidence bearing on negligence in another respect was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**23. DAMAGES (§ 158\*)—PERSONAL INJURIES—PLEADING AND PROOF.**

Ordinarily personal injuries other than those alleged in the petition cannot be proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-444; Dec. Dig. § 158.\*]

**24. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Plaintiff's testimony of his having received an injury other than those alleged in the petition, having been expressly withdrawn from the jury, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**25. APPEAL AND ERROR (§ 1052\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Plaintiff having been found guilty of contributory negligence, admission of any conclusion that plaintiff got in the best position he could was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.\*]

**26. EVIDENCE (§ 194\*)—DEMONSTRATIVE EVIDENCE—INJURY TO SERVANT.**

The shoes which plaintiff wore when injured by the coming off of a belt while he was putting it on, being in the same condition as at the time of the accident, are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 679; Dec. Dig. § 194.\*]

**27. DAMAGES (§ 173\*)—PERSONAL INJURY—PLEADING AND PROOF.**

The wages received by plaintiff and his ability to fire on an engine, though not express-

ly pleaded, may be shown in a servant's action for injury while employed about an engine.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.\*]

**28. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.**

As bearing on the alleged negligence, in a servant's action for injury from the coming off of a belt while he was putting it on, that it was too short, evidence that on a subsequent attempt to put it on the same pulley it came off is admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

Appeal from District Court, Hall County; J. A. Nabers, Judge.

Action by A. T. Tolbert against the Memphis Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

Presler & Thorne, of Memphis, Chas. K. Lee and W. D. Smith, both of Ft. Worth, and Taylor & Humphrey, of Henrietta, for appellant. Moss & Leak, of Memphis, R. R. Hazlewood and Jones & Miller, all of Amarillo, for appellee.

**HUFF, C. J.** A. T. Tolbert, appellee, instituted this suit in the district court of Hall county against appellant, Memphis Cotton Oil Company, for damages for personal injuries received while in the employment of appellant in and about its mill. The statement of the pleadings will be noticed later under assignments of error.

[1] The appellant presents as his first assignment the following:

"Because the judgment of the court is contrary to the law and the evidence and the findings of the jury in this said cause, in this: That the defendant pleaded as a defense assumed risk, fellow servant, and contributory negligence; and the jury found in favor of each and all of said defenses, and the court, notwithstanding the fact said defenses were pleaded, the proof made, and the jury finding in favor of each of said defenses, wholly failed and refused to enter up a judgment on said defenses and on said findings of the jury, which is contrary to law."

Appellant presents, as additional propositions under the above assignment, six propositions and subdivisions a, b, c, d, and e of proposition 6. The statement follows the last proposition, setting out the answer of appellant, the special issues submitted to the jury for their findings, and certain requested issues, and the answer of the jury to the issues. The first additional proposition is substantially that the defendant, having pleaded the defense of assumed risk, fellow servant, contributory negligence, which plaintiff failed to deny by supplemental petition, the court was not authorized to submit these, except as complete defenses and in complete bar to a recovery by plaintiff. The assignment we do not think raises the issue that the answer undenied was a bar to a recovery; that is, under the pleadings alone that defendant was entitled to a judgment. The

assignment is that under the defense pleaded, the evidence introduced, and the verdict of the jury thereon, the court erred in rendering judgment for the plaintiff. We do not think the first proposition germane to the assignment. Appellant evidently by this proposition seeks in this court, under article 1829, R. C. S., as amended, a judgment upon the pleadings as upon confession. This was not the ground urged in its motion for new trial and brought up to this court as an assignment. There is no statement under the proposition giving the pleadings of plaintiff. The statement contained in the proposition itself cannot be considered as a compliance with the rule requiring such statement. The appellee, in his statement answering this proposition, asserts that the original petition in several places alleges plaintiff was in the exercise of ordinary care and was doing the work in the usual way, and that he did not know of the failure of the defendant to repair the defective conditions until the very time of the injury, and that the defendant was negligent in failing to provide reasonably safe means, instrumentalities, etc.

[2, 3] Referring to the clause of the statute, "Any fact so pleaded by the defense that is not denied by the plaintiff shall be taken as confessed," Judge Moursund, speaking for the Court of Civil Appeals, Fourth district, said:

"This, of course, only applies to facts not already in issue by virtue of plaintiff's allegations. To allege in affirmative language the converse of what plaintiff has alleged does not constitute new matter which must in turn be controverted." *Railway Co. v. Pennington*, 166 S. W. 464.

While the defense set up by the appellant in this case is affirmative in its nature, yet, if the plaintiff anticipated such defense in his original petition, and denied its existence, we see no good reason for requiring a repetition thereof by supplemental petition. The allegations contained in the original petition, in effect, deny the defenses set up. We believe the Court of Civil Appeals in the *Pennington* Case, *supra*, correct in the holding that:

The general rule announced by 31 Cyc. 733, "conduces to a fair trial and will prevent litigants from taking up the time of the court with experimental trials, relying upon saving themselves if things go wrong by urging that they should have judgment upon the pleadings. Therefore we hold that, if defendant was entitled to a judgment upon the pleadings, it waived its right thereto, and we give such holding as an additional reason for deciding that appellant's first proposition is without merit." *Telegraph Co. v. Andrews*, 169 S. W. 218; *Railway Co. v. Tomlinson*, 169 S. W. 217.

The second, third, and fourth propositions are to the effect that the jury found in favor of appellant upon contributory negligence, assumed risk, and fellow servant, and that judgment should have been rendered in its favor. The correctness of this proposition depends upon whether propositions 5 and 6

are sound. Propositions 5 and 6 assert that the act of the Legislature known as the Workmen's Compensation Act (chapter 179, Acts 33d Legislature) is unconstitutional, for the following reasons: (a) It is in conflict with section 35, art. 3, of the Constitution of this state, in that the subject of the act is not expressed in the title thereof, and for the reason that said act contains more than one subject; (b) it is unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws"; (c) it violates the fourteenth amendment of the Constitution of the United States, and section 19, art. 1, of the Constitution of the state of Texas, in that the act authorizes the taking of the property of a citizen and depriving him of his liberty without due process of law; (d) The act is contrary to public policy, and is not within the police power of the state; (e) it is in violation and contrary to article 12, §§ 1, 2, of the Constitution of the state of Texas, which provides:

"No private corporation shall be created except by general laws. General laws shall be enacted providing for the creation of private corporations."

The act undertakes to create by special enactment a private corporation to be known as the "Texas Employers' Insurance Association." The following is a copy of the title of the act and the first and second sections:

"An act relating to employers' liability and providing for the compensation of certain employes and their representatives and beneficiaries, for personal injuries sustained in the course of employment, and for deaths resulting from such injuries, and to provide and determine in what cases compensation shall be paid, and to make the payment thereof the more certain and prompt by the creation of an insurance association to insure and guarantee such payments and of an industrial accident board for the investigation of claims and for the adjudication thereof for consenting parties, fixing the membership and powers of said board and its compensation and duties, and the method of its appointment, and the term of office of its members, and fixing also the powers, duties and liabilities of said insurance association and the extent of control over the same to be exercised by the commissioner of banking and insurance, and providing also for the insurance of payments of compensation to employes by certain other insurance companies and organizations, and declaring an emergency.

"Be it enacted by the Legislature of the state of Texas:

#### Part 1.

"Section 1. In an action to recover damages for personal injuries sustained by an employe in the course of his employment, or for the death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employe was guilty of contributory negligence; but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employe, provided that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence where the vio-

lation by such employer of any statute enacted for the safety of the employes contributed to the injury or death of such employe.

"2. That the injury was caused by the negligence of a fellow employe.

"3. That the employe had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employe to bring about the injury.

"4. Provided, however, in all such actions against an employer who is not an (a) subscriber as defined hereafter in this act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

"Sec. 2. The provisions of this act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employes of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employes of any person, firm or corporation having in his or their employ not more than five employes."

Following section 2 there are some 15 other sections in part 1 of the act, and in part 2 there are some 7 sections, and in part 3 there are some 23, and in part 4 some 7 sections. The latter parts and sections than those quoted relate to the organization of the insurance company, etc., which will be unnecessary to set out in full.

[4] "Articles of an act essentially single in subject which do not thus conceal or disguise the real purpose, are not subject to the constitutional objection, although the ends intended to be reached through the one subject may be many." Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865. "The purpose of the constitutional provision is merely to reasonably apprise the legislators of the contents of the bill, to the end that surprise and fraud in legislation may be prevented. We think the title in question sufficiently full to give reasonable notice to the contents of the act." Doeppenschmidt v. I. & G. N. Ry. Co., 100 Tex. 532, 101 S. W. 1080. While it is true that the provision of the Constitution in question is mandatory, "such provisions have been liberally construed, and it has been steadily held that a title which, in substance, is a compliance with the requirement of the Constitution is sufficient." Gunter v. Texas Land & Mortgage Co., 82 Tex. 496, 17 S. W. 840-842. We have concluded that the subject of the act is stated in the title, and that there is not more than one subject contained therein. The ends to be reached are more than one, but all relate to the employer's liability and the proceedings for the compensation of certain employes, etc. The employer is liable when he is not a subscriber to the insurance association, and the act then further provides what compensation the employe may receive from the association when the employer is a member thereof. We regard the following authorities as in point on the question as to what may be considered under the subject

and as related to the subject, and whether or not there is more than one subject named in the title. *Railway Co. v. Stoker*, 102 Tex. 60, 113 S. W. 3; *Nalle v. City of Austin*, 103 S. W. 825; *Taggart v. Hillman*, 42 Tex. Civ. App. 71, 93 S. W. 245; *Railway Co. v. Smith*, 54 Tex. 1; *Stone v. Brown*, 54 Tex. 341; *Focke v. State* (Cr. App.) 144 S. W. 267.

[5-7] Subdivisions b, c, and d of proposition 6 have been fully answered by the courts of this state in various decisions. They have held a similar statute relating to the employes of railroads not in violation of the fourteenth amendment to the Constitution of the United States, and we think the reasons advanced in those cases applicable to this. *Railway Co. v. Jenkins*, 137 S. W. 711; *Railway Co. v. Sadler*, 149 S. W. 1188; *Railway Co. v. Grenig*, 142 S. W. 135; *Railway Co. v. Matkin*, 142 S. W. 604. We think the Supreme Court of the United States has answered the appellant's proposition that the act in question is contrary to the Constitution of the United States, in that it is class legislation, and that it makes an arbitrary division of the employes, and that the act is contrary to public policy, and authorizes the taking of the property of the citizen, etc. It is held by that court that no one has a vested right in the common law. "The law itself may be changed at the will of the \* \* \* Legislature, unless prevented by constitutional limitations." If the appellant had been possessed of property created by the common law, the Legislature could not deprive it of such property by changing the law, but that is not this case. *Mondou v. Railway Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Aluminum v. Ramsey*, 222 U. S. 251, 32 Sup. Ct. 76, 56 L. Ed. 185.

[8] Subdivision "e" of proposition 6 asserts that the act is unconstitutional, because it violates article 12, §§ 1, 2, of the Constitution of this state. We shall not discuss the question of what is a general law within the meaning of the provision of the Constitution, but it will, we think, be sufficient to say that, if the sections of the act authorizing the creation and regulation of Texas Employers' Insurance Association are unconstitutional, because not authorized under the general incorporation law of this state, the sections of the law involved in this suit are not so connected with the insurance sections as to render void the sections relating to contributory negligence, assumed risk, and fellow servant.

It is a well-recognized principle that an act may be unconstitutional, and therefore void, as to some of its provisions and valid as to others. If the insurance sections are repugnant to the Constitution and should be stricken out, yet, if that which remains of the act and which are involved in this suit are complete within themselves and capable of being executed in accordance with the leg-

islative intent, then such parts so remaining should be held valid. *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Breen v. Railway Co.*, 44 Tex. 302. We think the sections relating to insurance of employes may be so eliminated from the act, if they should be held repugnant to the Constitution, without impairing other sections of the act in question. We do not wish to be understood as holding that the sections relating to insurance associations are unconstitutional. We do not pass on that question at this time, for the reason that we do not think it necessary in order to hold the other portions valid. This assignment will be overruled.

[9, 10] Appellant presents its second and third assignments together. Assignment No. 2 is to the effect that the court erred in rendering judgment upon the motion of plaintiff for \$7,200, because, under the findings by the jury, he was not entitled to a judgment in any sum. The third assignment is to the effect that the court erred in entering judgment upon the motion, because said findings were so conflicting that the plaintiff was not entitled to a judgment thereon. Appellee objects to the consideration of these assignments, because improperly grouped, and also to the consideration of the propositions and statements thereunder. We cannot say, under these assignments, that they present distinct questions. The first proposition asserts that the verdict is conflicting, and judgment should have been rendered against plaintiff and for defendant; and the second proposition that it is impossible to tell whether the jury meant for plaintiff to have nothing, or whether they meant for him to have \$4,200; or whether they meant for him to have \$7,200; or whether they meant for him to have \$9,200, and that it is therefore so confusing and vague that it is insufficient to support a verdict for the plaintiff for the amount of \$7,200, or for any sum whatever. This will necessitate setting out the issues submitted to the jury, and their findings, which are as follows:

"Questions.

"(1) Was the belt which injured plaintiff too short at the time the injury occurred? Answer: Yes.

"(2) If you answer the last question in the affirmative, then say whether the fact that the belt was too short, if you find it was, was the proximate cause of plaintiff's injury. Answer: Yes.

"(3) Was it the special duty of Bob Kemp to keep belts repaired and in proper condition for the purposes for which they are used? Answer: Yes.

"(4) Did Bob Kemp have his attention called to the fact, if it was a fact, that the belt was too short, if you find it was, by plaintiff prior to the time of the accident? Answer: Yes.

"(5) Did Bob Kemp fail to repair said belt? Answer: Yes, he did.

"(6) If, in answer to the last question, you should say that Bob Kemp did fail to repair said belt, then say whether or not such failure, if such you find there was, was negligence on his part. Answer: Yes.

"(7) If you say that Bob Kemp failed to repair the belt, then say whether or not such failure, if such you find there was, was the cause of the accident which injured plaintiff. Answer: It was.

"(8) It is the duty of employers to use ordinary care to furnish their employes with reasonably safe appliances for the doing of their work. Now, did said defendant company do this as regards the matter of the belt being too short, if you find it was? Answer: No.

"(9) If, in answer to the last question, you should say, 'No,' then say whether such failure of duty on the part of the defendant company, if such you find there was, was the proximate cause of plaintiff's injuries. Answer: Yes.

"(10) What sum of money, if now paid, would fairly compensate plaintiff for such injuries as he received in the loss of his arm, part of his ear, the injuries, if any, to his head, neck, and right side, and left foot, and to his hearing, if any, and to his mind and memory, if any? And, in answering this question, you may take into consideration the physical and mental pain, if any, suffered by plaintiff because of his said injuries, and whether or not and to what extent his injuries are permanent, if you find they are. Answer: \$7,000.00.

"(11) Was plaintiff himself guilty of contributory negligence in the manner he put on said belt at the time he got hurt? Answer: Yes.

"(12) If you say in answer to the last question that plaintiff was guilty of contributory negligence, then say whether or not such negligence, if any, contributed to or caused the injuries of plaintiff? Answer: Contributed to the cause of injury.

"(13) Did the plaintiff assume the risk of the injuries he received? Answer: Assumed part of the risk.

"(14) Did the plaintiff actually know of the danger, if any, he was incurring at the time he got hurt, or were the dangers so open and apparent that plaintiff must have known of such danger, if any, that he was incurring, if you find he was, in adjusting the belt in the way he did? Answer: No.

"(15) If you say that the plaintiff's injuries were caused in part by the negligence of both plaintiff and defendant company, if any, concurring together, if you find they did, then say how much the amount named in paragraph 10 of this charge, if any amount is named, should be reasonably diminished, if you find it should by reason of plaintiff's negligence, if you find he was negligent, taking into consideration the amount of negligence attributable to said plaintiff, if any, and diminishing such amount, if any, in proportion to such negligence of plaintiff, if any? Answer: Two-fifths."

The jury answered the following issues requested by plaintiff and submitted by the court:

"At the request of the plaintiff, you are instructed to find from the evidence whether or not the earning capacity of the plaintiff has been decreased by reason of his injuries; and if you find that his earning capacity had been decreased thereby, you will then say to what extent plaintiff's earning capacity has been decreased by reason of his injuries. Answer this as a separate question; don't get it mixed up with paragraph 10 of the general charge. Answer: Decreased \$5,000."

The jury also answered the following issues submitted by the defendant:

"(1) Was the plaintiff, at the time he was injured, a fellow servant with Bob Kemp in the work in which they were engaged? Answer: Yes.

"(2) Was Bob Kemp the foreman of the Dixie cream mixer machinery at the time of the injury to plaintiff? Answer: Yes.

"(3) Did Bob Kemp, at the time of the injury to the plaintiff, have the authority to employ and discharge employes? Answer: No.

"(4) Was Bob Kemp, at the time of the injury of the plaintiff, in charge of the Dixie cream machinery as foreman under the direction of P. M. Holland? Answer: Yes.

"(5) Did Bob Kemp, at the time of plaintiff's injury, direct the plaintiff how to perform the service he was performing at such time? Answer: No."

We think the answer of the jury to the fifteenth issue, to the effect that appellee's recovery should be diminished two-fifths on account of his own negligence, gave a rule by which the court could ascertain the amount found by the jury and for which judgment should be rendered. If the act of the Thirty-Third Legislature above quoted is constitutional, which at the time of the injury was in force, the fact that appellant himself was guilty of negligence contributing to his injury would not defeat a recovery, but would diminish his damages in proportion to such contributory negligence. The fact the laborer was injured through the negligence of a fellow servant or that he had assumed the risk is not a defense under the above act. We are inclined to believe the answers of the jury to the thirteenth and fourteenth issues do not find that appellee assumed the risk from the defective belt. While the answer to the thirteenth issue is that he assumed a part of the risk of the injuries he received, the answer to the fourteenth is that he did not know the danger he was incurring at the time he got hurt, and that the danger was not so open and apparent that he must have known of such danger in adjusting the belt. If the issue propounded had been as to his knowledge of the defect in the belt, then certainly there would have been no uncertainty in the verdict. We are inclined to think the answer to the preceding issues, especially the eighth and ninth, to the effect that appellant was negligent in furnishing the belt, and that such defective belt and negligence on the part of appellant was the proximate cause of the injury, renders the verdict reasonably certain. If the belt was too short, and this was the proximate cause of the injury, its then condition was the danger which appellee did not know, and the danger therefrom was not then open and obvious to him, and if appellee did not so know or was not charged with such knowledge, he did not assume the risk. The jury clearly found that the damages sustained by appellee should be diminished two-fifths, chargeable to appellee's negligence, which would, under the law, diminish his recovery to the amount for which the judgment should be rendered. We think the verdict sufficiently certain to sustain a judgment.

[11] The fourth and fifth assignments are presented together. The fourth complains at the action of the court in granting appellee's motion to render judgment for \$7,200, because excessive, and because the finding of

the jury authorized a judgment only for the sum of \$4,200.

The fifth assignment complains at the action of the court in refusing appellant's motion for judgment only for the sum of \$4,200, because there were no pleadings or evidence to support a sum in addition to that amount. These assignments are objected to because grouped. We think they relate to the same question, and may be considered together. The first proposition is largely in the nature of a statement, but is perhaps sufficiently explicit to present the issue. We think the judgment should have been rendered for \$4,200, under the findings of the jury, and the assignment in that respect will be sustained, for the reasons hereinafter presented under assignments 8, 9, and 10.

[12] The second proposition is to the effect that the findings of the jury in answer to the issue requested by the plaintiff was not signed by the jury. This proposition is not germane to either of the above assignments. The third proposition is to the effect that, since appellant pleaded contributory negligence, assumed risk, and fellow servant, and there was no denial by supplemental petition, that this plea should have been taken as confessed. This proposition is not relevant or included in either of the assignments.

[13] The sixth and seventh assignments are not propositions within themselves, and are followed by no propositions, but refer to propositions under the second assignment. The propositions there considered are not in any wise germane to these assignments.

[14] The eighth, ninth, and tenth assignments are presented together. Appellee urges the same objections to the manner of briefing them. The eighth assignment is, in effect, that plaintiff failed to plead as an element of damages by reason of diminished earning capacity, and, there being no evidence thereon, plaintiff was not entitled to recover any sum therefor, and that the judgment is therefore excessive in the sum of \$3,000.

The ninth assignment is substantially that the judgment should not have been rendered for \$7,200, but, if for anything, not to exceed \$4,200, because the pleadings, evidence, and the findings of the jury did not authorize the same, and that the judgment is excessive in the sum of \$3,000, and is a double recovery against defendant.

The tenth assignment is because the findings of the jury show upon their face that they did not intend to find for plaintiff in any sum to exceed \$4,200, and that the judgment for the sum of \$7,200 is \$3,000 in excess of what the jury expected and intended to return in favor of the plaintiff. We believe the questions presented by the assignments are so related that they may be considered under one assignment. The first and second propositions are not in accordance with the rules.

[15] The third proposition is to the effect that, when the jury awarded damages for all physical injuries sustained by him, taking in-

to consideration the permanency thereof, such damages would include any diminished capacity to earn money by reason of such injuries. It will be observed that the tenth issue submitted for the finding of the jury is:

"What sum of money, if now paid, would compensate plaintiff for such injuries as he received in the loss of his arm, etc? And in answering this question you may take into consideration the physical and mental pain, if any, suffered by plaintiff because of his injuries, and whether or not, and to what extent, the injuries are permanent, if you find they are."

The jury answered: "\$7,000."

At the request of the plaintiff the court submitted the issues:

"You are instructed to find from the evidence whether or not the earning capacity of the plaintiff has been decreased by reason of his injuries, and if you find, etc., you will state to what extent, etc. Answer this as a separate question; don't get it mixed up with paragraph 10 of the general charge."

The jury answered: "Decreased \$5,000."

We are inclined to believe the tenth instruction included a consideration of diminished capacity to earn money in the future. "The decreased capacity to labor and earn money would necessarily be a result of the impairment of physical and mental health." *Railway Co. v. Butcher*, 98 Tex. 462, 84 S. W. 1052; *Railway Co. v. Smith*, 63 S. W. 1064-1067; *Ry. Co. v. Bock*, 88 Tex. 310, 31 S. W. 500.

[16-18] We do not think the precautionary admonition, added to plaintiff's requested issue, sufficient to direct a finding on the damages sustained for permanent physical and mental injuries and diminished capacity to labor and earn money as constituting one item, but, in fact, it is a direction to consider them separately. This would reverse the case, if the appellant had excepted to the charge on the ground that it authorized a double recovery. The exceptions presented to this charge in the trial court are: "It is not the law; there is no pleading and no evidence to support the issue." This is not an objection that it permitted a double recovery. It has long been the rule that objections to evidence which were not made in the trial court will be considered as waived. *Hill v. Baylor*, 23 Tex. 261; *Pool v. Wedemeyer*, 56 Tex. 287-300. We see no good reason why the same rule should not be applied to exceptions taken to the court's charge. If the exception was not made in the trial court that the charge authorized a double recovery, it should be regarded as waived under the law as amended, with reference to charges, by the Thirty-Third Legislature (chapter 59, p. 113), and the previous holdings of this court. We think the appellant should be held to have waived the exception here presented; but, as above suggested, under assignments 4 and 3, the judgment should have been rendered for three-fifths of \$7,000. This amount, under issues 10 and 15, clearly include the issue requested by the plaintiff, appellee herein. The

findings of the jury are not inconsistent with each other. One included diminished capacity to earn money by reason of physical, mental, and permanent injury, and also physical and mental suffering, which the jury found had damaged appellee in the sum of \$7,000. Under the issue requested by appellee, they found his damage by reason of diminished capacity alone to be \$5,000. By this method the jury itemized the damages.

[19] The fourth proposition is substantially that the appellee did not plead his earning capacity, and there was no evidence thereof, and that the findings of the jury thereon are without pleading or evidence. The physical and mental condition of appellee, as alleged and proven, would necessarily result in the loss of his earning capacity, as above stated by us. The diminished capacity of appellee to labor or earn money may be inferred from the nature and character of the injuries sustained, and may be ascertained by the jury from their common knowledge of men. *Railway Co. v. Vance*, 41 S. W. 167-170.

The eleventh assignment will be overruled. While we do not approve of the form of the judgment, it is, we think, a final judgment, and will sustain an execution for the amount adjudged.

[20] The twelfth, thirteenth, and fourteenth assignments complain at the action of the court in admitting the testimony of Mrs. Ellis Kennedy, J. A. Presley, and Silas Wood, as to certain evidence relative to the appellee's mind after the injury. The propositions presented are that the statements of the condition of the appellee's mind was the opinion of nonexpert witnesses, and no sufficient facts were given upon which to base the same, etc. Mrs. Kennedy testified:

"Since his injury I have noticed a changed condition of his ability to remember things and talk connectedly. He cannot hold a conversation very long. He will talk, and then will go off on something else. I noticed that in his conversation on the first Sunday he came home."

Mrs. Kennedy is the mother of appellee. This we do not think an opinion as to the mental condition of appellee. It is simply a statement of facts observed by her.

Presley, with whom appellee had worked before the injury, testified:

"I have had more talk with him since the injury than I ever did before, but I never noticed his talk scatter before. It don't seem that he can stay on a conversation now very long, and I didn't notice anything of the kind before. If he was that way before, I did not notice it."

Silas Wood testified to his acquaintance with appellee before and after the injury, and testified, in substance, that appellee was not in the same condition of mind or had the same mind he had before the injury. The court sustained the objection of appellant to this evidence, but, upon assurance of counsel to follow it up, the court permitted the examination to proceed. The witness then stated:

"I notice in talking with him since that accident that he seems to forget things that he states, and recites them in a way I never noticed

before. Before that time his conversation was methodical, and now he will talk along and change off on something else, and maybe drop back and reverse what he has been saying."

We do not understand from this testimony that the witnesses were testifying that, in their opinion, the mind of the appellee was weak, or that he was mentally unbalanced, or that he was insane, but they simply related the facts which had fallen under their observation. The jury from these facts were left to draw their own conclusions. The assignments are overruled.

[21, 22] The fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth assignments are grouped and relate to the testimony of several witnesses, the substance of which may be stated to be that they testified as to the length of the elevator shaft and how it was placed and braced in the elevator, and that, if the belt was too short and too tight, it would spring the shaft so as to throw the belt off of the pulley. The appellant objected to this testimony on the ground that there were no allegations in the petition that the brace to the pulley or shaft was the cause of the accident, and that it was irrelevant, immaterial, and prejudicial to the defendant's rights. The plaintiff in his original petition, after describing the length of the elevator shaft, the position of the pulleys thereon, and its position with reference to another shaft in the same building, allege generally that his injuries were caused by the carelessness and negligence of the defendant in failing to provide a reasonably safe place to work and reasonably safe appliances with which to do the work, in this: That the belt which he was attempting to put on the pulley at the time of his injuries was from 1½ to 2 inches too short, and alleging negligence on the part of appellant in failing to furnish a proper belt, etc. We do not understand the evidence in this case to have been offered or admitted for the purpose of proving negligence on the part of appellant with reference to bracing the elevator shaft or with reference to the manner in which the pulley was placed on the shaft. The purpose appears to have been to show that the belt, if too short, or too tight, would spring the shaft, and cause the pulley thereon to turn in such way that it would throw the belt therefrom. If the appellee had sought to prove negligence on the ground of failure to properly brace the shaft or pulleys, and sought to show negligence on the part of the appellant in that particular, we do not think the testimony under the pleadings would be admissible; but, for the purpose of showing that the belt, if too short, would be thrown from the pulley, we think the facts which showed the condition and the probability of such an occurrence were admissible; but, if not admissible under the pleadings in this case, there was no error or injury resulting therefrom, for the reason that the court only sub-

mitted as to negligence whether or not the belt was too short, and therefore in a defective condition. Where testimony is irrelevant and immaterial, or not supported by the pleadings, if not submitted by the court's charge, as a rule, it will not work a reversal of the case. *Higby v. Kirksey*, 163 S. W. 315. The above assignments are overruled.

[23, 24] The twenty-first and twenty-second assignments of error are grouped, and relate to the admission of testimony by the appellee that he was injured in the small of his back, and the testimony of J. A. Presley that appellee had an injury on the back of his head. The testimony of the appellee was expressly withdrawn from the jury. Presley had stated when the plaintiff was taken to the sanitarium he had seen wounds on the plaintiff, and among other wounds which he described was one on the back of his head. Ordinarily, a party cannot prove injuries other than those alleged in the petition; but, under the facts alleged in this case as to the manner in which the injury occurred and the injuries to the right side, head, etc., we are unable to see any injury that did or could have resulted to the appellant by reason of this statement of Presley; and the statement of the appellee himself, having been withdrawn from the consideration of the jury, would certainly not prejudice appellant. We overrule this assignment.

[25] The twenty-third assignment is to the testimony of the appellee, Tolbert, where he stated: "We changed our places, and we got in the best position we could at the places to put on the belt. I used the best care to my knowledge that I could." The objection was that this was a conclusion of the witness as to whether or not they got in the best position they could, and whether the plaintiff used the best care to his knowledge. We see no injury to appellant by the admission of this testimony. The jury found that the appellee was guilty of contributory negligence, and evidenced the fact that they did not consider this statement of the appellee that he used his best care, etc. This assignment is overruled.

[26] The twenty-fourth assignment of error is to the effect that the court erred in permitting the exhibition to the jury of the shoes which he had on at the time of the injury. The evidence shows the shoes were in the same condition at the time they were exhibited that they were in shortly after the injury. We think the testimony was admissible under the circumstances of this case, and that no injury resulted.

[27] The twenty-fifth and twenty-sixth assignments of error relate to the wages that the appellee received and his knowledge or ability to fire on an engine, etc. The objections are that the pleadings did not authorize the introduction of such testimony. We overrule the assignment, and hold the testimony was admissible.

We think no error is shown by the twenty-seventh assignment of error, with reference to what the appellee testified in regard to signing a certain statement procured from him shortly after the accident by the appellant company; and, in explaining why he signed the instrument, he stated he did not think the defendant company would have him sign anything that was not at all right, etc. This testimony was possibly admissible to explain the intent that he had at the time of signing the instrument in question. We think there is no serious injury done appellee or reversible error in admitting it.

[28] By the twenty-eighth assignment objection was made to the testimony of Bob Kemp and other witnesses, which, in effect, is that efforts had been made after the accident in question to put on the same belt on the same pulley, and that it came off. The objection urged by appellant as to what might have been done since the injury is irrelevant and immaterial and prejudicial to the rights of the appellant, and that there is no proper predicate laid. We think, under the circumstances, the testimony was admissible as bearing upon the question of appellant's negligence in regard to the belt; it may be slight, but it is admissible, we think, under the circumstances. *Railway Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163; *Railway Co. v. Woolridge*, 63 S. W. 905.

In considering this case we have been compelled, over appellee's objections to the brief, to investigate the authorities with reference to briefing, which has taken more time than upon the main questions at issue on the appeal. The brief is subject to the criticisms offered in many instances, and we believe we would have been justified in disregarding some of the assignments, propositions, and statements, but we concluded it would be better to consider the case upon the brief presented. If counsel, in briefing their cases, would observe and follow the rules more closely, they would save the court time and trouble in investigating various objections that are urged to briefs improperly prepared under the rules.

In this case the judgment of the lower court will be reformed, and rendered for the sum of \$4,200, and, as reformed, the judgment will be affirmed, at the cost of appellee.

**PECOS & N. T. RY. CO. et al. v. GRUNDY et al. (No. 678.)**

(Court of Civil Appeals of Texas. Amarillo. Nov. 21, 1914. Remittitur filed Nov. 24, 1914.)

**1. TRIAL (§ 279\*) — INSTRUCTIONS — OBJECTIONS.**

The objection, "failing to charge \* \* \* correctly the measure of damages \* \* \* the measure as to difference in market and actual value," to the court's charge that, if it be found part of the goods were damaged as alleged, the jury will find such damages as were incurred through the carrier's negligence, is insufficient to show the trial court wherein was the error as required by Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971).

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 690; Dec. Dig. § 279.\*]

**2. DAMAGES (§ 105\*) — LOSS OF SECONDHAND GOODS—EVIDENCE.**

The owner of clothing and household goods, which had been used by him, and so were secondhand, may, in the action for their loss by a carrier, testify to their value, the loss to him in money, and not what they would sell for in any market being the measure of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 266–271; Dec. Dig. § 105.\*]

**3. EVIDENCE (§ 501\*)—VALUE—QUALIFICATION OF WITNESS.**

To qualify the owner to testify to the value of his wearing apparel and household goods, lost by defendant, he need not state their cost and the period of their use and their condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292–2305; Dec. Dig. § 501.\*]

**4. CARRIERS (§ 105\*)—DELAY IN TRANSPORTATION—SPECIAL DAMAGES.**

The carrier not being apprised that any such special damages would ensue from delay in transporting a car of household goods, recovery cannot be had for board bills and room rent paid by the owner while awaiting their arrival.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451–458; Dec. Dig. § 105.\*]

**5. CARRIERS (§ 105\*)—DELAY OF TRANSPORTATION—DAMAGES.**

The measure of damages for delay of a carrier in transporting household goods is the reasonable value of their use to the owner during the delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451–458; Dec. Dig. § 105.\*]

Appeal from Randall County Court; C. E. Coss, Judge.

Action by J. A. Grundy and another against the Pecos & Northern Texas Railway Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed on condition of remittitur.

Terry, Cavin & Mills, of Galveston, N. H. Lassiter, of Ft. Worth, and Madden, Trulove & Kimbrough and H. C. Pipkin, all of Amarillo, for appellants. B. Frank Bule and Rector L. Lester, both of Canyon, for appellees.

**HENDRICKS, J.** The appellees, J. A. Grundy and L. T. Da Vault, sued the Pecos & Northern Texas Railway Company and the Chicago, Rock Island & Gulf Railway Com-

pany, in the county court of Randall county, Tex., for damages with reference to a shipment of a car of household goods from McLean, Tex., to Canyon, Tex., claiming damages for the loss of some of the goods and for difference in value as to others, as well as specific damages for the detention of the use of the goods on account of unreasonable delay. Upon a trial to a jury the appellees recovered a verdict for \$375.

[1] The appellants complain of the fifth paragraph of the court's charge to the jury, which was to the effect that, if the jury found that a "part of the goods were damaged, as alleged by plaintiffs, \* \* \*" the jury were to find such damages as they may find were incurred on account of the negligence of the carrier. The objection to this charge was that the court erred "in failing to charge the jury correctly the measure of the plaintiffs' damage by reason of the alleged damage to said goods, the measure as to difference in market and actual value."

We take it that the purpose of the act of the Thirty-Third Legislature with reference to the presentation of objections to the court's charge before the same is read to the jury (article 1971) is to correct the court's error—to lead the court to the truth of the law—and places the burden upon the party making the objections to show the court wherein the error exists. Appellants say:

"It is true that their objection \* \* \* did not particularly specify that the measure of damages to certain of the goods was the difference in the actual value of the goods 'just prior to and just subsequent to the alleged damage'; but \* \* \* submit that by said objection \* \* \* they did suggest to the court the correct basis of plaintiffs' measure of damages."

Appellants did not submit any special charge embodying a correct rule as to the measure of damages. In cases of this peculiar character, under our interpretation of the statute, the same having been passed for the purpose of preventing reversals, unless the court is informed of his error, in the condition of this objection, and the record, it was not error to overrule the same. See *Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309, decided November 7, 1914, not yet officially reported.

[2, 3] Under the fifth assignment of error the bill of exception shows that Da Vault, one of the owners of a part of the property, testified as to the worth and value of a part of the personal property, consisting of clothing, culinary articles, household paraphernalia, etc., stating the same item by item. The defendants objected to the witness "stating what said items were worth, because said questions and answers called for the opinion and conclusion of the witness as to said values, and the witness was not properly qualified to state them, and that this was not the proper method of proving the value of said articles, or the proper measure of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

damages for the loss thereof"—quoting from said bill of exceptions.

The plaintiff and witness was testifying to the value of the goods which had been lost by the carriers. The measure of damages referable to the destruction or loss of this character of property, as announced by Chief Justice Willie, in the leading case of *Railway Co. v. Nicholson*, 61 Tex. 550, is commented upon as follows:

"\* \* \* The lost articles seem to be of such a character—namely, secondhand clothing, books, and table furniture which had been used by the plaintiff—that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damage rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover; not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family."

The Supreme Court, in the case of *Missouri Pacific Railway Co. v. Colquitt*, 9 S. W. 604 (not in State Reports), speaking through Chief Justice Stayton, reiterated and reaffirmed the same rule. If the value to the owner is the true rule, without any fanciful consideration entering into same, and from which criterion we are to deduce the rule of actual value, and not market value, we do not believe that the court committed positive error in permitting the testimony. In reading the decisions further with reference to the particular character of goods, we find that, though there may be a "secondhand" market for secondhand goods at destination, the secondhand price is so depreciated, compared to the actual or intrinsic value to the owner, that it is not just compensation for the actual loss; hence a "secondhand market" is an unjust rule. See *P. & N. T. Ry. v. Porter*, 156 S. W. 267.

The Supreme Court of New York, in the case of *Fairfax v. Railway*, 73 N. Y. 167, 29 Am. Rep. 119, in speaking of wearing apparel, said:

"It would sell but for little, if you put into market to be sold for secondhand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff, in such a case, the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff."

The Supreme Court of Kentucky, following our courts, also quoting from the New York case, *supra*, further says:

"No two sets of secondhand effects of this kind are the same in condition; and therefore no standard of market value exists." *Railway Co. v. Miller*, 162 S. W. 76.

Wigmore (volume 1, § 716), in speaking upon kindred subjects and with reference to personal services principally, says:

"Here the general test that any one familiar with the values in question may testify is liberally applied, and with few attempts to lay down detailed minor tests."

And, continuing, said:

"The owner of an article [italics his], whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and courts have usually made no objection to this policy."

See note 2 and the numerous cases cited by the author. The author is also commenting upon household goods.

Chamberlayne, in his work on Evidence, (volume 3, § 2127), says:

"\* \* \* An ordinary observer may properly estimate the value of familiar articles of personal property. So, generally, a designation may properly cover household furniture of any ordinary description, new or secondhand, \* \* \* wearing apparel and the like. It would probably include stable equipment, such as carriages, horses, or barn fixtures."

In reading the numerous authorities and copious annotations in the notes relevant to the general text of the writers mentioned some of the authorities bear out the rule indicated and some of feeble importance sustaining the particular principle. It is necessarily true, as elements entering into the consideration affecting the value to the owner, that the cost of the articles, the period of their use, and their condition, with other pertinent data, as would enable the jury to arrive at a fair valuation, is important testimony; but we are unable to find any well-considered case, as to the peculiar property involved here, that the owner of the goods, as a witness, is required to state the elements mentioned as a precedent qualification to testify to the value. These goods were lost by the carrier and no witness produced by it as to the value of the property; neither does the record show any cross-examination by defendants of the witness attempting to ascertain the cost of said articles, the extent of their use, the kind and character of the same, or as to the condition of the goods at any time, but rely solely upon the general objections enumerated in the bill. If the value in this instance is at all fanciful, or if the ingredients of cost, the extent of the use of the property, the condition of same at the time of the loss would have indicated to the jury that the value placed upon the same by the owner was improper, we believe, in this character of case, it is the duty of the defendants to elicit it. If neither market value, nor secondhand value, nor the price for which he could sell the goods to others is a criterion for the compensation to the owner, but the value to him is the standard, from this underlying principle it seems to us that the owner of the goods could testify to the value, weak as it may be.

The case of *Seyfarth v. Railway Co.*, 52 Mo. 450, involved the testimony of husband and wife as to the value of goods of a

kindred character, as in this record, and the Supreme Court of Missouri said:

"The subject of inquiry was not one to which the doctrine in reference to experts applied; and it cannot be questioned that the opinion of this witness as to the value of the articles was clearly admissible under the circumstances. The evidence being competent, the plaintiff was not obliged to restrict the examination to the value of each article, and in that way arrive at the total value; nor was it incumbent on him to show the process by which the conclusion of the witness was reached."

The Supreme Court of Nebraska said, in the cause of Western Home Insurance Co. v. Richardson, 40 Neb. 10, 58 N. W. 600:

"\* \* \* We think it was competent for the witness (in this instance the owner of the goods) to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods."

The Supreme Court of Michigan, in the case of Erickson v. Draskowski, 94 Mich. 551, 54 N. W. 283, said:

"Plaintiff and her husband testified to the value of the property taken, but it is insisted that their competency to testify upon the question of value did not appear. The articles seized were such as housekeepers are accustomed to buy, and householders must be presumed to have such knowledge upon the subject as to render them competent to testify as to the value of such articles."

To the same effect, in practically the same language, is the case of Tubbs v. Garrison, by the Supreme Court of Iowa, 68 Iowa, 44, 25 N. W. 923. We believe we could extend the authorities on this question unnecessarily, and our elaboration of the question is induced by the serious insistence of the appellants, and the reference by them to the case of Railway Co. v. Giles, 126 S. W. 282, announced by the Court of Civil Appeals of the San Antonio District, and the case of St. Louis & Southwestern Railway Co. of Texas v. Benjamin, 161 S. W. 379, by the Dallas Court of Civil Appeals, on the same question, and contended by appellants, as announcing the contrary doctrine. Whatever the effect of those decisions, we believe the foregoing rule, is the correct rule, and consequently overrule the assignment. We likewise overrule appellants' companion assignment complaining of the admission of the testimony delivered by the wife with reference to the value of certain enumerated articles along the same line.

[4, 5] In this case both appellees, as owners of the car of goods, recovered the sum of \$64.75—at least we have to presume such a recovery—as items claimed to have been paid by them for board bills and room rent on account of the alleged unreasonable delay in the shipment of said goods to destination. (Objected to by the defendants, both to the

pleading setting up such damages, and to the testimony proving the same.) We disagree with appellees that the character of damages pleaded and recovered by them is consequential, necessarily resulting from the injury, and agree with appellants that they are in the nature of special damages, to be properly alleged by setting up the special circumstances, and as having brought to the attention of the carriers at the time the contract of shipment was made. This record is silent that the carriers knew, or were apprised of any circumstances, either by the pleading or the evidence, that the special damages would ensue from a nonperformance. The mere making of a contract with the carriers to ship a car of household goods, we do not believe it could be said, would induce the expectation of the carrier to foresee that the shippers, without any further knowledge, would be required to rent rooms and pay hotel bills as a necessary consequence of the delay. The familiar rule measuring the damages for unreasonable delay as to the shipment of articles of this character, is the reasonable value of the use of the property to the plaintiff during the time of the delay. *M., K. & T. Ry. Co. of Texas v. Clifton*, 80 S. W. 386, 387; *Gulf, Colorado & Santa Fé Ry. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303; *Texas & Pacific Ry. Co. v. Douglas*, 30 S. W. 488; *Hutchinson on Carriers* (3d Ed.) vol. 3, § 1363. In the *Douglas Case*, supra, it seems that the trial court permitted plaintiff to show the purchase by her of clothing for herself and child, and the cost of laundry of clothing while waiting for the delivery of the trunk; and Justice Rainey said, after applying the ordinary measure of damages: "Such expenses are too remote to enter into the measure of damages, in such a case." The record here does not indicate that the carrier even knew that the appellees were married. Appellants' assignments on this question are sustained, and the elements of damages as indicated should not have been submitted to the jury. On that account this cause is reversed and remanded, with the right extended to appellee to file a remittitur within ten days for the sum of \$65.30, which, if done, the cause will be affirmed, but, if not done within that time, the whole cause will be remanded, and it is so ordered. The costs are to be taxed against appellees in either event.

There are no other assignments deserving consideration, except to say that the charge of the court wherein the expression "reasonable value," instead of "actual value," is used, referable to the measure of damages, in the condition of this record, could not have misled the jury.

NOTE.—Remittitur of \$65.30 filed by appellees November 24, 1914.

**FLEMING v. CITY OF MEXICO.**  
(No. 16804.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**COMMERCE (§ 40\*)—"INTERSTATE COMMERCE"—  
LICENSES—TRADE ORDINANCE.**

Defendant, a sales agent for an Ohio corporation, came to plaintiff city in Missouri and from there went about from house to house taking orders for coffee, groceries, and other articles of household supplies, which orders he sent to his principal's place of business in Ohio, where the goods to fill the orders were packed in separate packages. These were assembled and shipped to defendant in plaintiff city, where he received them from the carrier, took them to his room in a hotel, and delivered them to the various purchasers, collected the money, and remitted it to his principal. *Held*, that such transaction constituted "interstate commerce" within the exclusive regulation of Congress as provided by Const. U. S. art. 1, § 8, pt. 3, and hence defendant was not subject to a city ordinance imposing a license tax on any person acting as a mercantile agent within the city.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.\*

For other definitions, see *Words and Phrases*, First and Second Series, *Interstate Commerce*.]

**Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.**

Action by the City of Mexico against C. A. Fleming. Judgment for plaintiff, imposing a fine on defendant for violating a city license ordinance, affirmed on appeal to the circuit court, and defendant appeals. Reversed and remanded, with directions to dismiss.

C. A. Fleming was a sales agent of the Citizens' Wholesale Supply Company, an Ohio corporation, doing business at Columbus, Ohio. He was arrested upon an affidavit filed in a police court in Mexico, Mo., for an alleged violation of an ordinance of that city, enacted on the 29th of June, 1909, which imposed a fine of not less than \$10, nor more than \$100 on any person acting as "mercantile agent" without the payment of a license fee of \$2 per day, and a fee of 50 cents to the city clerk for issuing the license. Am. Rev. Ord. City of Mexico of 1893, §§ 57, 57a, 57b. He was convicted and fined the maximum penalty in the police court, and the same amount upon the hearing of his appeal in the circuit court of Audrain county, from which judgment he has appealed to this court for that his defense was immunity from such prosecution under the commerce clause of the national Constitution.

On the trial in the circuit court by admissions of the parties of record, and by supplementary evidence, the facts were shown to be, to wit:

"For the purposes of this trial it is admitted that on the 6th day of April, 1910, the said Citizens' Wholesale Supply Company, a corporation doing business in the state of Ohio, sent its agent, C. A. Fleming, the defendant, from place to place, and from house to house, in the city of Mexico, where said Fleming took orders

for tea and groceries and other articles for persons who ordered them for use in their families, and who were not dealers in coffee, groceries, and such articles; the said goods were not at the time delivered, but were delivered in the future; and at the time the orders were taken the goods ordered were at the principal place of business of the Citizens' Wholesale Supply Company in Columbus, in the state of Ohio."

The testimony was further to the effect that, when the defendant's principal (City Wholesale Supply Company) received from him the orders which he had taken, it packed the goods to fill such orders in separate packages, and, when enough had been received for that purpose, assembled these separate packages in large boxes and barrels and shipped them to its agent, the defendant, C. A. Fleming, by a bill of lading, addressed to him at the railroad station in Mexico, Mo.; that the defendant received the goods from the carrier, took them to a room at his hotel, and opened the large boxes and barrels, and took out of them the separate packages of the proper size and quantity, to fill the orders of the respective purchasers, and with the aid of said orders (which had been transmitted to him of even date by registered letter or express) delivered said goods in accordance therewith to the individual purchasers; that no goods were sent to defendant by the company except to fill specific orders taken by him in this way, and no goods were sold or delivered by him except in fulfillment of said orders; that, when the deliveries were thus made, the defendant collected the money and remitted it to his principal; that it was while engaged in these duties that defendant was arrested and fined in the police and circuit courts as above stated.

Philemon S. Karshner, of Adelphi, Ohio, and F. R. Jesse, of Mexico, Mo., for appellant. A. C. Whitson, of Mexico, Mo., for respondent.

**BOND, J.** (after stating the facts as above). Upon the admitted facts, and those shown on the trial, it is impossible to distinguish the instant case from that of *Jewel Tea Co. et al. v. City of Carthage et al.*, 185 S. W. 743. The doctrine of that case is set forth in paragraph 2 of the opinion therein, and demonstrates that the transaction in question in this case falls within the purview of the provision of the Constitution of the United States, vesting "the complete and paramount power" in Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Constitution U. S. art. 1, § 8, pt. 3; *Houston E. & W. T. Ry. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1347; *Gibbons v. Ogden*, 9 Wheat. (U. S.) loc. cit. 222, 6 L. Ed. 23. The authorities and reason for that view are stated in extenso in the opinion en banc in that case and must control the disposition of the present case. Our conclu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—21

sion is that the ordinance referred to in the aforesaid statement was and is inoperative so far as the appellant (defendant below) or others engaged in like business are concerned. The respondent did not avail itself of the leave granted until the 24th of October, to file a brief on this appeal, nor made any oral argument at the time of its submission. We have therefore been deprived of the benefit of its theory of the law, applicable to the facts shown in this record, as we were also without any similar aid on the part of respondent in the case of Jewel Tea Co. et al. v. City of Carthage, supra.

The judgment herein is reversed, and the cause remanded, with direction to dismiss the proceeding against appellant. All concur.

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**JODD v. MEHRTENS.** (No. 16974.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**1. APPEAL AND ERROR (§ 871\*)—RECORD—MOTION FOR NEW TRIAL—PRESERVATION—BILL OF EXCEPTIONS.**

Where the abstract statement, brief, and argument filed on behalf of appellant do not disclose that her motion for a new trial was preserved in a bill of exceptions, the appellate court may decline to consider any question other than those arising on the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

**2. LIMITATION OF ACTIONS (§ 19\*)—RECOVERY OF REAL PROPERTY—DEFORCEMENT OF DOWER.**

Where, in an action for alleged deforcement of dower, it was admitted that the equitable title to the premises in dispute emanated from the government more than 50 years before suit, and that neither plaintiff nor any one under whom she claimed had paid any taxes on the premises or any part thereof for 31 years next preceding the suit, the action was barred by Rev. St. 1909, § 1884, providing that where title has emanated from the government more than 10 years before entry of lawful possession of any person holding the premises, which shall be claimed by another, the right of the claimant or those under whom he claims title is barred if they have not been in possession at any time within 30 years and have not paid taxes for 31 years before suit brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by Genevieve Jodd against Louis Mehrtens. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action for an alleged deforcement of dower. It was begun on October 28, 1910, in the circuit court of the city of St. Louis. The plaintiff (who has died since the appeal taken herein) was the wife of Michael Jodd, Sr. She alleged the death of her husband on the ——— day of September, 1878, and his seizure at the date of his death of two acres of ground in the city of St.

Louis and state of Missouri. The petition recites the names of the children and heirs of the deceased, who survived him, and alleges that plaintiff, upon the death of her husband, became entitled to dower in the land described in the petition, and that she had never at any time relinquished her right, nor received any equivalent therefor; that the defendant, Louis Mehrtens, entered into said premises and wrongfully deforced plaintiff of her dower right therein on the ——— day of May, 1910. The petition prayed for damages and monthly rents, and for an admeasurement in said land if that could be done; otherwise, for monthly rents and profits, and for general relief. The answer admitted the possession of the defendant as a tenant, denied that he held under the plaintiff, or any of the heirs mentioned in her petition, denied that plaintiff had not relinquished her dower in the manner prescribed by law, denied that she was entitled to an admeasurement of dower, and pleaded specially the statute of 10 years of adverse possession, and also the statute of 31 years, and alleged plaintiff was forever barred thereby to any right or title to said property. The reply took issue. The case was tried upon an agreed statement of facts in the record, in the form of a written stipulation signed by the parties, and upon some supplemental testimony, given by the real estate agent, who had charge of the property and knew of its condition for 30 or 35 years, whose testimony is not, however, set out under appellant's abstract.

A summary of the agreed statement of facts is, to wit: That the plaintiff is the lawful widow of Michael Jodd, deceased, having intermarried with him on the 26th of October, 1848; that the said Michael Jodd died December 30, 1878; that the defendant in the action was tenant in possession under other persons than the children and widow of Michael Jodd, deceased; that said Michael Jodd and the plaintiff were in possession of the premises on the date of a deed of trust, executed thereon by them, on May 1, 1875, and until the death of said Jodd in 1878; that they held possession under a provision of said deed of trust, whereby the premises were let to the grantors therein until a sale, under said deed, upon payment of a monthly rent of one cent, and upon an agreement to deliver possession when said deed of trust should be foreclosed; that said deed of trust was jointly executed by Michael Jodd, and the plaintiff, his wife, on May 1, 1875, and conveyed the property to Alfred Fleming and John F. Lee, as trustees for the benefit of Mary E. Fleming, and her legal representatives. Said agreed statement of facts then concludes, to wit:

"(7) It is admitted that the real estate mentioned and described in said deed of trust of May 1, 1876, was duly sold by said trustees Alfred Fleming and John F. Lee on September

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

18, 1879, and at said sale the said defendant, Mary E. Fleming, became the purchaser thereof; the trustee's deed may be read in evidence.

"(8) It is admitted that the legal representatives of said Mary E. Fleming were at all times since, and are now, in possession of said real estate openly and under a continuous claim of absolute title thereto by and under the sale of said premises under and through said deed of trust executed by said Michael Jodd and his wife, the above-named plaintiff, by said trustees Alfred Fleming and John F. Lee, to the said Mary E. Fleming, on September 18, A. D. 1879.

"(9) It is admitted that the equitable title to the premises in dispute emanated from the government more than 50 years before the bringing of this suit, and that neither the plaintiff, nor any one under whom she claims, has paid any taxes on said premises, or any part thereof, for any part of 31 years next preceding the institution of this suit.

"(10) Either party is at liberty to prove any other relevant, competent, and additional facts which are not inconsistent with the facts herein admitted."

Upon the submission of the case to the trial court without the aid of a jury, judgment was rendered for defendant on October 6, 1911, from which plaintiff duly appealed to this court.

H. K. Bunch and E. C. Dodge, both of St. Louis, for appellant. A. & J. F. Lee and James A. Waechter, all of St. Louis, for respondent.

BOND, J. (after stating the facts as above). [1] Upon the calling of the cause in this court, it was submitted without argument, upon the briefs filed by both parties. It must be confessed that the abstract statement, brief, and argument filed on behalf of appellant do not disclose that her motion for new trial was preserved in a bill of exceptions. And we might for that reason, under the repeated rulings of this court, decline to consider any question on this appeal other than those arising upon the record proper. Jodd v. Lee, 256 Mo. 536, 165 S. W. 991; State ex rel. v. Adkins, 221 Mo. loc. cit. 120, 119 S. W. 1091; Barham v. Shelton, 221 Mo. 70, 119 S. W. 1089; Gilchrist v. Bryant, 213 Mo. loc. cit. 443, 111 S. W. 1128; Thompson v. Ruddick, 213 Mo. loc. cit. 561, 111 S. W. 1131.

[2] But a careful consideration of all that is contained in appellant's brief, including in that review the evidence contained in the agreed statement of facts, as if it had been properly preserved in the bill of exceptions, demonstrates that there was no error in the ruling made by the trial court in favor of the defendants, and this, for the reason, among others, that the agreed statements of facts shows that plaintiff's cause of action falls strictly within the terms of the statute of repose pleaded in defendant's answer, and set forth in section 1884 of the Revised Statutes of 1909. That is a familiar statute, and need not be quoted. It was first enacted in 1874. Collins v. Pease, 146 Mo. loc. cit. 139, 47 S. W. 925.

It applies to all titles, legal as well as equitable, which have emanated from the government more than 10 years before the entry of lawful possession of any person holding the premises, which shall or might be claimed by another, and precludes any assertion of such claim, if it be shown that said claimant, or those under whom he derails title, have not been in possession of said premises at any time within 30 consecutive years of said premises, and neither said claimant, nor those under whom he may hold, have paid any taxes for that period, nor within one year after its lapse brought an action to recover the premises. The admission contained in section 9 of the agreed statement of facts shows that this case is within the plain language of the statute and is barred by the lapse of more than 31 years from the time plaintiff's right to dower accrued upon the death of her husband in September, 1878, and the institution of her suit on the 28th of October, 1910. Section 1884, R. S. Mo. 1909; De Hatre v. Edmonds, 200 Mo. 246, loc. cit. 275, 98 S. W. 744, 10 L. R. A. (N. S.) 86; Crain v. Peterman, 200 Mo. 295, loc. cit. 299, 98 S. W. 600; Campbell v. Greer, 209 Mo. 199, loc. cit. 216, 108 S. W. 54; Dunnington v. Hudson, 217 Mo. 93, loc. cit. 101, 116 S. W. 1083; Collins v. Pease, 146 Mo. 135, 47 S. W. 925, supra.

The judgment of the trial court was the only one which could have been rendered under the pleadings and the facts admitted of record. It is therefore affirmed. All concur.

## CITY OF CARUTHERSVILLE v. HUFFMAN et al. (No. 16019.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

### 1. APPEAL AND ERROR (§ 584\*)—REVIEW—ABSTRACT—SUFFICIENCY.

Where the dividing line between the record proper and the bill of exceptions clearly appeared in the abstract by a heading "Bill of Exceptions" in large, black-faced capitals, it will not be disregarded on the ground that matters of exception and matters of the record proper were commingled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2584, 2585; Dec. Dig. § 584.\*]

### 2. LIMITATION OF ACTIONS (§ 11\*)—STATUTES—CONSTRUCTION.

In view of Rev. St. 1909, § 9400, giving to cities exclusive control over all streets and alleys, section 1886, declaring that no statute of limitation shall extend to lands given, granted, or appropriated to any public use, applies to lands included in a street of which a city had possession, though it did not have the legal title.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.\*]

### 3. DEDICATION (§ 46\*)—GRANT—CONSTRUCTION.

In construing plats dedicating land, the courts must give effect to the plain meaning and

intent they exhibit by their outlines as well as their words.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 89; Dec. Dig. § 46.\*]

#### 4. DEDICATION (§ 48\*)—APPROVAL.

Persons to whom property was conveyed by reference to a plat, which attempted to dedicate the streets to the public, adopt the dedication by accepting the conveyance.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 114; Dec. Dig. § 48.\*]

#### 5. DEDICATION (§ 35\*)—ACCEPTANCE—ACTS CONSTITUTING.

Where a plat, by which it was attempted to dedicate streets to the public, was not submitted in such a manner as to constitute a statutory dedication, but, after being recorded and lots sold by reference thereto, the city opened and improved streets as shown by the plat, there was an acceptance of the dedication, and a purchaser could not acquire adverse title by inclosing streets or alleyways, attempted to be dedicated, for the property was devoted to a public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68-71, 75, 76; Dec. Dig. § 35.\*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by the City of Caruthersville against J. D. Huffman and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Vance J. Higgs and Everett Reeves, both of Caruthersville, for appellants. Arthur L. Oliver, of Caruthersville, for respondents.

**BROWN, C.** Ejectment to recover a tract of land in the city of Caruthersville, in said county, 20 feet wide and 100 feet long, on the ground that it is dedicated to public use as an alley. A jury was waived.

There was no substantial dispute as to the facts. While it is not clearly shown in the evidence, it seems to be assumed in argument that on March 22, 1895, the land included in "Ward's First addition of Caruthersville" was within the city limits. On that day the plat was filed, consisting of two tiers of blocks extending in a northerly and southerly direction, five blocks in each tier. On the east side was a street named Carleton avenue. Between the two tiers of blocks was Highland avenue and on the west Cotton avenue. From north to south the cross streets were named George, Neptune, Jupiter, Mars, Mercury, and an unnamed street along the south end. Block 5 occupies the southeast corner of the plat, with its two tiers of lots; each lot having 50 feet frontage and a depth of 140 feet. Lots 1 to 6, inclusive, numbered from north to south, fronted on Carleton avenue, while lots 7 to 12, inclusive, numbered from south to north, fronted on Highland avenue. The alley in question extends through the middle of the block from Mercury street on the north to the unnamed street on the south, in the rear of the lots, and is 20 feet wide. A similar alley extends through each block, except the north pair, the north six lots of which front north on

George street, with an alley extending east and west in their rear. All the other blocks are identical.

On the date mentioned, William A. Ward and his three sisters, with the husbands of two of them who were married women, filed the plat above described in the recorder's office, duly signed and acknowledged, with the following certificate:

"We, the undersigned, hereby declare the above to be a true and correct plat of Ward's First addition to Caruthersville, Mo., and forever dedicate to the public the streets therein named."

The approval of the common council was not indorsed on the plat, nor was there any evidence of such approval by ordinance. On March 15, 1896, they conveyed lots 5, 6, and 7 of block 5 to the defendant Sarah E. Huffman, wife of her codefendant, by that description. In September following they built a residence on lots 5 and 6, fronting on Carleton avenue, and fenced the three lots, including in the inclosure the land in controversy, being the entire 100 feet of the alley lying in the rear of the two lots on which they built. This inclosure remained up to the time of the trial. Building proceeded in the addition so that, when this suit was tried in 1909, it was "thickly settled." The unnamed street south of defendants' premises was opened and traveled in 1897. All the other streets on the plat were opened and improved by paved or plank sidewalks on each side and by grading, and telephone and electric light poles had been maintained on all of them for a number of years. Carleton avenue had been opened and traveled at the time defendants built their inclosure. The north 200 feet of the alley in question in block 5 has been open and used several years. At the trial Mr. Huffman was sworn as a witness for the plaintiff and stated on oath that the defendants had no other paper title to the premises than the deed above mentioned, and that he claimed title to the land in controversy by adverse possession for more than 13 years. The judgment was for the defendants.

[1] I. The preliminary point is made by the respondent that the appeal should be dismissed for the reason that "no sufficient abstract of the record has been filed." The only specification is that "there is nothing to show where the record proper ends and the bill of exceptions begins."

Examining the abstract, we find at the end of the pleadings the statement: "The following entries and matters appear of record proper." Then follows a statement of orders of the court up to and including an order granting time to file bill of exceptions and an order in term filing the bill within the time so granted. Then follows a big, black-faced capital line as follows: "BILL OF EXCEPTIONS"—followed by such matter as is usually preserved in that form, and final-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ly by the usual and time-honored attestation and signature of the judge with his official title. Having no difficulty in locating the dividing line between these two important portions of the record, we feel at liberty to proceed to the real question upon which the parties seem to have differed at the trial.

[2] II. This question is, in general terms, whether this land has been given, granted, sequestered, or appropriated to public use, within the meaning of that expression as used in section 1886 of the Revised Statutes of 1909, which provides that "nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public \* \* \* use," so as to give the plaintiff city a possessory title which it may enforce in ejectment, and to prevent the acquisition of that title by the defendants by adverse possession, under the circumstances conclusively shown in this record. It is intimated by the defendants in their brief that this provision applies only to lands acquired by the public in fee, although they do not attempt to support that position otherwise than by naked assertion, and we can see no reason upon which such a distinction can stand. The city is given "exclusive control over all streets, alleys, avenues and public highways within the limits of such city" (R. S. 1909, § 9400), and it is plain that it cannot exercise this control without possession, whether the title be an easement or a fee. The action of ejectment is a purely possessory one, and it lies wherever the right to the possession of lands exists, and possession is withheld. So with the provision of section 1886 of the same revision, exempting lands appropriated to public use from the operation of the statutes of limitation. Its words, as well as its reasons for being, apply equally to all interests in land appropriated to public use susceptible of adverse possession. The question is: Has this land been dedicated to the public as a street or alley? If so, it is immaterial whether such dedication be of the nominal fee or a simple easement.

[3-5] In construing plats of this character, we must give effect to the plain meaning and intent they exhibit by their outlines as well as by their words. *St. Louis v. Railway*, 114 Mo. 13, 23, 21 S. W. 202; *Buschmann v. St. Louis*, 121 Mo. 523, 536, 26 S. W. 687. This plat expressed in its outlines, more certainly than it could have expressed in words, what portions were to be sold or used as lots and what portions were intended as streets and alleys to serve them. It conformed exactly to the provisions of the statute in those respects, but did not conform to the provision requiring it to be submitted to the common council of the city, and its approval by ordinance to be indorsed on it before recording;

and in this respect it did not constitute such a dedication of the streets and alleys which were shown on it as was required by the statute, and which carries with it the acceptance of the city. After the filing of the plat the owners sold the three lots at the south end of block 5 to the defendant Mrs. Huffman, conveying them by a deed which described them only by numbers which they bore on the plat, and which could not operate without the assistance of the latter to identify the description. The streets and alleys shown on the plat were thus appropriated to the public uses thereon indicated, so far as it could be done by a common-law dedication in which the defendants, or at least the wife, joined with the original owners.

"When an incomplete or defective statutory dedication is accepted by the public, or where rights are acquired under such dedication by third persons, such acquisitions will operate in favor of the public and of such acquirers respectively;" and "the sale and conveyance of the lots in the town according to its plan carry with them a grant or covenant that the streets indicated on the plan shall be forever open to the use of the public." *Heitz v. St. Louis*, 110 Mo. 618, 624, 19 S. W. 735, 736; *Buschmann v. St. Louis*, 121 Mo. 523, 536, 26 S. W. 687.

The city accepted the dedication by opening to public travel Carleton avenue, on which the defendants' lots fronted 100 feet, and the unnamed street on the south, upon which they abutted 280 feet, and have continued ever since to improve and maintain them. The defendants showed their appreciation of this by fencing up the alley, for which they apparently had no use, and to which they neither had nor claimed any title other than that which inheres in the abutting proprietor, for the purpose, as they now say, of acquiring title to it by adverse possession. In this the law affords them no assistance. When the defendants received the deed to their lots as described in the plat, they approved and adopted it; when the city adopted it and opened and improved the streets upon which the lots abutted, it accepted the dedication of the alley as well (*Heitz v. St. Louis*, supra, 110 Mo. loc. cit. 625, 19 S. W. 735); and thereafter, whether fenced or unfenced, it was held subject to the right of the city to take it at any time it should see fit to exercise its statutory dominion over it (*Robinson v. Kornes*, 250 Mo. 663, 673, 157 S. W. 790; *Otterville v. Bente*, 240 Mo. 291, 144 S. W. 822).

The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

**BOWLES v. TROLL.** (No. 17576.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**1. COURTS (§ 488\*)—CONFLICTING JURISDICTION—TRANSFER OF CAUSES—LAW OF CASE—RIGHT TO CORRECT ERROR.**

Though the Supreme Court having once denied a motion to retransfer a cause to one of the courts of appeals might treat the question as foreclosed by its former ruling, yet, as it is a court for the correction of errors of other courts, it should correct its own decision if it be erroneous.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1316-1323; Dec. Dig. § 488.\*]

**2. COURTS (§ 37\*)—JURISDICTION—OBJECTIONS—TIME FOR MAKING.**

Questions of jurisdiction may be raised at any time in the trial court or on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 37.\*]

**3. COURTS (§ 231\*)—STATE COURTS—MISSOURI—JURISDICTION OF SUPREME COURT.**

The Supreme Court is without jurisdiction of an appeal in an action where the nonresident guardian of an insane person sought to compel the local guardian to deliver up the corpus of the estate, which amounted to about \$10,000, for the right of the ward to the corpus of the estate was not in controversy, and it cannot be held that the right of the local guardian to handle the estate involved an amount equal to \$7,500.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by John W. Bowles, Iowa guardian of Maggie V. Wilson, insane, against Harry Troll, public administrator, Missouri guardian of Maggie V. Wilson, insane. From a judgment for defendant, plaintiff appealed to the St. Louis Court of Appeals (172 Mo. App. 102, 154 S. W. 871), which transferred the case to the Supreme Court. Retransferred to the St. Louis Court of Appeals.

Warren D. Isenberg, of Los Angeles, Cal., and A. V. Proudfoot, of Indianola, Iowa, for appellant. Marshall & Henderson, for respondent.

LAMM, J. Plaintiff sued in equity in the St. Louis circuit court. The object and general nature of his bill was to procure a decree in his favor as Iowa guardian requiring Troll, the Missouri guardian, to make a final settlement of his accounts, and pay over the balance in his hands, that is, transfer the estate, and for general relief; the bill counting on the theory the insane ward resided in Iowa, was adjudged insane, and confined in an asylum there, that plaintiff is the primary or domiciliary guardian, and defendant the ancillary guardian, that the purposes of the Missouri guardianship have been fully subserved, and to continue it would subject the estate of the ward to the wasting burden of double costs and expense.

The case was tried in a notably unconventional way, on an agreed statement of facts,

in substance as follows: Mrs. Wilson is an insane person domiciled for 20 years in Iowa, adjudged insane by a court of competent jurisdiction in Warren county in that state in 1897, and since then confined in an Iowa hospital, the Clarinda Insane Asylum. That in 1897 Bowles, plaintiff, was duly appointed her guardian in Iowa by a named court of competent jurisdiction and has ever since acted as such. That in 1906 defendant Troll, public administrator of St. Louis, was duly appointed guardian in Missouri, and is now acting as such. That plaintiff as guardian is under a \$20,000 bond in the proper court in Warren county, Iowa, which bond is now in full force and effect. That said court authorized plaintiff by its due orders to collect by proper proceeding the estate of said ward in the hands of defendant. That the ward is a widow with three children, one a minor about 14 years of age. That she has no estate in Iowa except a widow's pension, a small one, received from the United States government. That plaintiff is a relative of said ward by marriage, and a fit and suitable person to be guardian at the domicile of the ward. That plaintiff at the time of defendant's appointment as guardian, being a nonresident of Missouri, could not be appointed guardian in this state. That defendant's appointment as such was for the purpose of collecting funds of the ward's estate in Missouri. That Troll as such guardian has in his hands about \$10,000. That the ward is not indebted, so far as known, to any person in Missouri. That two years have passed since Troll's appointment. That notice of his appointment was duly given as required by law. And that all claims proved against his ward's estate in Missouri have been paid.

[1, 2] On such agreed facts, the court found for defendant, and plaintiff appealed on due steps to the St. Louis Court of Appeals. That court on its own motion transferred the case to this court on the theory "the amount in dispute" exceeds \$7,500 exclusive of costs, basing its ruling on the doctrine of *Gartside v. Gartside*, 42 Mo. App. 513, a case transferred here and of which we retained jurisdiction (113 Mo. 348, 20 S. W. 669). Subsequently, it seems, a motion was filed in this court to remand the instant case to the St. Louis Court of Appeals on the grounds of our lack of jurisdiction. This motion was overruled—we now think improvidently. Undoubtedly we could take the question as foreclosed once for all by our ruling on the motion and proceed to decide the cause on its merits. But, on the other hand, this being a court of errors, the power to correct our own is self-evidently an integral part and parcel of the power to correct the errors of other courts, and the duty to correct them in the same case at the first opportunity is always present where a ruling is sharply wrong and unsettles correct practice, or the

law. *Star Bottling Co. v. Exposition Co.*, 240 Mo. loc. cit. 643, 644, 144 S. W. 776. Especially is this so on so vital a question as jurisdiction—a question always obtruding itself, *sua sponte*, in any case in any court at any time above or below.

[3] That our ruling on the motion to retransfer was improvidently made will appear from the following premises: In the case at bar neither plaintiff nor defendant claim to own the fund in their own right. Contra, both plaintiff and defendant concede it belongs to and constitutes practically the corpus of the estate of their unfortunate ward. Both of them therefore are but trustees. She is the beneficiary, and the dispute is not over her right to the fund, but it is over their respective rights to the custody of it while it is being used under the supervision of the probate court for its true beneficial owner. So, plaintiff does not ask a money judgment against defendant to be enforced by *fi. fa.* He invokes merely the power of a chancellor to do the following thing, to wit, to coerce a final settlement in the proper probate court of the ancillary guardianship with the ultimate view and purpose of an order of transfer of what then remains of the fund from the ancillary guardian to the domiciliary guardian at the place of residence of the ward in order to throw off the burden of expense, waste, and inconvenience of two administrations. Hence the real justiciable dispute is over the power of a court of equity to make that order either by virtue of its superintending control over the probate court, or under a recognized and ancient head of chancery jurisdiction over the estates of insane persons. Necessarily involved, though incidental to the main question thus outlined, is the value of the right in defendant to the custody of the fund, and this, in turn, springs from the perquisites, emoluments, and fees of his trusteeship falling to him in administering the estate. These, moreover, fluctuate with the amount of the trust fund, with the duration of the trust, etc. Now, in the *Gartside Case*, supra, the trust estate ran up into the hundreds of thousands of dollars and the trusteeship was for life. Judge Rombauer, speaking in that case, laid the foundation for his judgment on the postulate that where jurisdiction hinges on the value of the matter in dispute such value must be estimated in money; on the further postulate that jurisdiction does not turn entirely on whether the immediate object of the suit was for the recovery of a sum of money, but is to be got at on a survey of the whole record—for instance: In a suit to establish the right to an office, the aggregate of the salary for the unexpired term claimed by the adverse party is the money value of the matter in dispute and is determinative of jurisdiction. So, in an injunction suit, the money value to plaintiff of the object sought to be gained by the bill is the

money value of the matter in dispute and determinative of jurisdiction. It was on such postulates, and not otherwise, the *Gartside Case* was resolved on the question of jurisdiction as appears from an excerpt which is the sum of the matter, thus:

"In the case at bar the record fails to show what value, if any, attaches to the defendant's position as trustee, but it does appear that the duration of that office, if it may be so called, is for life, and invests him, as far as these plaintiffs are concerned, with the partial control of property of the value of \$200,000 or more, of which he is to be deprived by this proceeding, and we are not prepared to say, unconditionally, that this is a case where the amount in dispute does not exceed \$2,500."

In *Gast Bank Note, etc., Co. v. Fennimore Ass'n et al.*, 147 Mo. 557, 49 S. W. 511, an injunction suit in which there was no allegation in the bill to determine the value in money of relief to plaintiff, it was ruled we had no jurisdiction. This ruling was put in part on a pronouncement made by the Court of Appeals in *Evens, etc., Brick Co. v. St. Louis Smelting Co.*, 48 Mo. App. 643, reading:

"When the object of a suit is not to obtain a money judgment, but other relief (in this case an injunction), the amount involved must be determined by the value in money of the relief to the plaintiff, or of the loss to the defendant, should the relief be granted, or vice versa should the relief be denied. If either is necessarily in excess of \$2,500, the Supreme Court has appellate jurisdiction in the cause."

To like effect is *Marx, etc., Clothing Co. v. Watson*, 168 Mo. loc. cit. 143, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440, and in a very late quo warranto case (*State ex rel. Union Elec. Light & Power Co. v. Reynolds et al.*, Judges, not yet officially reported, 165 S. W. 801), the learning on the point was reviewed in extenso by our Brother Graves in banc. In that case we drew to ourselves jurisdiction because the value of the right necessarily involved, estimated in money, self-evidently gave us jurisdiction. We will not swell this opinion by quoting from so late a case. The student with a prying mind may consult it with profit. We dismiss it with the observation that the precedents there marshaled and the reasoning employed point unerringly to the conclusion that we are without jurisdiction in this case, on the question in hand, unless we are prepared to say the money value of the right of the Missouri guardian to hold the corpus of a \$10,000 estate in his hands and administer it (thereby enjoying the appurtenant and expectant fees, perquisites, and emoluments of the trusteeship), is over \$7,500. There is a case, not in our reports, in which no opinion was rendered because it rode off on a motion to retransfer, to wit, *Horton et al. v. Troll, Public Adm'r*, in charge of the estate of Dunham. See 167 S. W. 1081, 1083. In that case, although the corpus of the estate itself gave us jurisdiction if we took that particular amount as decisive, we retransferred it to the St. Louis Court of Appeals because the money

value to the administrator of the right to administer was within its jurisdiction.

Turning, now, to the present record, the money value of the right to administer Mrs. Wilson's estate, which is the only thing Troll stands to lose or win, hence is the "amount in dispute," in a jurisdictional sense, certainly cannot equal \$7,500; unless, more's the pity (to borrow the wry conceit of a barrister in another case at our bar), we take the letters of guardianship as in the nature of a warranty deed to the whole or the lion's share of the estate of the ward—a thing we are not willing to do, nor is it asked at our hands.

This court has neither a disposition to yearn after jurisdiction and give teeth to such yearning by reaching out and grasping it on unsubstantial grounds, nor does it shirk a jurisdiction rightfully belonging here. As final arbiter, it takes and gives ungrudgingly as the facts warrant and the law directs; and in this case we are of opinion we have no jurisdiction unless other questions besides the amount in dispute give it to us. We have searched the record with an eye to that fact and find no question the Court of Appeals cannot jurisdictionally deal with.

The premises all in mind, the cause is retransferred to the St. Louis Court of Appeals. It is so ordered. All concur

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MIDDLETON v. BAKER et al. (No. 16840.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**MORTGAGES (§ 369\*)—SALES—VALIDITY.**

Where a sale by the trustee in a deed of trust was made for 3 or 4 per cent. of the value of the property and about 8 per cent. of the debt, during the absence of the creditor, who innocently mistook the hour at which the sale would be made, but who appeared a few minutes after the sale and asked the trustee to set aside the sale, the trustee was obliged to set aside the sale and resell the property, provided the bidders had not dispersed, or readvertise the property for sale at a future date.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.\*]

Appeal from Circuit Court, Callaway County; N. D. Thurmond, Judge.

Action by James A. Middleton against Frank T. Baker and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action brought in the circuit court of Callaway county, by the plaintiff against the defendants, to set aside a sale of real estate, sold under a deed of trust, executed to secure borrowed money. The grounds for relief, as charged, were fraud, mistake, surprise, and inadequacy of consideration paid for the land, etc. The judgment was for the plaintiff, and the defendants appealed to the Kansas City Court of Appeals, and by that court certified here under the Constitution.

The record is short, the facts few, and practically no conflict in the testimony. The facts of the case are substantially as follows: On and prior to July 1, 1905, N. M. Baker, Lidia Baker, William Baker, and Nancy Baker owned 40 acres of land situate in Callaway county, Mo., particularly described in the petition. On that date they made and delivered to the plaintiff, James A. Middleton, their promissory note for the sum of \$227.20, bearing 8 per cent. interest, due one day after date, and executed the deed of trust conveying said land to secure said loan. That, said note not having been paid when due, the plaintiff requested the defendant John H. Buchanan, the sheriff of said county, the substituted trustee (the one named in the deed of trust having died), to advertise and sell the land to pay said note. That in pursuance to said request, and according to the terms of said deed, the trustee advertised the land for sale at the west front door of the courthouse at Fulton, on August 1, 1910, between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon, and on said day, at the hour of 2 o'clock p. m., he sold said land to the defendant Frank T. Baker, for the sum of \$26, a stranger to all the transactions. All the Bakers save the last one mentioned were negroes; and the latter was an old friend of the makers of the note, and claimed to have acted for them in the purchase of the land at the trustee's sale, but he never mentioned that fact to the trustee or any one else present at the sale, and, if I understand the record, there was no evidence introduced tending to show he was acting for the makers. That at the time the sale took place neither the plaintiff nor any of the makers of the note were present, which fact was known to the trustee. There was other land sold immediately preceding the time the sale of this 40 acres took place. There was a large crowd present, but only two bids were made for this land. The defendant Baker, being one of them, and he being the highest bidder, became the purchaser; and he immediately paid the purchase price, and the trustee executed to him a trustee's deed conveying to him the land mentioned. The weight of the evidence shows that the plaintiff was innocently mistaken as to the time the land was to be sold, and for that reason was not present at the exact moment the sale took place, but appeared a very short time thereafter—but a few minutes. Upon learning of the sale, he immediately then and there requested the trustee to resell the land, but the trustee declined to so do; hence this suit. At the date of the sale there was due on the note the sum of \$338, and the evidence tended to show that the land was worth from \$600 to \$800.

J. R. Baker, of Fulton, for appellants. E. L. McCall, of Fulton, for respondent.

WOODSON, P. J. (after stating the facts as above). The plaintiff contends, and the greater weight of the evidence shows, that he was innocently mistaken as to the exact hour at which the sheriff would offer the land for sale, and for that reason he was a few minutes too late to be present at the sale, and was therefore taken by surprise. In addition, he contends that, because of the fact that the land sold for only \$26, about 8 per cent. of the debt, and from 3 to 4 per cent. of the value of the land, the sheriff should have declared the sale void and resold it, especially in the light of the facts that plaintiff offered to pay all the costs then accrued, and offered to guarantee that the land, if resold, should bring its fair market value.

In the case of Griffith v. Hadley, 10 Bosw. (N. Y.) 587, it was held that a mistake as to the time of sale, coupled with the fact of inadequacy of consideration paid therefor, without much competition, justified the court in setting aside the sale, and ordered a resale. That case was cited with approval in the case of Holdsworth v. Shannon, 113 Mo. 523, 21 S. W. 85, 35 Am. St. Rep. 719.

If those authorities are to be followed in this case, which I think they should be, upon the grounds of equity and common justice, we must hold that the sheriff did not properly perform his duties in the premises, but should have set the sale aside and resold it then and there, if the bidders had not dispersed, which the evidence strongly tends to show they had not, or, if they had done so, then readvertised it for sale for some future date, according to the terms of the deed of trust.

Entertaining these views, I am satisfied that the judgment of the circuit court should be affirmed. All concur.

ST. LOUIS LODGE NO. 9 B. P. O. E. v.  
KOELN, Collector of Revenue.  
(No. 18081.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. TAXATION (§ 204\*) — EXEMPTIONS — CONSTRUCTION.

Exemptions from taxation should be strictly construed, since the purpose of the state to abandon its right to tax should not be presumed, and since equality is equity in matters of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 321-323, 325, 332, 333; Dec. Dig. § 204.\*]

2. TAXATION (§ 241\*)—EXEMPTIONS—"BUILDING USED EXCLUSIVELY FOR CHARITABLE PURPOSES"—"PURELY CHARITABLE USE."

A lodge building used as a club for members and their guests, in which free entertainments of various kinds were given and from which no profits were realized, the surplus funds being devoted to charity, is not a building used exclusively for purposes purely charitable within Const. art. 10, § 6, exempting such buildings

from taxation, an exclusive use implying that all other uses are excluded, a "purely charitable use" being one in which the charity is unmixed with other purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 389-393; Dec. Dig. § 241.\*]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Suit by St. Louis Lodge No. 9 Benevolent and Protective Order of Elks against Edmund Koeln, Collector of Revenue for the City of St. Louis, to cancel a tax bill. Judgment for the defendant, and plaintiff appeals. Affirmed.

Brownrigg & Mason, of St. Louis, for appellant. Edward W. Foristel and Frank H. Haskins, both of St. Louis, for respondent.

BROWN, C. This is a suit to cancel a tax bill issued against a lot in the city of St. Louis for city and school taxes for 1912. The lot is owned by the plaintiff and occupied exclusively by a building containing its lodge room, a hall used by the members and their wives, daughters, and friends for entertainments such as dancing, card or other social parties, a rathskeller, where meals and other refreshments, including liquors, are served to the members and such guests as by the rules of the lodge they are permitted to entertain there, and an auditorium in which vaudeville and similar entertainments, including on one occasion a boxing exhibition, are given for the entertainment of the members and their guests. There are also billiard and card rooms for similar use. No admission fee to the entertainments is charged. The general constitution of the order to which the lodge belongs states that it is established "to inculcate the principles of charity, justice, brotherly love and fidelity; to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship; to perpetuate itself as a fraternal organization." The by-laws of the plaintiff lodge provide for the relief of destitute and unemployed Elks to the extent of \$10 per week out of the funds of the lodge. A liberal construction has been given to this rule, and by reason of the fortunate rarity of destitute Elks, it has been tacitly extended to cover general charities without limit as to the amount, and in winter, and especially at Christmas time, large sums have been raised from the voluntary contributions of members to be dispensed for such purposes, and for Christmas gifts to children who, it is presumed, would not otherwise be able to partake of the pleasures of that blessed season. Their entire lodge fund, arising from membership dues and including the profits upon refreshments, except the sinking fund provided for the payment of the amount unpaid upon the property in question, has been devoted to these charities. The lodge is incorporated under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the state law providing for the incorporation of benevolent, religious, scientific, educational, and miscellaneous associations. The only question presented for our consideration is whether or not the property in question is exempt from these taxes because it is used exclusively for purposes purely charitable within the meaning of that expression as used in section 6 of article 10 of our state Constitution.

[1] In construing this same section this court recently said:

"It must be conceded to the state that, whether a tax-exempting clause be viewed from the standpoint of the state down to the people, or from the standpoint of the people up to the state, there must be unbending and inviolate rules which, as sure words of the law, are always to be reckoned with; and those rules (from the standpoint of the state) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms (*Railroad v. Cass County*, 53 Mo. loc. cit. 27); and from the standpoint of the people they are that equality is equity in taxation." *State ex rel. v. Johnston*, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. (N. S.) 171.

The same rule is distinctly stated in the cases cited in that opinion, as well as in *State ex rel. v. Casey*, 210 Mo. 235, 248, 109 S. W. 1. It is a just and reasonable one, and whatever may be the doctrine of the adjudications in other jurisdictions must be taken as the well-settled law of this state.

[2] There can be no question as to the charitable character of the defendant lodge, nor of its disposition in that respect. While the property is used as the meeting place of the lodge where all its regular business is transacted, it also affords to the members and their families, free of cost, the most liberal facilities for social enjoyment and the entertainment of their guests, and to the unfortunate bachelor member and transient brother, for compensation, something like the culinary and table advantages of home. The surplus of its lodge funds, whatever that may be, together with large sums voluntarily contributed by its members, is dispensed, through the activities of the lodge organization, in the relief of the needy. Were the virtues of human sympathy and helpfulness grounds for the exemption of one's property from the common burden of taxation, the plaintiff would stand upon firm ground while urging its claim for relief. There are, however, others whom we have enjoyed the pleasant privilege of knowing, who might stand upon the same ground and urge a similar claim. For them the home has not only been the instrument and abiding place of their own personal comfort, but they have opened its doors to helpless and deserted or orphaned children whom they have nurtured and educated to be good and useful citizens of the state, and have spent their income, and in some cases more, in dispensing aid to the destitute and suffering. Perhaps

one of the brightest virtues of these has been the instinctive patriotism evident in their willingness to share in the burden assumed by the government in protecting them in the life they have chosen and in educating their children.

It is evident that the constitutional exemption before us has no reference to the character and activities of the owner except in so far as those activities relate to the use of the property. For instance, the same sentence of the Constitution we are considering exempts from taxation property used exclusively for religious worship, yet it is evident one might have family worship in his own residence from morning until night, except at such times as he should step out for a few moments to evangelize his neighbors, without changing in the least the character of the property as his residence, or exempting it from taxation on the ground that it was used exclusively for religious worship. The worship would be an incident to the residence in the property of a pious, God-fearing man, given to the observance of such duties. If, on the other hand, the building were a church, devoted to public worship, and the owner should reside in it in the capacity of pastor in charge and caretaker of the premises, the condition would be reversed; for the occupation would be an incident to and a part of the religious use. This distinction is clearly illustrated and interestingly discussed in *State ex rel. v. Johnston*, supra, and cases cited therein at pages 663 et seq. of 214 Mo., 113 S. W. 1083 (21 L. R. A. [N. S.] 171).

This house is used, as the plaintiff's secretary tells us in his testimony, for lodge and club purposes, and seems to be well and liberally calculated for that use. The constitutional exemption requires that the property be "exclusively" used for purposes "purely" charitable. This "exclusive" use implies that all other uses be excluded. This exclusion naturally applies to vaudeville, boxing, dancing, billiards, and cards for the amusement of the owners. It might, under some circumstances, be said that all these things may be used to raise money for charitable purposes; but here the shoe is on the other foot. We are told in the testimony that these things are all *free*. No fee is charged for entrance to the shows, or to the dances, or for billiards or cards. These must be paid for out of the funds of the lodge, and consequently constitute uses not incidental, but paramount, to the charities. When the lodge has used the hall for a dance, and has paid the fiddler, then charity may come for the crumbs. The exempting use must also be "purely" charitable—charity which, according to Webster, is *unmixed* with any other element. Charity is not a promiscuous mixer. Here she modestly stands outside or goes her way and waits; waits until the plaintiff has finished using the spacious and comfort-

able rooms for the pleasure of its members; waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the dancers have tired and gone home; until the billiard rooms have been deserted to the markers; until the plaintiff has paid the cost of its own entertainment, and goes out and finds her, and hands her whatever it may have left in its pocket. She gets not the use of the premises, but what remains of income to the owners after they have used it in carrying out the injunction of their organic law, by promoting their own welfare, enhancing their own happiness, and cultivating their own good fellowship among themselves. Like the Supreme Court of Wisconsin in *Green Bay Lodge v. Green Bay*, 122 Wis. 452, 100 N. W. 837, 106 Am. St. Rep. 984, we do not find the maintaining of a clubhouse to be a purely charitable use. Were this true, as that court remarked in its opinion—

"then any number of men may organize themselves into a corporate body to provide these privileges and benefits for themselves and their guests, and claim the exemption of the statute."

After what we have said, it is unnecessary to notice further the Utah case of *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940, in which it was held that law exempting property of this character from taxation should be liberally construed. We are satisfied with our own rule in that respect.

The judgment of the circuit court for the city of St. Louis is affirmed.

BLAIR, C., concurs in result.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur, BOND, J., in result.

WESSEL v. LAVENDER. (No. 16461.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. RAPE (§ 66\*)—CIVIL LIABILITY—ACTION—PLEADING—INSTRUCTIONS.

Where, in a civil action for rape, the petition charged that defendant administered to plaintiff "a dose of medicine," and plaintiff, being sick and in bed, under the influence of the medicine became and was unconscious, and while in such condition defendant assaulted her, such allegation as to plaintiff's unconsciousness being the result of medicine was surplusage and not material, and hence did not authorize the giving of an instruction that the burden was on plaintiff to show by a preponderance of the testimony that defendant was engaged in assaulting her against her will while she was unconscious as a result of medicine administered to her by him, and unless she had so shown she could not recover.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. § 66.\*]

2. PLEADING (§ 375\*) — PROOF — SCOPE OF PROOF.

Plaintiff is only required to prove those allegations necessary to a recovery, and those

which are unnecessary may be rejected as surplusage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1224; Dec. Dig. § 375.\*]

3. RAPE (§ 66\*)—CIVIL LIABILITY—QUESTION FOR JURY.

In a civil action against defendant, a physician, for an alleged rape on plaintiff, a female patient, while unconscious from medicine administered to her by him, evidence held to entitle plaintiff to have the question as to the occurrence of the assault submitted to the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. § 66.\*]

Appeal from Circuit Court, Warren County; James D. Barnett, Judge.

Action by Tillie Wessel against O. L. Lavender. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. W. Delventhal, of Warrenton, and John W. Booth and Jesse H. Schaper, both of Washington, Mo., for appellant. T. W. Hukriede, of Warrenton, and Morton Jourdan, of St. Louis, for respondent.

BROWN, C. This is an action by plaintiff for \$5,000 actual damages and \$5,000 punitive damages for ravishing her on April 16, 1908, while she was unconscious. She was, at the time of the injury complained of, married, about 30 years old, and lived with her family, consisting of husband and two children—Dalla, a girl 10 years old; and Earl, a boy of 6. The defendant had been their family physician for 12 years. His age is not given, but the fact that he graduated at the Washington University Medical School in 1865 indicated that he had arrived at the age of discretion. Mrs. Wessel had suffered from an ovarian trouble for which Dr. Lavender had been treating her. It caused her much pain at times, and he had been called to relieve her, and on the particular occasion in question he was called for the same reason, and administered the usual sedative by hypodermic injection. What is charged to have occurred is stated in the petition as follows:

"That on the said 16th day of April plaintiff's husband was temporarily absent from his home and not expected to return for a period of about — days, and the defendant knew that plaintiff's husband was so absent and was not expected to return for said period of — days; and, so knowing, defendant being in the course of his treatment of plaintiff for her sickness in her bedroom in the presence of said minor children, administered to and caused to be taken by plaintiff, under the belief, on the part of plaintiff, that the same was necessary for her proper treatment for said sickness, a dose of medicine. That defendant having administered said medicine, plaintiff being then and there sick and in bed, under the influence of said medicine, became and was unconscious, and that shortly thereafter plaintiff regained consciousness, and upon regaining consciousness, defendant, then plaintiff's physician as aforesaid, was in bed with plaintiff, engaged in the act of committing sexual intercourse upon the body and person of plaintiff. That at the time defendant was undressed and plaintiff's minor children were absent from the room. That at the time when plaintiff as aforesaid discovered defendant in said act of violating her

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

person, she at once separated her person from that of defendant, and thereupon defendant left plaintiff's bed and put on his clothes and departed."

On the trial the plaintiff testified, in substance, that on Monday evening, April 13, 1908, she was suddenly seized with a painful aggravation of her trouble, and called Dr. Lavender, who administered a hypodermic injection which relieved her. He also attended her the next day for the same purpose, but did not come Wednesday. On Thursday evening after retiring she was seized with a very painful attack and sent for Mrs. Struebe, a neighbor woman, and for Dr. Lavender. There was at the time, in addition to her own family, a young girl about 15 years old staying in the house to assist her. She slept in a large room with two beds, one of which was occupied by this girl, and her daughter, while the little son occupied the bed with her. Mrs. Struebe came, and then the doctor, who administered a hypodermic injection and sat by the bed to await its effect. It did not relieve her, and he administered another. The two girls had, after the arrival of Mrs. Struebe, been sent to bed in a room across the hall, and the boy had been placed in the other bed in Mrs. Wessel's room. Shortly after the administration of the two injections she became tired and went to sleep; the doctor then being seated at the bedside and Mrs. Struebe at the foot of the bed. She awoke with a smothering sensation, and found the doctor in the bed engaged in the commission upon her of the act charged in the petition. She then said, "What in the dickens are you doing, doctor?" and called for her daughter. The doctor said, "The kids aren't in here." She then called Mrs. Struebe, and the doctor said she had gone home. She said, "You get in the hall and call those kids out of there, you call them." He was then dressing and told her to be quiet; that it was not so bad. She asked him again to call the children. When he had completed his toilet, he picked up his grip, and she cried again two or three times to call the children, but he walked back into the kitchen and then returned to the bed and said, "Look here, Mrs. Wessel, now if you ain't quiet I will give you another dose of medicine." She then shut up mighty quick and kept still. He asked her how she was feeling, and she said all right, and asked him again to call the children. He then went out and the two girls soon came into the room. She further testified that the next morning the doctor called at her home, and, coming into her room, shut the door and sat down near her bed. She asked him what made him do that to her the night before. He said it was not so bad, and not to make a great big halloo about it. After some talk in which he attempted to excuse himself, she called him, "You dirty, nasty, stinking thing," and threatened to tell her husband. He tried with much talk to persuade her not to make a great big howl about "little or

nothing," but she kept on fussing, and he kept on arguing that it would ruin his reputation and that a murder might come of it. She insisted that she was going to tell Mr. Wessel, and after the fuss had lasted quite a while he said:

"Well, I am willing to pay for the dirtiness and harm; it don't make any difference how much it will cost, if it costs me \$1,000, just so you won't tell him."

She vowed and declared for a while that she would, and finally said she would see about it. He said, "All right, Mrs. Wessel," and then after they had quarreled a little longer he went home. This talk lasted from half past 6 or 7 o'clock that morning until half past 8 or 9 o'clock. In the afternoon he came back, and after shutting the door asked her if she agreed to it. After they had argued a while, she said: "If you are willing to pay what I ask you, I will agree to it, to take the money." He said: "All right, Mrs. Wessel, are you honest?" She said, "Yes, honest to God," and they shook hands on it and made the agreement that he was to pay. She was not to tell her husband or anybody else. This final conference took about an hour. No amount was mentioned other than stated above.

Dr. Lavender testified that at the time of his call on the night of April 16, 1908, he stayed until Mrs. Wessel had gone to sleep after the administration of the second hypodermic and then went home, and that everything she testified to as having occurred afterward was purely fabrication, without any foundation in fact, and that he never had heard of any complaint of the kind until February 6, 1909, when she came to him with a bill as follows:

"Marthasville, Mo., Feb. 4, 1909.

"To Dr. C. L. Lavender \* \* \* \$500.00 for taking the advantage of me Mrs. Wm. Wessel while I was under the influence of medicine."

On this paper were written by Dr. Lavender the following word and figures: "2-6-08. Received \$60."

Mrs. Wessel testified that when she made the bargain with the doctor he said he could not pay her until the first of the year, so that she waited until about the middle of January before saying anything more to him about it. In the meantime she was making monthly payments on the family doctor bill, which he then told her had nothing to do with her bill against him, which he wanted her to make "reasonable." This induced her to make it \$500 instead of \$1,000. On February 4th Mr. Wessel asked her to pay the balance of \$57 still due on the family bill, which she did, taking her bill along, but had no opportunity to present it. She went back on the 6th, and when she presented it he said, "What are you going to do if I don't pay it?" They then quarreled, during which she asked him to call his wife and threatened to tell Mr. Wessel, and that it would come out, and then started to go, when he caught her by the arm

and after more talk paid her \$60 and marked it on the bill as it appears.

The doctor says that she first presented the bill on February 6th, and that, when he refused to pay it, she presented a gun, and in terms oozy with profanity and ribaldry commanded him to pay some of it. He was scared, thought his life in danger, and gathered up \$60, the same bills she had paid him two days before, which he paid, marking it on the bill, which he put in his own pocket, where he kept it until he turned it over to his attorney. He had her arrested with due promptitude on the charge of robbery growing out of the manner in which she made the collection, and she brought this suit. Dr. Lavender testified on the trial as to the kind and quantity of the medicine administered to Mrs. Wessel on the night of the alleged assault and introduced expert witnesses who testified that it would not ordinarily produce unconsciousness.

The plaintiff requested and the court gave the jury the following instructions:

"(1) The court instructs the jury that if they believe from the evidence that defendant on the 16th day of April, 1908, was the physician of plaintiff, and as such physician gave to plaintiff one or more hypodermic injections, and that within a short time thereafter plaintiff, being in bed in her home and defendant being present as such physician in the same room with plaintiff, fell asleep, and that thereupon defendant, while plaintiff slept (if she did so sleep), without the knowledge of plaintiff, got in bed with plaintiff and had sexual intercourse with plaintiff against her will and without her consent, then the jury will find a verdict in this case for plaintiff, and will assess her actual damages at such sum not exceeding \$5,000 as in the judgment of the jury will fairly compensate plaintiff for such distress of mind, shame, humiliation, and wounded feelings as the jury may find plaintiff sustained by reason of such intercourse."

"(3) The court instructs the jury that if they find from the evidence that defendant had sexual intercourse with plaintiff against her will and without her consent on the 16th day of April, 1908, at a time when defendant was in attendance upon plaintiff as her physician and plaintiff in bed and asleep and her husband absent from home, and that at the time of such intercourse no other persons were on the premises with plaintiff and defendant, except plaintiff's son, aged about 6 years, and her daughter, aged about 9 years, and a girl employed about the premises, aged about 15 years, and that on the following morning defendant returned and pleaded with plaintiff to say nothing about such intercourse and proffered to pay plaintiff damages if she would say nothing about such intercourse, and that plaintiff was thereby induced to keep silent about such intercourse, then plaintiff's failure to make complaint to other persons of such intercourse will not defeat plaintiff's right to recover damages in this action for such intercourse. But the jury should take these circumstances and all the other facts and circumstances in evidence in consideration in determining whether the defendant did or did not have carnal knowledge of plaintiff against her will and consent."

At the request of defendant he gave the following instructions:

"(8) The burden of proof is upon the plaintiff to show by a preponderance, that is, by a greater weight of the testimony, to the reasonable satisfaction of the jury, that the defendant

engaged in the act of committing sexual intercourse upon the body and person of plaintiff against her will and while she was unconscious as a result of medicine administered to her by defendant, and unless she has so shown by the greater weight, that is, by the preponderance of the testimony, you will find for defendant."

The verdict was for defendant.

1. The questions of fact in this case are simple, and it will assist us to reduce them to their lowest terms before proceeding to the examination of the questions of law predicated of them in this appeal. The wrong charged in the petition is that the defendant violated the plaintiff's person while she was unconscious. The answer is a general denial. Both parties testify that the defendant attended the plaintiff in his capacity of physician, at her request, at the time and place of the alleged commission of the wrong so charged, for the purpose of ministering to her in physical distress, and that he gave her remedies appropriate to her condition of suffering, and sat by her side until she slept. Up to this point their versions are in perfect accord, but here they diverge. He says that when she went to sleep he went away, leaving her in that comfortable condition. She says this is not true; that she was rudely awakened and found him engaged in perpetrating the outrage of which she complains, having already committed a capital felony. There are none of those questions of consent or resistance which are frequent features of such dramas. The sole question is upon the truth or falsity of these respective statements of the actors.

2. The defendant, by his instruction No. 8, raised the subordinate issue as to whether or not the condition of unconsciousness which is admitted to have supervened to her upon the cessation of her pain was "a result of medicine administered to her by defendant." He prepared the way by the introduction of expert testimony to the effect that the dose he said he administered would not ordinarily have caused unconsciousness. This testimony was not disputed; in fact, its effect could not be contradicted, because the defendant alone of all the world knew how much medicine he gave her. It is plain that if the cause of her unconsciousness was not in issue, but if the act charged was actually committed while she was unconscious from natural sleep induced by the cessation of her pain or otherwise, she was equally entitled to recover under the pleadings, then the giving of this instruction was highly prejudicial to the plaintiff. This raises the important question of the case.

[1] The respondent does not contend that this limitation upon the plaintiff's right to recover is correct as an abstract proposition. He admits that the act with which he is charged would be equally actionable had the unconsciousness charged resulted from natural sleep, as in *State v. Welch*, 191 Mo. 179, 89 S. W. 945, 4 Ann. Cas. 681, but he attempts to justify the instruction on the ground that

the statement of the petition that the defendant administered to plaintiff "a dose of medicine," and that "having administered said medicine, plaintiff being then and there sick and in bed, under the influence of said medicine, became and was unconscious," implies, if it does not state, that the unconsciousness was a result of the medicine; and that it follows that there can be no recovery unless the cause of her unconsciousness is proved as charged. Admitting his construction of the petition, is respondent's conclusion correct?

[2] The rule is that proof is only required of those allegations necessary to a recovery, and that those unnecessary to that end may be eliminated as surplusage. *Mehan v. St. Louis*, 217 Mo. 35, 46, 116 S. W. 514; *Fredrick v. Allgaier*, 88 Mo. 598, 603, 604; *Smith v. Fordyce*, 190 Mo. 1, 88 S. W. 679. The rule more specifically stated is that, where a good cause of action is well stated in the pleading, all additional averments consistent therewith, whether by way of inducement, explanation, or additional particulars, may be rejected as surplusage, and a recovery may be had upon proof of the essential facts remaining. The only exception to this rule is that in those special cases when the law permits a recovery upon the statement of a legal conclusion, as upon the general allegation negligence in a suit by a passenger against the carrier, if the plaintiff, instead of relying upon this right, undertakes to state the specific facts constituting his cause of action, he will be held to have abandoned his general statement. This exception, it will be seen, is more apparent than real, for the pleading, so constructed and construed, will then be subject to the rule we have stated. The allegation in this petition that the plaintiff was asleep is as clearly a statement of fact as would be the allegation that she was dead. While the cause of her slumber as well as the cause of her death might in a proper case become an important question for adjudication, it is not, as we have seen, important in this case. The giving of this instruction was prejudicial error.

[3] 3. The respondent says that the judgment ought to be permitted to stand because, underlying and controlling all other questions in the case is the fatal fact that the testimony of the plaintiff is of such a character that, had the verdict and judgment been for the plaintiff, it ought not to be permitted to stand. He says that for that reason the case should not have been submitted to the jury.

We are not usually disposed in such cases to attach much importance to the failure of a woman to vindicate her own virtue and the majesty of the law by raising the hue and cry to announce her shame and humiliation. We can understand how the natural modesty of a good woman may impel her to hide so foul a thing in her own soul, suffering the pain and humiliation alone, rather than to

endure the mortification of displaying it in the arena the law has provided for such exhibitions, to curious crowds that in her outraged imagination would look upon her as polluted rather than wronged. This case, however, presents no such difficulty. According to her own relation of the affair, the plaintiff, as soon as the matter was presented to her in that light, considered the financial features of the situation, with the result that she agreed, in consideration of money promised her by the one who had wronged her by the commission of a felony, to conceal the crime, and thereby herself became guilty of a felony. R. S. 1909, § 4360. When the money was not paid and he intimated that he did not intend to pay it, she said to him, "I am going to tell on you." This, she says, brought him to such a realizing sense of the trouble he was in that he followed her, and caught her by the arm in the door, and paid her the \$60. She then wiped the tears from her eyes on her wrist and departed. The fact that Dr. Lavender, in charging her with robbery, founded his accusation upon a threat to shoot rather than a threat to accuse him of a felony, under section 1895, R. S. 1899, may not be corroborative of his version of the affair as against hers; but it at least illustrates that queer perversity of human character which sometimes prefers pure invention to equally available facts. We know of no law which disqualifies Mrs. Wessel as a witness by reason of these circumstances, or prevents the jury from considering her testimony for what they may think it worth; but, even should it require corroboration, about which it is entirely unnecessary to express an opinion, it finds it in the fact that the doctor paid \$60 on a fair statement of the ground on which this suit is founded, and took upon himself the burden of explaining it.

On the ground stated in discussing the defendant's eighth instruction, we are constrained to reverse the judgment of the trial court, and to remand the cause for a new trial.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur. WOODSON, P. J., in result.

BROYLES v. EVERSMEYER. (No. 16808.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. PLEADING (§ 248\*) — AMENDMENT — "NEW CAUSE OF ACTION."

Generally there is the statement of an entire new cause of action when it is apparent from the original and amended petitions that the subject-matter in dispute is different; that different evidence would be required to support the cases stated; that the measure of damages would be different; that the recovery under one petition would not be a bar to an action to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

recover under the other; and that the same defense would not apply equally well to both petitions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.\*

For other definitions, see Words and Phrases, First and Second Series, New Cause of Action.]

**2. EJECTMENT (§ 76\*)—AMENDMENT—NEW CAUSE OF ACTION—CORRECTION OF MISTAKE—MISTAKE IN ANY OTHER RESPECT.**

An amended petition in ejectment to recover a fractional quarter of a section correcting a description in the land sued for by changing section 27 to section 28 does not state a new cause of action, but is within Rev. St. 1909, § 1848, authorizing an amendment correcting a mistake in the name of a party or a "mistake in any other respect."

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 205-214; Dec. Dig. § 76.\*]

Appeal from Circuit Court, Lincoln County; James D. Barnett, Judge.

Ejectment by W. W. Broyles against Eno. V. Eversmeyer. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. Martin, of Troy, for appellant. R. H. Norton and Avery, Young & Killam, all of Troy, for respondent.

**GRAVES, J.** This case involves but a single question of law. Appellant has made a succinct statement of the case in the following, taken from the brief:

"The plaintiff commenced this suit in ejectment for the northeast fractional quarter of section 27, township 50, range 2 west, in Lincoln county, September 16, 1908. To this petition defendant filed a general denial October 12, 1908. At the March term, 1909, the plaintiff filed his amended petition in which he asked recovery of possession of the northeast fractional quarter of section 28, township 50, range 2 west. On the same day, March 22, 1909, that plaintiff's amended petition was filed, the defendant filed his motion to strike out plaintiff's amended petition for the reason that it was the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, and various other reasons. This motion was by the court overruled and exceptions taken and preserved and filed at the same terms of court. The plaintiff took no further steps in the case until March term, 1911, and then on the 28th day of March, 1911, took judgment against defendant by default. On March 31, 1911, the defendant filed his motion to vacate and set aside the judgment and in arrest of judgment. These motions were overruled, and exceptions taken and filed. The question in the case is: Was the second or so-called amended petition an amendment of the original cause of action or the substitution of a new cause of action? There was no waivers or appearance by defendant to the second petition. Can a plaintiff sue for one tract of land and by amendment recover another by default without appearance by defendant?"

[1] That the last expressions of this court are adverse to the contention of the defendant is conceded by his able counsel. He argues the differentiation of those cases in the first place, and lastly that the broad language used is not a correct annunciation of the law. He contends that there is the statement of an entire new cause of action

when it is apparent from the two petitions (1. e., the original and the amended) that (1) the subject-matter in dispute is different; (2) that different evidence would be required to support the cases stated in the two respective actions; (3) that the measure of damage would be different; (4) that the recovery under one petition would not be a bar to a recovery under the other; (5) that the same defense would not apply equally well to both petitions.

[2] Generally speaking, these are the tests applied in determining whether there has been such a departure as to make the amended petition state a different cause of action. However, what we have said upon the subject has been with reference to our statute upon amendments. Section 1848, R. S. 1909, reads:

"The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return, or other proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

If, in the record before us, the reason of the court for permitting the amendment did not appear, the court would be presumed to have been guided by the statutory rule in permitting the amendment. This statute says the court may amend a pleading at any time before final judgment "by correcting a mistake in the name of a party, or a mistake in any other respect." In permitting this amended petition to stand, it could well be concluded that the trial court was convinced that the section number, as stated in the original petition, was a mere mistake, and such as often happens in such petitions. A correction of this mistake, if it was shown to the court to have been a mistake, is one which would, in our judgment, fall fairly within the meaning of the clause of the statute with reference to "a mistake in any other respect." But in the case at bar we are not left in the dark as to the reason of the trial court for permitting the amendment. The record nisi reads:

"Now at this day come the parties herein by their respective attorneys, and leave is granted plaintiff to file during this day an amended petition correcting error in description, and said amended petition is now filed."

This amounts to a finding of the court that there was a mistake made in the original petition, so far as the description of the land was concerned, and plaintiff was given leave to correct the same. Nor is this a harsh construction of the statute, because, if the defendant is placed at any disadvantage by reason of the amendment, such amendment under the statute must be granted upon terms. In this case the defendant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sought no terms, but stood boldly upon his conception of the law. His boldness may prove his undoing, but, if so, the undoing has been one wrought by his own hands. This is the view of the statute taken by Lamm, J., in the case of *Wright v. Groom*, 246 Mo. 158, 151 S. W. 465, and is likewise the view previously taken by this court in the other Missouri cases cited by Judge Lamm. Whether the language used by the court in *Wright v. Groom*, supra, was strictly called for by the facts of that case is immaterial, if such language announces good doctrine, and we think it does. Under the opinion in that case, as well as the other cases therein cited, this judgment should be affirmed. The statute quoted is broad enough to cover just what was done in this case.

Let the judgment be affirmed. All concur.

KELLER et al. v. SUMMERS. (No. 16536.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. COURTS (§ 231\*)—STATE COURTS—MISSOURI SUPREME COURT—CERTIFIED CASES.

For the Supreme Court to obtain jurisdiction of a cause certified to it from one of the Courts of Appeals, on the theory that the decision of that tribunal is in conflict with a decision of the Supreme Court or of one of the Courts of Appeals, the Court of Appeals must have rendered a decision in the case or proceeding, and not have made a mere ruling on a preliminary or interlocutory motion not decisive of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

2. COURTS (§ 231\*)—STATE COURTS—MISSOURI SUPREME COURT—CERTIFIED CASES.

The purpose of Const. Amend. 1884, § 6, allowing the certification of cases from the Courts of Appeals to the Supreme Court in case one of the judges shall deem the decision contrary to a decision of the Supreme Court or of one of the Courts of Appeals is to prevent conflict in the rulings of the appellate courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

3. COURTS (§ 231\*)—STATE COURTS—MISSOURI SUPREME COURT—“OPINION”—“DECISION.”

In a case before the Springfield Court of Appeals, part of a judgment for plaintiff was reversed and one of the judges of that court filed a dissent, stating that to reverse the judgment was in conflict with named cases, which were decisions of the Supreme Court. The majority opinion recited that such judge dissented from part of the opinion, and requested that the cause be certified to the Supreme Court, wherefore it was so ordered. *Held*, that as the words “opinion” and “decision” are used interchangeably, and as the language of the dissenting judge clearly showed that he deemed the reversal of the case in conflict with decisions of the Supreme Court, the cause could be certified to the Supreme Court in accordance with Const. Amend. 1884, § 6, providing that where one of the judges of a Court of Appeals deems a decision in conflict with decisions of one of the other Courts of Appeals or of the Supreme

Court, the cause shall be certified to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

For other definitions, see Words and Phrases, First and Second Series, Decision; Opinion

4. COURTS (§ 231\*)—STATE COURTS—MISSOURI SUPREME COURT—JURISDICTION OVER CERTIFIED CASES.

Where a case is certified to the Supreme Court on dissent of a member of the Court of Appeals, who asserted that the decision was in conflict with decisions of the Supreme Court, the Supreme Court, under the direct provisions of Const. Amend. 1884, § 6, takes jurisdiction of the whole case just as if it had been brought there originally.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

5. DAMAGES (§ 87\*)—EXEMPLARY DAMAGES—RIGHT TO.

Punitive damages may be recovered where a proper basis therefor is laid in the petition and proof, although plaintiff recovers only nominal actual damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. § 87.\*]

6. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

Where one count of a petition to recover the value of a certificate of deposit wrongfully taken from plaintiff did not charge larceny of the certificate, an instruction, which authorized an award of punitive damages in case the certificate was stolen, is improper, going beyond the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

7. APPEAL AND ERROR (§ 1140\*)—DETERMINATION—REMITTITUR.

Where the award of punitive damages which was based on an erroneous instruction could be separated from the award of actual damages, the error in the instruction may be cured by a remittitur of the punitive damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Error to Circuit Court, Jasper County; Haywood Scott, Judge.

Action by R. F. Summers against S. A. Keller and another. Judgment for plaintiff, and defendants bring error. The Springfield Court of Appeals (152 Mo. App. 626, 133 S. W. 1180) reversed the judgment and certified the case to the Supreme Court. Affirmed on condition that plaintiff enter a remittitur; otherwise reversed and remanded.

This suit was decided by the Springfield Court of Appeals by the affirmance of the judgment for plaintiff on the second count of his petition and the reversal and remand of his judgment on the fourth count of his petition. One of the members of that court dissented to the reversal and remand in a written opinion, setting forth the grounds of his dissent and stating that “to reverse that part of this judgment, etc., is also in direct conflict with *Cartwright v. Culver*, 74 Mo. 179, \* \* \* and also in direct conflict with *Foster v. Railway*, 115 Mo. 165, 21 S. W.

916." Thereupon the majority opinion concludes, to wit:

"Self, Special Judge, concurs; Cox, J., dissents as to that part of the opinion reversing the judgment and remanding the cause on the fourth count of the petition, and requests that the cause be certified to the Supreme Court, and it is so ordered. Gray, J., not sitting." *Summers v. Keller*, 152 Mo. App. 626, 646, 651, 133 S. W. 1180, 1186.

As shown in the two opinions of the Judges of the Springfield Court of Appeals, this cause was lodged there after a writ of error had been sued out in the Kansas City Court of Appeals by the defendants in a judgment in favor of plaintiff in the circuit court of Jasper county, by the transference of the cause to the Springfield Court of Appeals. It is shown by the record and briefs in the latter court that the three first counts of plaintiff's petition were different statements of a cause of action for the alleged recovery by defendants of a certificate of deposit for \$500, that the next three counts were for the value of a certificate of deposit for \$300, and that the seventh count was dismissed on the trial. Plaintiff prayed actual and punitive damages separately on both causes of action, and alleged in each a proper basis for the recovery of both measures of relief. Plaintiff had judgment on the first cause of action for \$507.50 actual and \$937.50 punitive damages. On the second cause of action plaintiff recovered \$314.50 as actual and \$562.50 as exemplary damages. The first recovery was rendered on count No. 2 of the petition, and the second on count No. 4. So far as necessary, the language and scope of these counts will be adverted to in the opinion. The cause is here under the above-quoted order of the Springfield Court of Appeals, based upon the above-quoted dissenting opinion of one of its judges and his request for its certification and transfer.

M. R. Lively, of Webb City, for plaintiffs in error. H. W. Currey and Geo. V. Farris, of Webb City, and W. J. Owen, of Joplin, for defendant in error.

BOND, J. (after stating the facts as above). [1-3] I. Although no question is made by either of the counsel in this case as to the acquisition of jurisdiction of this court, it is not improper that we should determine that for ourselves before considering the merits of the writ of error by which the cause was taken to the Springfield Court of Appeals. By section 6 of the amendment of the Constitution adopted in 1884, specific provision is made by that instrument for the certification and transfer of any case or proceeding pending in any Court of Appeals to this court, and in the event that method is complied with, this court acquires the same jurisdiction of such case or proceeding as if it had been rightfully brought here by appeal or writ of error from the trial court, and must rehear and determine it. To vest jurisdiction in this constitutional mode it is neces-

sary: First, that the particular Court of Appeals where the case or proceeding is pending shall render a decision therein, not a mere ruling on a preliminary or interlocutory motion which is not decisive of the case (*Gipson v. Powell*, 167 Mo. 192, 66 S. W. 969); second, some one of the judges of that court must state of record by adequate terms that he deems the decision of the majority of the Court of Appeals contrary to a previous decision of this court or some one of the Courts of Appeals; third, upon the filing of such a statement by one of its judges, the Court of Appeals must, of its own motion pending the same term, certify and transfer said case or proceeding and the original transcript therein to the Supreme Court; fourth, this procedure was devised to prevent disharmony in the rulings of the appellate courts of this state and to enforce in all others the paramount authority of the "last previous rulings of the Supreme Court on any question of law or equity" (*Ex parte Conrades*, 185 Mo. 411, 85 S. W. 160).

It has been uniformly held in this state since the adoption of this constitutional provision that this method of transfer of jurisdiction is accomplished solely by the statement of one of the judges of a Court of Appeals that he deems the ruling on which its judicial action is taken to be contrary to the previous ruling of this court or some Court of Appeals. He is not required, under the Constitution, to employ any set or stereotyped terms to express that idea. It is only necessary that in some authentic way he declare his opinion of the contrariety of the Court of Appeals with a subsisting previous opinion of this court or some one of the Courts of Appeals. It does not at all affect the displacement of jurisdiction by this process that the judge so stating should be in error in his opinion or mistaken as to the fact. It is enough to oust the jurisdiction of the Court of Appeals in any case or proceeding for one of the judges to say, in proper words and of record, that its decision of any case is in conflict with an unreversed ruling of this court, or any one of the Courts of Appeals. *State ex rel. v. Philips*, 96 Mo. 571, 10 S. W. 182; *State ex rel. v. Smith*, 107 Mo. loc. cit. 531, 16 S. W. 401, 17 S. W. 901; *Clark v. M., K. & T. Ry. Co.*, 179 Mo. 66, 77 S. W. 882; *Wilden v. McAllister*, 178 Mo. 732, 77 S. W. 730; *Rodgers v. Fire Ins. Co.*, 186 Mo. 248, 85 S. W. 369; *Bradley v. Milwaukee Mech. Ins. Co.*, 163 Mo. 553, 559, 63 S. W. 1132; *State ex rel. v. Smith*, 129 Mo. 585, 31 S. W. 917; *Smith v. M. P. Ry. Co.*, 143 Mo. loc. cit. 38, 44 S. W. 718.

In the case at bar the dissenting judge stated of record that "to reverse" this case as his colleagues did "was in direct conflict" with two decisions (naming them) of this court. If there is any potency in words to convey the idea that he thought the decisions of his associates to be contrary to the deci-

sions of this court, then the above terms did express that opinion on the part of the dissenting judge. He could not have expressed that thought more clearly nor distinctly if he had copied the language of the Constitution. It is idle to say that he should have used the word "decision" instead of the words "to reverse" when speaking of the action of the court, which he said was "in direct conflict" with the previous decisions of this court. To reverse a case is to decide it; and to speak of a reversal is to speak of a decision, for there can be no reversal without a decision "to reverse." Hence, when Judge Cox stated that the reversal of this case was "in direct conflict" with two mentioned decisions of this court, he, in effect, stated in the clearest and most unequivocal form that the court of which he was a member had rendered a decision—the causa causans of its reversal—which was "in direct conflict" with the rulings of the two cited cases in this court.

Neither is there any logical force or value in the suggestion that a "decision" is the judgment of a court, and its "opinion" is the mere reason for its judgment. The words "decision" and "opinion" are used interchangeably in juridical literature, and especially in many of the cases cited above, where this provision of the Constitution was under review. By the use of the word "decision" the Constitution makers plainly meant the opinions of the respective Courts of Appeals in conformity to which their judgment or decretal order was made. The Constitution was not concerned with the sums of money awarded to the plaintiff or other decretal orders of the courts further than these were the consequence of the principles of law and equity announced in the opinion or decision and upon which they were based. What the Constitution designed to prevent was repugnancy of rulings between Courts of Appeals or between them and the Supreme Court, and by "rulings" it meant expositions of the law or the legal reasons upon which the courts rested their judgment on the questions presented or the issues joined. To make these the same, the constitutional provision under review provided that the Courts of Appeals should have no right to decide a case when any judge of that body stated its decision or opinion, upon which it rendered a judgment, was contrary to a previous ruling of this court or any one of the Courts of Appeals. It was harmony of doctrine and adjudication, which this clause of the Constitution was framed to safeguard, and that was the sole idea, object, and extent of section 6 of the amendment of the Constitution of 1884. It was the legal antecedents of the judgments of the Courts of Appeals which the Constitution desired to control so as to render the jurisprudence of this state a symmetrical and harmonious body of law for the administration of equal justice, measured by the same standards, in all the courts of the state.

[4] In the instant case the cause has come before this court in full accord with the constitutional duty of the Springfield Court of Appeals to certify and transfer it here upon the statement of record of one of its judges that the opinion of his associates was "in direct conflict" with two decisions of this court, and we take jurisdiction of the entire cause. For although the dissenting judge stated, in substance, that the action of his associates in reversing a part of plaintiff's recovery was contrary to the decisions of this court, yet, it is shown by the record that both of plaintiff's causes of action arose out of the same transaction, and as that transaction must come before us for review as to one of plaintiff's causes of action, it is our duty to determine it with reference to all of the relief claimed by plaintiff. When a cause is sent to this court under this provision of the Constitution it is not transferable by piecemeal, but under the very language of the Constitution, this court is possessed of full jurisdiction and "must rehear and determine said cause or proceeding, as any case of jurisdiction obtained by ordinary appellate processes." Const. Am. 1884, § 6. This makes this court the final arbiter of the cause just as if it had been properly appealed to this court after the judgment in the circuit court, and furnishes a salutary rule whereby an appeal or writ of error must be finally determined by one appellate court whose opinion will be the single guide for the trial court in any subsequent proceedings in the cause.

[5] II. This case was given careful consideration by the Springfield Court of Appeals, as is shown by the full opinion written by Judge Nixon, and concurred in by a special judge, and the dissenting opinion of Judge Cox. The facts and issues are fully stated in the report of the case in the Court of Appeals (152 Mo. App. 626, 133 S. W. 1180) and will not restate further than to show the grounds of our decision. The gravamen of plaintiff's two causes of action was the recovery against defendant, who were charged to be fraudulent conspirators of the amounts of two certificates of deposit for the respective sums of \$500 and \$300, which were issued to the plaintiff for money, which he had earned as a mine worker, and deposited in two banks. The pith of plaintiff's complaint is that one of the defendants became aware of his possession of the two certificates, and at once invited him to the drinking saloon kept by the other, well knowing his weakness for drink and that he lost his senses when he yielded to it; that after plying him with drink, he was enticed into a back room to gamble with the two defendants; that he was made very drunk and his two certificates of deposits were taken from his coat pocket without any consideration and without his knowledge by the fraudulent schemes of the two defendants; that one of them thereafter

indorsed plaintiff's name on the backs of plaintiff's certificates, and received the money due upon them from the banks, and did not deliver it to plaintiff.

The two counts (numbers 2 and 4) of plaintiff's petition upon which plaintiff recovered judgment against defendants alleged, not only the elements for a recovery of actual damages, but also the elements of fraud, malice, oppression, and conspiracy on the part of the defendants in perpetrating their joint schemes for obtaining plaintiff's money as a basis for punitive damages. In the full and learned opinion of Judge Nixon, all the points insisted upon by the plaintiff in error relating to the judgment on the second count were properly adjudged. This conclusion of the Springfield Court of Appeals affirming the verdict and judgment on that count of the petition is approved by us, though we do not approve of some of the views expressed in that opinion which, as we understand them, condition the right to recover exemplary damages upon a recovery of substantial actual damages. That is an inexact statement of the rule. Punitive damages may be recovered where a proper basis therefor is laid in the petition and proved, although the plaintiff recovers only nominal actual damages. *Ferguson v. Chronical Pub. Co.*, 72 Mo. App. loc. cit. 466; 2 *Sutherland on Damages*, § 406; *Lampert v. Drug Co.*, 238 Mo. loc. cit. 418, 141 S. W. 1095, 87 L. R. A. (N. S.) 533, Ann. Cas. 1913A, 351. In the latter case the learned opinion of Roy, C., reviewed fully the authorities in this state and elsewhere, and reaches the correct conclusion that "verdict for nominal actual damages will support a verdict for punitive damages."

[8, 7] III. But we do not concur in the disposition made by the majority opinion of the Springfield Court of Appeals of the recovery which defendant in error had under the fourth count of his petition. The substance of the allegations in that count of the petition, while charging the obtention of the \$300 certificate by fraud, conspiracy, and procuring the owner to become drunk and a party to a gambling game, did not impute to the defendants the technical crime of larceny. The instruction given for defendant in error on that count properly hypothesized the conditions upon which he could recover actual damages, but it went beyond that, and permitted the jury to find punitive damages if they believed the defendants had stolen the \$300 certificate of deposit. That part of the instruction relating to punitive damages was not warranted by the particular averments of the fourth count of the petition upon which it was based, and should not therefore have been given. But this error could not have prejudiced the plaintiffs in error except to the extent of permitting a recovery of punitive damages on grounds not pleaded in the fourth count of the petition.

It did not in any way affect their liability for actual damages as to which the jury was correctly instructed by instruction No. 2. The error in the portion of that instruction relating to punitive damages is entirely curable by excluding from the verdict of the jury the award made by them of \$562.50 as exemplary damages in their verdict on the fourth count of the petition. In all other respects we hold (as all the members of the Springfield Court of Appeals), that defendant in error is entitled to an affirmance of the judgment recovered by him in the circuit court. If, therefore, the defendant in error will, within the next ten days, enter a remittitur of \$562.50 of the judgment rendered in his favor in the trial court, the remainder of that judgment will be affirmed; otherwise this cause will be reversed and remanded for a new trial. All concur.

TOLER et al. v. JUDD et al. (No. 16941.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**1. DESCENT AND DISTRIBUTION (§ 91\*)—ACTIONS BY HEIRS—RECOVERY OF PERSONAL ASSETS.**

A suit to cancel, on the ground of fraud and undue influence, a contract whereby one who had since died intestate exchanged a stock of merchandise for certain lands, cannot be maintained by the heirs, since the personal property vested in the administratrix.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 359-381; Dec. Dig. § 91.\*]

**2. DESCENT AND DISTRIBUTION (§ 91\*) — ACTIONS BY HEIRS—PARTIES.**

The refusal of the administratrix to bring such suit does not entitle the heirs to maintain it joining the administratrix as a defendant therein, since the heirs have a complete remedy by action on the administratrix's bond, or by proceedings in the probate court for her removal.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 359-381; Dec. Dig. § 91.\*]

Appeal from Circuit Court, Macon County; Nat. M. Shelton, Judge.

Suit by W. L. Toler and another against James A. Judd and others. From a judgment for defendants upon demurrer to plaintiffs' bill, the plaintiffs appeal. Affirmed.

This is a bill in equity instituted by the plaintiffs against the defendants, in the circuit court of Macon county, to set aside and cancel a certain contract made and entered into by and between one E. F. Toler and James A. Judd, by which the former traded a certain stock of goods at McFall, Mo., to the latter for certain real estate, and other considerations, located in Macon county. There was a demurrer filed to the bill which was by the circuit court sustained, and, the plaintiffs declining to plead further, judgment was duly rendered against them. In

due time and in proper form the plaintiffs appealed to this court.

This state of the record requires this court to pass upon the sufficiency of the bill, and the demurrer filed thereto.

The bill is as follows:

"Plaintiffs for their course of action state: That on and prior to January 31, 1910, one E. F. Toler was the owner of a general stock of merchandise of the value of \$16,500, then located and situated in a certain store building occupied by him in the town of McFall, in Gentry county, Mo. That the defendant Judd was then the owner in fee of certain lands located in Macon county, Mo., to wit: 15 acres off the south end of the west half of the northwest quarter; and the east half of the northwest quarter, and the west half of the northeast quarter, and the southeast quarter of the northeast quarter, and the north half of the southeast quarter, all in section 6, township 57, range 17, containing 295 acres more or less, subject to certain deeds of trust aggregating about \$4,000 principal. That said lands were then not worth to exceed \$25 per acre, or \$7,375 in aggregate, and the said Judd's equity of redemption therein was not worth to exceed \$3,375. That the said E. F. Toler was then, and for a long time prior thereto had been, broken down in health, physically and mentally weak, of unsound mind, incapable of transacting business, easily susceptible to persuasion, influence, and suggestions, and in constant fear and dread of death, and suffering from a mortal illness, as the defendants and each of them then well knew.

"Plaintiffs further state that the defendant James A. Judd, well knowing the said condition of the said E. F. Toler physically and mentally, with the intention, design, and purpose to fraudulently cheat and defraud the said E. F. Toler out of his said stock of merchandise, did falsely and fraudulently represent to the said E. F. Toler that the said lands of the said James A. Judd were of the value of \$60 per acre, and, with the fraudulent purpose aforesaid, proposed to the said E. F. Toler that he would sell and exchange his equity in said lands in Macon county, Mo., at the valuation of \$13,700, taking the said Toler's stock of goods in exchange therefor at the valuation of \$16,500, and would settle the difference in favor of said Toler of \$2,800 in certain notes that said Judd then held on persons living on or in the neighborhood of said lands in Macon county, Mo., which said Judd falsely and fraudulently represented to said Toler were good, solvent, and collectible notes.

"Plaintiffs further state that said E. F. Toler was not acquainted with the said lands of the said Judd in Macon county, Mo., and was wholly ignorant of the value of said land, and was wholly ignorant of whether the said notes for the said sum of \$2,800 were solvent and collectible, all of which the defendant Judd then well knew, and the said Judd importuned and constrained the said E. F. Toler to make said exchange of said stock of goods for the said lands in Macon county, Mo., and the said \$2,800 in notes, the said E. F. Toler being wholly unable to resist the importunities, persuasions, and constraint of the said Judd for that purpose, as the said Judd then well knew, and said Toler wholly relying upon the said representations of the said Judd, and being unable to resist his importunities and persuasions, was induced thereby to sell and deliver to the said Judd his said stock of goods in exchange for said lands and said notes for \$2,800, and did on January 31, 1910, so wholly relying upon said representations of the said Judd, and being so fraudulently influenced by the said Judd, as aforesaid, sell and deliver to him his said stock of goods, and received in exchange there-

for a deed from the said James A. Judd and his wife conveying said lands to him, the said E. F. Toler, and Ida E. Toler, the defendant, his wife, subject to four certain deeds of trust upon said lands to secure the payment of four several notes therein described, aggregating the sum of \$4,000 principal, and the said Judd then assigning and transferring without recourse to the said E. F. Toler and Ida E. Toler, his wife, said notes aggregating the said sum of \$2,800; and plaintiffs aver that the said representations of the said James A. Judd were wholly false, that said lands were not worth to exceed \$25 per acre, and the equity of redemption of the said James A. Judd therein was not worth to exceed \$3,375, and the said notes for the sum of \$2,800 were not collectible, and the makers thereof were insolvent.

"Plaintiffs further state that they do not know and are unable to state the names of the makers of said notes.

"Plaintiffs further state that, immediately upon effecting said exchange, the defendant James A. Judd took possession of the said entire stock of goods so owned by said E. F. Toler, and removed the same from said town of McFall and has converted the same to his own use.

"Plaintiffs further state that the said E. F. Toler, of the said illness of which he was then suffering, as aforesaid, died on or about March 1, 1910, intestate and without issue, being at the time of his death a resident of Gentry county, Mo., and left surviving him his widow, the defendant Ida E. Toler, and the plaintiff W. L. Toler, his brother, and Mary J., his mother, his only surviving heirs; that the father of E. F. Toler had theretofore died; and that said E. F. Toler had no sisters or brothers, or their descendants surviving him, other than his brother W. L. Toler.

"Plaintiffs further state that, immediately upon the death of said E. F. Toler, the defendant Ida E. Toler took out letters of administration and was appointed administratrix of the estate of E. F. Toler, by the probate court of Gentry county, Mo., and duly qualified, and has ever since been, and now is, acting as such administratrix; that plaintiffs have requested the said Ida E. Toler to join with them in this action, and have been unable to obtain her consent, and she has refused to join with them in this action, either individually or as administratrix of the estate of E. F. Toler, deceased, and they have for that reason made her a codefendant in this action, individually and as administratrix of the estate of said E. F. Toler, deceased.

"Plaintiffs further state that they are willing, and now offer, to convey to the said James A. Judd any interest that might or would pass to them in the lands above described by reason of said conveyance of the said James A. Judd and his wife to the said E. F. Toler and Ida E. Toler, and are willing to transfer to said James A. Judd any interest they may or might have in said notes for \$2,800, and they pray that said sale and exchange, of said stock of goods so owned by said E. F. Toler for the said lands in Macon county, Mo., and said notes for \$2,800 be canceled and set aside, and for naught held, and that the said defendant, James A. Judd, be required to account for and to pay over to the administratrix of the estate of the said E. F. Toler the said sum of \$16,500, the value of said stock of goods so owned by the said E. F. Toler, and that judgment be rendered in favor of Ida E. Toler, as administratrix of the estate of E. F. Toler, deceased, for the sum of \$16,500 with interest and costs of suit, and that she be required to return to the said James A. Judd the said notes for \$2,800, and to reconvey to said Judd said lands in Macon county, Mo., and for other proper relief."

The demurrer was as follows:

"Now come the defendants and demur to the petition of plaintiffs filed herein, and assign the following grounds of demurrer, to wit:

"First. Because said petition fails to state facts sufficient to constitute a cause of action.

"Second. Because said petition fails to state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendants.

"Third. Because said petition shows upon its face that plaintiffs have no legal capacity to sue herein.

"Fourth. That there is a defect of parties plaintiff, in that under the allegations of the petition the administratrix or administrator of the estate of said E. F. Toler, deceased, is a necessary party plaintiff to this action.

"Fifth. Because there is an improper joinder of parties plaintiff, in that said W. L. Toler and Mary J. Toler have no right or authority to maintain this action, and are improper parties plaintiff herein.

"Sixth. Because said petition shows upon its face that the cause and right of action, if any exists, is in the administratrix of the estate of E. F. Toler, deceased, and the remedy of the plaintiffs, if any they have, must be pursued in an entirely different proceeding from that sought to be maintained in this action.

"Seventh. Because said petition, in effect, attempts to divest the defendant Ida E. Toler of her title to the real estate therein mentioned, and the same fails to allege any fact or facts, showing, or tending to show, that the said Ida E. Toler participated in any pretended or alleged fraud claimed to have been perpetrated upon the said E. F. Toler, deceased, in the sale of said stock of merchandise, or the conveyance of the real estate in said petition described.

"Eighth. Because said petition fails to state the specific facts and acts of the defendant Judd which it is claimed constituted fraud or undue influence, and fails to state any specific facts amounting in law to fraud sufficient to justify the rescission of said contract of sale.

"Ninth. Because said petition fails to allege that the said E. F. Toler did not see or examine the real estate mentioned in said petition, and fails to allege that he did not investigate the solvency of the makers of the notes therein mentioned, or that he was prevented from making such examination of such land, or such investigation of the solvency of the makers of said notes, by any act or conduct on the part of the defendant Judd."

Weatherby & Frank and Higbee & Mills, all of Kirksville, for appellants. E. C. Lockwood and J. W. Peery, both of Albany, for respondents.

WOODSON, P. J. (after stating the facts as above). I. It will be observed by reading this bill that it states that E. F. Toler and Ida E. Toler, at the time of the execution of the contract mentioned, were husband and wife; that after its execution the husband, E. F. Toler, died intestate, leaving surviving him his widow, Ida E. Toler, his mother, Mary J. Toler, and a brother, W. F. Toler, as his only heirs at law; that Ida E. Toler was the duly appointed and acting administrator of her deceased husband's estate.

[1] Upon that state of facts, counsel for defendants contend, among other things, that since the object of the suit was to annul the contract and recover back the stock of merchandise, which of course was personal property, it could not be maintained by the

plaintiffs, although it being admitted by the demurrer that they were heirs of the deceased, for the reason that the title to personal property of a deceased person vests in his administrator, and that the heir can acquire no title thereto except through an administration of the estate through the probate court, which has not been done, rather completed, in this case.

The following authorities cited by counsel for defendants fully sustain this contention, viz.: *Leaky v. Maupin*, 10 Mo. 368, 47 Am. Dec. 120; *State to Use v. Fulton*, 35 Mo. 323; *Smith v. Denny*, 37 Mo. 20; *Vastine v. Dinan*, 42 Mo. 269; *State ex rel. v. Moore*, 18 Mo. App. 406; *Becraft v. Lewis*, 41 Mo. App. 546; *Hellmann v. Wellenkamp*, 71 Mo. 407; *Pullis v. Pullis*, 178 Mo. 683, 77 S. W. 753; *Brueggeman v. Jurgensen*, 24 Mo. 87; *Griesel v. Jones*, 123 Mo. App. 45, 99 S. W. 769; *Orchard v. Store Co.*, 225 Mo. 414, 125 S. W. 486, 20 Ann. Cas. 1072; *Hillman v. Schwenk*, 68 Mich. 297; *Bourget v. Monroe*, 58 Mich. loc. cit. 566, 25 N. W. 514; *Hanenkamp's Adm'r v. Borgmier*, 32 Mo. 569.

[2] We, however, do not understand that counsel for plaintiffs controvert the conclusion previously announced, but seek to evade the effect thereof by saying that, because they are heirs of the deceased Toler, and therefore the equitable owners of the stock of goods, subject to the widow's marital rights therein, and her neglect or refusal to sue or join them in the suit, entitled them to institute and maintain this action against her individually and as administratrix, as well as the other defendants.

This position of counsel for plaintiffs is untenable, for the reason that this court has repeatedly held that if an administrator, in a proper case, refused to bring an action for the recovery of personal property belonging to the estate, the remedy of the heir is either by a suit on his bond, or to institute proper proceedings in the probate court to have him removed from office, and have another appointed in his stead. Among such cases are the following: *Hellmann v. Wellenkamp*, 71 Mo. 407; *Pullis v. Pullis*, 178 Mo. 683, 77 S. W. 753; *Hillman v. Schwenk*, 68 Mich. loc. cit. 300, 36 N. W. 670; *Flynn v. Flynn*, 183 Mass. 365, 67 N. E. 314; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80; *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. 370; *Scruggs v. Scruggs* (C. C.) 105 Fed. 28; *Moore v. Fidelity Co.*, 138 Fed. 1, 70 C. C. A. 663; 2 *Woerner's Am. L. Ed.* p. 674, § 322; *Butler v. Roer*, 163 Mo. App. 283, loc. cit. 287, 288, 146 S. W. 811.

The cases cited by counsel for plaintiffs are not in point. They are cases where the beneficiary have in certain cases been permitted to sue where the trustees, officers, and directors of corporations, etc., have declined to sue; but they are based upon the ground that those beneficiaries, stockholders, etc., have no other remedy. The books are full of such

cases, and the doctrine therein announced is so familiar to the bench and bar it would be useless to cite them. But the case at bar is not embraced in that class, for the reason that the law affords the plaintiffs ample remedy, as is shown by the authorities last cited.

We are therefore of the opinion that the judgment of the circuit court should be affirmed, and it is so ordered. All concur.

In re AIKEN et al.

HOWELL v. JACKSON COUNTY.

(No. 16724.)

(Supreme Court of Missouri, Division No. 1  
Dec. 2, 1914.)

**1. APPEAL AND ERROR (§ 877\*)—QUESTIONS REVIEWABLE.**

Under Rev. St. 1909, § 2082, prohibiting the Supreme Court from reversing a judgment except for error against appellant materially affecting the merits, a county appealing from a judgment awarding damages to a landowner for the taking of land for a public road, rendered on his appeal from a judgment of the county court establishing the road and awarding damages, may not complain because damages for the taking of the land of a third person were not awarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

**2. EMINENT DOMAIN (§ 235\*) — ESTABLISHMENT OF HIGHWAY—AWARD OF DAMAGES—STATUTORY PROVISIONS.**

Under Rev. St. 1909, §§ 10438-10440, providing for the assessment of damages for the taking of land for a public road, authorizing exceptions to the report of commissioners, and appeals to the circuit court from orders assessing damages or opening the road, an owner not excepting to the report of commissioners "damages none" for the taking of his land, cannot thereafter complain, for the county court had jurisdiction over all landowners affected by the establishment of the road, and the landowners not filing exceptions and demanding assessment of damages anew are bound by the judgment of the court establishing the road and confirming the report of the commissioners awarding damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 601; Dec. Dig. § 235.\*]

**3. APPEAL AND ERROR (§ 877\*)—PROCEEDINGS TO ESTABLISH HIGHWAY—RIGHT TO COMPLAIN OF ERROR.**

Where, in proceedings to establish a public road, an owner of land taken for the road did not file exceptions to the report of the commissioners, which awarded him no damages, the county, permitting a judgment of the county court establishing and opening the road, could not thereafter complain because damages were not awarded to the landowner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

**4. APPEAL AND ERROR (§ 169\*)—QUESTIONS REVIEWABLE—EXCEPTIONS—NECESSITY.**

Under Rev. St. 1909, § 2081, declaring that no exception shall be taken in an appeal or writ of error to any proceeding in the circuit court, except such as shall have been expressly decided by the court, a point not made in the cir-

cuit court during the trial, or in the motion for new trial, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.\*]

**5. APPEAL AND ERROR (§ 238\*) — ARREST OF JUDGMENT—NECESSITY OF MOTION.**

Rev. St. 1909, § 10440, providing that appeals to the circuit court shall be allowed either party from a judgment of the county court assessing damages or for opening any road, and on the appeal the circuit court shall hear and determine the same anew, provides for two kinds of appeal, one from the damages awarded by the county court, and the other from the order establishing the road, and where a landowner appealing brought up to the circuit court the issues of establishing and opening the road and the amount of damages awarded to him, but did not oppose the establishment of the road, but merely asked damages for the appropriation of his land, the county complaining of the judgment awarding damages could not, in the absence of a motion in arrest, complain of the failure of the circuit court to find jurisdictional facts authorizing the road to be established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1343, 1345, 1382, 1386-1395, 1397, 1399-1401, 1404-1407; Dec. Dig. § 238.\*]

**6. APPEAL AND ERROR (§ 275\*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RULED ON IN TRIAL COURT.**

Under Rev. St. 1909, § 2081, providing that no exception shall be taken in an appeal except such as shall have been expressly decided by the circuit court, a point not ruled on by the circuit court cannot be determined on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1560, 1567, 1647; Dec. Dig. § 275.\*]

**7. HIGHWAYS (§ 58\*)—ESTABLISHMENT—PROCEEDINGS—APPEAL.**

A landowner in proceedings for the establishment of a road, who appealed to the circuit court on an affidavit averring that he believed that he was injured by the verdict and the judgment of the county court, and that the appeal was from the merits and an order and judgment taxing costs, merely appealed on the issue of damages, and not on the issue of the establishment of the road, so that the order of the county court establishing the road remained operative.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 177-198, 200-203; Dec. Dig. § 58.\*]

**8. APPEAL AND ERROR (§ 171\*)—QUESTIONS REVIEWABLE—THEORY OF TRIAL COURT.**

Where a cause was tried in the circuit court on one theory, the court on appeal must dispose of the case on the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

**9. EMINENT DOMAIN (§ 222\*) — ESTABLISHMENT OF HIGHWAY — DAMAGES — INSTRUCTIONS.**

An instruction that the jury in assessing damages to a landowner should consider the quantity and value of the land taken for a public road together with improvements thereon, the cost of building the necessary fences along the road, if any, and the damages, if any, to the whole tract, by reason of the road running through it, and should deduct the benefits peculiar to the tract itself, directs the jury to consider the cost of building necessary fences along the road and the damage to the whole tract and that from that sum plus the value of the land taken must be deducted peculiar bene-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fits, and is not objectionable as containing overlapping items on elements of damage.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.\*]

10. EMINENT DOMAIN (§ 145\*) — ESTABLISHMENT OF HIGHWAY—MEASURE OF DAMAGES.

The measure of damages for taking land for a public road is the value of the land taken and the damage to the tract of which it forms a part, from which must be deducted the benefits peculiar to the tract arising from the establishment of the road.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 378-389; Dec. Dig. § 145.\*]

11. APPEAL AND ERROR (§ 1140\*)—CORRECTION OF VERDICT.

Where the amount erroneously included in a verdict can be definitely ascertained, the court may affirm the judgment for the proper amount on the successful party entering a remittitur for the excessive amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Proceedings by Scott Aiken and others for the establishment of a public road. From a judgment of the circuit court awarding damages to John T. Howell for land taken, Jackson County appeals. Conditionally affirmed.

Rozzelle, Vineyard & Thacher and Frank A. Boys, all of Kansas City, for appellant. L. T. Dryden, of Independence, for respondent and exceptor John T. Howell.

LAMM, J. No remonstrance having been filed in the matter of locating and opening a public road in Sin-a-bar township, Jackson county, presently proceedings were had culminating in orders in the county court finding jurisdictional facts together with the practicability of the road that same was of such public utility as warranted the location, establishment, and opening thereof at the expense of the county, etc., the petitioners depositing the probable damages, estimated at \$200, in the county treasury. It was further ordered that the proper named officer view, survey, and mark out the road and take relinquishments of rights of way, etc. Presently, such officer made report in due statutory form showing, among other things, that the road ran through the land of John T. Howell, who claimed damages in the sum of \$2,000. On the approval of that report, three disinterested freeholders were appointed commissioners to view the premises, hear complaints, and assess damages to the owners of property not relinquishing the right of way, the court further finding anew that the road was of sufficient public utility to warrant the opening and establishment thereof at the expense of the county. Presently, after qualifying, those commissioners reported assessing Howell's damages at \$400.

Going back a little, there was another property owner who did not relinquish the

right of way, to wit, John P. Webb. As to Webb the commissioners reported "damages, none." To that assessment, Webb filed no exceptions.

(N. B. No question is raised on the regularity of any of these preliminary matters or to the jurisdiction of the county court, hence details become unimportant.)

On the coming in of the commissioners' report, John T. Howell in due time filed his written exceptions to the effect that the damages allowed by the commissioners were inadequate, and he claimed and asked for a jury to assess the same. Presently, on the coming in of these exceptions, a statutory jury of six freeholders was impaneled and, on a trial, it brought in a verdict assessing his damages at \$200. Presently, upon that verdict the road, 40 feet in width, was established as a public road by the judgment of the county court, describing it, the parties owning land through which the road ran were allowed until the following March to give possession and open the same, a warrant was ordered issued to Howell and he, in turn, was ordered to pay all costs accruing since the date of filing his exceptions.

In due time Howell perfected his appeal to the circuit court, his agent's affidavit for appeal, among other things, stating:

"\* \* \* He believes the appellant is injured by the verdict of the jury, the judgment of the court, and that this appeal is from the merits and an order and judgment taxing costs."

Thereupon a transcript of the proceedings was filed in the circuit court of Jackson county and presently at a trial there, on the question of damages alone, a new jury awarded him \$1,500, and judgment followed against Jackson county for that sum. On the coming in of a motion for a new trial, the court required a remittitur of \$200, which was made. It thereupon entered a new judgment for \$1,300, at the same time overruling the motion. From that judgment, Jackson county appeals.

The motion for a new trial was put on the grounds that the verdict was against the evidence, the weight of the evidence, the law and the evidence, showed passion and prejudice, and was excessive. Furthermore, that the court erred in giving three instructions, A, B, and C, for plaintiff; also in admitting incompetent testimony over the objection of defendant and in excluding competent testimony offered by the defendant.

At the trial in the circuit court, Webb did not appear, nor did any one appear for and on behalf of any of the petitioners for the road. The only appearances were on behalf of Howell, exceptor, on one side, and Jackson county on the other. The following excerpt from appellant's statement sufficiently indicates the scope of the last trial:

"The trial of the case in the circuit court was also directed solely to Howell's claim for damages." (And we may add, the judgment

was limited to his damages.) "No evidence was introduced concerning the damages of John F. Webb, and the jury in their verdict made no reference to him at all. Neither was any evidence introduced to show the signers of the petition were qualified freeholders, or that notice had been given of their intention to present their petition to the county court, or that the road was of sufficient utility to warrant its establishment at the expense of the county."

The record shows that appellant objected to no testimony below, and that no testimony offered by appellant was excluded; nor is it now contended there was any error in instructions B and C given for plaintiff; nor that the verdict, as a verdict, is against the evidence, or the weight of the evidence, or the law and the evidence; nor that the jury was actuated by passion and prejudice against defendant. So that, by elimination, appellant reduces its assignments of error materially, as will appear in due course.

Challenged instruction A reads (the italicized clause containing the alleged vice):

"The court instructs the jury that in assessing the damages to the landowner Howell you should consider the quantity and value of land taken for the road, together with improvements thereon, if any, *and also the cost of building the necessary fence along said road, if any*, and damage, if any, to the whole tract of land, of which that taken for the road forms a part, by reason of the road running through it, and from the sum of these deduct the benefits, if any, peculiar to such tract; that is to say, benefits peculiar to the tract itself and not shared in common by it and other lands in the same neighborhood."

The record shows the road was opened from end to end and side to side in due time under the judgment and orders of the county court, and, as we understand it, has ever since then been and is now in use as a public road.

In taking its appeal, appellant county filed no motion in arrest, but stood alone on its motion for a new trial.

So much for a statement of the case.

The questions here are three, to wit:

(1) That respondent's instruction A was erroneous in that it contained overlapping items on elements of damage and required the jury to assess the cost of fences as a distinct item of damages.

(2) That the judgment is invalid because the circuit court made no finding of jurisdictional facts authorizing the road to be established and the judgment incorporates no order establishing the road.

(3) And is invalid because, on the face of the record, it appears that damages to the land of John P. Webb were not considered or determined.

Of these in inverse order:

[1] I. Of Webb's damages: The road statutes direct that any party in interest may file written exceptions to the report of the commissioners assessing damages. Thereupon a jury of six freeholders, qualified under the law to act, shall be summoned, which jury "shall try the case anew on the question of damages, in each case separately." R. S. 1909,

§ 10438. On certain contingencies the county court is authorized to order the road established and opened, and one of these contingencies is "if the parties in interest fail to file written exceptions thereto." Ibid, § 10439. Turning to section 10440, Ibid, it contemplates an appeal by "either party" to the circuit court "from the judgment of the county court assessing damages, or for opening \* \* \* any road. \* \* \*" We shall assume for the present, for the purposes of the point in hand, that Howell's appeal to the circuit court was not from the judgment opening the road, but from the verdict on the issue raised by his written exceptions on the quantum of damages and from the judgment on that verdict. From this viewpoint, how stands the case on the assignment of error relating to the nonassessment of damages for the appropriation of Webb's land for the road?

In our opinion the point is without substance, because:

(1) In the first place, in so far as the point concerns Webb and his rights, he is not a party to this proceeding. Not being in court, appellant is not entitled on its appeal from the Howell judgment to interpose the rights of Webb, if any he have. It must let Webb speak for himself. An appellant is not allowed two voices on appeal, one for itself and another for some party absent and not complaining. One voice is enough. It is only errors that affect appellant or plaintiff in error that are reversible, and courts lend an attentive ear to none other. *City of St. Louis v. Lanigan*, 97 Mo. loc. cit. 180, 10 S. W. 475; *R. S. 1909, § 2082*; *Kansas City v. Woerishoeffer*, 249 Mo. loc. cit. 24, 155 S. W. 779.

[2] (2) In the next place, an analysis of the sections of the road statute cited supra put it beyond question that the county court had jurisdiction over all landowners affected by the establishment of the road. Webb was one of them. When the commissioners, with notice to him (i. e., by an order entered in a proceeding to which he was a party), were appointed to assess damages, view the premises, and hear complaints and, in the performance of that duty, reported he was not damaged, the statute provided him a remedy he could take or leave, to wit, to file exceptions and have his damages assessed anew. Webb being in that fix and standing mute, do we understand learned counsel now appearing for appellant county to take the position that Webb could neglect to file exceptions, allow the road to be located without protest, and, not only so, but open the road himself in pursuance to the court's order and turn it over to the public, and thereafter claim damages? An answer to that question is not necessary to our case, but we may as well say while we are about it that we do not so understand the law. In *Seafeld v. Bohne*, 169 Mo. loc. cit. 551, 552, 69 S. W.

1051, are some observations in point. In that case no exceptions were filed to the commissioners' report, and, after the time for filing the same had expired, the court took up the case and made the final order (page 551 of 169 Mo., page 1055 of 69 S. W.), precisely as it did in this case, so far as Webb is concerned. In that condition of things, Valliant, J., speaking for this division of the court, said:

"But when private property rights are threatened it is the duty of the owner to avail himself of the process of law for his protection, and if he stands by and allows a court in the exercise of its rightful jurisdiction to decide questions of law or of fact contrary to the correct interpretation of the one or to the weight of the evidence as to the other, and neglects the means at hand to correct the error he cannot afterwards treat the whole proceedings of the court as a nullity."

[3] (3) In the next place, Howell, being in no wise to blame for the absence of Webb in the county court or in the circuit court, how comes it he stands to be punished for what did not concern him? Counsel appearing for the county on this appeal, and raising the point for the first time, were not its trial attorneys in the circuit or county court. Evidently those trial attorneys concluded when the commissioners found Webb was not damaged, that the next move was up to him under the statutory plan of opening roads. They further concluded, since he made no move, that silence showed consent, and that the finding of the commissioners became conclusive on him, hence their client, the county, was in no danger of being mulcted thereafter in damages for the appropriation of his land. There is no escape from this conclusion, because, being learned in the law, they permitted the judgment of the county court to go establishing and opening the road. Having done that, does it lie in the mouth of the county at this late day, when new hands have come to the bellows, to face about and change its view on that question on appeal to this court?

Moreover, if learned counsel now appearing for the county are right in their contention, then the county has the road without paying Webb's damages. If, peradventure, the conscience of the county be pricked in that behalf, a ready remedy is at its door. It can ease its conscience by paying them at any time without our meddling with Howell's judgment for his separate damages, inasmuch as a reversal will not pay Webb. If, as we fear is the case, it is not conscience, but supposed danger from that angle, that is behind the point and puts life and mettle into its heels, then, how will that danger be lessened by reversing Howell's judgment? Will reversal here parry the menace? Can the county make Webb interpose, or does it want to make Webb come into the circuit court on Howell's appeal, willy nilly, and claim his own separate damages? Or, absent Webb, are his damages to be awarded

him without his having a finger in the pie, a day in court? All those things, we opine, would be new wrinkles in road litigation for which there are no precedents known to us. If he was a bold man who first ate an oyster, as Swift tells, what should we say of a court that added 'new terrors to road litigation?

[4] (4) Finally, no such point was made below during the trial, or in the motion for a new trial. The circuit court ruled on no such question, ergo we may not. Attend to the lawmaker's mandate in that behalf:

"No exception shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court." R. S. 1909, § 2081.

[5] II. Of the failure of the circuit court to find jurisdictional facts and to incorporate an order establishing the road in the judgment: Although appellant has its road in full and undisputed possession, yet it suggests that it ought not to pay Howell's damages because it fears its title to the road is bad, for that the judgment in the circuit court is a straight award of money damages and makes no finding of jurisdictional facts and does not in terms establish a public road. Is that assignment of error well taken? Decidedly not, because:

(1) In the first place, it cannot be contended that the circuit court has no jurisdiction at all in the premises. It must be conceded it had jurisdiction to try the issue of damages and enter judgment thereon. If, now, it also had jurisdiction on Howell's appeal (as appellant contends) to find jurisdictional facts upon which a road could be established and had jurisdiction to establish the road, its jurisdiction to do those additional things would depend on the *form* of the appeal, as pointed out in the former paragraph and as ordained in R. S. 1909, § 10440, *supra*. That section provides for two kinds of appeals, one from the damages, the other from the order establishing the road. Let us also concede, only *pro hac vice*, that Howell's appeal brought up to the circuit court the issues of establishing and opening a road (i. e., the question of road or no road), and for the same turn let it be admitted it was error to make no finding on those issues. With such concessions, made by way of argument, the questions obtrude at once: Was there any exception taken below? Was the question raised to be ruled nisi? The answer must be, no. This appellant, as this record shows, got all it wanted from the court below on those scores. Howell was not opposing the road, nor was he seeking to establish the road. He was asking damages for the actual appropriation of his land. That was the sole issue interesting him. In that view of it, the burden was on appellant to show these jurisdictional facts, if on any one. This burden appellant lightly cast off. Moreover, when the judgment was rendered did appellant file a motion in arrest because on the

whole record the judgment was erroneous as not responsive to the issues? No. Contra, it rested content with the form of the judgment, took its exception on other questions, and raises the point in hand for the first time in this court. If the question here was whether the circuit court had jurisdiction to render any judgment at all, we would have a question of different quality, but unless we are to rule that a motion in arrest no longer serves any purpose in practice whatever, we must hold one was necessary in this case. *Murphy v. R. R.*, 228 Mo. loc. cit. 85, 128 S. W. 481; *Stid v. R. R.*, 211 Mo. 411, 109 S. W. 663, and cases cited; vide, *State ex rel. v. Fisher*, 230 Mo. 325, 130 S. W. 35, Ann. Cas. 1912A, 970, *arguendo*. And that its absence is fatal to the point.

[6] (2) In the next place, if it be conceded that no motion in arrest was necessary to preserve the point, yet on this record we are forbidden by the statute to reverse the judgment on that account. This is so because the circuit court did not rule on any such question, and, absent its decision, we can make none. Vide the statute quoted *supra*, R. S. 1909, § 2081.

[7] (3) In the next place, this record shows conclusively that no appeal was taken on the issue of road or no road, but only on the issue of damages. *Bennett v. Woody*, 137 Mo. 377, 38 S. W. 972. Therefore the judgment of the county court establishing and opening the road was in no sense drawn in question or put in jeopardy by the appeal, but was left behind a final, operative, self-enforcing judgment, free from the vicissitudes of the event of the appeal, and not a whit depending on the circuit court's finding jurisdictional facts on which the location of a public road depends. Why should the circuit court go out of its way to do over again, by a side stroke, what had already been well and finally done in the county court? The maxim is: A court has nothing to do with what is not before it.

[8] Moreover, not only was such the trial theory and therefore the preclusive theory on appeal, according to the settled doctrine of this court, but the affidavit for appeal clearly shows, when fairly read, that the appeal was taken only from the verdict and judgment for damages and costs. That the word "merits" was used in the affidavit of appeal is due to the statutory relation between appeals from justices' courts and from county courts, and the context shows the merits meant were those on the issue of damages. It results that when the county court found the road was of sufficient public utility to warrant its establishment and opening at the expense of the county, and (closer home) when it went on and opened it and took possession, and when (still closer home) Howell's appeal did not bring up the issues of road or no road, but only that of his damages—we say, when all these things happened, as they did, then the county, by its own election, be-

came irrevocably bound to pay the damages whenever they were set at rest by being legally awarded by an adjudication on his appeal. *Forsyth v. Heege*, 61 Mo. App. 277. The point is disallowed to appellant as without substance.

[9] III. Of instruction A: With foregoing questions at rest, we confront the main contention in the case, viz., that instruction A overlapped on the elements of damage and permitted recovery for the cost of fencing as a separate and specific item. We are of opinion this assignment is well laid, because:

(1) While a strained construction of the language of an instruction is not a sensible device for administering justice, neither is a loose or illogical construction. As put by Professor Gray: "A loose vocabulary is the fruitful mother of evils," and, we may add, that a loose construction of loose language is the nursing father of many more. Giving the language of the instruction a sensible interpretation, it is plain that the jury were told to consider the cost of building the necessary fences along the road *and* the damage to the whole tract of land of which that taken for the road forms a part, and they were told that from the "sum" of these, together with the value of the land taken, they were to deduct the benefits, if any, peculiar, etc. That meaning is a fair and legitimate one, nay, the only one shining on the very face of the instruction itself. There can be no two ways about that. If now, it be the law (as we shall presently see it is) that necessary fencing is an element, to be sure, but is only an integral element of the damages to the land, and submerges itself into such damages, then the instruction was erroneous; for the jury under instruction A would assess as damages (1) the value of the land taken and improvements, (2) next, the cost of building the necessary fence, (3) next, the damage, if any, to the whole tract by reason of the road running through it, and would add one item to the other, thereby making a "sum" and from that sum it would deduct the benefits peculiar to the tract, etc.

[10] The general rule for assessing damages for taking lands for a public highway and railroads is not in doubt. It is (put in small compass) the value of the land taken and the damage, if any, to the tract of which it forms a part, from which must be deducted the benefits, if any, peculiar to such tract arising from establishing the road. *McReynolds v. Ry. Co.*, 110 Mo. loc. cit. 487, 19 S. W. 824 et seq.; *Bennett v. Woody*, 137 Mo. loc. cit. 383, 38 S. W. 972; *McElroy v. Air Line*, 172 Mo. loc. cit. 555, 72 S. W. 913. Cases may be found where the jury have been told that in estimating those damages they may take into consideration this or that item, for example, fencing when that is necessary to be done by the landowner, and respondent cites us to a case in the Court of Appeals, *Galbraith v. Prentice*, 100 Mo. App. 498, 84 S.

W. 997, claimed to sustain the instruction, but in that case the jury were told what elements to take into consideration. They were not told, as here, to add the fencing to the value of the land taken "and" to damage to the land.

We are convinced that the cost of fencing when necessary is but one of the elements that go to swell the owner's damage to the land, and which latter, when added to the land actually appropriated, make the total of his damage to be diminished by peculiar benefits, if any. There is no controlling pronouncement in any of our cases to the contrary, and the well-reasoned cases elsewhere seem to so hold.

The right doctrine is announced by Lewis (2 Lewis, Eminent Domain [3d Ed.] § 741) thus:

"Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land, then the burden of constructing and maintaining such fence, in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. In some of the cases cited an allowance was made for the cost of fencing as a specific item, and the language of many of the decisions seems to warrant the same view. But this is clearly not correct, unless such an allowance is required by the statute under which the proceedings are had. It is a question of damage to the land, as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it. Evidence of the cost of suitable fencing is competent as affording a means of arriving at the extent of the burden. Where by statute a railroad is bound to fence its right of way, no allowance can be made to the owner for that purpose. \* \* \*

The testimony was put in in a way to stress the error. Some of the witnesses testified to the damage from the depreciation in value to the farm, as a farm, by running the road through it and cutting off 60 acres, giving figures. Some testified to the same thing, and then, as an additional item, were asked about the cost of fencing, so that when the testimony was in and the erroneous instruction was listened to by the jury, it is plain from the amount of damages they returned that it was built up precisely as the instruction directed.

[11] (2) But the situation is such that this erroneous instruction ought not to reverse the judgment and necessarily remand for a new trial. This is so because: All the witnesses, testifying to the cost of the fence, agree on the cost, putting it at \$338.66. Deducting that sum from the judgment amount, we have left \$961.34, as a good round judg-

ment for respondent and all the testimony will support.

Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, as here, the false item may be pinched out, eliminated by excision, under the reasoning of our cases, by requiring a remittitur. The right of judicial excision of such an item was the underlying groundwork of our present doctrine of remittitur which has gone, in its later developments, far beyond that.

If, therefore, respondent within 10 days will enter a remittitur of \$338.66, his judgment will be affirmed for \$961.34 to bear interest from the date of its rendition. Otherwise the judgment will be reversed and the cause remanded for a new trial. All concur.

SANG v. CITY OF ST. LOUIS. (No. 16978.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. WORDS AND PHRASES—"COMMINUTED FRACTURE"—"COMPOUND FRACTURE"—"COMPLICATED FRACTURE."

Where the bones of a broken leg had been crushed somewhat, this crushing made the fracture a "comminuted fracture," and where both bones of the leg were broken it was a "compound fracture," and where some of the flesh and ligaments got between the parts of this fracture, causing suppuration and failure to knit, there was a "complicated fracture."

2. DAMAGES (§ 43\*)—PERSONAL INJURY—INSTRUCTIONS—EVIDENCE.

Where it appeared that only an operation would restore a dislocated organ to its place, but there was no evidence that an operation was necessary or advisable to restore the integrity of its normal function, or that its condition was dangerous to health, or inconvenient, or tended to prevent performance of its functions, an instruction on the reasonable probability or necessity of future medical services to replace it, as an element of damages, was unwarranted.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 242-254; Dec. Dig. § 43.\*]

3. DAMAGES (§ 208\*)—PERSONAL INJURY—CAUSE OF INJURY—EVIDENCE.

In an action for personal injury caused by a defective street, evidence held sufficient to go to the jury on the question whether the displacement of an organ was or was not caused by the accident.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

4. DAMAGES (§ 208\*)—PERSONAL INJURY—QUESTIONS FOR JURY.

In an action for personal injuries, evidence as to the probable necessity for future medical services because of the injury to plaintiff's leg and a rupture held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

5. DAMAGES (§ 43\*)—GROUNDS OF COMPENSATION—FUTURE MEDICAL SERVICES.

Future expenses for medical services may be recovered in an action for personal injuries.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 242-254; Dec. Dig. § 43.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**6. TRIAL (§ 255\*)—INSTRUCTIONS—NECESSITY OF REQUEST.**

In an action against a city for personal injury from driving into a hole in a street, if defendant, in the state of proof, desired to limit recovery for future medical services to a nominal amount, it should have tested the right to do so by requesting an instruction to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627, 641; Dec. Dig. § 255.\*]

**7. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

In an action for personal injuries, where the uncontradicted proof showed plaintiff's liability, for past medical services for his injury, for more than \$400, that plaintiff, whose earning capacity was \$15 a week, had been out of employment for over a year, leaving, out of a verdict for \$4,000, only about \$2,800 for future loss of earnings, for a permanently shortened leg, due to a compound fracture, and for hernia, and a dislocated testicle, any error in instructing on the evidence that he might recover for the expense of future medical services reasonably certain to be incurred was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**8. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

Where defendant city, on the trial of an action for personal injuries from a defective street, was notified on the first day where the name and address of the party who assisted plaintiff after his injury could be obtained, though plaintiff himself did not know it, but took no steps until after the trial to locate him or have him summoned, except some telephone inquiries, and asked for no recess, and made no objection to going to the jury, there was a lack of diligence which precluded a new trial on locating the witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

**9. NEW TRIAL (§ 101\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

To entitle a party to a new trial on the ground of newly discovered evidence, he must show that it has come to his knowledge since the trial, that it was not owing to the want of due diligence that it was not known sooner, that it is so material that it would probably produce a different result on a new trial, that it is not cumulative only, and that its object is not merely to impeach a witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 205, 206; Dec. Dig. § 101.\*]

**10. NEW TRIAL (§ 108\*)—NEWLY DISCOVERED EVIDENCE—EFFECT.**

In an action for personal injuries caused by driving into a deep hole in a street filled with water, a new trial will not be granted for newly discovered evidence that a street lamp was lighted near the spot at the time of the accident, that issue having been raised at the trial, since it was not likely to change the result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by George Sang against the City of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

William E. Baird and Robert Burkham, both of St. Louis, for appellant. Joseph A. Wright and Conrad Paeben, both of St. Louis, for respondent.

LAMM, J. Suing for personal injuries and laying his damages at \$15,000, plaintiff had a verdict for \$4,000. In due time defendant unsuccessfully moved for a new trial and appealed.

In outline the case is this: Plaintiff, 27 years old, married and earning \$15 per week, at 6:30 p. m., October 3, 1910, during a great rain and while it was "pitch dark," was driving a one-horse beer wagon with a canopy top on a paved street, Palm, in St. Louis for the purpose of delivering a barrel and a keg of beer. Palm intersects Glasgow, then either a dirt road or partly clay and partly macadam. This intersection was not paved. In the street there was a hole, say, seven or eight feet long, two or three feet wide, and a foot or a foot and a half deep, at the time flooded with water as were the two streets. Never having driven there before and knowing nothing of this hole, plaintiff at a sharp trot drove into it, whereby he was thrown over the footboard against the horse, and into the hole, both wheels of the wagon on his side running over his leg and the lower part of his abdomen. The existence and character of this hole in the street and in the line of travel for a length of time sufficient to give notice to the city are not questioned. In other words, the negligence of the city, disputed below, is no longer disputed on appeal. That the issue of negligence was properly submitted on the pleadings is not controverted. So, defendant's defense being contributory negligence, that issue was well submitted. So, the grave character of plaintiff's injuries is not disputed, the testimony showing a complicated, compound, comminuted fracture of the left leg between the knee and the ankle. It also showed a resulting hernia, a lump hard by the groin still existing at the trial. In addition thereto a singular thing happened on plaintiff's theory, to wit, one of his testicles was driven by the accident up into his abdomen and remained there at the point of the hernia. The fact of the dislocated testicle is conceded. That it resulted from the accident is strenuously controverted by defendant. We shall revert further to the evidence in the body of the opinion.

Two questions, and only two, are to be ruled, to wit:

(a) In plaintiff's instruction on the measure of damages are three propositions. The first allowed recovery for plaintiff's past pain of body and mind suffered and caused by his injuries and for such pain as the jury may find and believe he is reasonably certain to suffer in the future as a direct result. The second allowed recovery of expense for medical services and medicines necessarily incurred by plaintiff and for which he became obligated by reason of his injuries and directly resulting therefrom. (The testimony tended to show the rise of \$400 on this item.) Then follows this clause:

"And for any expense for medical services which the jury find and believe from the evidence plaintiff is reasonably certain to necessarily incur in the future by reason of his injuries and directly caused thereby."

The third allowed recovery for loss of earnings of his labor suffered by reason of his injuries or which he was reasonably certain to suffer therefrom in the future.

Appellant assigns error in giving that part of the instruction quoted above from the second proposition and such insistence is its first assignment.

(b) A timely supplemental motion for a new trial counts on the theory of newly discovered evidence. The second assignment of error is predicated on the overruling of such supplemental motion, the facts in judgment appearing in due course.

[1] I. Of assignment (a): There is no complaint made of the *form* in which the question of future medical services is put to the jury. The complaint is narrowed to the contention there was no evidence on which to predicate such recovery, and that is the sole issue. Attend to that. The medical testimony indicates the broken leg "seems to be fairly well." When the fracture was reduced at the outset the bones did not knit blandly. It seems the bones had been crushed somewhat, and this crushing made the fracture a "comminuted" one. It seems both bones of the leg were broken, hence the fracture was a "compound" one. It seems that some of the flesh and ligaments got between the parts of this fracture. This fact was not discovered at the start and caused suppuration and failure to knit, thus giving rise to a "complicated" fracture. Subsequently a serious operation was performed in the hospital and the bones wired together. It was several months healing. There is still pain in the wounded limb, and tenderness in the parts. The injury was of a sort that permanently shortened, and gave a limp to, the leg, and up to the time of trial (over a year) had prevented plaintiff's employment as a common laborer. Being without education, that was his only avocation.

There does not seem to have been any operation for the hernia. The doctors prescribed lying in a favorable position and rest. By such means the hernia was reduced, but the medical testimony agrees with common observation that the trouble is likely to recur. Plaintiff's doctor in testifying was asked for an opinion whether he would have trouble in the future from this rupture, replied: "He may, have at any time." Another place the record shows these questions to the physician and his answers:

"What about this rupture, will that continue in your opinion? A. I think it will. That is, I think if he strains himself it is likely to come out again. \* \* \* Q. Does that rupture interfere with his lifting in any way in your opinion? A. Well, I think it would."

[2-4] Under the medical testimony nothing short of an operation will put the dislocated testicle in the place nature designed for it;

but there is no testimony tending to show that an operation is either necessary or advisable to protect or restore the integrity of its normal function or that its present condition is dangerous to health, inconvenient, or makes or tends to make it *functus officio*.

In this condition of the record we rule as follows on the first assignment:

(1) The testimony leaves the question of the reasonable probability or necessity of medical services to replace the dislocated testicle a matter of merest conjecture. There is nothing to show it would be safe or better to replace it by surgical means, hence that part of the instruction on the measure of damages allowing a recovery for future medical attention could not well stand on this part of the record.

In leaving this branch of the case we by no means rule that plaintiff is not entitled to recover substantial damages for the pain and suffering incident to the forceful dislocation of the part. It is ingeniously argued by appellant's learned counsel that the accident did not (and could not) cause the dislocation. They rest the argument on the fact that the doctors testified they never read of or saw an incident of the kind; that the size of the usual canal, protected, as it is, by muscular rings, excludes the idea that the testicle could be driven by force from nature's sack up and into the abdomen along this canal; but this testimony was merely advisory. We stress the fact there was testimony of lay witnesses, unimpeached save from these theories of the testifying doctors, that before the accident this man was normal in this particular and abnormal ever after. The testimony of the mother negatively the medical theory advanced, to wit, that the progress of the testicle down had merely been arrested in the foetal stage (a common phenomenon) and that it never had been in place. That it is now dislocated and is in the region of the hernia is shown by both the lay and the medical testimony. Now, it is trite doctrine that the credit due the testimony of lay witnesses directed to establishing facts as against the advisory theorizing of the expert witnesses is always for the jury, not the court; for to all such expert speculative theorizing the suggestion of the Melancholy Dane applies: "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy." If some witnesses say "it couldn't" and some say "it did," what then? Does such divergence make an insoluble problem in jurisprudence—put the matter in the air, in suspension like Mahomet's coffin? Not at all. The common sense of the jury settles it.

(2) But when we come to the reasonable necessity for medical assistance in the future arising from the hernia and the leg we are of opinion there was substantial testimony upon which the challenged clause of the instruction on the measure of damages can rest. True, a doctor (long in prior at-

tendance) had not attended this plaintiff for some time before the trial, but we cannot say as a matter of law that a leg so seriously injured as to incapacitate a man from common labor for a year and which is still painful and tender will not require medical attention and medicines in the future. To the contrary it would look entirely reasonable and probable, judging from the tendency of the proof, that such would be the case. The same, only to a greater extent, may be said of the hernia. When some of the abdominal walls are ruptured and the intestines have once protruded, as the uncontradicted evidence showed in this case, it is common knowledge that the trouble will with reasonable certainty recur from lifting or the vicissitudes of ordinary labor. The medical testimony runs on all fours with that idea. We know and the jury knew medical attention in the future would be reasonably certain to guard the situation, or to reduce the recurring hernia, or prevent strangulation. To the common sense then of the jury, guided by their conscience, their everyday experience, their sound judgment, their oaths, must be left the question; for there is no line of testimony by which the fact may be established to an absolute certainty. To leave it to the jury is the best the law can do, for no case calls for better testimony than the case admits of. *Sotabier v. Transit Co.*, 203 Mo. 702, 102 S. W. 651; *Mabrey v. Road Co.*, 92 Mo. App. loc. cit. 603, 69 S. W. 394; *Feeney v. L. I. R. Co.*, 116 N. Y. loc. cit. 382, 22 N. E. 402, 5 L. R. A. 544.

[5] The rule is that adequate compensation may be recovered in a single action for all the natural consequences of a negligent act. That principle controls here. Future expenses from physicians rest upon the same grounds as the probable loss of future earnings. *Turner v. Boston & M. R. Co.*, 158 Mass. loc. cit. 267, 33 N. E. 520.

[6] Moreover, if, in the state of the proof, defendant desired to limit the recovery for future medical services to a nominal amount, it should have tested out its right to do so by asking an instruction to that effect. *King v. St. Louis*, 250 Mo. loc. cit. 514, 157 S. W. 498; *State ex rel. Unit. Rys. Co. v. Reynolds*, 165 S. W. 729.

[7] (3) But if we were to allow appellant's contention out and out, to wit, that the instruction was too broad in the particular in hand, we would still not reverse the judgment, because: Here is a case where the uncontradicted proof showed liability for past medical and surgical attention resulting from the injuries in the rise of \$400. The same character of proof showed that the plaintiff, as a result of his injuries, had been out of employment for over a year, and that his earning capacity was \$15 per week. That would make his past loss in earnings from his labor over \$720, or a total on those two items of \$1,120. Deducting that from his

verdict of \$4,000, we have left a bit the rise of \$2,800 for future loss of earnings, for a permanent injury, a shortened and limping leg, pain and suffering from a compound fracture with subsequent complications, a hernia, [and a testicle dislocated by force]. In the face of such facts showing a modest recovery for serious injuries, undisputed, it would be trifling with justice to suppose that the jury allowed anything of substance on the issue of future medical services; for the verdict is all absorbed by referring it to damages plainly suffered and about which there can be no speculation. In that view of it we say that the error complained of, if error at all, becomes self-evidently harmless, and, hence, nonreversible.

[8] II. Of assignment (b): Recurring to the record, a summary sufficient to an understanding of the question whether there was error in overruling the supplemental motion for a new trial follows: The accident happened on October 3, 1910. Suit was brought March 17, 1911. The answer was filed April 5, 1911. The trial was begun October 16, 1911. When court arose, the testimony not being all in, the trial was laid over until the next day, the 17th. At the close of that day for like reason it was laid over until the 18th, when it was completed and a verdict had. By its answer defendant interposed contributory negligence as a defense—contributory negligence with a specification, "to wit, that plaintiff did not exercise due care in watching the direction in which he was driving." There was a showing by the city in support of the supplemental motion to the effect that it was unaware of the accident and had no notice until suit was brought, i. e., for the rise of five months. But there was a satisfactory countershowning to the effect that the city had immediate notice. Plaintiff and a witness driving with him testified to the effect there was a lamp post at the locus in quo, but that the lamp was not going. It seems to be conceded that at the time of the accident (6:30 p. m.) city lamps were due to be lighted. As we read it, the light at this point was of gasoline. After plaintiff was injured he worked his way to this lamp post and held himself up by it, his horse having broken from control and passing on a ways. While in this fix, a man and his wife drove up in a buggy and, ascertaining the trouble, the man took plaintiff and drove him to his home. This man's name was Graffeman, but plaintiff did not know his name then or afterwards. It is not clear on what theory plaintiff needed the testimony of this witness, as there was plenty without it, and it does not appear that he took any steps to ascertain the name or to summon the man or his wife. Nor did he conceal information. The fact that plaintiff was taken home in the buggy of some person, coming on the scene after the accident, was known to the city long before the trial. It seems some attempt was made by the city

to find out the name, and plaintiff, being inquired of, frankly stated he did not know it. Neither at that time nor afterwards when his deposition was taken by the city was plaintiff asked whether he knew any person who did know the name. At the first day of, and early in, the trial plaintiff was on the stand in his own behalf as the first witness, and the following record was made on his cross-examination:

"Q. When you got out of the street you say you went over to this lamp post on the northeast corner? A. I hopped over, yes. Q. And then how did you get home? A. There was a man and lady come along in a horse and buggy. Q. Who were they? A. I do not know their names, and they took me on home in the horse and buggy and went and got the nearest doctor in the neighborhood. Q. You say you don't know who they were? A. No, I was there about 20 minutes before they come along. Q. Did you ask who they were? A. No, I did not; but the party that works in the brewery knows their names. Q. You never have seen them? A. I have seen them, yes. Q. When did you first see them? A. The night this happened. Q. I mean after? A. No, I ain't seen them after that. Q. You don't know where they live or anything about them? A. No, I couldn't say where they live. Q. Who is the person at the brewery that knows them? A. Fred Brandt. Q. How do you spell that name? A. I don't know. Q. Brandt? A. Brandt. Q. What does he do at the brewery? A. He is in the office, clerk there, as far as I see, he is writing."

Reference having been made in the foregoing testimony to a "brewery," it will do to say that the city knew all along that plaintiff was a driver for the Union Brewery Company of St. Louis. His petition so states and the fact stands conceded. It seems the Fred Brandt mentioned was working for the same brewery at the time of the trial and had been for a long time in some minor official capacity. It seems also he was easily accessible by telephone or messenger, and that he actually knew the name and the place of residence of the Graffeman who carried plaintiff home, and of his wife. This Graffeman was a member of a well-known family, easily accessible, but, I believe, had no telephone. It is conceded by the city that after the foregoing testimony over 24 hours went by, it is contended by respondent that over 40 hours went by, before this Graffeman was located. No inquiry was started on the first day, as we read the record, nor on the second day of the trial and then nothing but the telephone was used. No subpoena was issued. No attempt was made to have any officer, charged with the duty of locating witnesses or summoning them, attend to that duty, but the trial flowed on unruffled to the end. Presently after an adverse verdict and judgment, the witness Graffeman and his wife were located, and an affidavit was procured from each in substance to the effect that the street light in question was going when they came upon the scene. The city had contented itself with submitting the case on the question of light or no light on mere negative testimony that no complaint had been

made of the absence of a light at the time and place. On such record, the trial judge was of opinion that due diligence was not shown and we are of the same opinion. If it be conceded to the city that the testimony was material on its issue of contributory negligence, as tending to show that the driver of a beer wagon drove into an open hole within the radius of the light of a street lamp, yet when it allowed the trial to progress for a day or two to its consummation, warned of the existence of the witnesses, and armed with the information that the names of the witnesses were in the possession of Brandt, it seems clear that due diligence was not used to obtain the testimony at the trial. As in the issue of negligence, so it is in diligence, to wit, what is due diligence varies with the facts and circumstances of each case. Let it be assumed (which is an assumption of doubtful stability) that defendant was diligent in preliminary preparation, yet here there was an emergency sprung, and sharp diligence was necessary after notice. Defendant after it had notice made no objection to going on with the trial, no objection to the submission to the jury, asked no recess or similar favor at the hands of the trial judge, but stood mute, folded its arms and suffered the issue to be determined adversely, content to take its chances with the testimony at hand. We overrule the assignment on the authority of *State v. Nickens*, 122 Mo. 607, 27 S. W. 339; *State v. McKenzie*, 177 Mo. 716, 76 S. W. 1015; *Devoy v. Transit Co.*, 192 Mo. 197, 91 S. W. 140; *Porter v. St. Joseph Stock Yards*, 213 Mo. 372, 111 S. W. 1136.

[9] The doctrine of this court is the Georgia doctrine (vide the *McKenzie Case*, supra):

"The party must show, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial was granted; fourth, that it is not cumulative only; fifth, \* \* \* sixth, that the object of the testimony is not merely to impeach the character or credit of a witness."

The rule thus laid down is stringent, but useful, and ought not to be relaxed. Marked by this rule, appellant has no foot to stand on its second assignment of error.

[10] Moreover, even if the testimony of these two witnesses had been given at the trial, yet it is not at all clear the result would not have been precisely the same. With a street and a hole in the street flooded with water, how would the glimmer of a street lamp give plaintiff notice of the depth of the hole so that his driving in it would have made him guilty of contributory negligence as a matter of law? Or how would it have persuaded a jury that he was guilty as a matter of fact?

Entitled to one fair trial, the city, we think, got it. Let the judgment be affirmed. All concur; BOND, J., in result.

**LYMAN v. DALE.** (No. 16838.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**1. JUSTICES OF THE PEACE (§ 90\*)—PLEADING—FORMALITIES.**

In justices' courts the same strict formalities of pleading are not required as in the circuit court, but, if the plaintiff elects to plead in strictness in such court, he is bound by his pleadings.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 306; Dec. Dig. § 90.\*]

**2. JUSTICES OF THE PEACE (§ 124\*)—PLEADING—NEGLIGENCE—CONFORMITY OF JUDGMENT TO PLEADING.**

A complaint in a justice's court, alleging that injury to a buggy wheel was caused by leading a wild and unruly mule in a negligent manner, does not authorize a recovery for the negligent handling of an ordinary mule.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 389, 393, 394; Dec. Dig. § 124.\*]

**3. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—NEGLIGENCE—EVIDENCE.**

In an action in justice's court for damages to a buggy wheel caused by a mule led through a city street by an employé of defendant, evidence held insufficient to sustain a verdict for plaintiff, whether the complaint be construed as alleging the leading of a wild and unruly mule in a negligent manner or the negligent leading of an ordinary mule.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**4. APPEAL AND ERROR (§ 204\*)—REVIEW—OPINION EVIDENCE NOT OBJECTED TO.**

Though opinion evidence of a fact is admitted without objection, such evidence cannot be considered by the court on appeal, if the fact was not provable by such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.\*]

**5. EVIDENCE (§ 512\*)—EXPERT TESTIMONY—ADMISSIBILITY.**

The use of a halter with a rein five or six feet for the leading of both horses and mules on the public highway is one of such long standing that expert testimony as to the due care used is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.\*]

**6. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS—LEADING MULE BY REIN.**

Leading a mule by the rider of another mule, in a city street, with the use of a halter with a rein five or six feet held at the end thereof, is not negligence, if the mule has no vicious propensities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

Appeal from Circuit Court, Greene County; J. T. Neville, Judge.

Action by B. L. Lyman against Horace Dale. From a judgment for plaintiff, defendant appeals. Certified to the Supreme Court from the Springfield Court of Appeals. Reversed without remand.

W. D. Hubbard and J. T. White, of Springfield, for appellant. Roscoe Patterson, of Springfield, for respondent.

**GRAVES, J.** This case involves the magnificent sum of \$5. It reaches us under a certification from the Springfield Court of Appeals. We are enlightened by three well-written opinions from the three respective members of that court. The facts we shall state for ourselves. Plaintiff, having had one wheel of an old buggy somewhat demolished by coming in contact with a mule belonging to defendant, but being led by an employé of defendant, sought damages therefor before a justice of the peace in October, 1909. He thus challenges his enemy in an amended petition filed before such justice:

"Plaintiff, for an amended petition, states that on the 2d day of October, 1909, at the county and state of Missouri, he was driving a horse and buggy along Walnut street, between South and Jefferson streets, in the city of Springfield, on the right-hand side of the street; that defendant's agent and employé, on the aforesaid date, was leading a wild and unruly mule along the aforesaid street in such a careless and negligent manner as to permit said mule to run into and against plaintiff's said buggy, thereby injuring and breaking the wheel and axle of said buggy and damaging the same to the extent of \$5. Plaintiff further states that, at the time of the accident aforesaid, defendant's agent and employé leading said mule was acting in the scope of his employment. Wherefore plaintiff prays judgment in the sum of \$5."

As we gather the facts, plaintiff has been successful throughout from the justice's court up to the present. In the Court of Appeals his success was by a divided court. In this court he stands behind the fortification erected by his judgment, and submits his case here without brief. A yellow slip of paper found in the files here bears the ominous inscription, "The Celebrated Mule Case," and nothing more. Why we were thus enlightened by this otherwise silent monitor we know not. It at least admonishes to look well to the facts. Plaintiff and his brother and father-in-law were driving east on Walnut street in Springfield, Mo., in plaintiff's buggy, and, at a point where there was some digging in the street and some brick piled up in the street, met defendant's employé, James S. Parker, who was riding one mule and leading another. Both mules were of good size, and the one being led was gray in color, if the color is material. According to plaintiff's evidence, the halter strap by which the mule was led was five or six feet long; two witnesses say five and another says five or six feet. It was being held near the end. In passing the bricks the mule shied across to the buggy and got his hind leg between the shaft and the wheel, and in extricating itself damaged the wheel. Plaintiff's theory of the case is made to appear by the following evidence:

Plaintiff himself says:

"Q. Do you know the customary manner of managing mules when they are being led over the street? A. I don't know what lots of people do, but I know what I do with them. I would neck them together so they could not spread all over

the street. Q. How would be a proper way to handle them? A. That would be a proper way to handle them, I think, would be to neck them together when you go through a crowded place like that. Q. How was he leading this mule? A. At the end of the halter rope. Q. How long was that rope? A. About five feet, the best I could tell."

The brother said:

"Q. Tell the court the proper manner to handle them. A. In a place where you are likely to have any difficulty with mules, you neck them right up short together. Q. Can they be handled at all by giving five feet of rein? A. No man can handle a mule of any size by a halter rein. If you are handling a mule you have got to halter him up close to you."

The father-in-law said:

"It was his hind leg; got it in between the wheel and shaft. I said the front wheel. That is all I know about it. I didn't see any misbehavior in the mule until we got right up to them. He shied at something. I don't know what it was. There was a lot of brick on the north side and some dirt thrown up there. If there were any red lights there, they were not lit up, because it wasn't dark enough. I quit work that day at 6 o'clock. I had not taken any whisky. I don't drink. We were sitting in the seat, and he was sitting on our knees. This did not happen very suddenly. It didn't take but a few minutes but the mule got the best of us. It was somewhere about a minute in happening. I did not see any misbehavior in the man who was riding the other mule, only he couldn't handle the mule, is all. He didn't have them up so he could handle them. I am not very much of a mule handler. He could have tied them up closer than he did. I don't think he was tied up at all. I think he was leading the mule at the end of the rope."

There is no evidence in the case to the effect that the mule in question was wild and unruly, or that defendant had any knowledge of the animal being unruly or wild, if it was so, in fact. Defendant said that the mule was well broke, but a little high-lifted, and this is as far as the evidence in behalf of the defendant adds to plaintiff's case. Defendant demurred to the evidence at the close of the plaintiff's case and again at the close of the whole case. Plaintiff's right to recover under the pleadings and under the evidence is thus squarely presented.

[1, 2] I. There are at least two reasons why this judgment should be reversed. It is true that in justice's courts the same strict formalities of pleadings are not required as in the circuit court; but it is further true that, if the plaintiff elects to plead in strictness in such court, he is bound by his pleadings there as he would be elsewhere. By this we mean, if he is suing in tort, and specifically states the negligence upon which he relies to recover, he must recover for that negligence and none other. In the case at bar, what is the negligence upon which the plaintiff seeks to recover? Is it the negligent handling of a mule, an ordinary average mule, or is it the negligent handling of a wild and unruly mule? And, if the latter, has there been a case made? This is the first proposition in the

case. We have set out in full the plaintiff's statement of his cause of action. A reading of that statement shows that the plaintiff was undertaking to charge the careless and negligent handling of "a wild and unruly mule." Counsel for plaintiff, who drew and signed the petition for plaintiff, recognized that what would be a negligent handling of a wild and unruly mule might not be a negligent handling of an ordinary mule. He canvassed his facts, and then charged that defendant was guilty of a negligent handling of "a wild and unruly mule." This was the case defendant was called upon to meet. When, therefore, it was made to appear that the defendant had not handled "a wild and unruly mule" at all, the case stated had failed. Under the pleadings, the defendant was not required to come prepared to meet the question of a negligent handling of an ordinary mule, but, on the other hand, the plaintiff, if permitted to recover, must recover upon the case made by his pleadings. Under the case pleaded, his proof failed, and the court should have directed a verdict for the defendant.

[3, 4] II. But even grant it that the petition in this case is in such form and substance as to permit a recovery upon the proof of a negligent handling of a mule, without reference to the "wild and unruly" characteristic of the animal, as two of the judges of the Court of Appeals thought, yet should there have been a recovery under the evidence? We think not.

Plaintiff's theory is that the leading of a mule, somewhat "high-lifted" or high-spirited, upon a street, where a portion of the street was torn up by digging, and in which was piled bricks in a long continuous row or pile, by a halter, with a rope of five feet long, was negligence. There is no question but that there was ample of the obstructed street for the safe passage of both the buggy and the mules. It is true that plaintiff's witnesses say that the mules should have been haltered together, or something of that kind. This is their expert view of the situation, but we hardly think that the question is one calling for opinion evidence; and, although such was admitted without objection, the case here is not changed by reason of that fact. *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915; *Boggs v. Laundry Co.*, 171 Mo. 282, 70 S. W. 818; *Thompson on Trials*, § 691.

[5, 6] The use of a halter with a rein of five or six feet for the leading of both horses and mules upon the public highway is one of such long standing that expert testimony has no place in such a case. Not only so, but such a leading is not negligence; at least it is not negligence unless some vicious propensity of the animal be pleaded and shown. In this case we have no vicious propensity pleaded or proven. It is true that the petition charges that the mule was "wild and unruly" (not

strictly a vicious propensity), but even that was not shown. Without some proof of vicious propensities, the trial court should have said that the mere proof that the defendant led the mule by a halter rein five or six feet long was no evidence of negligence upon his part. To hold that such conduct amounted to negligence is to overthrow all common knowledge as to the handling of animals upon the public highways. Courts must not blind themselves to common knowledge. The proof made in this case failed to show negligence in any degree, and the judgment from start to finish should have been for defendant. *Eddy v. Union R. Co.*, 25 R. I. 451, 56 Atl. 677, 105 Am. St. Rep. 897, 1 Ann. Cas. 204.

We regret to feel constrained to thus abruptly terminate "The Celebrated Mule Case," but it should have been so determined long since.

Let the judgment of the circuit court be simply reversed, so that there will be an end to the controversy. All concur; LAMM, J., in separate opinion.

LAMM, J. It was Dr. Johnson (was it not?) who observed that Oliver Goldsmith had "contributed to the innocent gayety of mankind." (Note bene: If, as a pundit tells me, it was Garrick, and not Goldsmith, Johnson spoke of, and if, in quoting, I misquote, then memory has played a trick upon me, and a learned bar will correct me. Time and weightier matters press me to go on and leave the "quotation"? stand.) The function of this suit is somewhat the same. Beginning with the "J. P.'s" it has reached the "P. J.'s" and in its journey has run the gamut of three courts, one above the other. Now, *secundum regulam*, it, a fuss over \$5, has reached the highest court in the state for final disposition—all this because (1) of divergence of opinion among our learned brethren of the Springfield Court of Appeals, and (2) the provisions of the Constitution in that behalf made and provided. However, if the amount at stake is small, the value of the case for doctrine's sake is great.

As I see it, the case is this: Dale, a man of substance, a farmer, owned a brown and a gray mule, both young and of fine growth; one saddlewise, the other otherwise. Both, used to the plow and wagon, were entitled to the designation "well broke and gentle." One Parker was Dale's manservant, and in the usual course of his employment had charge of these mules. On a day certain he had driven them to a water wagon in the humble office of supplying water to a clover huller in the Ozark region hard by its metropolis, to wit, Springfield. Eventide had fallen; i. e., the poetical time of day had come when the beetle wheels his droning flight, drowsy tinkling lulls the distant folds, and all the air a solemn stillness holds. In

other words, dropping into the vernacular, it was time to "take out." Accordingly, Parker took out with his mind fixed on the watchdog's honest bark baying deep-mouthed welcome as he drew near home; he mounted the rideable mule. He says he tied the other to the hames of the harness on the ridden one by a four or five foot halter rope, and was plodding his weary way homeward a la the plowman in the Elegy. The vicissitudes of the journey in due course brought him to Walnut street in said city of Springfield. At a certain place in that street the city fathers had broken the pavement and made a "rick of brick" aside a long hole or ditch. Hard by this rick of brick was a ridge of fresh earth capped by a display of red lantern danger signals. It seems the unriden mule crowded against the ridden one and harassed Parker by coming in scraping contact with his circumjacent leg. Any boy who ever rode the lead horse in harrowing his father's field will get the idea. In this pickle he took hold of the halter rope, still fastened to the hames, to keep the unriden mule from rasping his said leg. It might as well be said at this point that witnesses for plaintiff did not observe that the end of the rope was attached to the hames of the ridden mule. As they saw it, Parker was leading the mule. As will be seen a bit further on, at this point a grave question arises, to wit: Is it negligence to lead a mule by hand, or should he be fastened "neck and neck" to his fellow? But we anticipate.

Going back a little, it seems as follows: At about the time Parker had reached said part of Walnut street, plaintiff and two others were in a buggy pulled by a single horse and on their own way home to the country. So equipped, these several parties met face to face. At this point it will do to say that, while the mules were used to being on the water wagon, it is not so clear that these travelers three were. There are signs of that artificial elation in the vehicle party that in the evening springs from drinking ("breathing freely"), but on the morning after produces the condition of involuntary exclamation Dr. Von Ihring calls "katzenjammer." They disavow being half seas over or drunk. Their chief spokesman, as descriptive of the situation, in part told his story mathematically in this fashion:

"I had not drank so much but what I kept count. I can keep count until I take three, and hadn't quit counting yet. \* \* \*

In the course of their journey they, too, came to the brick rick, the ditch, the ridge of dirt, and the red lights on Walnut street. There they met, as said, the gray and brown mule and Parker face to face. When mules and rider approached and passed the three travelers, all on the same side of the ditch, the led mule (whether scared by the hole in the ground, the rick of brick, or the ridge is

dark) shied from his fellow ("spread" himself), and presently his hind leg was mixed up with the shafts and wheel of the buggy. When the status quo ante was re-established, both leg and wheel were found damaged. Subsequently a blacksmith offered to repair the damages to the wheel for, say, a dollar and a half. This sum defendant, though denying liability, was willing and offered to pay; but plaintiff's dander was up, and he, as buggy owner, demanded a new wheel worth \$5 and sued. In the justice court defendant lost outright and appealed. In the circuit court the same. The learned judges of the Court of Appeals could not agree (the furor scribendi being much in evidence, and three learned opinions falling from their several pens) and sent the case here—and here it is.

My Brother GRAVES has well disposed of it on certain grounds, but the theme being the Missouri mule, and state pride calling for further exposition, the said furor scribendi has seized me—witness:

(a) It is argued that it was negligence to ride one mule and lead its fellow by hand. That they should be halter-yoked "neck and neck." Parker says he necked them in a way, but plaintiff takes issue on the fact. Allowing credit to plaintiff's evidence, two questions spring, viz.: First. Is the neck-and-neck theory "mule law" in this jurisdiction? Second. If so, then was the absence of the neck-and-neck adjustment the proximate cause of the injury? We may let the first question be settled in some other mule case and pass to the second as more important. It will be observed that the neck and forequarters of the mule did not do the damage. Contra, the hindquarters or "business end" of the mule were in fault. We take judicial notice of facts of nature. Hence we know that haltering a mule neck and neck to another will not prevent his hind parts spreading. His neck might be on one line, but his hind legs and heels might be on another—a divergent one. True, the mental concept relating to shying or spreading would naturally originate in the mule's head. But it must be allowed as a sound psychological proposition that haltering his head or neck can in no wise control the mule's thoughts or control the hinder parts affected by those thoughts. So much, I think, is clear and is due to be said of the Missouri mule whose bones, in attestation of his activity and worth, lie bleaching from Shiloh to Spion Kop, from San Juan to Przemyśl (pronounced, I am told by a scholar, as it is spelled). It results that the causal connection between the negligence in hand and the injury is broken, and recovery cannot go on the neck-and-neck theory. This because it is plain, under the distances disclosed by the evidence, that the mule's hind legs could reach the buggy wheel in spite of a neck-and-neck attachment.

(b) The next question is a bit elusive, but seems lodged in the case. It runs thus: There being no evidence tending to show the mule was "wild and unruly" as charged, is such a mule per se a nuisance, a vicious animal, has he a heart devoid of social duty and fatally bent on mischief when led by a halter on the street of a town, and must his owner answer for his acts on that theory? Attend to that view of it:

(1) There are sporadic instances of mules behaving badly. That one that Absalom rode and "went from under" him at a crisis in his fate, for instance. So it has been intimated in fireside precepts that the mule is unexpected in his heel action, and has other faults. In Spanish folk lore it is said: He who wants a mule without fault must walk. So, at the French chimney corner the adage runs: The mule long keeps a kick in reserve for his master. "The mule don't kick according to no rule," saith the American Negro. His voice has been a matter of derision, and there be those who put their tongue in their cheek when speaking of it. Witness the German proverb: Mules make a great fuss about their ancestors having been asses. And so on, and so on. But none of these things are factors in the instant case, for here there was no kicking and no braying standing in the relation of causa causans to the injury to the wheel. Moreover the rule of logic is that induction which proceeds by merely citing instances is a childish affair, and, being without any certain principle of inference, it may be overthrown by contrary instances. Accordingly the faithfulness, the dependableness, the surefootedness, the endurance, the strength, and the good sense of the mule (all matters of common knowledge) may be allowed to stand over against his faults and create either an equilibrium or a preponderance in the scales in his favor. He then, as a domestic animal, is entitled to the doctrine that, if he become vicious, guilty knowledge (the scienter) must be brought home to his master, precisely as it must be on the dog or ox. The rule of the master's liability for acts of the ox is old. Ex. 21:29. That for the acts of the dog is put this way: The law allows the dog his first bite. Lord Cockburn's dictum covers the master's liability on a kindred phase of liability for sheep killing, to wit: Every dog is entitled to at least one worry. So with this mule. Absent proof of the bad habit of "spreading" when led and the scienter, liability did not spring from the mere fact his hind leg (he being scared) got over the wheel while he was led by a five-foot halter rope, for it must be held that a led mule is not a nuisance per se, unless he is to be condemned on that score out and out because of his ancestry and some law of heredity, some asinine rule, so to speak—a question we take next.

(2) Some care should be taken not to al-

low such scornful remarks as that "the mule has no pride of ancestry or hope of posterity" to press upon our judgment. He inherits his father's ears; but what of that? The asses' ears, presented by an angry Apollo, were an affliction to King Midas, but not to the mule. He is a hybrid, but that was man's invention centuries gone in some province of Asia Minor, and the fact is not chargeable to the mule. So the slowness of the domestic ass does not descend as a trait to the Missouri mule. It is said that a thistle is a fat salad for an ass' mouth. Maybe it is also in a mule's, but, be it so, surely his penchant for homely fare cannot so far condemn him that he does not stand rectus in curia. Moreover, if his sire stands in satire as an emblem of sleepy stupidity, yet that avails nought, for the authorities (on which I cannot put my finger at this moment) agree that the Missouri mule takes after his dam and not his sire in that regard. All asses are not four-footed, the adage saith, and yet to call a man an "ass" is quite a different thing than to call him "mulish." Vide the lexicographers.

Furthermore, the very word "jackass" is a term of reproach everywhere, as in the literature of the law. Do we not all know that a certain phase of the law of negligence, the humanitarian rule, first announced, it has been said, in a donkey case (*Davis v. Mann*, 10 Mees. & W. 545) has been called, by those who deride it, the "jackass doctrine?" This on the doctrine of the adage: Call a dog a bad name and then hang him. But, on the other hand, to sum up fairly, it was an ass that saw the heavenly vision even Balaam, the seer, could not see and first raised a voice against cruelty to animals. Num. 22: 23 et seq. So, did not Sancho Panza by meditation gather the sparks of wisdom while ambling along on the back of one, that radiated in his wonderful judgments pronounced in his decision by the common-sense rule of knotty cases in the Island of Barataria? Did not Samson use the jawbone of one effectually on a thousand Philistines? Is not his name imperishably preserved in that of the fifth proposition of the first book of Euclid—the pons asinorum? But we shall pursue the subject no farther. Enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds; ergo if his hybrid son, tracing his lineage as he does to the Jacks of Kentucky and Andalusia, inherits some of his traits, he cannot be held bad per se. Q. E. D.

It is meet that a \$5 case, having its tap root in anger (and possibly in liquor), should not drag its slow lengths through the courts for more than five years, even if it has earned the soubriquet of "the celebrated mule case."

The premises herein and in the opinion of Brother GRAVES all in mind, I concur.

STATE ex rel. BLAIR, City Collector, v. CENTER CREEK MINING CO.  
(No. 18758.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. JUDGMENT (§ 702\*)—CONCLUSIVENESS—ACTIONS BY THE STATE FOR TAXES.

The ordinary rules of res judicata and estoppel by judgment apply to actions by the state for the collection of taxes.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1227; Dec. Dig. § 702.\*]

2. JUDGMENT (§ 713\*) — CONCLUSIVENESS — MATTERS CONCLUDED.

While a matter once adjudicated is forever concluded when it arises under the same circumstances between the parties or their privies, and the estoppel of a judgment applies, not only to everything urged in support of or interposed in defense to the cause of action, but also to all which might have been put forward, yet, where there is a second action between the same parties upon a different claim or demand, the judgment in the prior action operates as an estoppel only to those matters in issue or points controverted upon the determination of which judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1289, 1241, 1247; Dec. Dig. § 713.\*]

3. MUNICIPAL CORPORATIONS (§ 18\*)—INCORPORATION—ORDER OF COUNTY COURT—"JUDICIAL ACT."

The act of the county court, in incorporating a town in accordance with Laws 1871, p. 85, is a judicial act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 41-44; Dec. Dig. § 18.\*  
For other definitions, see Words and Phrases, First and Second Series, Judicial Act.]

4. MUNICIPAL CORPORATIONS (§ 18\*)—INCORPORATION—COLLATERAL ATTACK.

The judgment of the county court incorporating a municipality in accordance with Laws 1871, p. 85, cannot be collaterally attacked, but can be questioned only by a proceeding in quo warranto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 41-44; Dec. Dig. § 18.\*]

5. MUNICIPAL CORPORATIONS (§ 18\*)—ATTACK ON INCORPORATION — PLEADING — SUFFICIENCY.

To assail an order of the county court incorporating a city or town, all essential infirmities resulting from the order must be alleged and proven with the same strictness required in a bill in equity to amend the final judgment of the court of record on the ground of fraud or collusion; hence the validity of such a judgment of incorporation must be raised by express pleading.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 41-44; Dec. Dig. § 18.\*]

6. MUNICIPAL CORPORATIONS (§ 33\*)—BOUNDARIES—EXTENT OF.

Rev. St. 1899, § 5257, provides that, where it is desired to incorporate a town in its respective class, an ordinance shall be passed submitting that question to the voters, etc. Section 5895 provides that the jurisdiction of any city organized in such manner shall not be affected, but the limits shall remain after such organization the same as they were previously. Held that, while a municipality, by its incorporation, has the power to enlarge or restrict

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

its boundaries by ordinance, a city incorporated by order of the county court may not, upon incorporating under the statute, change its boundaries by the incorporation ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81-97; Dec. Dig. § 33.\*]

#### 7. MUNICIPAL CORPORATIONS (§ 28\*)—EXTENSION OF BOUNDARIES.

As the right of a municipality to extend its boundaries gives to one of the interested parties legislative power, the reasonableness of such an ordinance is a subject of judicial inquiry.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 63; Dec. Dig. § 28.\*]

#### 8. JUDGMENT (§ 713\*) — CONCLUSIVENESS — MATTERS CONCLUDED.

In an action where the validity of city taxes upon defendant's property was in question, the taxes were held invalid upon the theory that the incorporation ordinance by which the city became a city of the fourth class was unreasonable in its inclusion of defendant's property. The city had been previously incorporated by order of the county court, and such order included defendant's property within its boundaries. *Held*, that, since the action did not question the validity of the order of the county court, the judgment was not conclusive, in a subsequent suit for other taxes, upon the question whether defendant's property was properly located in the city.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

#### 9. TAXATION (§ 431\*)—ASSESSMENTS.

While certification of a city assessment by the county clerk, who, as secretary of the county board of equalization, is its certifying officer, is sufficient authentication of the assessment, the corrected land list of the county assessor, kept in accordance with Rev. St. 1909, §§ 11372, 11397, is the original record, and the city assessment must yield to it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 741-744; Dec. Dig. § 431.\*]

#### 10. MUNICIPAL CORPORATIONS (§ 971\*)—CITY TAXES—ASSESSMENT.

Under Const. art. 10, § 11, declaring that the valuation of property for city taxation shall not exceed the valuation of the same property for state and county purposes, and Rev. St. 1909, § 9347, providing that in cities of the fourth class the city assessor shall, jointly with the county assessor, assess all property, and such assessment shall, after it has been passed on by the board of equalization, be taken as a basis from which the aldermen shall make the levy for city purposes, an assessment for taxes by a city of the fourth class at a valuation greatly in excess of the valuation for county purposes cannot stand.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2075-2077; Dec. Dig. § 971.\*]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by the State, on the relation of F. P. Blair, City Collector, against the Center Creek Mining Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

The plaintiff sues for taxes charged by the city of Carterville, in Jasper county, a city of the fourth class, on the northeast quarter

of the southeast quarter of section 17 in township 28 of range 32 in said county, and alleged to be in said city, as shown by the following tabulated statement:

Years for Which Taxes are Due.	Valuation.	Gen'l Fund.	Special.	Sewer.	Waterworks.	Total Taxes.	Pay from Jan. 1st & Col's Fees.	Total.
1905	2000	10	5 00			15	8 55	23 55
1906	80000	400	200			600	270	870
1907	80000	400		257	200	856	232 48	1138 48
1908	25000	125	62 50	80		257 50	56 17	323 67
1909	22500	112	56 25	72		239 75	27 58	267 33
								2623 03

The answer, after a general denial, pleaded facts relating to the situation and condition of the land tending to show that it ought not to be subjected to urban burdens, and stated:

"That the pretended ordinance purporting to extend the corporate limits of said city so as to include the defendant's land was and is unreasonable, unjust, and oppressive, \* \* \* and that any and all acts whatever purporting or undertaking to include the said land within the corporate limits of said city of Carterville were and are unreasonable and void."

It further pleaded that the same issue was adjudicated in a suit for taxes for previous years, in the Jasper county circuit court, wherein the state, at the relation of one A. Pease, collector of said city, was the plaintiff, and this defendant was the defendant, in which there was a judgment upon the same issue for the defendant.

The plaintiff introduced his tax bill, corresponding with the foregoing tabulated statement, and an entry from the records of the Jasper county court, as of April 16, 1877, as follows:

"In the Matter of Incorporation of Carterville:

"Whereas, more than two-thirds of the inhabitants of the territory hereinafter named have petitioned the court, setting forth the metes and bounds of their village commons as follows: Beginning at the northeast corner of section No. Seventeen (17), township twenty-eight (28), range thirty-two (32), running thence west three-fourths of one mile, thence south one mile, thence east three-fourths of one mile, thence one mile north to place of beginning. The platted town of Carterville being situated within the described bounds, and praying that the territory as above described may be incorporated under the name and style of the town of Carterville and a board of trustees appointed for the preservation and regulation of any commons appertaining to said town. And having asked that for the first trustees of said town that W. A. Daugherty, J. Alexander Wilson, A. N. McReynolds, J. O. Rose, and Joseph W. Manlove be appointed. It appearing to the satisfaction of the court that the prayer of the petitioners is reasonable. It is ordered by the court that the territory above described be and the same is hereby incorporated under the name and style of the town of Carterville and W. A. Daugherty, J. Alexander Wilson, A. N. McReynolds, J. O. Rose, and Joseph Manlove be and are hereby appointed trustees of said town."

The defendant introduced the "Land Tax Book" of the county for taxes of 1906 and 1907 and the "Land List" of the assessment for the same taxes. The valuation for each of those years, as shown on these books, is as follows: 1906, total valuation by assessor, \$2,000; total valuation as adjusted by the board of equalization, \$6,000; 1907, total valuation by assessor, \$12,000; total valuation as adjusted by the board of equalization, \$15,000. The state and county taxes were charged on those valuations. The tax books of Carterville for the same years were in evidence, and showed a valuation upon this land for each of said years of \$80,000. A certificate was attached to the city tax book for 1906, the body of which is as follows:

"I, Lon L. Ashcraft, clerk of the county court and secretary of the board of equalization and appeals within and for state and county aforesaid, do hereby certify that the within and foregoing contains a fair, true, and correct copy, in red ink, of all changes in real and personal property assessments within the city limits of the city of Carterville for the year 1906, as adjusted by the county board of equalization and appeals, and on file in my said office."

A substantially similar certificate was attached to the city tax book for 1907.

The record in the Pease Case in the Jasper county circuit court was introduced by defendant. The petition in the ordinary form, for the recovery of city taxes for the years 1898 to 1902, inclusive, was filed September 15, 1903. The answer pleads substantially the same facts with respect to the condition and situation of the land as in this case, and "that the pretended ordinance purporting to extend the corporate limits of the city so as to include the defendant's said land is unreasonable, unjust, and oppressive." The only ordinance appearing in the transcript of the evidence introduced in that case is a general ordinance entitled "An ordinance changing and diminishing the present corporate limits of Carterville, Mo." It provided that the corporate limits as they then existed, and described as containing more than 4½ sections of land, including the whole of the original town, with the land in controversy, be changed and diminished to metes and bounds containing less than half as much land, but still including all the old town. The process by which the city grew to its larger estate does not appear in the record of that case. The judgment was for the defendant. The court refused, in this case, to instruct, at the request of the plaintiff, that it was not an adjudication against the right of the city to tax the land in question, and did instruct at its request as follows:

"The court declares the law to be that if the evidence in the case of State of Missouri ex rel. Al. Pease, City Collector of the City of Carterville, v. Center Creek Mining Company shows that the question of the original incorporation of the city of Carterville was not submitted to the court in the determination of said cause, and that the question of whether said land was included in the original incorporation of the said city of Carterville was not one of the issues in

said cause under the pleadings and the evidence, but that the evidence in said cause shows that the question considered was the reasonableness of the corporate limits of the city of Carterville, as fixed by ordinance of the board of alderman of said city, as shown by Ordinance No. 84, p. 181, of the Ordinance Book of said city, then the judgment in the cause of State ex rel. Al. Pease, City Collector of the City of Carterville, v. Center Creek Mining Company is not res judicata in the present cause."

It then gave judgment for defendant, which is now before us on this appeal.

Allen McReynolds, of Carthage, for appellant. L. E. Bates, of Excelsior Springs, Robert F. Stewart, of Webb City, and R. M. Sheppard, of Joplin, for respondent.

BROWN, C. (after stating the facts as above). [1] I. The controlling question, and the one on which the decision of the trial court was placed, is whether or not the judgment in the Pease case estops the city from asserting that the land in question was subject to taxation for city purposes at the time these taxes were levied. There is much respectable authority to the effect that such an adjudication is only conclusive against the state as to the very taxes which were its subject, and does not extend to the incidental questions actually and necessarily decided in reaching the judicial result. This court has, however, adopted and followed the more just and reasonable doctrine that, in the absence of any constitutional or legislative declaration to the contrary, these rules, which it has established, and which it enforces for the protection of the subject from vexations and unnecessary litigation, should be and are binding upon the state itself. *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979; *New Orleans v. Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; *Gymnastic Soc. v. Hagerman*, 232 Mo. 693, 135 S. W. 42. In the case last cited we said:

"To our minds the matter was so exhaustively considered and so soundly reasoned in the *Exposition Driving Park Case* that no judicial excuse exists for a re-examination of its doctrine."

We will assume, then, that the doctrine of res judicata and estoppel by judgment applies as well to cases of this character as to ordinary litigation between individuals, and consider its application from that standpoint. This was the view taken by the trial court in the instructions given and refused. Was it rightly applied?

[2] II. There is no question in this case as to the identity of the parties with the parties in the Pease case, or of the capacity in which they sue. The plaintiff in each is the state, and the relator the collector of the city of Carterville, suing in that capacity, while the defendant is the same. But the thing sued for in the Pease case was the amount of the city taxes for the years 1898 to 1902, inclusive, and the cause of action was its nonpayment. The thing in issue and adjudicated was the liability of the land for

those particular taxes, and when that was determined by the court, and its determination had been embodied in its final judgment, the very existence of the judicial branch of the government required that nothing should remain but to give effect to the judgment by final process.

"The very essence of judicial power is that, when a matter is once ascertained and determined, it is forever concluded when it arises again under the same circumstances \* \* \* between parties or their privies." *New Orleans v. Bank*, supra.

The estoppel of the judgment embraces, not only everything urged in support or interposed in defense of the cause of action in issue, but everything that might have been so urged or interposed, so that the judgment constitutes the ultimate measure of success on the one hand and of defeat on the other. While the defendant has the right to interpose as many consistent defenses as he may think he has to the action against him, he has the equal right to plant his case upon the one he conceives to be the surest and most available, and thus avoid the trial of a swarm of possible issues which may involve him in almost endless expense and difficulty, and the courts charged with the hearing and determination of the case in much unnecessary labor. In doing this he only risks the subject-matter directly in issue in the particular suit, and does not run the risk of binding himself with respect to other matters by the fiction of an adjudication of things never tried or considered. Upon this point the Supreme Court of the United States in the *New Orleans Case*, supra, quoting with approval from *Cromwell v. Sac County*, 94 U. S. 351-353 (24 L. Ed. 195), said:

"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

This conclusion is supported in the case cited by an extensive collection of authorities from the same distinguished court which we have examined with much interest. In the light of the principles so stated, we are to determine whether or not the questions involved in this case, a suit for city taxes for the years 1905 to 1909, inclusive, were "actually litigated and determined" in the *Pease* suit for the city taxes on the same land for the years 1898 to 1902.

[3, 4] III. The plaintiff, for the purpose of making out its case in the first instance, introduced, not only its certified tax bill, but also the original record of an order of the county court of Jasper county, made April 16, 1877, incorporating the town of Carter-

ville, consisting of 12 40-acre tracts in compact form, of which the tract involved in this suit is one. The regularity of this order is not questioned. It states all the facts necessary to give the county court jurisdiction under the act of February 8, 1871 (*Laws* 1871, p. 85), which was in force at the time it was made. That the authority given the county court by this act is judicial is not an open question. *Kayser v. Trustees*, 16 Mo. 88; *State ex rel. v. Fleming*, 158 Mo. 558, 59 S. W. 118; *Black v. Early*, 208 Mo. 281, 303, 304, 106 S. W. 1014; *State v. Wilson*, 216 Mo. 215, 277, 115 S. W. 549. In the case last cited, in considering the action of the county court in the incorporation of a drainage district, this court said that:

"Where such court, or a mere ministerial board for that matter, possesses, under the law, jurisdiction of a certain class of cases, and is required to find the existence of certain facts, \* \* \* the law will presume, in a collateral attack upon the judgment, that such facts did exist, and that such court or board passed upon them, as required by the statute."

In the *Kayser Case*, which involved the incorporation of the town of Bremen under a law (*R. S. Mo. 1845*, p. 1048) from which the act of 1871 was copied, this court held that, the county court having jurisdiction of the subject-matter and having declared the town incorporated, the validity of its existence could only be questioned by a direct proceeding in quo warranto, and that in a collateral proceeding (which was, in that case, an application to enjoin the collection of town taxes) it could not be shown that the charter was obtained by fraud or had been forfeited by misuser or nonuser. This could only be done by process on behalf of the state. Of the doctrine of that case, we said in *Black v. Early*, supra:

"The *Kayser Case* has been followed in a long line of cases from that day substantially to this, and, if any cases be found in our reports that strike or seem to strike a discordant note, they have in turn not been followed."

[5] It is not necessary to consider whether or not quo warranto would lie to inquire into the propriety of the incorporation by the county court of this particular 40 acres of land into the town of Carterville. While we hold that the validity of that action was not a proper subject of inquiry in the *Pease* case, we will assume that if the question was before the court in any form in that case, and was there litigated and decided, whether rightly or wrongly, the parties are estopped from questioning the force of that decision in this case. But the question of the validity of the judgment of the county court is not one that raises itself. This court has said that:

"To assail an order of the county court in the matter of incorporating a city or town, or to disturb the result of its judgment, through the office of the writ of quo warranto, all the essential infirmities thereof, and iniquities therein, resulting from the manner of its procurement, or the fraud of the court, must be alleged and proven with the same strictness that would be required in a bill in equity having for its object the amendment of the final

judgment of any court of record \* \* \* brought about by fraud or collusion." State ex rel. v. Fleming, supra.

[8-8] There was no attempt made in either the pleadings or the evidence in the Pease case to attack or put in issue the validity or regularity of the judgment of incorporation. In short, the defendant seems to have assumed, as it now argues in its brief, that the ordinance of 1897, "changing and diminishing the present corporation limits of the city," ignored all previous existence of the corporation, and was equivalent, for all purposes, to the establishment of a new corporation, by ordinance instead of by judgment of the county court, as then provided by law. R. S. 1899, § 5257. A complete answer to this is that the city had no such power. When the original town became a city of the fourth class, its jurisdiction was not affected, but its limits and boundaries remained the same after such organization as before. Id. § 5895. The city had no power to interfere with these boundaries, except to extend them over adjacent lands, or to diminishing them by excluding territory therefrom. Ib. The power to annex territory is *sui generis* in the sense that it creates one of the interested parties to an adversary transaction the legislative agent of the other with power to bind its antagonist, who has neither voice in the creation of the officers who inaugurate the action, nor vote in the election by which it is confirmed. It is this reason upon which the doctrine that the reasonableness of such an ordinance is a subject of judicial inquiry in suits to enforce rights claimed thereunder is founded, and we have justly said that the doctrine runs like a thread of gold through our case law, and is too firmly buttressed on reason and authority to be now mined by hostile criticism. State ex rel. v. Birch, 186 Mo. 205, 85 S. W. 361, and cases cited. In pursuance of this doctrine, the defendant pleaded in the Pease case, and introduced evidence for the purpose of proving that the ordinance of 1897 was, so far as it might apply to this land by including it in the city limits, unreasonable and void. Neither by pleading nor evidence was the validity of the judgment of incorporation now before us questioned, nor is there anything in that record suggesting that it was considered. We therefore hold that the trial court erred in its ruling that the propriety of the inclusion of this land in the original incorporation of the town of Carterville was a thing adjudicated in the Pease case, so that the plaintiff is estopped from claiming in this case that it is taxable for city purposes.

[9, 10] IV. The question remains whether the assessment for city taxes of 1906 and 1907 is invalid because it does not "conform" to the assessment for state and county taxes for the same years. The certification of this assessment by the county clerk, who is made by the statute the secretary of the county

board of equalization, and therefore its certifying officer, is undoubtedly the certification of the board, and a sufficient authentication; but the corrected land list of the county assessor is the original record of the equalized assessment, and the city assessment must yield to this best evidence. R. S. 1909, §§ 11372, 11397. With this in mind, and the Constitution and statute before us, we have no difficulty in the solution of this question.

The statute under which the city assessment was made (R. S. 1909, § 9347) was intended to conform to that provision of section 11 of article 10 of the Constitution which requires that the valuation of property for taxation for town, city, or school purposes shall not exceed the valuation of the same property for state and county purposes. It provides that:

"In cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes."

It also provides that:

"The assessment of the city property, as made by the city and county assessor, shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made \* \* \* and so certified by said board, and then returned to the board of aldermen."

In this case no attempt was made to conform to the method so prescribed, either in form or substance. The city assessor valued the land independently of the county assessor for each of the years in question at \$80,000, while the county assessor valued it for each of those years respectively at \$2,000 and \$12,000, which was raised by the county board of equalization to \$6,000 and \$15,000, respectively. The record of this action, both of the county assessor and board of equalization, was ignored by the county clerk in the list certified by him to the board of aldermen. We are not called upon to speculate as to the reasons of these officers for their disregard for the plain requirements of the Constitution and laws made to give effect to its provisions, nor can we make an assessment for them. We can only say that this record shows a total lack, both in form and substance, of a legal assessment of this land for the city taxes of 1906 and 1907, and there can be no recovery for them in this suit.

The judgment of the trial court is reversed, and the cause remanded for disposition in conformity with this opinion.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

FARRIS et al. v. BURCHARD et al.  
(No. 17998.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

**1. EVIDENCE (§ 83\*)—PRESUMPTIONS—PERFORMANCE OF DUTY—ADMINISTRATOR WITH WILL ANNEXED.**

Where an administrator with the will annexed was appointed and qualified, there is a presumption that he faithfully discharged the duties of his office.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**2. COURTS (§ 116\*)—CORRECTION OF RECORDS—LIMITATIONS.**

No statute of limitation applies to and bars the right of a court to put in proper form at any time that which appears from its record to have been done and to have been imperfectly or informally recorded.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 369, 371-373; Dec. Dig. § 116.\*]

**3. WILLS (§ 353\*)—ADMISSION TO PROBATE—ENTRY OF JUDGMENT.**

Rev. St. 1865, c. 167, § 14, provides that the county court, or clerk thereof in vacation, subject to confirmation of the court, shall take proof of last wills, and sections 16, 18, and 21 prescribe the proof to be made, the reduction of the proof to writing, and the indorsement thereof on the will itself. Section 26 imposes upon the clerk the duty of recording such instruments, but requires no order of court therefor. Proof of a will was made in 1865, and an administrator with the will annexed appointed. The administration continued for about four years, after which time the will came into the possession of the wife of the testator who was given a life estate in his lands. No formal judgment of probate was ever entered, and the wife who obtained possession of the will, treated it as a nullity, allowing a daughter, to whom an estate for life only was devised, to treat the land as her own. *Held*, that as the will had been in proper custody all the time, and as nothing but the entry of formal judgment remained, it being apparent that the will was admitted to probate, formal judgment of probate might be entered 40 years thereafter, so that the remaindermen in fee could assert their interests under the will, even though the instrument had not been recorded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 809; Dec. Dig. § 353.\*]

Appeal from Circuit Court, Gasconade County; John W. Booth, Judge.

Suit to quiet title by Virginia G. Farris and others against F. B. Burchard and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

August Meyer, of Hermann, C. G. Baxter, of Owensville, and Robert Walker, of Hermann, for appellants. J. W. Hensley, of Owensville, for respondents.

**BROWN, C.** This case is founded upon section 650 of the Revised Statutes of 1899. It was instituted in the circuit court for Gasconade county December 23, 1907, and has been once before to this court upon the appeal of defendants from a judgment in favor of the plaintiffs, which was reversed and the cause remanded for a new trial. Farris v. Burchard, 242 Mo. 1, 145 S. W. 825. The

question in that appeal was whether, upon the records of the probate court for that county as they then appeared, the will of James Johnson, under which the plaintiffs claim their title to an undivided fourth of the land involved, was shown to have been admitted to probate. The opinion of this court in rendering its judgment concluded as follows:

"Whether the parties interested could now present the will for probate or whether the record is in such a condition as would entitle them now to a judgment *nunc pro tunc*, we express no opinion, because there is no such case before us, but we do feel constrained to say that the proof adduced did not justify the conclusion that the will had been duly probated, and therefore did not justify the judgment that the respondents were entitled to the interest in the land which the judgment gives them. The judgment is therefore reversed, and the cause remanded for a new trial."

Upon the return of the cause to the circuit court the plaintiff Samuel Matthews appeared in the probate court, and by written petition stated that he was a devisee in the will as well as heir at law of James Johnson, deceased, who died in 1864 leaving said will, which was on — day of —, 1865, produced in the county court of Gasconade county, Mo., having at the time probate jurisdiction, and the testimony of the subscribing witnesses thereof was duly and formally taken by the clerk of the court in vacation and indorsed, with his certificate thereto, on the back of said will, that said will has since remained in the custody of the probate court, although no formal judgment of probate has been entered of record by said court, and prayed that an entry of formal judgment of probate be entered on the records of said court upon such proof. The defendant Burchard appeared, filed objections in writing, and opposed the entry of such judgment, but the court, at its August term, 1912, after reciting all the facts upon its record, ordered and adjudged that the instrument be considered proved, and adjudged the same to be the last will of said James Johnson, deceased, and ratified and confirmed the proceedings of the clerk, and ordered the will to be admitted of record. A similar order and judgment was then written out and signed by the judge on said will, and it was recorded by the clerk. It also appeared upon the records of the county court that, in 1865, after the presentation and proof of the will before the county clerk, Peter W. Burchard was by order of the court duly appointed administrator with the will annexed of the estate of James Johnson, deceased, and was required to give bond as such administrator in the sum of \$15,000, and that he thereupon filed such bond which was by the court approved. The administration of the estate continued from the time of his appointment in 1865 until some time in 1869. The will, with the proof and certificates thereon, was recorded in the office of the recorder

of deeds for Gasconade county on March 29, 1913. The admission of the will in evidence with these record entries constitute the error relied on by appellant.

The paragraph in the will under which the plaintiffs claim title to an undivided fourth of the land, as the only children of the testator's daughter Mary Elizabeth, who was married to one N. G. Matthews, their father, is as follows:

"I give and bequeath all my estate to the use of my wife during her natural life; at her death my estate, or one-fourth of it, to my daughter, Mary Jane; one-fourth to my daughter, Susan Ann; one-fourth to my daughter Eliza Virginia; the remaining fourth to my daughter Mary Elizabeth and her bodily heirs, her husband having no control over the same. The income from the one-fourth part of my estate devised to my daughter, Mary Elizabeth, she can have the use of during her natural life, and at her death to go to her bodily heirs, but if she should die without bodily heirs, it is to be divided equally among the bodily heirs of my three daughters above named, viz.: Martha Jane Johnson, Susan Ann Johnson and Eliza Virginia Johnson."

Martha Jane afterward married one Benjamin P. Richardson, Susan Ann married one Perry A. Richardson, and Elizabeth Virginia married one J. W. Cantley. Mrs. Matthews was alive when this suit was instituted, but has since died.

The defendant Burchard claims through deeds as follows: (1) Deed dated March 1, 1877, from Mrs. Matthews and husband, Mrs. Cantley and husband, and Mrs. B. P. Richardson and husband to Perry A. Richardson for \$150; (2) deed from Perry A. Richardson and wife to Green C. Richardson dated August 16, 1880, and filed for record May 16, 1908, in which no consideration is expressed; (3) deed from Green C. Richardson and wife to Fred B. Burchard dated February 28, 1884, and recorded August 12, 1884. While a consideration of \$15,000 is expressed in this deed, it was an advancement to the wife of defendant, who was the grantor's daughter.

It was agreed on the trial as follows: "That defendant's father-in-law, Green C. Richardson, was a purchaser for value of the lands described in plaintiff's petition." The record shows that the oldest child of Mrs. Matthews, the plaintiff Virginia Farris, was born in 1868.

I. The cause was reversed in the former appeal on the sole ground that the proof adduced at the former trial did not justify the conclusion that the will of Johnson had been duly probated, and therefore did not justify the judgment that the plaintiffs were entitled to the interest in the land which it gave them. It only remains for us to determine whether or not at the last trial the evidential deficiency was supplied. It consisted solely of the absence of a formal judgment of the county court, then having jurisdiction in such matters, or of the probate court which succeeded to that jurisdiction, declaring that it had been proven, or, to use a more common ex-

pression, admitting it to probate. This court declining to express an opinion as to whether or not the parties in interest could still present the will for probate, or, depending upon the record as it then stood, have judgment entered nunc pro tunc to that effect, the cause was remanded, that the parties might proceed upon the theory so suggested; and whether the plaintiffs have now succeeded in establishing the probate of the will is the sole question before us.

II. We are not confronted with any question of laches or failure on the part of the plaintiffs to do everything in their power to protect their own interests, for, if they have lost their rights under the will, it is on account of neglect of duty on the part of those charged by law with their protection, beginning before the oldest of them was born and continuing until the wrong was consummated. Nor have they neglected to avail themselves in good time of the remedy which was given them as contingent remaindermen by the act of 1897 (R. S. 1899, § 650) by suing while the youngest still lacked two years of his majority, and while the mother, the life tenant, was still living. On the other hand, there is no question of wrong to an innocent purchaser. While it is stipulated that one of those through whom the title asserted by defendant has passed was a purchaser for value of the lands described in the petition, there is nothing in the record to indicate how much he paid (his deed being silent on that question), or what he knew or did not know. In short, we find nothing in the record inconsistent with the theory that, upon the death of the grandmother of plaintiffs, who had under the will a life interest in all the estate both real and personal, the surviving family determined to make the four husbands, who had then become members of it, equal, and quietly suppressed the will, and relegated it to "an old glass cupboard, amongst some school blanks and old letters and other things cast aside \* \* \* as being apparently of no value." It seems to have been a family by which husbands were appreciated, for the title was gathered in one of them, Perry A. Richardson, before being conveyed to Green C. Richardson, and the latter conveyed it to his defendant son-in-law as a gift to his daughter. The Matthews children, to whom Mr. Johnson had done everything in his power to secure their mother's share in his estate, were ignored.

[1-3] III. Coming to the real question, whether the judgment admitting the will to probate entered in 1912 after this cause was sent down to the circuit court for retrial entitles it to be admitted as evidence of plaintiffs' title, we will first consider the statutes regulating the duties of the probate courts in such matters, by which these records must be judged. In doing this we will refer to the Revision of 1855, in force at the time. Section 14, p. 1569, is as follows:

"The county court, or clerk thereof in vacation, subject to the confirmation or rejection by the court, shall take proof of last wills."

**Section 16 provides:**

"When any will is exhibited to be proven, the court or clerk may immediately receive the proof, and grant a certificate of probate, or, if such will be rejected, grant a certificate of rejection."

The measure of proof required from the subscribing witnesses is that the testator signed the writing as his last will, that he was of sound mind, and that they respectively subscribed their names thereto in his presence. This must be reduced to writing, signed by the witnesses, and certified by the clerk. Sections 18, 21. All this was done and the proof of the will was complete, subject only to the confirmation of the court in term, so that the controversy, is reduced to the question as to whether this confirmation was shown by the record introduced in the last trial, for unless such confirmation appears in the record the will is not properly before the court, and the plaintiffs have failed to show any title.

There is no question that, upon taking the proof of the will as shown by his certificate in evidence, the clerk could have immediately issued in vacation, subject to the confirmation or rejection of the court, letters of administration with the will annexed under the first section of the act relating to the appointment and removal of executors and administrators. R. S. 1855, p. 113. It was not necessary that the will should have been recorded. Its record required no order of the court, but rested solely with the clerk, upon whom the statute imposed the duty. Section 26, p. 1571. It was required by the section last cited to be done within 30 days after probate, and is coupled in the same section with the other clerical duty to carefully file the original in his office. We can see no reason why the failure to perform either of these duties should have any more or different effect upon the validity of the proof already made than would attend such failure in case of the other.

While the clerk had the right to issue letters founded upon the probate of the will in vacation, he did not do so, and when the court met in term it made an order appointing Burchard administrator of the estate with the will annexed. That the jurisdiction to make this order was derived from the probate of the will is evident. If the confirmation by the court of the act of the county clerk in taking and certifying the proof was necessary to its validity, it was confirmed by this appointment, which can rest on no other foundation than the will. It stands upon the same footing as would the act of the clerk in issuing ordinary letters of administration in vacation "subject to the confirmation or rejection of the court" under the first section of the administration act. If, in such a case, the act of the clerk should not be confirmed

in express terms, but the administration should proceed under the direction of the court to final settlement, it would seem technical, to the point of rashness, to say that all the proceedings would be void, and afford no protection to the actors, because the failure of the court to enter a formal order of "confirmation" had been equivalent to the rejection of the clerk's appointment. The same words are used with reference to the probate of wills by the clerk in vacation, and the same reason exists why it should continue in effect until rejected by the court. *Potter v. Adams' Executors*, 24 Mo. 159, 163. When the administrator was appointed and had given bond it became his duty (section 16, p. 115) to "faithfully execute the last will of the testator, pay the debts and legacies, as far as the assets will extend and the law direct." We will presume, in the absence from the record of anything to the contrary, that, during the entire period of the administration, he faithfully performed these duties, and although the personal estate must have been considerable, as indicated by the amount of the bond exacted from him, that he delivered it all, after the payment of the debts, to the widow, the sole legatee. This having been done, we see no reason why, upon the death of the widow, the estate should be diverted from the testamentary channel.

IV. This will has, during all the time that has elapsed since it was presented to the clerk of the county court for probate soon after the death of the testator, been in the custody provided by law for that purpose. So far from evidence having been lost or its production impeded or embarrassed, the very testimony which the law has prescribed as the best evidence of its execution has been perpetuated and certified in such form that it cannot be separated from the instrument. So far as its having been concealed or kept from the notice of those interested, it will be presumed that they were given the opportunity to execute its provisions. R. S. 1855, p. 114, § 10. Under these circumstances we have no doubt of the power of the court to enter a judgment in form confirming the act of the clerk and establishing the will as it did at its August term, 1912. No statute of limitations applies to and bars the right of the court to put in proper form at any time that which appears from its records to have been done and to have been imperfectly or informally recorded. *Martin v. Brown*, 162 Mo. App. 223, 228, 144 S. W. 1115; *Dawson v. Waldheim*, 89 Mo. App. 245; *Hansbrough v. Fudge*, 80 Mo. 307; *Smith v. Steel*, 81 Mo. 455. The same rule ordinarily applies to those cases in which nothing remains for the court to do but to enter the particular judgment which the law prescribes upon the facts appearing in its record. In this case both these conditions exist. The statutory evidence is taken and certified to the court without any word or fact tending to impair its

statutory effect. The statutory judgment was then due, without any further proceeding. The matter was still pending for that purpose. It was not formally entered, but the court did make an order which confirmed the probate of the will by adopting and acting upon it, and we have no doubt that the clerk might and should have then entered on his minutes words equivalent to the statement that *the probate of the will was confirmed*, and Peter W. Burchard appointed administrator with the will annexed of the estate. This case in its facts illustrates the two classes of cases which mark the distinction between the power of the court upon notice, and with due regard for intervening rights, to pronounce and enter the judgment of the law upon the facts which should conclude a pending proceeding, not withstanding it may have been delayed beyond the usual time for doing so, and its power to scan its record to ascertain from it what judgment it has pronounced and to correct any failure of the clerk to properly enter it. In this particular case, a judgment of probate entered upon either theory must, from its nature, relate, not only to the date of the pronouncement, but to the date of the death of the testator, so as to prevent a hiatus in the title to the property of which it disposes. Even the appointment of the administrator necessarily relates to the same period. 3 Redfield on Wills (3d Ed.) 46. For this reason it makes no difference in its effect whether we call it an original judgment or a judgment *nunc pro tunc* under the classification we have suggested. It clearly falls, however, within the latter class. *Hansbrough v. Fudge*, supra; *Smith v. Steel*, supra.

It follows from what we have said that the judgment of August 26, 1912, probating the will under which the plaintiffs claim was properly admitted in evidence, and the judgment of the circuit court is affirmed.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

#### THOMPSON v. WABASH RY. CO. (No. 16662.)

(Supreme Court of Missouri. Division No. 1.  
Dec. 2, 1914.)

COMMERCE (§§ 8, 27\*)—REGULATION—RAILROADS—INTERSTATE COMMERCE.

A fireman on a locomotive, drawing a train of empty cars from one state into a point in another state and along an interstate railroad, is engaged in interstate commerce, and the action for his death must be maintained under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 5, 25; Dec. Dig. §§ 8, 27.\*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by Ethel Thompson against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss complaint.

The plaintiff instituted this suit in the circuit court of Randolph county against the defendant to recover \$10,000 damages claimed to have been sustained by her by reason of the alleged negligence of the defendant in killing her husband, R. W. Thompson, a railroad fireman, while in the employ of the company. The suit was brought under section 5425, R. S. 1909 of Missouri. A trial was had in the circuit court, which resulted in a judgment in favor of the plaintiff for the sum of \$10,000. In due time and in proper form the defendant appealed the cause to this court.

The petition was in conventional form and properly stated a case under said section of the statute. Prior to answering, and in proper time and due form, the defendant filed a petition and bond for a removal of the cause to the Circuit Court of the United States for the Northern Division of the Eastern District of Missouri. The petition set out that the action arose under the act of Congress approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases"; that it appeared from plaintiff's petition that the defendant was engaged in, and decedent was employed in, interstate commerce at the time of his death (stating the averments of plaintiff's petition); that the question in the suit was whether plaintiff was entitled to recover under the act of Congress approved April 22, 1908, and that the suit involved a controversy with respect to the true meaning and intent of the act of Congress and its operation and effect upon the alleged facts of plaintiff's petition. This petition was overruled, and exceptions were duly saved.

Defendant's amended answer, filed March 14, 1911, upon which it went to trial, was a general denial; also it set out that defendant was engaged in commerce between the states, and that decedent at the time of his death was employed in such commerce; that plaintiff was not the administratrix or personal representative of decedent, and the action was not brought by her in such capacity, as provided by the act of Congress of April 22, 1908, and the plaintiff was not entitled to maintain the action as the widow of decedent; further, that the state circuit court had no jurisdiction, but that the jurisdiction was in the United States Circuit Court. The answer then alleged that the collision was the result of decedent's own negligence, and further was the result of his own negligence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

directly contributing with others with whom he was engaged in operating the train. The answer also set up the unconstitutionality of the act of Congress approved April 5, 1910 (36 Stat. 291, c. 143 [U. S. Comp. St. 1913, § 8662]), conferring jurisdiction on state courts, as in conflict with section 1, article 3, of the Constitution of the United States and certain amendments thereto, as well as certain provisions of the Constitution of the state of Missouri.

The reply was a general denial.

At the beginning of the trial the defendant objected to the introduction of any evidence under the petition, for the reason that it did not state facts sufficient to constitute a cause of action against the defendant; that the plaintiff could not maintain the action, because it arose under the "Federal Railroad Employers' Liability Act of April 22, 1908"; and that the court had no jurisdiction of the cause. This objection was overruled, and exceptions were duly saved.

The facts are few and not disputed, and are substantially as stated by counsel for respondent:

Respondent's husband, R. W. Thompson, while in the employ of appellant as a locomotive fireman on an extra freight train, was killed in a collision between said freight train and one of defendant's passenger trains, on defendant's line of railroad at a point about  $1\frac{1}{2}$  miles south of Glenwood, Mo., on the 28th day of August, 1909. Within six months thereafter, plaintiff, the widow of deceased, brought this action against defendant to recover damages for the death of her said husband, under the provisions of section 5425 of the Revised Statutes of Missouri of 1909; it being claimed by plaintiff that her husband came to his death by reason of the negligence of certain of his coemployés, namely, the engineer and conductor in charge of said freight train, in operating same in so negligent a manner as to cause it to run into and against and to collide with said passenger train. The defendant was operating a railroad for the transportation of freight and passengers from Moberly, in the state of Missouri, to Moulton and other points, in the state of Iowa.

The extra freight train on which plaintiff's said husband was serving as fireman was in charge of Finis McLean as engineer and Warren Cundiff as conductor. There were also a head and rear brakeman on the train. It left Moulton, Iowa, for Moberly, Mo., about 8:45 the morning of the collision, and made but one stop thereafter prior to the collision, that stop being made at Glenwood Junction, a station about one mile north of Glenwood, Mo. It left Glenwood Junction at 9:30, and passed through Glenwood without a stop. The collision occurred at 9:39. The passenger train, with which the extra freight collided, ran daily, except Sunday, between Moberly and points in Iowa, and was run on schedule

time, and had superior rights to all extras. It was due at Glenwood at 9:43, and at Glenwood Junction at 9:45. The passenger train was being run by a time card, and the freight train by order. The order under which the engineer and conductor were operating the freight train was to this effect: Extra 259 will run extra Moulton to Moberly, No. 2, engine 327, will wait at east yards Moulton until 10:00 a. m. for second 95, engine 261. Second 95, engine 261, will wait at Glenwood Junction until 9:30 a. m. and at Coatesville until 9:40 a. m. for extra, engine 259. The stop made by the freight train at Glenwood Junction was for the purpose of letting second 95 by. The extra freight train was composed of engine, tender, and empty cars. The collision occurred on the point of a sharp curve, and at that place the passenger train with which the freight collided could not have been seen from the cab of the freight engine a greater distance away than 100 yards. The passenger train was discovered by the engineer of the freight train as soon as it could have been discovered. It was then within 10 car lengths of the freight train. The two trains came together in what is known as a "head-on" collision.

The engineer of the extra freight train accounts for the collision by the fact that both he and the conductor, who had charge of the train, overlooked the day of the week; that is to say, mistook Saturday for Sunday. The engineer received a go-ahead signal from the brakeman and conductor at Glenwood Junction, he whistled for the station at Glenwood and again received a go-ahead signal, and, using the engineer's language, "got the board at the station," or, in other words, the arm of the order board at Glenwood was down, giving the engineer the right to go ahead.

The deceased fireman, R. W. Thompson, at the time of his death had been in the employ of the defendant as a locomotive fireman six or seven months, the greater part of which time he served as an extra fireman, and as such his duties took him all over the Western division of the Wabash Railroad, which has a mileage of about 950 miles. The last two or three months prior to his death he served as fireman with Engineer McLean on trains 67 and 68, which were regular trains between Moberly and Moulton. The trains on which he served met the passenger train with which extra 259 collided many times in the course of that two or three months' employment, but not always, nor even usually, at any one station. In fact, as disclosed by the record of trains on which Fireman Thompson served in the course of the last two or three months of his employment, he had met the passenger train in question at practically every station on the Wabash Railroad between Moberly and Moulton.

On the day of the fatal collision, Engineer McLean and Conductor Cundiff had control and were in charge of the extra freight. The

duty of Fireman Thompson was to keep steam on the engine and to watch for signals and to aid in the safety of the train to the extent of his ability. Thompson remained upon the engine at his post of duty, and did not protest to the engineer when the freight train was being run on the time of the passenger train, as shown by the time card. The engineer testified that while going through Coatesville, which is north of Glenwood Junction, that he stated to the fireman and head brakeman that it was Sunday, and that if he could get out of Glenwood Junction at 9:30 he would try to go to Moberly ahead of No. 2, which was the passenger train following. The engineer says that neither the fireman nor head brakeman made any reply to this statement. The head brakeman testified that the engineer turned to him and the fireman and asked if it was Sunday, and that he, the head brakeman, turned to him and said, "This isn't Sunday," and that the fireman said, "No."

At that time the freight train was going through Coatesville, had not reached Glenwood Junction, and was not running on the time of the passenger train. The principal duty of the fireman was to keep fire in the fire box and to keep up steam. This required him to be down in the deck of the engine shoveling coal a great part of the time. When the freight train pulled out of Glenwood Junction, its last stop before the collision, it was only 9:30, and the next station was Glenwood, about one mile away. At that time the passenger train lacked 16 minutes of being due at Glenwood. Not until Glenwood was passed did the freight train begin to run on the time of the passenger train. The collision occurred about a mile and a half out of Glenwood. Not more than 2 or 3 minutes at the outside elapsed after the freight train crossed the danger line at Glenwood. For only 2 or 3 minutes at the most could Fireman Thompson have known that the freight train was running on the time of the passenger train, and only 2 or 3 minutes for protest, even if he had realized and known the whole situation as it then existed.

Some of the facts will be made clear by setting out a few extracts from defendant's evidence:

Engineer McLean testified: That it was the duty of the fireman to keep up steam, watch for signals, to aid in the safety of the train to the extent of his ability, and whenever he discovered anything wrong he should tell it. That the fireman was under the instructions of the engineer, but had nothing to do with managing the engine. That the brakemen were under the control and supervision of the conductor. Witness and fireman got an order that morning to run extra 259 from Moulton, Iowa, to Moberly. Thompson read the order. He was a man of good intelligence and a good fireman. The order meant that extra 259 was to keep out of the way of regular trains. No. 51 was controlled

by a regular time-table. This time-table was identified by the witness as time-table No. 10. Witness kept one of those time-tables over his seat box in the engine cab, where he could look at it. Witness was well acquainted with the running time of No. 51, learning it from the time card. That morning he looked at the time card at Moulton, and saw the time of No. 51 at Glenwood. That morning, when witness left Moulton, he had it in his head it was Sunday. Coming through Coatesville, he told Fireman Thompson, the decedent, and the head brakeman, it was Sunday, and that they would try to get out of Glenwood Junction at 9:30. Neither the decedent nor the head brakeman replied. Witness announced it was Sunday and he was going on. Neither decedent nor head brakeman told the witness it was not Sunday. His train laid at Glenwood Junction 8 minutes to let second 95 by. No. 2 was following witness' train, 45 minutes late. Witness received orders that second No. 95, a freight, would wait until 9:30 at Glenwood for extra 259 to pass. Witness was trying to beat No. 2 to Moberly. No. 2 was a superior passenger train. Passing Glenwood station, witness saw people on the platform of the station, indicating they were there to take a train. The decedent could see these people plainer than witness. No. 2 was not due regularly in Glenwood until 10:12 and that day was 45 minutes late. Witness passed through Glenwood 13 minutes before No. 51 was due, and 40 minutes ahead of the regular time of No. 2, and 1 hour and 28 minutes ahead of No. 2's time that day. It was the duty of the fireman to look out for the safety of the train. Thompson had been making this run for three months and meeting No. 51. Extra 259 consisted of ten cars, going from Moulton, in the state of Iowa, to Moberly, Mo. No. 51 was a passenger train with three cars, and running from Moberly, Mo., to Ottumwa, Iowa. Firemen get their time cards, as engineers get them, at the roundhouses, by asking for them. Witness identified book of rules of defendant, marked "Exhibit 2."

There was other evidence corroborative of that of the engineer.

J. L. Minnis, of St. Louis, and Robertson & Robertson, of Mexico, Mo., for appellant. M. J. Lilly and Phillips & Phillips, all of Moberly, for respondent.

WOODSON, P. J. (after stating the facts as above). I. There are but two legal propositions of importance presented by this appeal, viz.: First, was the deceased, R. W. Thompson, at the time he met his death, engaged in interstate commerce? and, second, was he at that time guilty of such contributory negligence that directly contributed to his injury? Before the plaintiff can recover, both of these questions must be answered in the negative, while the affirmance of ei-

ther would lead to a reversal of the judgment and a denial of her right to a recovery in this particular case. For convenience we will answer these questions in the order in which they are stated.

Attending the first: It is practically conceded, or rather the evidence for both parties shows, that the Wabash Railroad Company was duly organized and incorporated under the laws of the state of —, and was engaged in the business of transporting both freight and passengers over its road, one branch of which leads from Moberly, Mo., to Moulton and other points in the state of Iowa, by means of locomotive engines and cars managed by crews composed of engineers, firemen, conductors, brakemen, porters, etc. The deceased, the late husband of the plaintiff, had been engaged as a fireman on one of the company's engines hauling freight in cars between said points over said road for some six or seven months. Counsel for each party concede that this general work in which the deceased was engaged was interstate commerce, but counsel for the plaintiff insist that at the particular time at which the deceased met his death he was not so engaged, for the reason assigned—that because the train of cars, which the engine in which he was firing was drawing, were empty cars, containing neither freight nor passengers, and therefore he was not engaged in interstate commerce. In other words, it is insisted that interstate commerce consists of carrying or transporting either freight or passengers, or both, from one state to another by various instrumentalities, and that, since this particular train was carrying neither, it could not be logically contended that he was engaged in interstate commerce.

In support of this general contention we are cited by counsel for appellant to the following cases: *Smith v. Turner*, 7 How. 401, 12 L. Ed. 702; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 241, 20 Sup. Ct. 96, 44 L. Ed. 136; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826, 29 L. Ed. 158; *In re Grand Jury (D. C.)* 62 Fed. 828-831. And in support of the particular question in hand we are by counsel for respondent cited to the case of *Norfolk, etc., Ry. Co. v. Commonwealth of Virginia*, 93 Va. 749, 24 S. E. 837, 34 L. R. A. 106, 57 Am. St. Rep. 827. That case clearly supports the contention of counsel. In that case the Supreme Court of Virginia held that a train consisting of empty freight cars, which had been used exclusively to transport coal from one state to another, and which was intended to be so used again, was not, while being returned from one point in that state to another state, engaged in the transportation of articles of interstate commerce, although en route to the coal fields outside of that state. While that is a highly respectable court, yet we, under the more recent ruling of the Supreme Court of the United States, the final arbiter in all such cases, are unable to lend

our concurrence to the view of the law as there announced.

In construing the act of Congress mentioned, the Supreme Court of the United States, in the case of *Michigan Central Railroad Co. v. Vreeland et al.*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176:

"We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employes while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states. Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. 'The subject,' as observed by this court in *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U. S. 1, 54, 32 Sup. Ct. 169, 56 L. Ed. 327, 347, 38 L. R. A. [N. S.] 44, 'is one which falls within the police power of the state, in the absence of legislation by Congress.' *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 9 Sup. Ct. 28, 32 L. Ed. 352, 353, 2 Interst. Com. R. 238. By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. Thus, in *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 93, 104, 15 Sup. Ct. 802, 39 L. Ed. 910, 912, it was said, in reference to state legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that: 'Generally it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. "No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 271, 23 L. Ed. 543, 548. "Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land." *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 661, 6 Sup. Ct. 252, 29 L. Ed. 516, 520. "While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail." *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 464, 6 Sup. Ct. 1114, 30 L. Ed. 237, 241.' It therefore follows that, in respect of state legislation prescribing the liability of such carriers for injuries to their employes while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states."

In the *Second Employers' Liability Cases*, 223 U. S. 1 et seq., loc. cit. 46, 32 Sup. Ct. 169, 173 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44) the court said:

"The principal questions presented in these cases, as discussed at the bar and in the briefs, are: (1) May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employes while both are engaged in such commerce? (2) Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? (3) Do those regulations supersede the laws of the states in so far as the latter cover the same field? (4) May rights arising under those regulations be enforced, as of right, in the courts of the states, while their jurisdiction, as fixed by local laws, is adequate to the occasion?"

Continuing, on page 53 of 223 U. S., on page 176 of 32 Sup. Ct. (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), the court said regarding the question there:

"The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316 [4 L. Ed. 579]."

And on pages 54 and 55 of 223 U. S., on page 177 of 32 Sup. Ct. (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), the court said:

"True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. \* \* \* The inaction of Congress, however, in no wise affected its power over the subject. \* \* \* And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In the opinion in *McCulloch v. Maryland*, referred to, is found on page 405 of 4 Wheat. (4 L. Ed. 579), where Justice Marshall said:

"The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'"

Also in the case of *Gulf, etc., Ry. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, the question being whether a state statute of Texas, which was in conflict with the Interstate Commerce Act, had any force, the court said (158 U. S. loc. cit. 103, 15 Sup. Ct. 803, 39 L. Ed. 910):

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law."

Continuing, on page 104 of 158 U. S., on page 804 of 15 Sup. Ct. (39 L. Ed. 910), the court further said:

"Generally it may be said, in respect to laws of this character, that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserve powers of the states, is subordinate to

those in terms conferred by the Constitution upon the nation."

In the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, the question was whether or not a contract between plaintiff in error and defendant in error, the plaintiff below, limiting the shipper's recovery to an agreed value, was invalid. The local law of the state was that such contract was invalid, and the shipper was entitled to recover the actual value. The shipment was an interstate shipment. The court held that the act of Congress of June 29, 1906 (34 Stat. 584, c. 3591), controlled, saying (226 U. S. 500, 33 Sup. Ct. page 149, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257):

"But it is equally well settled that, until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make, in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be directly affected."

Mr. Justice Lurton, quoting from page 505 of 226 U. S., page 152 of 33 Sup. Ct. 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, said:

"The congressional action has made an end to this diversity, for the national law is paramount, and supersedes all state laws as to the rights and liability and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed, by the state courts obeying and enforcing the provisions of the federal statute where applicable to the facts in such cases as shall come before them."

On the same page he further said:

"Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

In the case of *State of Missouri v. Wabash Railroad Co.*, 238 Mo. 31, 141 S. W. 649, the defendant was proceeded against for a violation of sections 7818 and 7819, R. S. Mo. 1909, regarding the hours of labor of railroad trainmen. The violation occurred in February, 1907. The evidence showed that the conductor who violated the statute was engaged in interstate commerce. There this court held that the same subjects were covered by Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. 1913, §§ 8677-8680), regarding the Hours of Labor Law, etc., and therefore our statutes on the same subject were abrogated. The language of this court was as follows:

"Consequently, in the case at bar, we are compelled to hold that, since the act of Congress before mentioned covers the same subjects or classes of legislation that are covered by the act of the Legislature of 1905, the former nullifies the latter as completely as if it had never been enacted."

And in *Rich v. St. L. & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011, is a case exactly in point. There the widow of decedent sued under the state law. Defendant set up in its answer that the plaintiff could not maintain the suit because it arose under the federal Employers' Liability Act, alleging the facts. On motion, the court struck out these allegations of the answer. The court, speaking through Norton, J., said (166 Mo. App. loc. cit. 389, 148 S. W. 1014):

"And now that Congress has acted, the laws of the state, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

This last quotation from *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. On page 390 of 166 Mo. App., on page 1015 of 148 S. W., the court said:

"It is therefore obvious that, though plaintiff did not declare upon the Employers' Liability Act, she nevertheless may not maintain this suit under our statute, for the right of recovery is given by the authority of Congress to the personal representative of her husband for the benefit of herself and his children. The court erred in striking out the portion of the answer above mentioned and in denying defendant the right to show the facts therein set forth."

In the case of *Eastern Ry. Co. of N. M. et al. v. Ellis et al.* (Tex. Civ. App.) 153 S. W. 701, the plaintiff sued in her individual capacity as widow on behalf of the parents of decedent and as the next friend of the minor children. She sought to recover under the federal Employers' Liability Act of 1908. Defendant set up that plaintiff could not maintain the action, because under the federal act the right of recovery was limited to the personal representative of decedent. Plaintiff also alleged in her petition that she was suing upon a Texas statute. The trial court held that the state statute was superseded by the federal statute, and if plaintiff had any cause of action it was under the federal statute. Upon appeal, appellant contended that that provision of the federal act requiring that a suit should be brought by a personal representative is directory only, and not mandatory. The Supreme Court held that the plaintiff was not entitled to a recovery under the state statute.

There are many other cases, both state and federal, of like import. Those cited and reviewed, as well as others, in effect hold that a corporation engaged in such business is an instrumentality of interstate commerce, as well as its employes, and physical property, such as the road itself. That being true, I am unable to comprehend upon what ground it can be logically contended that a car, though empty, which is being hauled from one state to another in order to receive ar-

ticles of interstate commerce, is not likewise an instrumentality of such commerce.

It is a well-known fact that the freight and passenger traffic moves periodically, first in one direction, and then in the other. For instance, the great wheat and corn crops, as well as the cattle and hogs of the West, are during the fall and winter months shipped East. This requires many thousands of cars, far in excess of the number that is required, at that time, for the transportation of the manufactured articles and other commodities of the East destined for the West. The same is true of passengers. During the summer months and vacations of various kinds, great hordes of people go to the Northern and Western resorts and even to the European, in order to escape the heat and seek comfort, as well as to avail themselves of more congenial climes and view the lands and scenes of historical renown. This condition of things tests the capacity of common carriers one way, and compels them to haul the movable instrumentalities of transportation loaded one way and empty the other. In the very nature of the business, these empty cars must be returned, in order to carry the remaining freight and passengers not able or ready to go at an earlier date, and to accommodate the ordinary traffic in ordinary seasons.

We must presume that Congress was familiar with these natural conditions, or rather conditions created by natural causes, and had them in mind when the act of Congress under consideration was enacted. Entertaining these views, I am satisfied that the Supreme Court of Virginia took too narrow a view of said act, and which, if adhered to, would greatly hamper and cripple interstate and foreign commerce, for the reason that there can be no intrastate or interstate commerce without the common carrier is authorized to return his or its empties from the points of delivery of freight and passengers to the intermediate and the other end of the road. They must have empty cars, boats, and ships before they can be loaded with freight or passengers destined for interior or foreign points or ports.

If our foregoing observations are sound, then all agree, the court and counsel for both parties, that the plaintiff cannot maintain this suit under the Missouri statute, but must proceed, in order to recover, under the act of Congress previously mentioned. That is for the reason, as briefly stated in the case of *State of Missouri v. Wabash Railroad Company*, supra. As previously indicated, the plaintiff cannot recover in this case.

II. The conclusions reached in paragraph I of this opinion render it unnecessary to undertake to answer the second interrogatory propounded at the beginning of this opinion, for the reason that the conclusions so reached completely dispose of this case.

We are therefore of the opinion that the

judgment should be reversed, and the cause remanded to the circuit court, with directions to dismiss plaintiff's petition. It is so ordered.

GRAVES, J., concurs. BOND, J., concurs in result.

LAMM, J. (concurring). On this record, the most favorable view possible for respondent is that her husband was fireman on a locomotive drawing a train of *empty* freight cars from Moulton, in Iowa, to Moberly, in Missouri, on the Wabash, an interstate railroad. These cars, the testimony shows, were mostly headed for St. Louis, Mo., belonged to other roads, and were intended for distribution at St. Louis to the carriers owning them. On such a record, though doubting much at the hearing, I am constrained to concur in the opinion of our learned Presiding Judge, putting my concurrence on the ground that the final arbiter on the question has spoken. In *North Carolina Ry. Co. v. Zachary, Adm'r of Burgess*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, where the precise point was in judgment, Mr. Justice Pitney spoke for the whole court in holding, first, that the federal Employers' Liability Act is in pari materia with the federal Safety Appliance Act; and, second, that the hauling of *empty* cars from one state to another is interstate commerce within the meaning of said Employers' Liability Act. An excerpt from that case, encompassing the sum of the matter, will not be amiss:

"There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded, and that it was incumbent upon defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But, were it so, the hauling of empty cars from one state to another is, in our opinion, interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in action based upon the Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1913, §§ 8605-8612]). *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 21 [25 Sup. Ct. 158, 49 L. Ed. 363]; *Voelker v. Railway Co. (C. C.)* 116 Fed. 867, 873. And the like reason applies, as we think, to actions founded upon the Employers' Liability Act, which, indeed, is in pari materia with the other."

As appositely put by Hook, Circuit Judge, speaking for the Circuit Court of Appeals in *Chicago, M. & St. P. Ry. Co. v. U. S.*, 185 Fed. 424, 91 C. C. A. 373, 20 L. R. A. (N. S.) 473, if these cars had been loaded on flat cars, and were being transported in that fashion from Iowa to Missouri, there could be no shadow of question but that their carriage would be interstate commerce. Such being the case, what difference does it make in principle that they were being run on their own wheels and coupled by their own

coupling to each other and to the engine? In other words, the traffic of interstate commerce "may as well consist of the property of carriers as the property of merchants."

Learned counsel for appellant cite a line of cases under the Safety Appliance Act, showing that under circumstances here the Safety Appliance Act would apply; hence if that act, as held by Mr. Justice Pitney, supra, is in pari materia with the federal Employers' Liability Act, and if the two are to be construed together, that line of cases is directly in point. It was on that theory such cases are used by Justice Pitney to support the judgment in *North Carolina Ry. Co. v. Zachary, Adm'r.*

That when the Congress of the United States, under its constitutional power of regulating interstate commerce, has occupied the field by its statute, the state damage act must give way, pro tanto, where the two overlap in remedy, is not to be questioned for a moment. However much the state bench and bar may revere the old landmarks of our statute on damages, they must be willing to see that statute yield when the paramount authority of the federal government once takes over any phase of the regulation of interstate commerce and the liability of carriers in that line of business, as it has done in this instance.

Wherefore I vote to concur.

#### WELLMAN v. KAISER INV. CO. et al. (No. 16406.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

#### 1. BANKRUPTCY (§ 303\*) — ACTION AGAINST TRUSTEE—EVIDENCE.

In a suit by a bankrupt's trustee to set aside certain conveyances by the bankrupt through an intermediary to his wife and later conveyed in her interest, through foreclosure of a deed of trust, to a corporation formed for her benefit to take title, evidence *adduced* to justify a finding that the conveyances were not fraudulent, but made in settlement of an indebtedness by the husband to her.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 458-462; Dec. Dig. § 303.\*]

#### 2. FRAUDULENT CONVEYANCES (§ 95\*)—CONVEYANCE BY HUSBAND TO WIFE—CONSIDERATION.

Where a wife, before marriage, had recovered a judgment against her husband for breach of promise, which had been satisfied in part by a transfer to her of certain notes or obligations of a corporation, the fact that these obligations were those of a third person, instead of the husband, did not prevent a surrender thereof from operating as a good consideration for a transfer of real property by her husband to her, as against his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 243-288; Dec. Dig. § 95.\*]

#### 3. HUSBAND AND WIFE (§ 115\*)—PROPERTY OF WIFE—SUBSEQUENT MARRIAGE—EFFECT.

Where a wife, prior to marriage, obtained a judgment against her husband for breach of marriage promise, and accepted the notes of a third

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

person as part payment of the judgment, her subsequent marriage did not destroy the validity of her claim to the notes.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 408-412; Dec. Dig. § 115.\*]

**4. HUSBAND AND WIFE (§ 131\*)—SECURITIES—LOAN.**

Where a wife received from her husband the notes of a third person in part payment of a judgment she had recovered against him for breach of promise, her subsequent lending of the notes to her husband that he might use them as collateral security for a loan to him did not raise a presumption of payment to her of the part of the debt represented by the notes.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 426, 471-483; Dec. Dig. § 131.\*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Bill by George W. Wellman, as trustee of the estate in bankruptcy of Chris Von der Ahe, against the Kaiser Investment Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff, as trustee in bankruptcy of the estate of Chris Von der Ahe, instituted this suit—a creditor's bill—in the circuit court of the city of St. Louis, to set aside and for naught hold certain deeds of conveyance mentioned in the pleadings and evidence, conveying the real estate in controversy, situate in the city of St. Louis, on the ground of fraud, and to recover same from the defendants, the present title to which now rests in the defendant Kaiser Investment Company. The substance of the pleadings are briefly and fairly stated by counsel for appellant in the following language:

"Plaintiff's amended petition, upon which trial was had, states: That in the year 1898, and for some time prior, Chris Von der Ahe was the owner of certain real estate in the city of St. Louis, Mo., being a lot of ground in city block 2386, beginning at a point on the north line of St. Louis avenue 105 feet 10 inches west of the west line of Grand avenue, and running westwardly along the north line of St. Louis avenue 145 feet more or less to the west line of lot nine (9) of said block; thence northwardly and parallel with the west line of Grand avenue 115 feet to an alley 15 feet wide; thence eastwardly and parallel with St. Louis avenue 145 feet to a point; thence southwardly and parallel with Grand avenue 115 feet to the north line of St. Louis avenue, the point of beginning.

"That on the 8th day of December, 1894, Chris Von der Ahe and Emma Von der Ahe, his wife, executed a deed of trust on this real estate in favor of David J. Hayden, trustee, to secure the payment of certain promissory notes of the sum of \$11,000. It is further charged in the petition that bankrupt Chris Von der Ahe, prior to 1898, became indebted to the extent of \$21,000 to creditors represented by the trustee in this action, a portion of which were proven against bankrupt estate to the extent of over \$12,000 in all. A large portion of the debts proven were contracted prior to the year 1898.

"It further appears from the plaintiff's amended petition that the bankrupt, together with the defendant Anna K. Von der Ahe, who was then, and is now, the wife of said bankrupt, on the 29th day of January, 1900, conveyed all of the aforementioned real estate to the defendant Max Kaiser for a pretended consideration of \$1,000; that on the same day defendant Max Kaiser

conveyed the said real estate to defendant Anna K. Von der Ahe for a pretended consideration of \$1,000, both of which deeds were recorded in the office of the recorder of deeds in the city of St. Louis, Mo., on the 22d day of May, 1902; and that on the 3d day of September, 1902, bankrupt Chris Von der Ahe and his wife, the defendant Anna K. Von der Ahe, conveyed the same real estate to John S. King for a pretended consideration of the sum of \$5, and in confirmation and in recognition of the deeds from bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, to defendant Max Kaiser, and from Max Kaiser to the defendant Anna K. Von der Ahe for a pretended consideration of the sum of \$5, and in confirmation and in recognition of the aforementioned deeds executed on the 29th day of January, 1900, from bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, to defendant Max Kaiser, and from the defendant Max Kaiser to the defendant Anna K. Von der Ahe, which later deeds were recorded on the 3d day of September, 1902.

"It is further charged in plaintiff's amended petition that on the 10th day of December, 1903, the said real estate was sold by the trustee under the deed of trust executed by the bankrupt and his first wife, Emma Von der Ahe, for a pretended consideration of \$10,000, to Christiana Winkelmeyer, the owner of the deed of trust, who, in turn, on the same day, conveyed said real estate to Helen Caldwell, who is the defendant Helen Caldwell How, for a pretended consideration of \$11,500, who in turn, on the 14th day of December, 1903, executed three first deeds of trust on this real estate to August Gehner, trustee for John A. Tomhagen, to secure the payment of principal notes aggregating \$10,500, and the interest to accrue thereon; that on the 15th day of December, 1913, said defendant Helen Caldwell How executed a second deed of trust on all of this real estate to August Gehner, trustee for John A. Tomhagen, to secure payment of principal notes aggregating \$2,025; that on the 4th day of January, 1904, the defendant Helen Caldwell How transferred the remaining equity in this real estate to the defendant Kaiser Investment Company; that all of these conveyances were duly recorded in the office of the recorder of deeds in the city of St. Louis, Mo.

"It is further charged in the petition that James M. Francis, Charles C. Kunz, and Robert A. Quackenbush, at the instance and request of the bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, and defendant Max Kaiser, organized the defendant Kaiser Investment Company, a corporation, under the laws of the state of Missouri, for the purpose of receiving and holding the legal title to this real estate, and subsequently transferred to the bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, and defendant Max Kaiser, all of the shares of stock of said corporation; that the purpose and effect of all of these conveyances other than the first deed of trust executed by the bankrupt Von der Ahe and former wife, Emma Von der Ahe, was to hinder, delay, and defraud the creditors of the bankrupt Chris Von der Ahe, and prayed for a decree setting aside all of said conveyances and to declare the real estate to be the property of bankrupt Von der Ahe, and ordered sold for the payment of the indebtedness of said bankrupt, subject to certain deeds of trust executed by Helen Caldwell, provided the court found that they were valid and subsisting liens on said real estate, and that defendants be required to account for the income from said real estate and for such other and further relief as may under the premises to the court seem meet, just, and proper."

Answer of Defendant Anna K. Von der Ahe.

"Defendant Anna K. Von der Ahe, answering plaintiff's amended petition, filed a general de-

nial, with admissions that bankrupt Von der Ahe, was, in the year 1898, and for some time prior thereto, the owner of the real estate mentioned in plaintiff's amended petition, the execution of the deed of trust by bankrupt Von der Ahe and his wife, Emma Von der Ahe, on the 8th day of December, 1894, and alleges that the conveyances of bankrupt and his wife, defendant Anna K. Von der Ahe, to Max Kaiser, and from Max Kaiser to defendant Anna K. Von der Ahe, were never delivered by bankrupt and defendants Anna K. Von der Ahe and Max Kaiser, and further alleges that both of said conveyances were at all times null and void; admits the execution and delivery of deeds from bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, to John S. King, and from John S. King to defendant Anna K. Von der Ahe, but denies that these deeds were fraudulent; admits that the real estate was sold on the 10th day of December, 1903, by the trustee under the deed of trust executed by bankrupt and Emma Von der Ahe, his first wife, to Christiana Winkelmeyer, but denies that the sale and purchase under deed of trust was fraudulent; admits the conveyance of said real estate from Christiana Winkelmeyer to Helen Caldwell, but denies said conveyance was fraudulent; admits that on the 14th day of December, 1903, defendant Helen Caldwell executed the three first deeds of trust to August Gehner, trustee, to secure the payment of her promissory notes to John A. Tomhagen, aggregating \$10,500, and the second deed of trust to secure the payment of her promissory note for \$2,025, to same party, and that the notes secured by said second deed of trust have been paid, and avers that the same were paid by defendant Anna K. Von der Ahe; denies that the conveyance from defendant Helen Caldwell How to defendant Kaiser Investment Company was for a pretended consideration and in fraud of creditors of bankrupt Chris Von der Ahe; that, in fact, the conveyance executed by Helen Caldwell How to defendant Kaiser Investment Company was null and void because Kaiser Investment Company did not exist, and was not a body corporate, and was incapable of holding and owning the title to said real estate at the time of the conveyance from Helen Caldwell How to defendant Kaiser Investment Company; that the title to said real estate is, in fact, in defendant Helen Caldwell How, who holds same in trust for defendant Anna K. Von der Ahe, and that defendant Anna K. Von der Ahe has received the rents and profits of all of real estate for her sole use and benefit, and paid out certain amounts for interest, taxes, and upon the promissory notes secured by the second deed of trust executed by Helen Caldwell How; that all of real estate was at all times prior to conveyances, and at the time of the conveyances, the homestead of bankrupt."

#### Answer of Kaiser Investment Company.

"The answer of defendant Kaiser Investment Company to plaintiff's amended petition was a general denial, with admission regarding ownership of real estate by bankrupt at and prior to 1898, the execution of deed of trust by bankrupt and his former wife on December 8, 1894, also deeds from bankrupt and his wife, the defendant Anna K. Von der Ahe, to defendant Max Kaiser, and the deed from Max Kaiser to Anna K. Von der Ahe, and charges that said last two conveyances were null and void; admits the execution of conveyances from bankrupt and his wife, defendant Anna K. Von der Ahe, to John S. King, and from John S. King to defendant Anna K. Von der Ahe, and asserts they were bona fide conveyances and for a valuable consideration; admits the sale of real estate, under deed of trust executed by bankrupt and his former wife, Emma Von der Ahe, to Christiana Winkelmeyer, to defendant Helen

Caldwell How, and the execution of the four deeds of trust upon said real estate by defendant Helen Caldwell How to August Gehner, trustee, to secure the promissory notes of John A. Tomhagen, and charges all were bona fide conveyances and for a valuable consideration; and further charges that the promissory notes, aggregating \$2,025, secured by the second deed of trust on said real estate, have been fully paid and discharged by defendant Helen Caldwell How, on the 15th day of December, 1903, conveying by warranty deed all of the real estate in question to defendant Kaiser Investment Company, subject to the four deeds of trust placed thereon by said defendant; and charges that ever since that date defendant Kaiser Investment Company has held, and now holds, the title to said real estate in good faith and for its sole use and benefit, and ever since the 15th day of December, 1903, has received the rents and profits of said real estate in good faith and for its sole use and benefit, and that, since acquiring title to said real estate, it has paid out and expended certain moneys in payment of taxes, interest, and upon the said second deed of trust; also states that at the time of conveyances by bankrupt the real estate was the homestead of said bankrupt."

#### Answer of Defendant Max Kaiser.

"The answer of defendant Max Kaiser to plaintiff's amended petition was a general denial and the adoption of the separate answer of the defendant Kaiser Investment Company."

#### Answer of Defendant Helen Caldwell How.

"The answer of defendant Helen Caldwell How to plaintiff's amended petition was a general denial and the adoption of the answer of defendant Anna K. Von der Ahe."

The trial before the chancellor, Hon. Moses N. Sale, resulted in a finding of the facts and a decree in favor of the defendants, from which the plaintiff in due time and in proper form appealed the cause to this court.

#### Appellant's Evidence.

In brief, the evidence of the appellant tended to prove the following facts: That about the year 1875 Chris Von der Ahe acquired the real estate in question, and erected the buildings thereon some time prior to the year 1894; that on the 8th day of December, 1894, Chris Von der Ahe and his then wife, Emma, placed a deed of trust on said real estate to secure \$11,000, money borrowed from one Winkelmeyer. That between the years 1894 and 1902 Chris Von der Ahe contracted the debts previously mentioned, aggregating twenty-odd thousand dollars. That on or about August 17, 1899, Henry C. Becker instituted a suit in the circuit court of the city of St. Louis against Chris Von der Ahe and his wife, Anna K., upon promissory notes aggregating approximately \$15,000. That, shortly after the institution of this suit Chris Von der Ahe and his wife, Anna K., by a general warranty deed dated January 29, 1900, conveyed the property in question to Max Kaiser, a brother of said Anna K., and that on the same date said Max, by a general warranty deed, conveyed the same land to his sister, Anna K. Von der Ahe. Both deeds were duly recorded May 22, 1902. That both of said deeds were without consideration. (This, how-

ever, seems to me to be immaterial, because all parties concede that both were void because never delivered.) That Chris Von der Ahe and Anna K., his wife, on September 3, 1902, by deed duly executed, conveyed said real estate to John S. King, and that on the same day said King, by deed duly executed, conveyed the same land to Anna K. Von der Ahe, both of which were duly recorded. King testified that in so far as he knew no consideration for the deeds passed between the parties at the time of their execution. That Winkelmeyer, the owner of the deed of trust dated December 8, 1894, executed by Chris Von der Ahe and his wife, Emma, on said real estate, to secure a loan of \$11,000 in the month of December, 1903, demanded payment of the same. That up to that time Chris Von der Ahe collected the rents on said property, and from December 14, 1903, the rents were paid to the defendant the Kaiser Investment Company. That at the time of the sale of the property under the Winkelmeyer deed of trust, Emma Von der Ahe, the first wife of Chris Von der Ahe, had an outstanding dower interest in said property (she having been divorced from Chris Von der Ahe on March 26, 1895), and that there were several judgment loans existing against the property. That at the sale of the property under the Winkelmeyer deed of trust Helen Caldwell became the purchaser, for the sum of \$11,500. That Helen Caldwell borrowed the money with which she purchased the property, and executed three or more deeds of trust on the same to secure the parties from whom she borrowed the money to pay Winkelmeyer. These deeds also included a small sum borrowed by her to pay cost and expenses of the foreclosure and sale of the Winkelmeyer deed of trust. All of these deeds were duly recorded on December 17, 1903, there being only one minute of time elapsing between the recording of each. That on January 4, 1904, said Caldwell, by a general warranty deed, conveyed the said real estate, subject to the said deeds of trust, to the defendant Kaiser Investment Company. That the arrangements made for the sale of the property under Winkelmeyer deed of trust and the ultimate transfer of the same to the Kaiser Investment Company were done on behalf of Chris Von der Ahe. That the bankrupt contracted the original debt with the Anheuser-Busch Brewing Association on August 4, 1896, while he was a single and unmarried man, and not within the class of persons entitled to claim or hold a homestead, and the evidence further tended to show that at the time of contracting this debt, also the debt of Broadheat et al., and at the time the Pendleton judgment was rendered against him, the bankrupt did not reside upon or occupy any of the property in question as a homestead, or that he occupied any of this property as a homestead until the spring of 1899.

### The Respondents' Evidence.

The following facts are either admitted or practically not disputed:

It is admitted that Chris Von der Ahe duly acquired the title to the real estate described in appellant's amended petition from the owners thereof on the 20th day of December, 1875, and that Chris Von der Ahe and Anna K. Von der Ahe were living upon said property at the time this case was tried in the circuit court; that Chris Von der Ahe and Anna K. Von der Ahe continued to live in one of the houses on said real estate up to the death of said Chris Von der Ahe, which occurred on the 5th day of June, 1913, and that said Anna K. Von der Ahe now occupies and lives in said house; that Chris Von der Ahe and Emma Von der Ahe, his first wife, were legally married in 1870; that on the 8th day of December, 1894, Chris Von der Ahe and his then wife, Emma Von der Ahe, executed and delivered their promissory note for \$11,000, secured by their deed of trust on said real estate.

Appellant admits in his amended petition, upon which this case was tried, that said deed of trust securing said note for \$11,000 executed by Chris Von der Ahe and Emma Von der Ahe is and was at all times a legal and valid lien upon said real estate; that Chris Von der Ahe and Anna K. Von der Ahe were legally married on August 18, 1898; that Max Kaiser and said Anna K. Von der Ahe were brother and sister.

The evidence tended to prove: That prior to September 3, 1902, Chris Von der Ahe was legally indebted to Anna K. Von der Ahe in the sum of about \$5,000. That in the year 1896, said Anna K. Von der Ahe, who was then Anna Kaiser, instituted suit for breach of promise against said Chris Von der Ahe in the circuit court of the city of St. Louis, Missouri, and that said case was settled out of court by Chris Von der Ahe agreeing to pay her \$3,000, but that only \$800 of said \$3,000 was paid to her in cash, \$200 to her and \$800 to her attorney. Chris Von der Ahe afterwards gave Anna K. Von der Ahe some old Sportsman's Park notes for the \$2,200 balance. None of these notes, nor any part thereof, were ever paid, and Anna K. Von der Ahe returned all of said notes to Chris von der Ahe. The \$2,200 was afterwards paid by said Chris Von der Ahe in the manner hereinafter set forth in this statement, after numerous demands made by her upon him. That Anna K. Von der Ahe had at different times loaned Chris Von der Ahe about \$2,000, in the manner to be presently stated:

Anna K. Von der Ahe, among other things, testified that:

"Q. Well, what did the balance of the \$5,000 debt from Chris Von der Ahe to you consist of? A. The other amount was a judgment I had against Mr. Von der Ahe for a breach of promise that Mr. William F. Woerner attended to. He was my attorney. Q. Do you remember

what year you sued Mr. Von der Ahe for breach of promise? A. In 1896. Q. You say that was settled for \$3,000? A. Yes, sir. Q. Did he ever pay you any part of that? A. He never did. Q. That made up the whole \$5,000 that he owed you? A. Yes, sir. Q. When you married him was there anything said to you at that time by Chris Von der Ahe about satisfaction of this judgment or claim that you had against him for this breach of promise suit? A. No, sir. Q. Isn't it a fact that when he consented to marry you that you agreed to relieve him from any liability on the claim for the breach of promise? A. No, sir. Q. You mean to tell the court that you retained your judgment against him for breach of promise when he consented to marry you? A. Yes, sir. Q. Now, in reference to this breach of promise suit, did you come into this court and have a trial of the case? A. No, sir; Mr. Woerner settled it. Q. I thought you said you got a judgment? A. That is what Mr. Woerner told me. Mr. Woerner settled it for me. I don't know how those things are done. Q. Now, isn't it a fact that he settled it by Chris agreeing to marry you? A. No, sir; Mr. Von der Ahe was married at the time, and I sued him for breach of promise when he was married. \* \* \*

"The Court: Q. What did you get as a settlement? A. Three thousand dollars. Q. In money? A. No, sir. Q. In what? A. Well, he was supposed—he paid me \$200, and he was supposed to pay the rest in six months. Q. Did he pay you the \$200? A. Yes, sir. Q. Did he pay you any of the balance? A. No, sir; he kept me off from time to time, and when I asked him for it after while he said he would give me that property for the money he owed me.

"Mr. O'Keefe: Did you take any notes or memorandum of what he owed you on the settlement? A. I held some notes, but I turned them over to him again. Q. When did you turn them over to him? A. In about 1900. Q. In about 1900? A. I think so. Those were notes secured by him, and he said if he would get the money he would pay me, but the notes were never paid, and I just turned them over to him, and he deeded that property over to me. Q. That was shortly after you were married that you surrendered those notes to him? A. No, sir; we were married quite a while before I surrendered them to him. Q. You just took a notion one day to surrender these notes without any reason for it? A. No. Q. What was the occasion? A. He asked me for those notes. Q. And you just willingly turned them over to him? A. He told me he would pay me some other way.

"Mr. Kelley: Q. Now, Mrs. Von der Ahe, those notes that Chris gave you to hold until this \$3,000 settlement of the breach of promise suit was paid were never paid, were they? A. No, sir. Q. You gave them back to him? A. I did. Q. What did he owe you that \$5,000 for? A. Well \$1,000 I sent him to Pittsburgh—Q. When did you loan Chris Von der Ahe this \$1,000? A. I gave him that on the 14th or 15th of February, 1898, when he was in Pittsburgh. Q. That was the time he got in jail in Pittsburgh? A. Yes, sir; and he sent Mr. Muckenfuss over to the house and asked if I could not send down any money, that he was hard up, and if I could get any I should send it to him, and I sent him \$1,000. Q. Where did you get that \$1,000? A. Seven hundred and fifty dollars was my own money, and \$250 I borrowed from my brother Max. Q. Is that the \$750 that you had in the Northwestern Savings Bank? A. Yes, sir. Q. Mrs. Von der Ahe, what money did you have when you married Chris Von der Ahe? A. I had about \$1,000 what I had sent him on to Pittsburgh. Q. What? A. About \$1,000. Q. You didn't have that then when you were married? A. No, sir; but I had given it to Mr. Von der Ahe. Q. You made him a present of it? A.

No, sir; I didn't do that. Q. Well, you said you gave it to him? A. I sent it to him, I said. Q. You were no relation of Mr. Von der Ahe's were you? A. No, sir. Q. You were not at that time? A. No, sir. Q. Was he married at that time? A. No, sir. Q. What? A. No, sir. Q. You mean to tell us that he was not married in February, 1900—1898? A. No, sir.

"The Court: Q. That is, you were not married to him. Was anybody else married to him? A. No, sir. Q. Was he a single man at that time? A. Yes, sir; as much as I know.

"Mr. O'Keefe: Q. You were not married to him at that time? A. No, sir. Q. And you were not married to him until August of that year? A. No, sir. Q. Do you recall about the time you made him the loan? A. February 14th or 15th I gave it to Mr. Muckenfuss and he sent it to Pittsburgh. Q. Now, what else did this debt consist of? You have told of \$1,000. A. Another thousand is what I borrowed from my mother from time to time, and gave it to Chris. That went up to another thousand. Q. When did you loan him the last of this second thousand dollars? A. I guess it was about in 1901.

"The Court: Q. When did you get that thousand from your mother? A. At certain times up to 1901. This was before he transferred this property to me, but do not remember just how long before. Q. Didn't you and Chris Von der Ahe sign a deed to Max Kaiser to that property? A. We signed a deed, but it was never delivered. I do not know what became of that deed. Max signed a deed conveying the same property to me, but it was not delivered either. Q. Who got those deeds after they were signed, if you know? A. I don't know. Q. Do you know whether Chris did or not? A. We never got those deeds. Q. How is that? A. We never got those deeds. Q. Who do you mean by we? A. Max and I. Q. But what I want to get at is, Did you deliver the deed that you and Chris signed to Max? A. We didn't; I did not. Q. When did you next see the deed that you and Chris signed, conveying the six stone-front houses to Max Kaiser, and the deed that Max Kaiser signed conveying these houses to you? A. When I seen them again? Q. Yes. A. When I took them out of the safe. Q. Out of whose safe? A. Out of Mr. Von der Ahe's safe. Q. When you took them out of the safe where was he? A. He was out of the city. Q. Did he tell you to go and get them? A. No, sir. Q. How did you happen to go and get these deeds? A. I had trouble with Mr. Von der Ahe, and I understood it was my property, and I went and took those deeds and took them downtown to Mr. Woerner, and Mr. Woerner said they were not recorded, and I should record them. Q. What Mr. Woerner? A. Mr. William F. Woerner, an attorney here. Q. What did you do with them? A. Mr. Woerner recorded them for me. Q. What were those deeds made for? A. To pay me my money that he owed me. Q. Who owed you? A. Mr. Von der Ahe. Q. How much did he owe you in 1900, at the time you and Chris Von der Ahe made the deed to Max Kaiser, and Max Kaiser made a deed to you? A. He owed me \$5,000. Q. Now, did Mr. Von der Ahe ever institute any court proceedings to set those deeds aside? A. He did. Q. How long afterwards? A. As soon as he came back. Q. As soon as he came back? A. Yes, sir. Q. Do you remember the time that you and Chris Von der Ahe signed a deed conveying the property described in the plaintiff's amended petition to John S. King? A. Yes, sir. Q. And John S. King signed the deed conveying certain property back to you, and certain property to Chris Von der Ahe? A. Yes, sir. Q. Now, will you just tell about that transaction—all about it in your own way? A. Yes, sir; Mr. Von der Ahe and I made a deed to Mr. King for all the property. Q. Tell the court what property it included. A. It included the north-

east corner leasehold and northwest corner property, and the six stone-front houses, and Mr. King made a deed back to Mr. Von der Ahe for the northeast corner leasehold and northwest corner property, and he executed another deed for the six houses to me. Q. Were those deeds ever delivered? A. Yes, sir; they were delivered for the money that he owed me. For that reason they were made. Q. How much did he owe you at that time? A. Five thousand dollars. Q. Did he ever pay you any part of it? A. Never a cent. Q. Now, why did you and Chris Von der Ahe execute the deed to John S. King, and John S. King execute the deed to you? A. That was for that matter—Chris owed me that money, and to pay me for that reason it was done. Q. Any other reason that this property was transferred to you? A. No, sir; just what he owed me, and for that reason he transferred that property over to me. Q. That was when? A. That was the 3d day of September, 1902. Q. Mrs. Von der Ahe, did you have any other purpose in taking title to this property in question than in payment of your debt—any other purpose whatsoever? A. No, sir. Q. State the purpose for which you took the title to this property September 3, 1902.

"Mr. O'Keefe: She has stated that.

"The Witness: I took it for the money Chris owed me. Q. Now, at the time this property was sold, tell the court in your own way what you did. A. You mean when it was sold under the deed of trust? Q. Yes. A. I went to Mr. Franciscus and told him, as this was my property, I wanted him to buy it in for me, and I would like him to form a corporation, as I had had trouble with Mr. Von der Ahe before, and didn't know but what I would get into some more, and my father went downtown and seen some one when that property was to be sold, and he got the advice that if I got up a corporation I would not have to have my husband's signature if I wanted to sell at any time, and I went to Mr. Franciscus' office and told him I wanted him to buy the property in for me, as it was my property, and I wanted to form a corporation. Q. Did you—what did you direct him to do? A. I directed him to form this corporation. Q. What did you direct him to do in regard to getting the title to the property before the corporation was formed? A. I directed him to make a deed of trust. Q. Well, did you take the title to the property in your name from Mrs. Winkelmeyer? A. No, sir; it was taken in Helen Caldwell's name. Q. Well, how did it happen to be done? Who told them to do it? A. I told them to do it. Q. Why did you tell them to take it in Helen Caldwell's name, instead of taking it in your own? A. Then I would be in just the same place again, and I would need his signature to everything, and that is what I didn't want. That is why I wanted to form the corporation, so I would not need his signature to sign any papers or anything if I wanted to sell, or get a loan of money on it, or anything like that. Q. Now, who did Helen Caldwell take the title to this property for, if you know? A. She held it in trust for me. Q. Where did you get the money to pay Mrs. Winkelmeyer the \$11,500 purchase price of this property? A. I had Miss Helen Caldwell execute deeds of trust for me, so I could get the money. Q. How much did you raise on these four deeds of trust? A. The original deed was \$11,500, and I added \$1,025 to it, and made a second deed of trust. Q. How much were both deeds of trust, the first and second? A. Twelve thousand five hundred and twenty-five dollars. Q. What became of this money? What was done with this money that Helen Caldwell borrowed on this property, described in plaintiff's amended petition? A. That was paid over to Mrs. Winkelmeyer. Q. Who did that? A. I did. Q. Do you remember when the Kaiser Investment Company was incorporated? A. It

was incorporated the 28th day of December, 1903. Q. Now, after Mr. Franciscus and Mr. Kunz and Mr. Quackenboss had incorporated this Kaiser Investment Company for you, what did they do with the stock? A. They kept it in trust for me. Q. Well, did you ever order them to transfer it? A. I did later on. Q. Well, who did you order them to transfer that stock to? A. To transfer it to Mr. Franciscus, 100 shares over to me, and one share to Max Kaiser. Q. Well, how did you happen to transfer that share to Max Kaiser? A. Just to hold him in the corporation, because Mr. Quackenboss wanted to step out.

"The Court: Q. Who held the balance? A. Mr. Kunz. He held 47 shares.

"Mr. Kelley: Q. Now, how did you happen to have some of this stock transferred to Chris Von der Ahe—47 shares of it? A. Well, Mr. Von der Ahe came and asked me if I would not loan him any of that stock, as he wanted to borrow some money, and that is how I transferred those 47 shares over to Chris. Q. Do you know who he borrowed the money from? A. From my brother, Max Kaiser. Q. Do you know how much it was? A. Well, he owed him that before that, and at that time he loaned him, I think, \$350. Q. Chris Von der Ahe didn't pay you any money for that stock, did he—that 47 shares of stock? A. No, sir; I loaned it to him. Q. To secure the loan of Max? A. Yes, sir. Q. Now, this one share of stock that you had transferred to Chris Von der Ahe, what did you do that for? A. Just to hold him in the corporation, as it needed three. Q. How much stock had been transferred to you? A. One hundred shares of stock. Q. That was Mr. Franciscus? A. Yes, sir. Q. And that left Mr. Quackenboss and Mr. Kunz still? A. Yes, sir. Q. And who transferred the 47 shares to Chris Von der Ahe? A. I told Mr. Kunz to transfer it to Mr. Von der Ahe. Q. And he did? A. Yes, sir. Q. What became of Mr. Kunz's other 2 shares of stock? A. I think Max got them. Q. How did he happen to get them? A. Well, I owed him \$100, and I asked him if he would not take those 2 shares of stock in payment of it, and he said he would. Q. How did they happen to be transferred over to him? A. It was done at my direction. Q. Now, Mrs. Von der Ahe, how much have you paid out in taxes on this property since September 3, 1902? A. I have paid out for city and school taxes \$5,109 and some cents. Q. Do you know how much those taxes run a year? A. They run from about three hundred—

"The Court (interrupting): What is the purpose of this?

"Mr. Kelley: I want to show she has been paying off debts on this property, taxes, and so forth.

"The Court: She has been getting the income, too, hasn't she?

"Mr. Kelley: Yes, sir.

"The Court: I don't think that cuts any figure in the case. She was getting the income from the property and she paid the taxes. I don't expect in this action, if a decree goes against her, to hold her for any income, and, of course, I cannot take into consideration the fact that she paid the taxes.

"Mr. Kelley: Q. State whether or not you have held this property—the title to this property—for Chris Von der Ahe since it was conveyed to you. A. No, sir; it was my property. Q. Has he gotten the rents and profits and income from it? A. No, sir.

"The Court: Q. Who has been collecting the rents? A. I did. Q. You collected them yourself? A. Yes, sir. Q. Since when? How long have you been collecting them? A. The last four years."

William F. Woerner testified substantially as follows:

"Q. Do you know Mrs. Anna K. Von der Ahe? A. I do. Q. Did you represent her in

the breach of promise suit against Chris Von der Ahe? A. I did. Q. About what year did you file that suit? A. I think it must have been about the latter part or some time in 1896. Q. About 1896? A. Yes, sir. Q. And what was the termination of that suit? A. That suit was disposed of by a settlement between the parties. Q. It never went to trial? A. It was never tried. Q. It was settled out of court? A. Yes, sir. Q. Do you remember the amount of the settlement? A. I do; \$3,000. Q. Do you remember whether or not Mrs. Von der Ahe took any note or any evidence of that indebtedness from Mr. Von der Ahe?

"The Witness: A. To the best of my recollection, I advised Mrs. Von der Ahe to take nothing but cash, but there seemed to have been a great deal of difficulty of getting cash, and my recollection is that it was partly paid in cash and partly in notes.

"Mr. Kelley: Q. Do you remember how much cash? A. Notes that were supposed to be good at that time. Q. Do you remember how much cash? A. Well, I know that there was \$600 paid in cash, and I think something in addition to that—several hundred dollars more than that. Q. In cash? A. Yes, sir; I believe \$200. I think the entire payment in cash was \$800. Q. One of the terms of that settlement was he had to pay your fee? A. Yes, sir. Q. And that was \$600? A. Yes, sir; I insisted upon Mr. Von der Ahe paying that in cash. Q. That was \$600? A. Yes, sir. Q. And \$200 additional that you speak of was to her? A. Yes, sir; I insisted that she should get at least some cash. Q. Do you know whether or not she ever got any Sportsman's Park notes? A. Well, now, I cannot testify to that, because I don't recollect whose notes they were, but they were stated to me to be perfectly good. Mr. Von der Ahe assured me time and again they were good. Q. You don't know whether the notes were ever paid? A. I do not."

#### Cross-examination:

"Q. When was that settlement made? A. That settlement was made in August, 1897. The money was paid then. Q. 1897? A. Yes, sir. Q. These notes were delivered to Mrs. Von der Ahe at that time? A. I do not know; I think they were. Q. Did you handle the transaction about the closing of the deal? A. I arranged the terms, and the parties both stated that the matter had been settled and the suit dismissed. Q. You never did see the notes? A. Now, I am not prepared to testify to that. I cannot recall whether I actually saw the notes or not, but I know there was a bona fide consideration of \$3,000, or that suit would not have been dismissed. Q. You didn't know at the time the settlement was made whether or not there was an agreement on Mr. Von der Ahe's part to marry the then Miss Anna Kaiser? A. Well, he was married at that time, and that is why the breach of promise was brought. Q. He was married at that time? A. Yes, sir. Q. You would not undertake to say but what those notes were surrendered in settlement of the debt by Mr. Von der Ahe marrying Miss Anna Kaiser? A. I do undertake to say that that consideration passed for the settlement of the breach of promise case, for the damages that were claimed in that petition."

#### Joseph F. Obernler testified:

"Q. State your name. A. Joseph F. Obernler. Q. What is your business? A. Cashier of the Northwestern Bank. Q. Was it the Northwestern Savings Bank in the year 1897? A. Yes, sir. Q. I now hand you some papers. Will you tell the court what they are? A. They are certificates of deposit in the name of Anna Kaiser. Q. Anna Kaiser is now Mrs. Anna Von der Ahe? A. Yes, sir. Q. What are the amounts of those certificates of deposits? A. The full amount is \$750. Q. Were they issued

by your bank? A. Yes, sir. Q. For money she put in there? A. Yes, sir. There was also one for \$250. All of them were introduced in evidence.

"Mr. Kelley: Q. The money called for in all these certificates of deposit was deposited by Anna Kaiser, who is now Anna Von der Ahe? A. Yes, sir. Q. Do you know when she drew this money out? A. Yes, sir; February 14, 1898. Q. February 14, 1898? A. Yes, sir. Q. I now hand you two papers and ask you what they are. A. They are certificates of deposit issued by the Northwestern Savings Bank payable to Max Kaiser, one for \$100, and the other for \$150. Q. Bearing what date? A. The \$100 one bears the date July 21, 1897, and the one for \$150 September 13, 1897.

"Mr. Kelley: I offer them in evidence, your honor, and ask that they be marked as exhibits.

"The Court: Q. That money was drawn out of your bank, was it? A. Yes, sir.

"The Court: Q. On all the certificates? A. Yes, sir.

"Mr. Kelley: Q. When did Max Kaiser draw out that \$250? A. The same day, February 14, 1898."

Max Kaiser, among other things, said:

"Mr. Kelley: Q. Now, Mr. Kaiser, do you remember the time that Chris Von der Ahe was in jail in Pittsburgh? A. Yes, sir. Q. What year was that? A. I think—1897. Q. 1897? A. Yes, sir. Q. Do you know whether or not of your own knowledge your sister sent him any money at that time? A. I do, sir. Q. How much? A. It was \$1,000."

The testimony of numerous witnesses shows that the property in question was worth, at the time it was conveyed to Anna K. Von der Ahe, about \$15,500; some testified it was worth about \$17,000; others \$16,000; and some others \$14,000 or \$15,000. The evidence also tended to show that at that time Chris Von der Ahe had a homestead right in said property of the value of \$3,000. On the date of the institution of the bankruptcy proceedings against Chris Von der Ahe, his indebtedness aggregated some \$21,000, some of which had been reduced to judgments. Of that \$21,000 of indebtedness, only about \$12,000 of it was proven up against him before the referee in bankruptcy.

Upon cross-examination of Charles C. Kunz, a witness introduced by appellant, he testified as follows:

"Q. Now, before the sale under the deed of trust, Mrs. Anna K. Von der Ahe owned these six stone-front houses, didn't she?

"Mr. O'Keefe: Well, the deeds are the best evidence of that.

"Mr. Kelley: I want to prove a conversation now he had with her. Q. Do you remember that? A. I think so, but I would have to refer to the deed myself. Q. Do you remember about the time this sale was to take place and Mrs. Von der Ahe came to you and had a conversation with you about this property? A. Yes, sir. Q. What did she say, Mr. Kunz? A. My recollection is that she wanted us—that she wanted us to buy the property and have us make a loan for her. That is what she asked at the time. Q. And she told you at that time it was her property and she wanted to protect it? A. Yes, sir. Q. Didn't she tell you she had had trouble with Chris and she didn't want to take the title in her name, or something to that effect? A. I think she did. Q. And then did she direct you to get the title for her to this property? A. You mean to purchase it? Q. Yes, sir; from Mrs. Winkelmeyer. A. I think so; yes. Q. And you did that as her

agent? A. Yes, sir. Q. How did you happen to put the title to this property in the name of Helen Caldwell? A. We had it put in her name temporarily until the company was organized. Q. Who was that for? A. It was for Mrs. Von der Ahe at that time. Q. Now, then, Helen Caldwell never paid a dollar for that property? A. No, sir. Q. And how did Helen Caldwell happen to execute these notes and deeds of trust to August Gehner for \$12,525? A. By request of our office. Q. For Mrs. Von der Ahe? A. Yes, sir. Q. But you were acting as agent for Mrs. Von der Ahe? Is that right? A. Yes, sir.

"Mr. Kelley: Q. Now, all the interest, then, that Helen Caldwell had in this property was to hold it for Mrs. Von der Ahe until this corporation was organized? A. Yes, sir. Q. Did Mrs. Von der Ahe tell you to organize the Kaiser Investment Company? A. Yes; she did. Q. She instructed you to do that, did she? A. Yes, sir. Q. And did she give you her reason for that, wanting that company organized? A. Yes; I think I mentioned that before; that she could not hold the title to it, being a married woman. Q. And had had trouble with Mr. Von der Ahe—did she mention that? A. Yes, sir. Q. And in case she wanted to convey it or mortgage it, she wanted it so she could do that? A. Yes, sir. Q. Do you remember that? A. Yes, sir.

"Mr. Kelley: Q. Then you were acting as agent for Mrs. Von der Ahe in getting this loan from Gehner? A. Yes, sir. Q. And in having this transfer made from Christiana Winkelmeyer, is that right? A. Yes, sir. Q. Did you pay out the money realized from these loans? For whom did you pay out the money realized from these loans from Mr. Gehner? A. For whom? Q. For whom; yes. A. Why, it was paid out for Mrs. Von der Ahe, but the Kaiser Investment Company was the way the account was on the books.

"Mr. Kelley: Q. Now, Mr. Kunz, will you look at that paper and tell me what it is (indicating paper)? A. It is articles of incorporation. Q. For what? A. Kaiser Investment Company. Q. Will you tell me the date on that—when that was issued by the secretary of state of Missouri? A. The 28th day of December, 1903. Q. Yes, sir. Now, will you look at the paper I now hand you (handing witness paper)? A. That is a general warranty deed from Helen Caldwell to the Kaiser Investment Company. Q. What date does that deed bear? A. The 15th of December, 1903. Q. When was that deed acknowledged? A. The 15th day of December, 1903. Q. The same day it was recorded? A. Yes, sir.

"Mr. Kelley: Q. The deed from Helen Caldwell to the Kaiser Investment Company then was made 15 days before the Kaiser Investment Company was incorporated, wasn't it? A. About 13 days. Q. About 13 days? A. Yes, sir. Q. Now, when Helen Caldwell executed that deed, what did she do with it? A. Why, I don't recall. Q. Gave it back to you, didn't she? A. I could not say that.

"The Court: Very likely. We will admit that she did. It doesn't make any difference.

"Mr. Kelley: Q. Now, all the interest, then, that Helen Caldwell had in this property was to hold it until this corporation was organized? A. Yes, sir. Q. Did Mrs. Von der Ahe tell you to organize the Kaiser Investment Company? A. Yes; she did. Q. She instructed you to do that, did she? A. Yes, sir. Q. And had had trouble with Mr. Von der Ahe—did she mention that? A. Yes, sir. Q. And in case she wanted to convey it or mortgage it, she wanted it so she could do that? A. Yes, sir. Q. Do you remember that? A. Yes, sir."

D. J. O'Keefe, of St. Louis, for appellant.  
Kelley & Starke, of St. Louis, for respondents.

WOODSON, P. J. (after stating the facts as above). [1] I. There is no question but what Chris Von der Ahe, the husband of Anna K. Von der Ahe, was hopelessly insolvent at the time he transferred the property to the respondent, his wife; and it cannot be successfully contended that the evidence for the appellant did not tend strongly to prove that said transfer was made to defraud his creditors of their just dues. In other words, I feel satisfied from reading this voluminous record, about 300 printed pages, that appellant made out a strong case in behalf of the creditors, and, had there been no evidence to the contrary, doubtless the learned chancellor should, doubtless would, have found for the appellant, and decreed the deeds mentioned to be null and void. But when we view the entire case, both sides, as illuminated by all the evidence introduced, that for the appellant, as well as that for the respondents, quite a different color and character are given to the facts sought to have been established by appellant. What are the facts of the case as learned chancellor found them to be? Answer: When Chris Von der Ahe married the respondent Anna K. Kaiser, he owned the property in question, worth about \$15,500—possibly \$16,000—as well as other real estate, which was incumbered by a deed of trust executed in behalf of Mrs. Winkelmeyer to secure a loan of \$11,000, and interest. That when this deed of trust was foreclosed, or rather when the sale took place under it, \$12,525 was required to liquidate or pay that debt (all of which was assumed by the respondent, Anna K. Von der Ahe). That at the time of the transfer of said property in question to her he was indebted to her in the sum of at least \$4,200, made up of the \$3,000 recovered in the breach of promise suit, less the \$200 paid her, and \$600 paid to her attorney, the \$1,000 she sent to him in Pittsburgh, and the \$1,000 she borrowed from her mother and turned over to him. If we add this \$4,200 to the \$12,525 secured by the Caldwell deed of trust on the property and assumed by respondents, we would have the sum of \$16,525. That sum unquestionably is at least \$500 in excess of the actual value of the property when it was transferred to Anna K. Von der Ahe, to say nothing of the homestead rights of Chris Von der Ahe or the dower interest of Emma Von der Ahe, his former and divorced wife. These observations are in harmony with the written memoranda of the chancellor's findings and decree filed in the case, and embodied in the record. If this is true which we accept as such, since the chancellor so found, from the preponderance of evidence, then the findings and decree of the circuit court must not be disturbed without they contravene some law of the state or sound principle of equity. Huffman v. Huffman, 217 Mo. 182, 117 S. W. 1.

II. Counsel for appellant has assigned

many legal objections to the findings of the court, but, after a careful consideration of each and all of them, I am convinced that there is but one of them that requires special consideration at the hands of this court, and it is couched in the following language:

(a) "Promissory notes received by defendant Anna K. Von der Ahe in settlement of breach of promise case were not the bankrupt's obligations." (b) "Marriage of defendant to bankrupt subsequent to execution and delivery of these notes destroyed their validity." (c) "Delivery of notes by defendant Anna K. Von der Ahe to bankrupt after her marriage to bankrupt raised the presumption of payment. *Amer. & E. E. of L.* vol. 22, p. 589; *Lawson v. Gudel*, 45 Mo. 480; *Stephenson v. Richards*, 45 Mo. App. 544; *Nat. Tube Works Co. v. Machine Co.*, 118 Mo. 365, loc. cit. 376 [22 S. W. 947]; *Klauber v. Schloss et al.*, 198 Mo. 502, loc. cit. 513-514 [95 S. W. 930, 115 Am. St. Rep. 486]."

This objection seems to be composed of three elements, which I have designated by the letters "a," "b," and "c," and for convenience I will consider them in the order stated.

[2] (a) Attending the first, I am not clear that I comprehend the meaning of counsel as stated in clause (a) of this objection. It is conceded that the promissory notes received by the respondent Anna K. Von der Ahe, née Anna K. Kaiser, were not the personal obligations of Chris Von der Ahe, but were notes or obligations issued by the Sportsman's Park Association, which the evidence shows he owned and transferred to her in satisfaction of the amount he owed her on account of the settlement of the breach of promise suit mentioned. I am unable to see that there would have been any difference in the legal effect of the settlement had Chris Von der Ahe given her his individual promissory note, instead of those of the Sportsman's Park Association. I can readily see how there might have been a difference in the value of the notes issued by Chris and those issued by the association; but that fact in no manner could have effected the character of the settlement, or have destroyed their validity. In my opinion, there is no merit in this element of the objection.

[3] (b) Regarding the second, counsel have cited us to no authority supporting the contention that the mere fact of the marriage of Chris Von der Ahe to Anna K. Kaiser, subsequent to the sale and transfer to her of the notes of the Sportsman's Park Association in settlement of the breach of promise suit, nullified them or destroyed their validity. Nor has any suggestion or reason been assigned why that should be true; and after much thought and reflection I have been unable to see any solid foundation upon which to predicate such a contention. In my opinion it is wholly untenable.

[4] (c) Respecting the last contention, it might be conceded (in the absence of the statute that declares all gifts, etc., of money and property by a wife to her husband not in writing shall be void) that the delivery of the notes by the wife to her husband raised a presumption of payment, yet the uncontradicted evidence shows that it was not the intention of the wife to give the notes to her husband, but clearly her intention was to lend them to him in order that he might use them as collateral security for money he desired to borrow. The authorities cited in support of this proposition have no application to the facts of this case. Had Chris Von der Ahe been the maker of the notes, and had the wife delivered them back to him, in the absence of all evidence, then a presumption of payment would have arisen, but not so in a case like this, where a third party was the maker, and the delivery fully explained by the evidence. There is no merit in the objection.

III. After a careful consideration of the record in this case, and a review of the authorities cited, I am satisfied that Chris Von der Ahe was legally and justly indebted to his wife, Anna K., in the sum of \$4,200, and that he conveyed the property in controversy to her subject to the deeds of trust thereon, in satisfaction of that indebtedness, which was more than the property was worth, and, so believing, in my opinion, the judgment of the circuit court should be affirmed.

It is so ordered. All concur.

## REYNOLDS v. THOMPSON.†

(Court of Appeals of Kentucky. Dec. 18, 1914.)

## 1. GIFTS (§ 49\*) — GIFT INTER VIVOS — EVIDENCE.

Evidence held not to sustain a gift inter vivos of a mortgage note.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.\*]

## 2. GIFTS (§ 4\*)—"GIFT INTER VIVOS"—EVIDENCE.

To constitute a "gift inter vivos," the donor's purpose to make the gift must be clearly and satisfactorily established, and must be completed by actual, constructive, or symbolical delivery, without power of revocation, and must take immediate effect; and where future control of the property remains in the donor until his death, there is no valid gift (citing 4 Words and Phrases, Gift Inter Vivos).

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 3, 17; Dec. Dig. § 4.\*]

## 3. GIFTS (§ 16\*)—GIFT INTER VIVOS—INTENTION.

Intention is not sufficient to constitute a gift inter vivos, but it must be carried out by conveying the title and possession as fully as it may be done under the circumstances.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 3; Dec. Dig. § 16.\*]

## 4. GIFTS (§ 49\*)—GIFT INTER VIVOS — EVIDENCE.

Where a note constituted practically all of the estate of the holder, the court, in determining whether he made a gift inter vivos thereof, will be slow to indulge a presumption that he intended to deprive himself of practically all of his estate, and that can only be done on satisfactory proof.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.\*]

## 5. TRUSTS (§ 1\*) — CREATION — ACTS CONSTITUTING.

To create a valid trust, there must be not merely an intention, but the transaction must be complete, and this rule applies to trusts created by voluntary dispositions, as distinguished from a trust arising out of contract supported by a consideration.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 6. TRUSTS (§ 1\*)—CREATION—ACTS CONSTITUTING.

One possessed of legal title may create a valid trust thereof, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party on specified trusts; but a mere intention to convey on a trust is not sufficient, where the proper steps are not taken to make a valid transfer to the intended trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 7. TRUSTS (§ 44\*) — ESTABLISHMENT — EVIDENCE—SUFFICIENCY.

Evidence held not to show a creation by the owner of a mortgage note of a trust thereof in favor of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Harrison County.

Action by Francis Reynolds against James Thompson and others. From a judgment for defendant Thompson against plaintiff, the latter appeals. Reversed, with instructions.

M. C. Swinford, of Cynthiana, for appellant. T. E. King, of Cynthiana, for appellee.

MILLER, J. The purpose of this appeal is to finally determine whether the appellee, James Thompson, is the owner of a mortgage note executed by Dunn for \$500, which he claims as a gift from the appellant, Francis Reynolds. The appellant, Francis Reynolds, is now more than 89 years of age. He had spent most of his life in Harrison county, Ky.; but some time previous to October, 1907, he removed to Dayton, Ohio, where he became an inmate of the Soldiers' Military Home. R. E. Smith, a successful merchant of Harrison county, Ky., was the friend and business adviser of Reynolds. In the fall of 1907, Smith undertook to place at interest, secured by a mortgage, \$500 which Reynolds had saved. This was done by buying a real estate lien note which L. M. Dunn had executed to J. W. Boyd on November 26, 1907, for \$500 and secured by a lien upon Dunn's land. It was indorsed in blank by Boyd and delivered to Smith, who kept it until his death in March, 1911. On January 10, 1908, Boyd made the following transfer upon the deed book in which the Dunn mortgage was recorded in the Harrison county court clerk's office, to wit:

"For value received I hereby transfer this note to Francis Reynolds, of Nat'l Military Home of Ohio.

"This the 10th day of January, 1908.

"J. W. Boyd.

"Attest: W. R. Curle, Clk."

On December 3, 1912, Reynolds brought this action against Dunn, the mortgagor, and James Thompson and Minnie Smith, the widow and executrix of R. E. Smith, seeking to recover a judgment for the \$500 and to enforce the mortgage upon Dunn's land to pay the note. Reynolds did not file the note with his petition, giving as his reason for not doing so that he left it with R. E. Smith for safe-keeping, that Smith was dead, and upon his death the note went into possession of his wife, Minnie Smith, who then had possession of same and refused to deliver it to Reynolds, claiming that the defendant, James Thompson, had some interest in the note. Thompson was called upon to assert any interest or ownership he claimed in the note. He answered, alleging that at the time the Dunn note was bought with Reynolds' money, in 1907, Smith was Thompson's statutory guardian, and that in January, 1908, Reynolds gave and delivered the note to Smith as the statutory guardian for Thompson, as an absolute gift, that Smith so received the note, and that Smith and his wife had so held it ever since.

The issues having been thus made as to the gift of the note by Reynolds to Thompson in January, 1908, and tried upon that issue, the chancellor was of opinion that the evidence established a gift inter vivos; but,

if he was mistaken in that conclusion, he was nevertheless of the opinion that the gift should be upheld as a parol voluntary trust, and in either of said events it was irrevocable by Reynolds. The chancellor rested his decision upon the authority of Marshall's *Adm'r v. Marshall*, 156 Ky. 20, 160 S. W. 775, 51 L. R. A. (N. S.) 1208. To reverse that judgment, Reynolds appeals.

[1] Reynolds' wife was the grandmother of the appellee, James Thompson, and his brother, John Thompson. Their father had died when the boys were quite young, and Reynolds, their stepgrandfather, had raised them from the time they were quite young, until they were perhaps 14 or 15 years old. Thompson afterwards took the name of Francis as his own middle name, and was thereafter generally known as his stepgrandfather's namesake. After Reynolds' wife died, he discontinued housekeeping and went to live at the Soldiers' Home, at Dayton, Ohio. The testimony of Reynolds bears the usual marks incident to great age, in that his ideas are sometimes disconnected and poorly expressed. He says, among other things, that during the summer of 1908, some six or eight months after the investment was made, he went to the clerk's office, in Harrison county, where the clerk read to him the note which he had bought from Boyd, and that after reading it upon the margin of the deed book he was satisfied of its validity and the regularity of his purchase. It will be remembered the assignment upon the deed book recited that it was a transfer of "the within note to Francis Reynolds." Throughout the subsequent transactions relating to the note, Reynolds always contended that it was in the clerk's office, in Harrison county. He seemed to think the assignment was the note, and that the assignment was the only evidence of Dunn's indebtedness to him.

When R. E. Smith died, in March, 1911, his wife, the defendant Minnie Smith, qualified as his executrix and as guardian of the appellee, Thompson. She found among her husband's papers a carefully kept account of his trust as guardian of James Thompson, in which he had charged himself with \$30 interest on the \$500 in November, 1908, and again with the same amount in November, 1909; the account reciting in each instance that the \$30 was "interest on mortgage note for year ending November 26, 1908," and 1909, respectively. Upon James Thompson reaching his majority, Minnie Smith made her settlement as his guardian in May, 1911, in which she adopted the account left by her husband; and although James Thompson had then reached his majority, Minnie Smith kept possession of the note, suggesting that Thompson ought not to have possession of so much money, or that it would be best for him to leave it in her possession.

Mrs. Cavanaugh, of Cincinnati, Ohio, was the niece of Reynolds' wife, and consequent-

ly the kinsman of Thompson. In August, 1912, appellee, James Thompson, who had theretofore and for several years been living with Mrs. Cavanaugh, in Cincinnati, Ohio, joined the regular army and was thereafter stationed at Ft. Des Moines, Iowa. In the following October the appellant, Francis Reynolds, left the Military Home, at Dayton, and went to live with Mrs. Cavanaugh, in Cincinnati, where he has since remained. By reason of this separation, the communications between Reynolds and Thompson have been principally, if not entirely, by letter. As early as October 20, 1908, R. E. Smith wrote to Reynolds, at Dayton, a long letter, which, among other things, contained this paragraph:

"The interest on the Boyd note is due soon. Should the party want to pay interest upon interest, for instance, \$30 now due, should he keep and pay upon \$530 for next year, or must he pay the \$30 now?"

The record contains no answer to this letter, but it is claimed by Thompson that there must have been an answer, in which Reynolds at least gave the interest to the boy, since Smith charged himself as guardian with the \$30 interest which accrued in November, 1908, and with a like sum which accrued in November, 1909. Subsequently, in a letter undated, but evidently written to Thompson before September 14, 1912, Reynolds used this language:

"I have no claim, nor there is none against you getting your money any time from that man, or any one else that owes you, or me, Francis Reynolds. If I was you, I would make that man pay me, or Mr. Billy Boyd, and you see Judge King and the clerk of the court, and get them to get your mortgage to James Thompson right off; or Swinford, he is the mayor of the city. Now, you see Mr. Swinford, and don't let Billy Boyd fool you. Judge King will tell you and get it for you. Write to me for any information and I will give it."

Reynolds made his will on May 16, 1908, in which he appointed Smith his executor; the second clause thereof reading as follows:

"2. It is my will and I direct that my late wife's grandson, James Francis Thompson, is to have that certain land note for \$500.00, and all interest due or accruing thereon, which was executed by L. M. Dunn and Pearl Dunn to J. W. Boyd, and assigned in writing to me."

The will was carefully drawn by a lawyer, and properly describes the note. Thompson knew of the existence of the will and of the disposition of the note as therein made, as will subsequently appear. On June 18, 1912, Thompson wrote from Cincinnati to Mrs. Smith, saying:

"I was up to see grandpa about that mortgage, and he said it was all right; no one could bother it. He said it was willed to me at his death, so you needn't bother about it. I guess we will let him keep it on. I will tell you more about it when I come up."

Thompson denies having written this letter; but it was found among his papers when he left Mrs. Cavanaugh's to go to the army in August, 1912. It was signed by

Thompson, and is, undoubtedly, in his handwriting. At this time Reynolds was living in Dayton. On September 14, 1912, Reynolds, writing from Dayton, to Thompson, said:

"Did you get the recording money at home or not. It is \$500. If you didn't, write at once and let me know; that money is all yours; nobody else will get it. I heard you got all the money that Miss Smith owed you. If there is anything wrong, write and let me know while I am alive. I will sign any paper that is required; let them know I count that money as yours. I guess they will be satisfied to pay it to you. Billy Boyd is bound for that money and mortgage."

Reynolds denies that he wrote said letter, although his name and address are signed to it. But, at another place in said letter, he uses this expression: "I am not able to write, but got a man from Cincinnati to do so." And while the letter is evidently not in Reynolds' handwriting, it was undoubtedly dictated by him. After Reynolds went to Cincinnati in September, 1912, Mrs. Cavanaugh conducted his correspondence for him; and at Reynolds' request she wrote to Thompson, who answered from Ft. Des Moines, Iowa, on October 16, 1912, as follows:

"I received your letter and glad to hear from you, and was surprised to hear that grandpa was there. \* \* \* About this note, I didn't get any of it yet; tell him that he will have to sign his name on the back of the mortgage before it can be collected; no one won't take it. Dunn would have paid it off before now, but no one won't take it unless it is signed. When it is signed there won't be any trouble. King is the one that said it was no good unless it was signed; he looked at it when I was in the country. King will write him about it and he will fix it up all right. King can send it to him to sign, or grandpa can go up, either one. I think it is about time to do something with it. You know about what to do. I told you about it when I was there. You can explain it to grandpa all right, and see that it is fixed all right this time. You can write me everything you want to know about it, and I will tell you all I know. The mortgage is in the National Bank of Cynthiana, Ky. King can get it. Miss Minnie has it in her deposit box in the bank, so you can see where it is, if he wants it."

Again, on November 14, 1912, Thompson wrote to Mrs. Cavanaugh, as follows:

"Did grandpa fix the note up yet or not? It looks like it could be fixed up by this time. It ain't any use leaving it as it is. If I had a little of it now, I could pay off the little debts I owe; and if I don't get it, I will try and pay it off a little every month."

Thompson was indebted to Mrs. Cavanaugh for board. On November 15, 1912, Reynolds wrote the clerk of the Harrison county court to send him a certified copy of the Dunn mortgage which secured the \$500 note in controversy. Ten days later, on November 25, 1912, Thompson wrote to Mrs. Cavanaugh, as follows:

"In regard to that note, it was taken out some time in November; I just don't remember the date of it. The man's name is Lark Dunn, of Connersville, Ky. It looks funny that it can't be paid without suing for it; that's the way of things that is half fixed up. I guess in the wind-up I won't get any of it. Well, if I don't, I have got two hands; I can get more."

Finally, on December 15, 1912, Thompson wrote Reynolds, from Iowa, as follows:

"Well, grandpa, I heard that you had sued Dunn for the money on the note which is up in the country. I think it was all unnecessary for doing that. In the first place, the man has never refused to pay the note; he was never asked to pay it. Yet he told me when I wanted the money to notify him, and he would pay it; or if he didn't have the money, he would borrow it and pay the note off. He would have had the note paid off already if you had signed the note as I asked you to do. All the trouble is that no one will take ahold of the note until it is signed; it is only money thrown away for a lawyer. King would have fixed it up all right if you had signed the note."

This closes the correspondence.

Mrs. Minnie Smith testified that she overheard a conversation between her husband, R. E. Smith, and the appellant, Reynolds, regarding the note, in which Reynolds told Smith he wanted to give it to "Jim" when he was 21 years old, that he had given the rest of the children more than that, that he didn't want any of the Cavanaugh's to have any more, and that he wanted his namesake to have that note.

Mrs. Cavanaugh testified that she went to Dayton to visit Reynolds while Thompson was living at her house in Cincinnati; that on the day before making the visit she informed Thompson of her intended trip to see Reynolds, whereupon Thompson said:

"When you go, I wish you would ask grandpa about that note in Cynthiana. Mrs. Smith has a note, and no one will buy it until it is signed; and ask him about this note."

She further testified that Thompson said the note was for \$500, and directed her to tell Reynolds it was the Dunn note. When Mrs. Cavanaugh went to Dayton she found Reynolds in the hospital; and when she repeated Thompson's message to him, Reynolds seemed puzzled about it, saying, "I don't understand it at all;" that he didn't know of any note Mrs. Smith had but the \$300, and Jim had got that when he became of age. But, after thinking a while, Reynolds said:

"Could he mean my mortgage note that Mr. Smith got for me? But I don't know how Mr. Smith could have gotten my note."

Reynolds finally said to Mrs. Cavanaugh that when she went back to Cincinnati she should write to Mrs. Smith and express to her his sympathy about her husband's death, and to tell her to have nothing to do with his mortgage note, because he would see to that in the fall. Reynolds further told Mrs. Cavanaugh that he had willed the note to Jim, but that he had given it to no one, and Mrs. Cavanaugh understood the note was in the courthouse.

Upon her return to Cincinnati the next day, Thompson asked Mrs. Cavanaugh if she had spoken to Reynolds. She answered that she had, and that Reynolds had said the note was willed to Thompson, and he did not understand how Mrs. Smith got the note. To this Thompson said, "All right."

[2] Are these facts sufficient to constitute

a gift of the note from Reynolds to Thompson? The law as to what will amount to a gift inter vivos is well settled. In 20 Cyc. 1192, it is said:

"A gift inter vivos is a contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title to it to the donee gratuitously, and the donee, who accepts and acquires the legal title to it. It operates, if at all, in the donor's lifetime, immediately and irrevocably; it is a gift executed; no further act of parties, no contingency of death or otherwise, is needed to give it effect."

And again, on page 1193 of the same volume, it is said:

"To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive, or symbolical delivery, without power of revocation."

In *Stark v. Kelley*, 132 Ky. 376, 382, 113 S. W. 498, 500, this court announced the same rule, in the following language:

"To constitute a gift inter vivos, the property must be delivered absolutely, and the gift must go into immediate effect. Where future control over the property remains in the donor until his death, there is no valid gift inter vivos. 20 Cyc. 1211; 14 Am. & Eng. Encyc. of Law, 1015; 4 Words and Phrases, 3092. In *Duncan v. Duncan*, 5 Litt. 12, this court said: 'It is perfectly clear that the court below was mistaken in supposing that the transaction in this case amounted to a valid gift inter vivos. To the validity of such a gift it is essential that there should be a delivery to the donee, and that the property or the thing given should immediately pass and be irrevocable by the donor.'

It is insisted, however, for appellee, that Smith and his wife, who held possession of this note ever since it was bought with Reynolds' money, held it as guardian for Thompson, and that this is shown by the fact that Smith charged himself, as guardian, with the interest on the note for the two years 1908 and 1909. But Smith did not charge himself with the note in the account which he left of his trust as guardian; he charged himself with the interest only. Furthermore, his letter of October 20, 1908, to Reynolds, inquiring about the collection of the interest, clearly and fully recognized Reynolds' ownership of the note; and when we recall that the petition rests plaintiff's case upon a gift made in January, 1908, nearly nine months before the letter was written, it is clear that the gift or trust must have been made, if at all, after October 20, 1908.

The petition claims the gift was made to Thompson when Boyd made the assignment upon the deed book in January, 1908; that the assignment and delivery of the note to Smith constituted the gift. But this contention rests upon the untenable proposition that Smith thereafter held the note as guardian for Thompson. Smith's subsequent letter of October 20, 1908, clearly shows that he then held the note as the agent of Reynolds, and not as the guardian of Thompson. The burden is upon Thompson to show that the capacity in which Smith held the note

was changed; and this he has wholly failed to do. Considering all the testimony, it is apparent that, although Reynolds upon more than one occasion used loose language that might be construed to show an intention to make gift of the note to Thompson, it is plain he was always careful to retain the legal title to the note, and never changed the character of Smith's possession. He never actually parted with it; he only talked about doing so.

[3] Intention is not sufficient to constitute a gift inter vivos; it must be carried out by conveying the title and possession as fully as it may be done under the circumstances. *Dick v. Harris' Ex'r*, 145 Ky. 739, 141 S. W. 56. The fact that the note always remained in the possession of Smith, who certainly was acting in 1908 as the agent of Reynolds, and fully recognized his title and ownership to the note upon the only occasion he spoke of it, leaves the burden upon Thompson to show that the character of Smith's holding was changed from that of the agent of Reynolds to that of guardian of Thompson. This has not been done. On the contrary, treating Smith's charge of the interest to himself as guardian as competent for the purpose of the argument, it in no way questions Reynolds' ownership of the note. It was a most natural thing for Reynolds to retain the note and give the interest to Thompson as it accrued. In his will Reynolds speaks of the interest that had theretofore accrued, and gives it, together with the note, to Thompson, to take effect upon the death of Reynolds.

[4] Furthermore, in view of the fact that this \$500 note constituted practically all of Reynolds' estate, the court will be slow to indulge a presumption that he intended to deprive himself of practically all of his estate in his old age. That will only be done upon satisfactory proof.

[5] If we should go beyond the scope of the petition, and consider whether the proof is sufficient to constitute a voluntary disposition of the note in trust for Thompson, we are met by the same rule which requires the trust to be effectually created, and that a mere intention, which has not been carried out, will not be sufficient. The rule is stated as follows in *Bispham's Equity*, § 66:

"It has been said that in order to create a valid trust there must not be merely an inchoate intention, but that the transaction must be complete. This rule, it must be remembered, applies more particularly to trusts which are created by voluntary dispositions, and which may be conveniently considered in this place. For a trust may arise either out of a contract or out of a gift, and the distinction which it is desirable to remember is this, viz.: That in trusts which grow out of contracts, and which are therefore based upon a consideration, it is not necessary that the intention should have proceeded to the same extent as is required in trusts which are purely voluntary. And this is only an application of the rule which exists at common law in reference to the distinction between contracts and gifts, as the former rest in fieri, whereas a gift can only be effectual after the intention to make it has

been followed by actual delivery of possession or some equivalent act. 'A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately. \* \* \* But if a gift does not take effect by delivery of immediate possession, it is not then properly a gift, but a contract.' The common-law rule, therefore, in reference to the transfer of legal titles, has been followed in equity as to the creation of equitable estates; and trusts which are purely voluntary—that is, those which do not depend upon or grow out of a consideration—must, to be effectually created, be accompanied by the delivery of the subject of the trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such delivery. An imperfect conveyance, which is also merely voluntary, will not be aided or enforced in equity."

[6] And again, in section 67 of the same work, the author gives the general result of the authorities as follows:

"When a settlor is possessed of the legal title to the subject-matter of the settlement, he may create a valid trust thereof, either by a declaration that he holds the property in trust, or by a transfer of the legal title to the property to a third party upon certain trusts. In other words, he may constitute either himself or another person the trustee. If he makes himself the trustee, no transfer of the subject-matter is necessary. If he makes a third party trustee, he must transfer to him the subject of the trust in such a mode as will be effectual to pass the legal title. But if there is a mere intention to convey the property upon trusts, this will not be sufficient if the proper steps are not taken for the purpose of making a valid transfer of the legal title to the intended trustee. Such was the case of *Milroy v. Lord*, 4 De G., F. & J. 264, where a deed of assignment of stock, unaccompanied, however, by a transfer of the stock, was held ineffectual to create a trust. \* \* \* It may be observed that, according to some English authorities, an assignment which is ineffectual to pass the legal title may yet take effect as a declaration of trust; so that the result of the abortive attempt of the assignor to convey the legal title would be, under those authorities, to constitute him a trustee of that title for the party designed to be benefited. But these decisions have not been approved in later cases, and the true doctrine would seem to be laid down in *Milroy v. Lord*, as stated above."

[7] Applying this rule to the facts of this case, we are of opinion the chancellor erred in sustaining Thompson's claim to the note. *Marshall v. Marshall*, supra, relied upon by appellee, is not inconsistent with the rule above announced. In that case the gift was completed by an indorsement and delivery of the note.

The judgment is reversed, with instructions to enter a judgment recognizing Reynolds' ownership of the note, and for all further necessary orders.

## LOUISVILLE & N. R. CO. v. SHOEMAKE'S ADM'R.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

### 1. RAILROADS (§ 400\*)—SPEED OF TRAIN—QUESTION FOR JURY.

Though those testifying, in an action for injury to a person on the track, to the speed of the train as being several miles an hour less

than permitted by ordinances were the trainmen, while those testifying to a rate greatly in excess of the speed limit were bystanders, unfamiliar with questions of speed, the issue is for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

### 2. RAILROADS (§ 400\*)—INJURY TO PERSON ON TRACK—NEGLIGENCE—QUESTIONS FOR JURY.

There being evidence that the train which struck deceased, he not having got off the track far enough to clear the engine, was running on a street constantly used by pedestrians, at an unreasonable speed, on a dark rainy night, and that the whistle was not sounded after deceased was discovered on the track, the question of negligence, as well as of contributory negligence, is for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

### 3. TRIAL (§ 253\*)—INSTRUCTIONS—RIGHTS OF PARTIES.

There being evidence in support of defendant's defense of contributory negligence, an instruction thereon should, at its request, have been given; it being the court's duty to submit the respective theories of both parties, if sustained by any evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

### 4. TRIAL (§ 244\*)—INSTRUCTIONS—SPECIFICALLY CALLING ATTENTION TO FACTS.

The clause of an instruction as to measure of damages for negligent killing, "In arriving at this the jury may take into consideration the age of decedent and the probable duration of his life," is objectionable as specifically calling attention to specific facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

### 5. EVIDENCE (§ 474½\*)—OPINION EVIDENCE—DEDICATION—STREETS.

Dedication of a public street cannot be shown by opinion of an individual that citizens of the town had a right to use it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.\*]

### 6. RAILROADS (§ 397\*)—ACCIDENT ON TRACK—NEGLIGENCE—EVIDENCE—HEADLIGHTS.

Railroads being required to keep a headlight on an engine at night, testimony that a person was likely to be blinded by meeting a train, with a large headlight, at night, is improper as putting the company in a position of being guilty of negligence for doing what it was required to do.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1344-1355; Dec. Dig. § 397.\*]

### 7. RAILROADS (§ 397\*)—ACCIDENT ON TRACK—NEGLIGENCE—EVIDENCE.

The striking by a train, running on K. street, of a person on the track having been east of P. street, on a track straight for four blocks, evidence that K. street was not straight west of P. street was irrelevant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1344-1355; Dec. Dig. § 397.\*]

Appeal from Circuit Court, Henry County.

Action by Allie Shoemake's Administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Moody & Barbour, of New Castle, and Benjamin D. Warfield, of Louisville, for appellant. H. K. Bourne, of New Castle, for appellee.

MILLER, J. Allie Shoemake was struck and killed by appellant's train, on Knapp street, in Louisville, Ky., on January 13, 1913; and, his administrator having recovered a verdict and judgment for \$4,000, the company appeals.

Shoemake worked in appellant's shops in South Louisville, and lived on Chester avenue, between Oak and Burnett streets, in Louisville. At the end of his day's work on January 13th, Shoemake, with his companions Tingle and Capito, started home from the shops. The night was dark, and a drizzling rain was falling. They walked together until they reached the point where Preston street crosses appellant's railroad track at Knapp street. Knapp street extends eastwardly in a straight line from Preston street to Shelby street, a distance of four blocks. It is occupied entirely by the double track of appellant, known in the record as the north track and the south track, respectively. When Shoemake and his companions reached the crossing at Preston street, Tingle and Capito separated from Shoemake, going in Preston street toward their homes, while Shoemake started home alone, walking eastwardly up Knapp street and upon the north track. Kusee, a stranger to Shoemake, was walking behind him; and, after they had gone about 200 feet east of Preston street, Kusee saw appellant's west-bound passenger train at Shelby street, coming towards them, and directly in front of them.

Kusee testified as follows:

"Now, Mr. Kusee, while you were walking along there, please state to the jury whether or not you saw a passenger train coming. A. Yes, sir; I saw a passenger train up there near Shelby street, and it was ringing the bell and blowing the whistle at the same time when they seen the young man what I was in behind of; and I said, 'Look out there, pard, there comes the 6 o'clock passenger train.' Q. What did you do? A. I got off of the track with him. Q. Now, when you got off of the track, did he get off of the track? A. Yes, sir. Q. Did you get off of the track next to the freight train? A. In between the two tracks. I hollered at this young man; I said, 'Look out there, pard, here comes the 6 o'clock passenger train.' Q. Then you got in between the two tracks? A. Yes, sir. Q. Did you or not walk some distance between the two tracks? A. Yes, sir. Q. State to the jury whether or not at about that time there was any signal given by the passenger train? A. Yes, sir; the bell was ringing and the whistle was blowing at the same time as I was hollering at this here young man; at same time I hollered he was struck by the passenger train, and then it knocked me down by it. Q. The engine struck him? A. Yes, sir. Q. And knocked him down? A. Yes, sir. Q. And threw the body back against you? A. Yes, sir. Q. Both fell between the tracks? A. Yes, sir. Q. Where did the engine strike him, if you know? A. On the left side of the temple."

At the time Shoemake was struck by the west-bound passenger train, a freight train was passing the same point, going eastwardly upon the south track.

The distance between the inside rails of the north and south tracks was 8 feet 8

inches, while the distance between the passing cars upon said two tracks was about 3 feet 9 inches.

Kusee was the only eyewitness to the accident, unless Martin be so treated. Martin was walking out Preston street, and, when he reached the railroad crossing at Knapp street, he found the guards down and the freight train going east on the south track. While waiting for the freight train to pass, he saw the passenger train coming from the east, and said that, as he looked at the passenger train, "there was something seemed to flash up, in the glare of the headlight, like; seemed like a man either jumped or was knocked off." He says the train did not whistle, and that it passed on westwardly to the Tenth Street station.

The train did not stop after it struck Shoemake, for the reason, given by Speaker, the engineer, that he did not know the engine had hit anybody, and did not learn that Shoemake had been struck until after he had ended his trip at the roundhouse, about 20 minutes later. Speaker, the engineer, testified that he saw a man on the track walking towards the engine, and between the rails of the north-bound track, about 180 or 200 feet in front of the engine. Speaker says he blew his whistle and gave the alarm with several successions of loud, short blasts of the whistle, and reduced the speed of the train from eight to about six miles an hour; and that the man then stepped right off the track onto the space between the two main tracks. Evidently Shoemake was struck on the side of the head by the pilot beam of the passenger train, although Speaker thought he had fully cleared the track.

The engineer and the conductor of the passenger train say the automatic bell upon the engine was ringing and had been ringing ever since the train had passed St. Matthews, or Crescent Hill, points from four to six miles east of Preston street; and while there is uncontradicted evidence, from many witnesses, that the bell was ringing, several witnesses, who were standing near the railroad crossing at Preston street, have testified either that the whistle was not sounded or that they did not hear it.

The train was on time; the headlight of the engine was in prime order; and, although the engineer and the conductor say the passenger train was running at a speed of from 6 to 8 miles an hour, several of the bystanding witnesses said the train was running from 18 to 30 miles an hour.

Appellant relies upon three grounds for a reversal: (1) That its motion for a peremptory instruction should have been sustained because the plaintiff's evidence was insufficient to authorize a submission of the case to the jury; (2) that the court erred in admitting incompetent evidence offered by the plaintiff and in rejecting competent evidence offered by the defendant; and (3) that the

court erred in giving instructions 2 and 3 on plaintiff's motion, and in refusing to give instruction B asked by appellant.

[1, 2] In support of the contention that the appellant's motion for a peremptory instruction should have been sustained, it is urged with a good deal of force that the proof conclusively shows that Shoemake knew of the approach of the passenger train, and stepped from the track to a point between the north and south tracks, where he was struck because he had carelessly failed to step far enough from the track to be in a place of safety. It must be admitted that the testimony of Kusee strongly tends to support this contention. The only evidence tending to contradict it is that of Martin, who was standing at Preston street, 200 feet away, and the testimony of several other witnesses who say the engineer failed to sound the whistle after he saw Shoemake upon the track, thus showing negligence upon the part of the engineer.

The proof shows that Knapp street, which was entirely occupied by the railroad track, was a dedicated street of the city; and, if there should be any doubt of that fact, it is clearly made to appear that it was used by such a large number of pedestrians as to put the appellant upon notice that a lookout duty was necessary to prevent injury to trespassers upon the track.

It is argued, with great force, that since a city ordinance prohibited passenger trains from running within the city limits at a greater speed than 12 miles an hour, and the engineer, conductor, and fireman say the train was running from 6 to 8 miles an hour, little or no credence should be given to the evidence of bystanders, who, being unfamiliar with questions of speed, say the train was running from 18 to 30 miles an hour. This is a very plausible argument, and to reasonable men it would seem, perhaps, conclusive; but that was a question peculiarly for the jury.

There being evidence that the train was running at an unreasonable speed, upon a dark, drizzly night, over a public street that was constantly used by pedestrians, and that the engineer failed to sound his whistle after he had discovered Shoemake upon the track, the determination of the question of appellant's negligence and of Shoemake's contributory negligence was for the jury.

[3] The first instruction properly defined ordinary care and negligence.

The second and third instructions read as follows:

"No. 2. The court instructs the jury that it was the duty of the defendant, its agents and employees operating its trains, at the time when plaintiff's intestate was killed, to keep a lookout for the presence of persons using its tracks as a foot passway and to operate the engine and train of cars at a reasonable rate of speed and give reasonably sufficient warning of its approach, to avoid injuring them; and if the jury believe from the evidence that the defendant's agents and employees, in charge of

its train at the time and place when plaintiff's intestate was killed, negligently failed to operate its engine at a reasonable rate of speed and keep a lookout for persons using the track and to give reasonably sufficient warning of its approach, and by reason of the negligent failure of defendant's agents and employees in charge of its train to perform these duties, and plaintiff's intestate, while using the track at said point and exercising ordinary care for his own safety, was struck by its engine and killed, the law is for the plaintiff, and the jury should so find."

"No. 3. If the jury find for the plaintiff, they should award such a sum in damages as they believe from the evidence will reasonably compensate the estate of the decedent, Allie Shoemake, for the destruction of his power to earn money, not to exceed \$15,000. In arriving at this the jury may take into consideration the age of decedent and the probable duration of his life."

The objection to the second instruction is that it fails to present appellant's defense that Shoemake knew of the approach of the train, and negligently failed to get sufficiently far from the track to escape from being struck by the engine. That was appellant's principal defense; and, to present that defense, appellant offered, but the court refused to give, instruction B, which reads as follows:

"(B) The court instructs the jury that, if plaintiff's intestate, Allie Shoemake, had knowledge or warning of the approach of the train in time to get into a position of safety, then it was not negligence on the part of defendant's agents or servants in charge of said train to fail to give warning of its approach, if they did so fail to give such warning."

It is the duty of the court to submit to the jury the respective theories of both the plaintiff and the defendant, provided they are sustained by any evidence, as was the case here. It did give the appellee's theory in the second instruction, but, in refusing instruction B, it wholly failed to present appellant's theory of the case. In this we think the court erred to the substantial prejudice of the appellant.

In *L. & N. R. R. Co. v. King's Adm'r*, 131 Ky. 347, 115 S. W. 193, we said:

"It has long been the settled rule that both the plaintiff and the defendant have the right to have their side of the case properly presented to the jury. The instructions given by the court in this instance did not comply with this requirement. The facts constituting the defendant's negligence were properly embraced in the instructions of the court, but the facts constituting contributory negligence on the part of the plaintiff's intestate (and therefore the defendant's main defense) were not presented to the jury in a clear, concise, and specific manner. While the instruction offered by defendant was not technically correct, in that it did not require the jury to believe that plaintiff's intestate saw the red signal, or by the exercise of ordinary care could have seen it in time to have stopped the train, yet it was the duty of the court, when such instruction was offered, to prepare and give a proper instruction on that point. *I. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233 [25 Ky. Law Rep. 250]. The failure of the court to do this is reversible error."

See, also, *L. & N. R. R. Co. v. Crutcher*, 135 Ky. 381, 122 S. W. 191; *West Kentucky*

Coal Co. v. Davis, 138 Ky. 667, 128 S. W. 1074; Jellico Coal Mining Co. v. Lee, 151 Ky. 53, 151 S. W. 26.

Upon another trial, if the proof be substantially the same, the court will, in lieu of the second instruction and instruction B asked by appellant, give the following instruction:

"No. 2. The court instructs the jury that it was the duty of the agents and employés of the defendant, in operating the passenger train at the time Allie Shoemake was killed, to keep a lookout for the presence of persons using its tracks as a foot passway, and to run its train at a reasonable rate of speed, and to give reasonable warning of its approach to avoid injuring them; and if the jury believe from the evidence that said Shoemake was walking upon the north track of defendant, and that the defendant's agents and employés, in charge of its train at the time and place when said Shoemake was killed, negligently failed to give him reasonable warning of the approach of the train by ringing its bell or sounding its whistle in time for him to get off the track before the train struck him, and he did not know of the approach of the train in time for him to get out of its way before it struck him, then the law is for the plaintiff, and the jury should so find. But if the jury shall believe from the evidence that Shoemake knew of the approach of the train in time to get out of its way by the exercise of ordinary care, and undertook to do so, but failed to get far enough from the track, and by reason of this was struck and killed, the law is for the defendant, and the jury should so find."

[4] It is further contended that the last clause of the third instruction, which authorized the jury to take into consideration the age of the decedent and the probable duration of his life, was erroneous because it specifically called the jury's attention to certain facts. In this respect the third instruction was objectionable, although not sufficiently prejudicial of itself to justify a reversal. It will be omitted from the instruction, upon another trial.

Instruction No. 4, asked by plaintiff, was properly refused, and instructions A and C, asked by defendant, properly given.

[5-7] The court improperly permitted the witness Harstein to say that the citizens of Louisville had a right to use Knapp street; that a person was likely to be blinded by meeting a train, with a large headlight, at night; and further that the railroad track west of Preston street curves northwardly in going into the depot at Tenth and Broadway. This testimony was all incompetent. The dedication of a public street cannot be shown by the opinion of an individual that the citizens of the town had a right to use the street. Furthermore, railroad companies are required to keep a headlight upon their engines at night, and it would be negligence if they failed to so equip their engines. By the admission of the testimony in question, the appellant was put in the position of being guilty of negligence in case it either provided or failed to provide its engine with an adequate headlight.

Finally, the accident having occurred east of Preston street, upon a track that was straight for fully four blocks, the fact that Knapp street was not straight west of Preston street had nothing to do with the case. Upon another trial this testimony will be excluded.

For the errors indicated, the judgment is reversed, and the cause remanded for further proceedings.

## CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LAIRD.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

### 1. TELEGRAPHS AND TELEPHONES (§ 20\*)—ACTIONS FOR INJURIES—EVIDENCE—JURY QUESTION.

In an action by a brakeman hurt when caught on a telephone wire running over the railroad track, the question of whether the defendant owned and controlled the wire held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

### 2. TELEGRAPHS AND TELEPHONES (§ 20\*)—ACTIONS—EVIDENCE.

Where a brakeman was caught on a sagging telephone wire extending over a railroad track and the question involved was whether the defendant owned and controlled the line, evidence that after the accident defendant's servants repaired the wire is admissible, when restricted solely to the question of ownership.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

### 3. DAMAGES (§ 132\*)—AWARD—PERSONAL INJURIES.

An award of \$5,000 in favor of plaintiff, who suffered injuries to his foot, necessitating the wearing of a shoe of special design, as well as injuries to his kidneys, was not excessive, though he was confined to his bed only 16 days, where as a result of the injuries he lost weight and was afflicted with persistent and painful headaches.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

### 4. APPEAL AND ERROR (§ 1043\*)—REVIEW—HARMLESS ERROR.

The denial of a continuance to procure medical testimony in a personal injury action was not prejudicial where four other experts testified for defendant and one of them was the first physician who saw plaintiff after the injury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.\*]

### 5. CONTINUANCE (§ 26\*)—RIGHT TO.

Where defendant did not file its answer until a few days before trial, and made no effort to take plaintiff's deposition as if under cross-examination, as provided by Civ. Code Prac. § 606, subsec. 8, until the Saturday before the convening of court the following Monday, and then was unable to secure service upon plaintiff because he was running as a brakeman, defendant is not entitled to a continuance; plaintiff's testimony not taking defendant by surprise.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 74-93; Dec. Dig. § 26.\*]

Appeal from Circuit Court, Nelson County. Action by B. C. Laird against the Cumberland Telephone & Telegraph Company. From

a judgment for plaintiff, defendant appeals. Affirmed.

W. Pratt Dale, of Louisville, Nat W. Halstead, of Bardstown, Brutus J. Clay, of Atlanta, Ga., and Humphrey, Middleton & Humphrey, of Louisville, for appellant. Jno. A. Fulton, Geo. S. Fulton, and Fulton & McGinnis, all of Bardstown, for appellee.

TURNER, J. The Louisville & Nashville Railroad Company owns and operates a line of railroad from Louisville, Ky., to Bardstown. Appellee was a brakeman on one of its freight trains running on that line in September, 1912. About one mile west of Bardstown a spur track, owned by the Louisville & Nashville Company, runs from the main line to what is known as the Lancaster Distillery, a few hundred yards away. Appellant operates a telephone system in Nelson county, with its principal exchange at Bardstown. Its lines radiate in all directions from that center, and, among others, is one going out the Bardstown and Louisville turnpike; about one mile north of Bardstown its said line makes a junction with a small neighborhood telephone line, serving only three patrons, the Lancaster Distillery, one Elmer Grigsby, and the Clear Spring Distilling Company, which operates a plant about one mile west of the Lancaster Distillery. This neighborhood line was originally constructed a number of years ago from the Lancaster Distillery to the junction with appellant's line on the Bardstown turnpike at the joint expense of the Lancaster Distilling Company, and the predecessors of the Clear Spring Distilling Company, and from the Lancaster Distilling Company's plant to the plant of the Clear Spring Distilling Company it was constructed wholly at the expense of the latter company's predecessors. The two wires, which continued to the Clear Spring Distilling Company from the Lancaster Company, had been for a number of years attached, by consent or acquiescence of the Lancaster Company, to one of its warehouses on the east side of the spur track, and from that point across the said spur track they were attached to a post on the west side thereof, and thence proceeded to the Clear Spring Distilling Company. As originally constructed, these wires where they crossed the spur track were elevated at least 25 or 30 feet above the level of the track. In the summer of 1912 the Lancaster Distilling Company tore down this warehouse to which these wires had been attached, and thereupon they sagged to such an extent as to hang only five or six feet above the level of the spur track. Attention being called to this condition, appellant's lineman undertook to remedy it, but did so in such manner as that the wires crossed the spur track at an elevation at about only 18 feet. With the lines in this condition a train, upon which appellee was brakeman, went onto the spur

track on the 24th day of September, 1912, and safely passed under it going in; but there was an empty box car already on the spur track, and when this box car was taken out, upon the return trip, appellee, in the exercise of his duty as a brakeman, climbed upon the top of it, and the telephone wire, while the car was moving, caught him under the throat or around the neck and threw him to the ground, whereby he was severely injured, and from which this suit for damages resulted. He recovered a judgment for \$5,000 in the lower court, and the telephone company has appealed.

Each of the three parties on this neighborhood line were directly connected with appellant's exchange at Bardstown, and had full communication, as did the other patrons, with the territory covered by it; each of them had a number assigned it in the published directory of appellant; each paid a fixed monthly rental—and this status had existed for several years. The plaintiff in his petition does not allege that the telephone company owned this neighborhood line, but does allege that it operated it, and that it was its duty to maintain it; the company's main defense being that it never owned or operated it, nor was it under any duty to maintain it.

[1] Appellant insists that it was entitled to a peremptory instruction because of the failure of evidence to show that it maintained, or repaired, or controlled the telephone line at the point of the accident. The evidence of Grigsby and Atherton, an employé of the Lancaster Distilling Company, was direct and positive to the effect that the appellant has repaired and maintained that part of the line running from the Bardstown pike to Grigsby's residence and the Lancaster Distillery; in fact there is no serious contention that it did not maintain and repair this line to those points, but, for some reason which is neither plain nor satisfactory, it is insisted that although it may have maintained and repaired that part of this line and may have assumed the control of it to those points, it never assumed such control, maintained or repaired that part of the line beyond the Lancaster Distillery. Our understanding of the evidence is that the line was built all at the same time, or practically so; that it was built by the same people, although paid for by one party in a larger proportion than the other because of its greater distance from the main line, but that in fact it was one line. We confess our inability to see why appellant should keep up and maintain this line a part of the way for the benefit of a part of its patrons, and deny its duty to keep up and maintain the balance of the line for another of its patrons, similarly situated.

But in addition to this there is evidence in the record that appellant's employés had, at different times, inspected the line running

from the Lancaster Distillery to the Clear Spring Distillery, had trimmed trees along that line so as they might not interfere with the transmission of messages, and it further appears from the evidence of the Clear Spring Distillery officials that it had not repaired, and had not undertaken to repair, anything on this line for a number of years, and that when repairs were needed or the line was in trouble the company sent out there and had it repaired. It is distinctly stated by Beam, vice president of the Clear Spring Distilling Company, that upon one occasion, a few years before the accident, when there had been a heavy sleet which broke the wire, the company sent out there and had it repaired. Certainly the fact that this line was directly connected with appellant's exchange at Bardstown, that it charged the persons along the line monthly toll rates, when taken in connection with this evidence that it had for several years assumed to maintain the line, justified the submission of the case to the jury.

[2] The plaintiff was permitted to prove that after the accident employes of the Telephone Company had worked on this line and had, in fact, elevated the line across this spur track, and it is urgently insisted for the appellant that this was in contravention of the well-known rule in this state that evidence of precautions taken or repairs made after an accident is not admissible as evidence that the defendant was negligent. *L. & N. v. Stewart's Adm'r*, 131 Ky. 674, 115 S. W. 775. But in this case the evidence was not admitted for the purpose of showing negligence, because that issue was not really contested, but was admitted for the purpose alone of enlightening the jury upon the contention that appellant was under no obligations to maintain that line. The distinction has been taken by many text-writers; while they all recognize the rule excluding such evidence when offered to show negligence, they recognize its competency upon the issue of ownership or control. For instance, *Watson on Damages and Personal Injuries*, 643, says:

"Where there is a dispute as to the defendant's control or authority over the place where the accident happened, the latter's act after the accident may be admitted, not as bearing on the issue of negligence, but for the purpose of showing the exercise of authority or control over such place."

Thompson in his *Commentaries on the Law of Negligence*, vol. 6, § 7850, under the head of Evidence of Subsequent Repairs, says:

"Evidence that the town after the accident removed the obstruction which produced it, though inadmissible on the question of negligence, is admissible to show that the town had authority to remove it before the accident."

Wigmore on Evidence, vol. 1, § 283, after a statement of the rule which excludes such evidence offered for the purpose of showing negligence, says:

"There may, of course, be other evidential purposes for which the acts in question may be relevant; in that event, they are to be received, subject to a caution restricting their use to the specific proper purpose. In particular, when the defendant's liability depends on whether a landlord or his tenant was in control of premises, or upon whether a municipal corporation was exercising authority over a highway, the acts of control of such a person are provable, and an act of repair done after the injury may chance to be such an act."

It results, therefore, that the lower court did not err in admitting this evidence on the issue of control.

The criticism of instruction No. 1 by counsel is not justified; it did not authorize a recovery, as counsel seems to think, if appellant operated and maintained *any portion* of the neighborhood telephone line, but, in express terms, authorized a recovery only in the event that the telephone wire was negligently suspended at a point at which appellant operated and undertook to maintain the same.

[3] While the verdict is large, in the light of the testimony as to the injuries of appellee, we are not inclined to say it was excessive. As the result of the accident his right ankle is permanently enlarged, the foot was thrown outward, and the arch of the foot lowered so that he is compelled to wear a shoe of special design to give support to it; since the accident he has suffered a reduction of about 20 pounds in weight; he is afflicted with persistent and painful headaches, and with abnormal and frequent evacuation of urine; an examination of his urine since the accident shows sugar therein, and the specific gravity of his urine is higher than it ought to be, and these conditions were found by the physicians upon three separate examinations. It is true that he was in bed only 16 days, and that something more than two months after his injury, on the 2d of December, he returned to his work as a brakeman; but he states he was compelled to do so by his necessities, when he was really unable to do so.

[4] Appellant insists that it was entitled to a continuance because of its inability to procure the evidence of Dr. Roberts, a Louisville physician, who had attended appellee during his illness after the accident. But it is apparent that it could not have been prejudicial, because four other physicians testified as to the injuries of appellee, including the physician who first reached him after the injury, and including one appointed by the court to examine him.

[5] It is also claimed that it was entitled to a continuance because of its failure to get the evidence of appellee, as if under cross-examination, as provided by subsection 8 of section 606 of the Civil Code. A failure to procure the presence of appellee at the place designated by appellant to so take his deposition grew out of the fact that he was running as a brakeman on the train and it

was unable to get personal service upon him. Appellant's answer was not filed until the 27th day of May, and the effort to take his deposition in Louisville was made on Saturday the 31st day of May, and the court convened on the following Monday. There is nothing in the record to show that anything in the testimony of the appellee on the trial took the appellant by surprise, or that it was not in every way ready to meet his testimony in so far as it was able to do so. The case of *Western Union Tel. Co. v. Williams*, 129 Ky. 515, 112 S. W. 651, 33 Ky. Law Rep. 1062, 19 L. R. A. (N. S.) 409, was where the plaintiff had refused to submit to the giving of his deposition as if by cross-examination, and on the trial he gave such testimony as was a surprise to the defendant, and which it claimed it could, if given time, refute; and under those circumstances this court said the continuance should have been granted.

The matter of granting a continuance is largely left to the discretion of the trial court, and we see nothing to indicate that that discretion was abused in this case.

Judgment affirmed.

#### LEE et al. v. WOODS.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

##### 1. APPEAL AND ERROR (§ 1068\*)—REVIEW—PREJUDICE—INSTRUCTIONS ON DAMAGES.

Where the jury found for defendants and the court set aside the judgment and granted a new trial, defendants were not prejudiced by instructions on the question of damages given on the first trial which the trial court refused to give on the second, whether they were correct or not.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

##### 2. SALES (§ 286\*)—PERSONAL PROPERTY—ANIMALS—FAILURE OF TITLE.

Defendants, who had purchased a mule without knowledge that it was mortgaged, sold the mule to plaintiff. The mortgagees having sued to enforce their mortgage on the mule, plaintiff kept it as bailee of the sheriff and then turned it over to the sheriff, blind and sick with distemper. The mule was sold under the lien and purchased by defendants, when it was immediately tendered to plaintiff, together with pay for the use of the mule while out of plaintiff's possession. Held, that defendants could comply with their warranty of title by retendering the mule after purchasing it, and that the court, in an action for breach of warranty, properly charged that if defendants used reasonable diligence to protect the title to the mule within a reasonable time and tendered it to plaintiff, together with the reasonable value of the use of the same, the jury should find for defendants unless the value of the mule had depreciated while out of plaintiff's possession, in which event the jury should find for plaintiff the reasonable difference, etc.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 809; Dec. Dig. § 286.\*]

Appeal from Circuit Court, Hickman County.

Action by W. H. Woods against George

Lee and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

R. L. Smith, of Clinton, for appellants.  
Flatt & Via, of Clinton, for appellee.

CLAY, C. In March, 1911, George Lee and Bill Greer sold to W. H. Woods a mule; the consideration being a mare valued at \$180, and \$25 in cash. Lee and Greer had bought the mule a few days before in the open market on the streets in Mayfield. At the time of the sale, Drewery and Ringo had a mortgage on the mule to secure a note for \$180, dated November 30, 1909, and payable 12 months after date. The mortgage had been executed to them by one Davis, a former owner of the mule, and was on record in Hickman county, where Davis resided at the time. The mule, when purchased by Lee and Greer, was not owned by Davis, and it conclusively appears that neither Lee nor Greer nor Woods knew of the mortgage in question, or knew that Davis had ever been the owner of the mule. In February, 1913, Drewery and Ringo brought suit in the Hickman quarterly court to enforce their mortgage lien. At that time Davis, the mortgagor, was a nonresident. They sued out an attachment and had it levied on the mule while in Woods' possession. Woods kept the mule as bailee for the sheriff from the time it was levied on until the third Monday in March, when the mule was brought by Woods to Clinton, the county seat, and turned over to the sheriff. The mule was then blind and had a bad case of distemper. This condition existed for several months. On the same day the Hickman quarterly court ordered the mule sold to satisfy the debt of Drewery and Ringo. When the attachment suit was filed, Woods served notice on Lee and Greer to defend the title. Lee and Greer investigated the matter and found that the mortgage was valid. Fourteen days after the mule was delivered by Woods to the sheriff it was sold. When sold the mule was purchased by Lee and Greer, and thereupon tendered by them to Woods. At the same time they also tendered Woods \$10 to pay for the use of the mule while out of his possession. Woods refused to take the mule back. Woods brought this action against Lee and Greer to recover damages for breach of warranty. On the first trial there was a verdict and judgment in favor of Lee and Greer. A new trial was granted. On the second trial there was a verdict and judgment in favor of Woods for \$205. Lee and Greer appeal.

On the first trial the court instructed the jury as follows:

"(1) The court instructs the jury that if they believe from the evidence that defendants Lee and Greer used reasonable diligence to perfect the title to the mule, within a reasonable time, and tendered said mule to plaintiff, together with a fair and reasonable amount for the use of

same, the law is for the defendants and you should so find; unless you further believe from the evidence that the value of said mule had depreciated while out of plaintiff's possession, in which event you will find for plaintiff the reasonable difference, if any, in the value between said mule when tendered back, and the said mule on the day he was taken from the possession of plaintiff, and also the reasonable value of the services of said mule while out of the possession of plaintiff, provided no tender was made to plaintiff by defendants of said amount for the use of the mule was made at the time of the tender of the mule.

"(2) The court instructs the jury that plaintiff in law was not bound to accept the mule when tendered, if not done within a reasonable time after being deprived of its use, nor to accept said tender or take the mule back, if the mule had in any material or substantial degree deteriorated or depreciated in value, from the time plaintiff was deprived of the possession of said mule; and, if you so believe, you will find for plaintiff the reasonable cash value of said mule at the time he was taken from plaintiff's possession, not exceeding \$225. And further, any reasonable damage plaintiffs sustained, in being deprived of the mule for the time he was deprived of the possession of said mule, at the time he was tendered back, not exceeding \$50 for this item, and not more than \$275 in all."

The new trial was granted because the court came to the conclusion that the above instructions were erroneous. On the second trial the court refused to give either of the above instructions, but in lieu thereof gave the following instruction:

"The court instructs the jury to find for the plaintiff the reasonable cash value of the mare exchanged by plaintiff for the mule at the time of the exchange, and in addition thereto \$25 paid by plaintiff to the defendants at the time of the exchange; in all, however, not exceeding the sum of \$205."

[1] Defendants insist that the instructions given on the first trial were proper, and that the court erred in setting aside the judgment and in refusing to give these instructions on the second trial. While plaintiff insists that, as there was a breach of warranty, the instructions given on the first trial were not authorized, and he was entitled to recover the purchase price paid for the mule in accordance with the instruction given on the second trial. We deem it unnecessary to pass on the proper measure of damages had there been no tender of the mule to plaintiff. On the first trial the jury found for the defendants. In other words, they found that plaintiff was not entitled to any damages. That being true, it is immaterial whether the measure of damages was correct or not. *Selbert's Assignee v. Ragsdale*, 103 Ky. 206, 44 S. W. 653, 19 Ky. Law Rep. 1869; *Gallimore v. Brewer*, 57 S. W. 253, 22 Ky. Law Rep. 296; *L. & N. R. R. Co. v. Crady*, 73 S. W. 1126, 24 Ky. Law Rep. 2339.

[2] The whole case, therefore, turns on the propriety of instruction No. 1, given on the first trial. This is not a case where the vendor acquired title after suit had been brought for a breach of warranty. It is a case where he acquired title and tendered the property, together with the reasonable value of its

use while out of plaintiff's possession, prior to the bringing of the suit on the warranty. The evidence shows that when the mule was taken from the possession of plaintiff he was blind and had a bad case of distemper. This blindness had existed for some time. Manifestly, if when the judgment was entered enforcing the mortgage lien Lee and Greer had then paid the judgment, they would have had the right to insist on Woods accepting the mule. We cannot see any difference in principle between their discharging the incumbrance in this way and their purchasing the mule a few days later, and then tendering the mule itself to Woods, provided, of course, the mule was then in the same condition as it was when taken from Woods' possession. The only disadvantage which Woods could have suffered under the circumstances was the loss of the use of the mule during the time he was deprived of it. To cover this loss Lee and Greer tendered him \$10. The jury evidently concluded that there was no loss, because, owing to the mule's condition, it could not be used to advantage during that time. Woods' whole case was predicated on the idea that there was a failure of title when he lost the mule in question. As a matter of fact, he did not lose the mule, but was deprived of its use only during a period when the mule was not in condition to be used. By tendering the mule back within a reasonable time Lee and Greer placed Woods in practically the same situation that he would have been in had there been no mortgage on the mule. We therefore conclude that instruction No. 1, given on the first trial, was not erroneous, but accords more with the justice of the case than the instruction given on the last trial, which permitted plaintiff to recover the purchase price of the mule two years later when the mule was practically worthless, when all that he had been deprived of was the use of the mule during a period when he could not have been used to advantage. We therefore conclude that the court erred in setting aside the first judgment and in awarding plaintiff a new trial.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with the verdict of the jury on the first trial.

#### GIBSON v. WESTERN & S. LIFE INS. CO. et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)  
TAXATION (§ 531\*)—PAYMENT OF TAXES BY  
THIRD PERSON—SUBROGATION.

There being no statute authorizing assignment of tax claims by the taxing authorities and subrogating a stranger who pays taxes under an agreement with the owner that he will be subrogated to the lien of the taxing authority, a stranger having no interest in the property, paying taxes under an agreement with the owner that she should be subrogated to the lien of the city, county, and state, was not subrogated to such liens, and could not enforce the

same as against the holders of mortgage liens on the property, being a volunteer in the legal, though not in the ordinary, sense of the word.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

Suit by the Western & Southern Life Insurance Company against Sidney Arthur and others, in which Loretta B. Gibson intervened, claiming a right to a prior lien by subrogation to the rights of the state and county because of her having paid certain taxes on the property at the request of the owners. A demurrer was sustained to the petition, which was thereupon dismissed, and petitioner appeals. Affirmed.

A. E. Stricklett, of Covington, for appellant. S. D. Rouse, of Covington, for appellee Western & S. Life Ins. Co. Robt. C. Simmons, of Covington, for appellees Leubrecht and Phillips.

CLAY, C. Sidney Arthur and others are the owners of two apartment buildings in the city of Covington, and the lots on which they are located. On April 29, 1905, they mortgaged one of the buildings to the Western & Southern Life Insurance Company to secure a loan of \$27,000, for which they executed their promissory note payable 11 years from date. Thereafter they mortgaged the same building to Thomas H. Phillips and George Leubrecht to secure certain promissory notes aggregating \$6,900. On August 8, 1906, the same parties mortgaged the other building to the Western & Southern Life Insurance Company to secure a loan of \$30,000, represented by nine promissory notes. While all these mortgages were in full force and effect, the owners defaulted in the payment of half the city taxes for the year 1908 and all the taxes for the years 1910 and 1911. They also failed to pay the state and county taxes for the year 1910. The city of Covington, through its delinquent tax collector, regularly advertised the taxes as delinquent on each of said parcels of real estate for said years. The sheriff of Kenton county advertised and sold each of the parcels for state and county taxes for the year 1910, and purchased same in the name of the commonwealth. Thereafter suit was instituted by the county attorney to enforce the lien of the commonwealth. The city taxes on the first parcel of land for the years mentioned were \$1,843.27. The state and county taxes, with interest and penalty, were \$418.44. The city taxes on the second parcel of land amounted to \$1,827.44, while the state and county taxes, including interest, costs, and penalty, amounted to \$418.44. The city of Covington, through its delinquent tax collector, was about to institute action in the Kenton circuit court to en-

force its lien on said parcels of land for the taxes due for the years above set forth. Sidney Arthur, one of the owners of the property, prevailed upon appellant, Loretta B. Gibson, to pay all the foregoing taxes under an agreement whereby she should be subrogated to the rights of the taxing authorities to the extent of the taxes so paid by her. On February 9, 1912, she paid the city of Covington, the county of Kenton, and the state of Kentucky all the taxes due them. On November 29, 1912, the Western & Southern Life Insurance Company brought two suits to enforce its mortgage liens on the two parcels of land. Phillips and Leubrecht became parties and asserted a lien on tract No. 1 superior to all other liens except that of the Western & Southern Life Insurance Company. Thereafter appellant, Loretta B. Gibson, became a party to the action, and filed a petition alleging substantially the facts above set out. She further alleged that all the mortgages above referred to were in full force and effect at the time the taxes became delinquent and were paid by her, and that by reason of her payment of the taxes the mortgagees were benefited in that the owners of the buildings were enabled to pay interest on the mortgage liens which the mortgagees would not otherwise have received. It was further alleged in her petition that the liens for said taxes were not to be canceled, but that the delinquent tax collector and the county clerk were to make such entries on their books as would show that such tax bills had been paid by and assigned to the plaintiff, in order that the lien for the same might remain unimpaired. The delinquent tax collector indorsed on the city tax bills the fact that payment was received of appellant, and that the bills, including interest and penalties, were assigned to her. The county clerk noted on his books the fact that payment was made by appellant. Appellant asked that she be subrogated to the liens of the city, county, and state for the taxes so paid by her, and that her liens be adjudged superior to all other liens or incumbrances on the two parcels of land. A demurrer was sustained to the petition, and the petition dismissed. From that judgment this appeal is prosecuted.

Briefly stated, appellant's contention is that, as she paid the taxes at the instance of the owners of the property, and with the distinct agreement that she was to be subrogated to the rights of the taxing authorities, she is not a volunteer, and is therefore entitled to a lien on the property under and by virtue of the general doctrine of subrogation, applicable to cases where a third party, by agreement with the owner, discharges a lien or incumbrance on the owner's land. 27 Cyc. 468. In this state we have no statute authorizing assignment of tax claims by the taxing authorities, and subrogating a stranger who

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

pays taxes under an agreement with the owner that he will be so subrogated to the lien of the taxing authority. The only statutes which we have on the subject provide that a lienholder, or the occupant or tenant of land, or the bailee or person in possession of personal property, may pay the tax which the owner ought to pay, and recover from the owner, and giving him a lien on the property taxed to secure the payment thereof. Kentucky Statutes, §§ 4032, 4033. We also have a statute providing that the purchaser of property at an invalid tax sale shall have a lien on the property for the amount of taxes and costs paid by him, and for which the property is liable. Section 4036. Aside from the authority contained in these statutes, it is also generally held that a person who has an interest in property, and who, in order to protect that interest, is compelled to pay the taxes thereon, is entitled to subrogation. This rule is applied in favor of mortgagor and mortgagee, vendor and vendee, grantor and grantee, tenants for life, tenants in common, lessor and lessee, executors, etc. Coolsey on Taxation, pp. 812-824. Then, too, in some jurisdictions subrogation is allowed where payment is made under a mistake as to ownership. *Kemp v. Cossart*, 47 Ark. 62, 14 S. W. 465; *Goodnow v. Moulton*, 51 Iowa, 555, 2 N. W. 395; *Ingersoll v. Jeffords*, 55 Miss. 37; *Shaefer v. Causey*, 8 Mo. App. 142, though this doctrine is denied by the federal Supreme Court. *Homestead County v. Valley R. Co.*, 17 Wall. 153, 21 L. Ed. 622.

In the case before us appellant had no interest whatever in the property. She did not pay the taxes under a mistake that she owned the property. She paid the taxes at the instance and request of the owner, and under an agreement that she was to be subrogated to the lien of the city, county, and state. As before stated, there is no statute in this state conferring on tax collecting officers the power to assign tax claims. The state and its various subdivisions are given broad powers in matters of taxation. These powers are conferred on state and municipal officers to be exercised by them, and not to be delegated to others. *McInerney v. Reed*, 23 Iowa, 410. Therefore, in the absence of statutory authority, the taxing officers upon whom these broad powers are conferred have no authority to assign tax claims and vest in the assignee the power to enforce their collection. This disposes of appellant's case in so far as she relies on the assignment by the delinquent tax collector. Counsel for appellant insist that appellant is not a volunteer because of the special agreement. It must be remembered, however, that a tax is not a debt in the ordinary sense of the word, and is not therefore subject to the control of

the parties. As neither the state nor any of its municipalities may assign their tax claims, we are unable to see upon what theory or sound public policy it can be held that the owner of property can, in effect, make such an assignment by procuring a stranger in interest to pay the taxes under an agreement that he will be entitled to subrogation. If this were the rule, the effect would be the same as if the taxing authority themselves had made the assignment. In our review of the authorities bearing on the question, we have been unable to find any well-considered case holding that a stranger who has no interest to protect is entitled to subrogation where he paid the taxes under a mere agreement with the owner that he was to be subrogated. In every case we have been able to find, subrogation is applied under the authority of particular statutes, or on the ground that the payment was made to protect some property right. We are not therefore disposed to hold that all the machinery for collecting taxes may be turned over to an entire stranger in interest under and by virtue of a mere agreement made with the owner of the property. In our opinion, sound public policy forbids it. Powers intended to be exercised by public officers would be conferred on private individuals. Not only so, but mortgagees and other lienholders would be frequently placed at a great disadvantage. They might go on for years in the belief that the taxes had been regularly paid by the owner, only to find that they had been paid by a stranger who was asserting a lien on the land in an amount sufficient practically to destroy the value of their security.

There is no merit in the contention that mortgagees would not be prejudiced. If the taxes were paid by the owner, the lien would be discharged. If paid by a stranger, the lien would continue in force. If not paid by the owner, and the law did not permit a stranger in title to pay them, the mortgagees could take prompt steps to protect their interests. While not a volunteer in the ordinary sense of that word, appellant was a volunteer in its legal sense, for subrogation to the lien of the taxing authorities upon the payment of the taxes was not authorized by any statute, nor was it necessary to protect any interest which she had in the property. We, therefore, conclude that, in the absence of a statute authorizing subrogation, a mere stranger who has no interest in the property to protect, but who pays the taxes thereon merely under an agreement with the owner that he should be subrogated to the lien of the taxing authorities, is not subrogated to such lien as against persons having valid liens on the property.

Judgment affirmed.

## BEHA et al. v. MARTIN et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

## 1. CORPORATIONS (§ 283\*)—SALARIES OF OFFICERS—INJUNCTION—SUFFICIENCY OF EVIDENCE.

In a suit by minority stockholders to enjoin defendants, as stockholders and officers, from collecting the salaries voted them at a meeting of the directors, and to recover the sums paid them, evidence held to show that the stockholders, by electing officers who were only eligible as such because they were directors, intended to and did elect such officers directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198-1205, 1207-1235; Dec. Dig. § 283.\*]

## 2. CORPORATIONS (§ 308\*)—DIRECTORS—POWERS—CONTROL BY COURTS.

The directors of a corporation, especially where they own a majority of the stock, are invested with large powers in the selection of, and the salaries to be paid to, its officers, with which discretion the courts will not ordinarily interfere.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

## 3. CORPORATIONS (§ 180\*)—STOCKHOLDERS—CONDUCT OF BUSINESS.

The majority of the stockholders must determine how corporate affairs are to be conducted, and to whom and under what restrictions the management of such affairs shall be intrusted; but the right of such majority either to originally direct or affirm a contract between the corporation and directors personally interested therein is subject to the qualification that the affirmation must not be brought about by unfair or improper means, and must not be illegal, fraudulent, or oppressive toward the opposing stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 685-673; Dec. Dig. § 180.\*]

## 4. CORPORATIONS (§ 308\*)—POWERS OF STOCKHOLDERS—DIVISION OF ASSETS.

The majority of the stockholders, although they may deal with the assets of the corporation, cannot divide such assets between themselves to the exclusion of the minority; but this rule does not require the directors of a corporation, who were its active officers, intrusted with the management of its affairs, and who also owned the majority of its stock, to serve gratuitously for the benefit of a stockholder who had entered the employ of a rival company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

## 5. CORPORATIONS (§ 308\*)—SALARIES OF OFFICERS—INJUNCTION AND RECOVERY—REASONABLE SALARY.

Where the majority stockholders of a corporation, as directors thereof, vote themselves salaries, a court of equity, on application by minority stockholders, will review the reasonableness of such salaries, and where it appears that, considering the nature and extent of the services rendered, they are unreasonable, will enjoin payment and adjudge a recovery for the excess over a reasonable salary; that question depending on what the services of a competent officer are reasonably worth, and not what he could make in a different business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

## 6. CORPORATIONS (§ 308\*)—SALARIES OF OFFICERS—INJUNCTION—BURDEN OF PROOF.

Objecting minority stockholders must establish affirmatively that the salaries of the officers are unreasonable, and where the corporation had an income of \$2,400 a year, and after deducting repairs, etc., and \$1,800 for salaries

of officers, could pay a dividend of about 10 per cent., the president's salary of \$100 a month and the vice president's and the treasurer's salaries of \$25 a month, in the absence of evidence as to their unreasonableness, would not be held unreasonable or oppressive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

## 7. CORPORATIONS (§ 308\*)—POWERS OF DIRECTORS—VOTING SALARIES AS OFFICERS.

A director of a corporation cannot vote in the matter of fixing a salary for himself as an officer, nor can his vote be counted to constitute a quorum; so that, where the salaries of three officers of a corporation were fixed by one resolution, and each of such officers as a director had voted for the resolution, the court could not hold that no one of the directors voted in his own case, and that his salary was fixed by the votes of the other two, and hence would hold that the action of the directors in voting salaries to themselves as officers was invalid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by R. L. Martin and another against Albert S. Beha and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

G. A. Ellerkamp and Henry J. Tilford, both of Louisville, for appellants. Gartner & Vaughan, of Louisville, for appellees.

CLAY, C. In the year 1904 Albert S. Beha and his brother, Robert M. Beha, together with George H. Carter, a practical laundryman, organized the O. K. Laundry Company, with a capital stock of \$2,500, divided into 100 shares, of the par value of \$25 each. The corporation prospered from the beginning, and liberal dividends were declared. In the month of March, 1908, R. L. Martin, who had been engaged in driving a wagon for another laundry, was sold 1 share of stock in the company by Albert S. Beha at the price of \$200. It was the policy of the company to have in its employ only men who were stockholders, and therefore personally interested in the success of the company. The share of stock was sold to Martin for the purpose of acquiring his services. Shortly after the purchase by Martin, William T. Tichenor, a workman in the laundry, was sold 5 shares of stock. In the year 1911, 10 shares of stock were sold to John B. Stokes, who was also a practical laundryman. In the meantime Robert M. Beha and George H. Carter had retired from the company. Thereafter the stock in the company was owned by Albert S. Beha, Stokes, Tichenor, and Martin, until October 5, 1912, when Martin, who had in the meantime acquired additional stock, sold 5 of his shares to W. H. Powell. On October 1, 1912, Martin was promoted from the position of driver to that of manager. There is considerable proof to the effect that Martin's management was not successful, and that complaints were frequently made of the poor character of the work turned out after he took charge. Albert

Beha, acting in conjunction with the other directors and stockholders, informed Martin on March 15, 1913, that in his opinion a new manager should be installed, and requested Martin to take his old place on the wagon. Martin refused to do this, and quit the service of the company. After quitting the service of the company, Martin took employment with another company as driver. In this capacity he earned about \$22 a week.

On August 2, 1913, a called meeting of the directors was held. There were present at this meeting Beha, Tichenor, Stokes and Martin. It was moved by Tichenor, and seconded by Stokes, that whereas, on March 15, 1913, two of the active stockholders retired from the service of the company, the remaining active officers should receive the following salaries from date: Albert S. Beha, president, \$100 a month; William T. Tichenor, vice president, \$25 a month; John B. Stokes, treasurer, \$25 a month. On this resolution Beha, Tichenor, and Stokes voted in the affirmative, while Martin voted in the negative. The resolution was declared carried. Shortly after the above action was taken, plaintiffs, R. L. Martin and W. H. Powell, brought this action against Albert S. Beha, William T. Tichenor, John B. Stokes, and the O. K. Laundry Company, to enjoin the defendants from collecting the salaries voted them at the meeting above referred to, and to recover the sums which had been paid them pursuant to the action taken at that meeting. Plaintiffs were granted the relief prayed for, and defendants appeal.

In addition to the foregoing facts, it appears that no formal directors' meetings were ever held, and no directors as such were ever elected at the annual meeting of stockholders. Thus, at the first meeting of the stockholders, held on January 18, 1904, the following officers were appointed to serve until the first Monday of February: President and treasurer, Albert S. Beha; secretary, Robert M. Beha; vice president, George H. Carter. On February 1, 1904, another regular annual meeting of stockholders was held, at which the same officers were elected, for the ensuing year. At this meeting the minutes recite that Robert M. Beha was appointed general manager for the ensuing year "with the approval of all the directors." On February 6, 1905, the same officers were re-elected at the annual meeting of the stockholders, and Robert M. Beha again appointed general manager "with the approval of all the directors." At the next annual meetings of stockholders, held on February 5, 1906, February 4, 1907, February 3, 1908, and February 1, 1909, the same proceedings were had. At a meeting held August 23, 1909, R. L. Martin was elected secretary, and William T. Tichenor, vice president, in the place of George H. Carter and Robert M. Beha, resigned. At the next annual meeting, held on February 7, 1910, the following officers were elected for the ensuing year: Albert S. Beha,

president; William T. Tichenor, vice president; R. L. Martin, secretary; Thomas H. Beha, treasurer. "With the approval of all the directors," Thomas H. Beha was appointed general manager by the president. At the annual meeting of the stockholders, held on February 6, 1911, the following officers were elected: President, Albert S. Beha; vice president, William T. Tichenor; secretary, R. L. Martin; treasurer, John B. Stokes. At that meeting Robert M. Beha was appointed general manager "with the approval of all the directors." At the annual meeting held February 3, 1912, the following officers were elected: President, Albert S. Beha; vice president, William T. Tichenor; secretary, R. L. Martin; treasurer, John B. Stokes. Robert M. Beha was reappointed general manager. At the annual meeting held on February 1, 1913, the same officers were elected for the ensuing year.

The stock that Martin bought averaged him in the neighborhood of \$100 a share, or four times the par value of the stock. At the time of the institution of the suit, the defendants Beha, Tichenor, and Stokes owned a majority of the stock. For several years the dividends ranged from 20 to 44 per cent. The annual income from the plant was about \$2,400. Deducting repairs, etc., there was available, after the payment of the \$1,800 salary voted to the defendants, sufficient money to pay an annual dividend of about 10 per cent. The charter and by-laws of the corporation are not in evidence. Albert S. Beha, the president, says that under its charter the corporation was authorized to have a board of from three to five directors. He further says that, while the minutes of the stockholders' meetings do not show that any directors were elected as such, yet they intended to elect directors by electing officers who could only serve if as a matter of fact they were directors. It further appears from the minutes of several of the meetings that the president appointed the manager of the plant "with the consent of all the directors."

The chancellor's judgment proceeds upon the theory that the only reason assigned for the action of defendants in voting themselves salaries is that one of the plaintiffs had obtained employment with another corporation engaged in the same business, and that there was no real reason for voting the salaries, except to absorb the earnings of the corporation, instead of paying the usual dividends in which plaintiffs would share. Though conceding that the president might be entitled to a small salary, the corporation was enjoined from paying him any salary whatever, and he was also required to pay back all the salary that he had received. It may be doubted if the judgment can be sustained for the reasons assigned by the chancellor.

[1] While it may be true that the minutes of the annual meetings do not show that the directors were elected as such, the evidence

leaves no doubt that the stockholders, by electing officers of the corporation who were only eligible as such because they were directors, intended to and did elect the officers directors. That this is true is further shown by the fact that the president immediately appointed a manager of the corporation "with the consent of all the directors." While it is true that the meetings of the stockholders were somewhat informal, and that the minutes of these meetings were not as full and accurate as they should have been, we conclude from a consideration of all the evidence that the defendants, as well as the previous officers of the corporation, were as a matter of fact elected directors of the corporation. It is evident from the judgment of the chancellor that he took the same view of the question. We shall therefore consider the case from the standpoint that defendants, together with plaintiff Martin, were, as a matter of fact, directors of the corporation. Not only so, but they owned practically all of the stock of the corporation. It follows, therefore, that the action of the directors was not invalid on the ground of the informality of the manner of their selection.

[2] It must also be remembered that this is not a case where the directors, without authority in the charter or by-laws, or without the acquiescence of the stockholders, have voted themselves salaries for services merely as directors. It is a case where the directors are the ministerial officers of the corporation, and have voted themselves salaries for services as such officers. Ordinarily, of course, the directors, especially where they own a majority of the stock of the corporation, are invested with large powers in the matter of the selection of, and the salaries to be paid, officers of the corporation. With this broad discretion the courts will not ordinarily interfere.

[3] It is also the rule that, in the absence of statutory or other provisions regulating the constitutional powers of the managing body, the majority of the stockholders must determine how its affairs are to be conducted, and to whom and under what restrictions the management of those affairs shall be intrusted. *Lindl. Comp.* (5th Ed.) 298. The right of a majority of the stockholders either to originally direct or affirm a contract between the company and a director or directors personally interested in the contract is not, however, absolute and unqualified, but is subject to the qualification that the affirmation or adoption must not be brought about by unfair or improper means, and must not be illegal or fraudulent, or oppressive towards those stockholders who oppose it. *Northwestern Transportation Co. v. Beatty*, L. R. 12 App. 589 (Jud. Council, 1887).

[4] It is likewise well settled that the majority of the stockholders, although they may deal with the assets of the company, cannot so deal with them as to divide the assets,

more or less, between themselves, to the exclusion of the minority. *Meiner v. Hooper's Telegraph Works*, 9 Ch. App. 353. At the same time this rule does not require that the directors who are active officers of the corporation shall donate their services to the corporation. The facts of this case illustrate the wisdom of this rule. Here, for a number of years all the officers and employes of the corporation were both stockholders and directors. So long as this condition continued, the officers of the corporation who were intrusted with the management of its affairs might have been willing to give their services in consideration of the increased dividends which they were to receive. Plaintiff R. L. Martin, however, severed his connection with the company, and entered the employ of a rival company. We cannot say, under these circumstances, that the officers were therefore required to give their services to the corporation for the purpose of increasing the dividends of Martin, who was receiving pay for his services from a rival concern, or to increase the dividends of his coplaintiff, who was rendering no services for the corporation.

[5] In such a case, however, a court of equity, on application by the minority stockholders, will review the reasonableness of the salaries allowed the corporate officers by the directors, with the approval of the majority of the stockholders, and where it appears that the salaries allowed, considering the nature and extent of the services rendered, are exorbitant or unreasonable, will afford adequate relief, by enjoining the payment of such salaries and adjudging a recovery for the excess over what is a reasonable salary. *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *Cook on Corporations* (6th Ed.) § 657; *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075; *Von Arnim v. American Tube Works*, 183 Mass. 515, 74 N. E. 680. The question of the reasonableness of the compensation of such an officer depends on what the services of a competent officer are reasonably worth, and not on what he could make in a different business. *Lillard v. Oil, Paint & Drug Co.*, supra.

[6] In a case like this, where the compensation is fixed by the board of directors, who also are a majority of the stockholders, it does not devolve upon the director whose compensation is in question to prove that the compensation is fair; but the objecting stockholder must establish affirmatively that the salary or compensation is unreasonable and oppressive. *Lillard v. Oil, Paint & Drug Co.*, supra. In the case under consideration, no evidence was heard on the question of the unreasonableness of the salaries involved. In the absence of such evidence, we are not prepared to say that the salaries voted the defendants are unreasonable and oppressive.

[7] 2. While there is authority to the ef-

fect that directors may vote increased salaries to themselves as officers, where each one refrains from voting when the resolution affecting himself is voted on (*McNab v. McNab*, etc., Co., 62 Hun, 18, 16 N. Y. Supp. 448; *Id.*, 133 N. Y. 687, 31 N. E. 627), yet it is elementary that no person can vote on his own case. Nor can his vote be counted for the purpose of constituting a quorum. *Schaffhauser v. Arnholt & Schaefer, etc., Co.*, 218 Pa. 298, 67 Atl. 417, 11 Ann. Cas. 772; *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235.

In the case before us the salary of each officer was not fixed by a separate resolution. The three salaries were fixed by one resolution. Each of the defendants voted in favor of the resolution. In such a case the court will not separate the resolution into three distinct parts, and say that that part of the resolution providing a salary for each particular officer or director was carried by the votes of the other two, even if the other two constituted a majority of a quorum. In other words, there is no way of drawing the line of demarcation, and holding that no one of the directors voted in his own case, but that his salary was fixed by the votes of the other two. It is simply a case where each director voted in favor of a resolution fixing his own salary, and it is impossible to say that his act was invalid as to himself, but valid as to the other two. We therefore conclude that the action of the board in voting the salaries was invalid.

Judgment affirmed.

#### MARRET et al. v. JEFFERSON COUNTY CONST. CO. et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 450\*)—PUBLIC IMPROVEMENTS—METHOD OF ASSESSMENT—"PRINCIPAL STREET"—PARK BOULEVARD—"SQUARE."

Under Ky. St. § 2833, providing that, when the improvement is the original construction of a street, improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned according to the number of square feet owned by them respectively, and that each subdivision of the territory bounded on all sides by principal streets shall be deemed a "square," the test of a "principal street" is dedication to the use of the public, and does not depend on whether the abutting owners will ever be called on to pay the cost of improvement, and a park boulevard, though improved by the park commissioners and under their control by virtue of Ky. St. § 2848, having been dedicated to the public use, is a "principal street"; hence an assessment for the improvement of the adjacent parallel street cannot be extended back to the line of the boulevard, but must be limited to a line midway between.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*

For other definitions, see *Words and Phrases*, First and Second Series, Square.]

#### 2. MUNICIPAL CORPORATIONS (§ 269\*)—PUBLIC IMPROVEMENTS—STREETS—EXPENSE OF ABUTTING OWNER.

A street, without regard to its previous condition, may be originally improved once at the expense of the abutting property owner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 718-724, 733; Dec. Dig. § 269.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the Jefferson County Construction Company and another against A. H. Marret and another. From a judgment for plaintiffs, defendants appeal. Judgment reversed, and cause remanded, with directions to enter judgment.

Al. M. Marret and D. Moxley, both of Louisville, for appellants. William Furlong and Furlong, Woodbury & Furlong, all of Louisville, for appellees.

CLAY, C. This appeal presents for determination the proper method of apportioning the cost of improving that part of Sherwood avenue in the city of Louisville lying between a point 830 feet northeast of the Bardstown Road and Cherokee Park.

[1] Sherwood avenue runs northeast from the Bardstown Road. Alta avenue is a street lying east of Sherwood avenue and running parallel with it. The distance between these two streets is approximately 400 feet. They are both quite long, without any intersecting streets. Eastern Parkway is located on the west side of Sherwood avenue. It, too, begins at the Bardstown Road and runs northeast. At the Bardstown Road its distance from Sherwood avenue is 400 feet. From that point the distance from Sherwood avenue varies at different points, and gradually diminishes until at the Park line the distance between the two streets is about 103 feet. The first section of Sherwood avenue was improved several years ago. The abutting property on the east side was assessed to a point midway between Sherwood avenue and Alta avenue, and on the west side to a point midway between Sherwood avenue and Eastern Parkway. The second section, and the one involved in this action, was afterwards improved, and the same method of assessment adopted. The work was performed by the Jefferson County Construction Company. On completion of the work improvement warrants were assigned to the Kentucky & Indiana Construction Company.

Two of the property owners, Goepper and Eckenroth, refused to pay their assessments. Thereupon plaintiffs, Jefferson County Construction Company and the Kentucky & Indiana Construction Company, brought this action to enforce payment. Goepper and Eckenroth contended that the cost of the improvement should be extended as far back on the west side of Sherwood avenue as it did on the east side; at any rate, to the boundary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

line of Eastern Parkway. The chancellor sustained the contention of Goepper and Eck-enroth, and adjudged that, where possible, the property on the west side of Sherwood avenue should be assessed to the same depth as the property on the east side, and that in no event should the assessment extend beyond the eastern border, which should be regarded as an impassable barrier. Pursuant to the judgment of the chancellor, a special commissioner was appointed to reapportion the cost of the improvement. This method of apportioning the cost of the improvement materially increased the assessments due by W. H. Marret and Carrie Moxley, who prosecute this appeal from the judgment finally entered.

Appellants contend that Eastern Parkway is a principal street, within the meaning of section 2833, Kentucky Statutes, describing the method of apportioning the cost of street improvements in cities of the first class. On the other hand, it is insisted that Eastern Parkway is not a principal street, within the meaning of that statute. It appears from the evidence that a portion of Eastern Parkway was formerly Melrose avenue. Appellant Marret conveyed to the board of park commissioners a strip of ground 40 feet wide "for the purpose of establishing and maintaining Eastern Parkway." The other land covered by the parkway was acquired by dedication or purchase from the abutting property owners. The care, management, and custody of all parkways are vested in the board of park commissioners, with the power to adopt rules and regulations for the reasonable and proper use thereof. Section 2848, Kentucky Statutes. The title to all such property is vested in said board, and such property must be held in strict and inviolable trust for public park purposes, free from all taxes, imposts, and assessments, state, county, district, municipal, or otherwise. Section 2833, Kentucky Statutes, provides in part as follows:

"When the improvement is the original construction of any street, road, lane, alley or avenue, improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works, according to the number of square feet owned by them, respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the streets or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth, not exceeding five hundred feet, on both sides of said improvement to be assessed for the cost of making the same, including the cost of the improvement of the intersections, if any, of said public way, according to the number of square feet owned by the parties respectively within the depth as set out in the ordinance."

The chancellor, basing his conclusion on the theory that the statute contemplates that the whole landed property within the city shall be subject to assessment for street im-

provements, and that the very essence of the statute is equality of burden, decided that the test to be applied in determining whether or not a street is a principal street within the meaning of the statute is not that of public use or dedication, but whether or not it has been or may be originally constructed at the cost of the abutting lot owner. Following out this reasoning, he concluded that as the title to the parkway was vested in the board of park commissioners, and that board at its own expense had constructed the boulevard, and the property owners would in all probability never be called upon to bear any of the cost of the construction of this street, Eastern Parkway was not, therefore, a principal street within the meaning of the statute.

[2] In answer to this position it is sufficient to say, in the first place, that the statute makes no such distinction. It refers only to principal streets, without regard to whether they have been or may be constructed at the cost of the property owner. In the next place, even if the view of the chancellor be correct in regard to the test to be applied, the case presented is not such as to make it certain that the property owners adjoining Eastern Parkway will never be called on to bear their proportionate part of its original improvement. It is well settled in a number of cases that a street, without regard to its previous condition, may be originally improved once at the expense of the abutting property owner.

The board of park commissioners is a creature of the statute, and subject to legislative change. The Legislature has the power to permit the control of park boulevards by municipalities as it sees fit, or it may authorize a city, for and on behalf of the board of park commissioners, to order the improvement of park boulevards at the cost of the abutting property owner. Should this be done, then defendants would be called upon to bear their proportion of the burden of the improvement of Eastern Parkway, although they have been relieved of liability for the cost of the improvement of Sherwood avenue on the theory that they would never be called on to bear any part of the cost of improving Eastern Parkway. Thus it will be seen that the test applied by the chancellor is not strictly applicable to the facts of this case. Indeed, the application of such a test would leave the matter of street assessments in great uncertainty and confusion. People purchasing lots have the right to look at the adjoining streets and determine whether or not the property purchased will ever be called on to bear any part of the cost of constructing these streets. When they see a street that has been dedicated to public use, they have a right to conclude that it is a principal street within the meaning of the statute, and should not be required to speculate as to whether or not it is a street of such peculiar character that it

could never be originally constructed at the cost of the abutting property owner.

We therefore conclude that a principal street, within the meaning of the statute, is a principal thoroughfare that has been dedicated to the use of the public. This rule will enable the general council to know with reasonable certainty what assessment burdens abutting property owners will have to bear, and to regulate street improvements accordingly. It will also give to the abutting property owner and those who expect to become abutting property owners a reasonable basis for measuring the burden which the abutting property will have to bear. The evidence in this case conclusively shows that Eastern Parkway is a principal thoroughfare, dedicated to the use of the public. It follows that the method adopted by the chancellor for apportioning the cost of the improvement is erroneous, and that the method adopted by the general council should stand.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity to this opinion.

#### ADAMS v. HAMBRICK.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

##### 1. LANDLORD AND TENANT (§ 128\*)—FAILURE TO GIVE POSSESSION.

That there is a little plunder in some of the rooms of a house rented to lessee which could be removed in a few minutes is not a failure to give possession where the lessee arrived without notice, and gave landlord no time to remove before repudiating the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 448, 449; Dec. Dig. § 128.\*]

##### 2. LANDLORD AND TENANT (§ 128\*)—FAILURE TO GIVE POSSESSION—OCCUPANCY OF ANOTHER.

That a landlord rents the whole house at a time when he has rented a portion of the house to a construction foreman who was in possession of such portion with right of occupancy until the construction work was completed, fails to give the lessee possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 448, 449; Dec. Dig. § 128.\*]

##### 3. LANDLORD AND TENANT (§ 129\*)—BREACH OF RENTAL CONTRACT—INSTRUCTIONS.

In an action for damages for breach of a rental contract, an instruction to find the reasonable rental value of the contract if plaintiff recovered is erroneous as fixing no standard by which to fix the amount of damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.\*]

Appeal from Circuit Court, Grant County. Action by R. S. Hambrick against Robert Adams. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded for new trial.

C. C. Adams, of Williamstown, and B. F. Menefee, of Crittenden, for appellant. J. J. Blackburn, of Williamstown, for appellee.

CLAY, C. Plaintiff, R. S. Hambrick, brought this action against defendant, Robert Adams, to recover damages for the breach of a rental contract. Defendant answered that plaintiff had breached the contract, and counterclaimed for damages amounting to \$35. The jury returned a verdict in favor of plaintiff for \$175. Defendant appeals.

Defendant owns a small tract of land near Crittenden, Grant county, Ky. On this land there are located a large house, two barns, and several other buildings. The house is two stories high in front and one story high in the rear. In the front part of the house are eight rooms, four upstairs and four down. The rooms on each side of the house are divided by hallways above and below. A portion of this house, consisting of the rooms on the north side of the house, a stock barn, and certain feed lots adjoining the pond and surrounding the barns, had been leased to A. G. Lawrence, the foreman of a construction crew, with the privilege of placing tents for his crew in the yard, and the lot next to the pond. His lease was to continue until he had finished his work of grading the railroad track nearby. Lawrence took possession of the portion of the premises leased to him, stretched tents, stored feed supplies, appliances, and equipment, and converted one of the six rooms into an office and another one into a commissary. The other four rooms were used for cooking and eating and sleeping. The only colored person who occupied the apartments was a cook, who had a room in the rear. While Lawrence was thus in possession, plaintiff, on the 18th day of February, went out to defendant's home for the purpose of renting the place. Defendant took plaintiff to the house and showed him the situation. Plaintiff returned to his home some distance away, and after consulting his wife returned to defendant's home and entered into a lease with him. Under the terms of this lease plaintiff was to have certain fields to be planted in tobacco, and another field to be planted in corn. Defendant was to have half of the tobacco and half of the corn. The other half was to be plaintiff's. The lease further provided that plaintiff was to have pasture for one cow and two horses, and the use of the house, free of rent, during the continuance of the lease. After the lease was executed, plaintiff returned to his home. On the evening of March 11th, plaintiff returned with his family and household goods. He had not advised the defendant of the time when he would arrive. There was some plunder in the rooms on the south side, but the evidence shows that this could have been removed in a very few minutes. Plaintiff went to defendant and made complaint of the fact that the house was occupied. He claims that defendant told him that he would see Lawrence in a day or two and get him to vacate some of these rooms.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Plaintiff stored his household goods in the town near by, and never returned to the house or thereafter asked possession.

Defendant pleaded that the real contract between him and plaintiff was that plaintiff was to have the south portion of the premises until Lawrence moved away. Thereafter he was to have the whole house, but by mutual mistake of the parties the contract as written called for the whole house instead of the four rooms and other portions of the premises until the premises were vacated by Lawrence, as agreed on by him and plaintiff. The weight of the evidence tends to show that such was the agreement of the parties. Defendant's evidence further shows that he told plaintiff to return to the house and tell Lawrence to move his things out, but plaintiff failed to do this.

[1-3] It is apparent that the case turns on whether or not the whole house was rented to plaintiff, or only a portion thereof. If, as a matter of fact, only a portion of the house was rented, the mere fact that a little plunder was in one of the rooms which might have been removed in a few minutes when plaintiff arrived, without any notice of his coming, would not amount to a refusal to put plaintiff in possession, in view of the fact that defendant was given no opportunity whatever to have the plunder removed. If, on the other hand, the whole house was rented to plaintiff, the possession of a portion thereof by the construction crew, who it is not contended had any purpose of leaving until their work was completed, would amount to a refusal to put plaintiff in possession. One of the instructions given by the trial court authorized a finding in favor of plaintiff if he rented only a portion of the house and defendant refused to put him in possession. This instruction was erroneous; for, as said before, the circumstances did not amount to a refusal, if, as a matter of fact, only a portion of the house was rented. The jury were also told that if they found for plaintiff, to find the reasonable rental value of the contract to him. This instruction gives to the jury no standard by which to fix the amount of damages, and is therefore erroneous.

On another trial the court will instruct the jury as follows: (1) You will find for the plaintiff, and fix his damages as provided by instruction No. 2, unless you believe as in instruction No. 8.

(2) If you find for plaintiff, you will award him such damages as you believe from the evidence will fairly represent the value of the use of the house and pasturage of one cow and two horses, and his half of the market value of the crops, which he, by ordinarily good husbandry, could have raised on the leased land, less the cost of raising the whole crops, including his services as part of the cost. (3) If you believe from the evidence that the true agreement between plaintiff and defendant was that plaintiff was to have only the south portion of the house until the construction crew vacated

the premises, and that by mutual mistake of the parties this part of the contract was omitted from the written contract, you will find for the defendant.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

## KEINER v. COLLINS.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

### 1. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for damages for malicious prosecution, where the evidence failed to show any physical suffering on the part of plaintiff by reason of the prosecution, and her arrest, an instruction submitting the issue of such damages to the jury is improper, not being applicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

### 2. MALICIOUS PROSECUTION (§ 72\*)—ACTIONS—INSTRUCTIONS—PROBABLE CAUSE.

An instruction in an action for malicious prosecution which generally defined probable cause, but did not tell the jury what facts constituted probable cause in the particular case, is erroneous; the question what facts constituted probable cause being for the court.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168-173; Dec. Dig. § 72.\*]

### 3. NEW TRIAL (§ 39\*)—RIGHT TO—ERRONEOUS INSTRUCTIONS.

Where the instructions in an action for malicious prosecution submitted elements of damage not raised by the pleadings, and improperly defined elements of the offense, a new trial should be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 57-61; Dec. Dig. § 39.\*]

### 4. MALICIOUS PROSECUTION (§ 27\*)—ACTIONS—"MALICE."

In an action for malicious prosecution, "malice" is not merely the intentional doing of a wrongful act without legal justification, but is the mental intent or unlawful purpose, which is an essential to the action.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 60; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, First and Second Series, Malice.]

### 5. TRIAL (§ 251\*)—INSTRUCTIONS—STATEMENT AS TO ISSUES.

In an action for malicious prosecution, it is proper to charge that plaintiff cannot recover for false imprisonment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

### 6. MALICIOUS PROSECUTION (§ 72\*)—ACTIONS—EVIDENCE—INSTRUCTIONS.

In an action for malicious prosecution, an instruction charging that, if defendant received information that a person of plaintiff's description had stolen a watch in another place, that if the information was such as a reasonably prudent person would act upon, and, if defendant from such information had reasonable cause to believe, and did believe, plaintiff to be the thief, he had probable cause for procuring her arrest and instituting a prosecution for the theft, correctly submits the issue of probable cause to the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168-173; Dec. Dig. § 72.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

**7. APPEAL AND ERROR (§ 1033\*)—REVIEW—HARMLESS ERROR.**

A party cannot complain on an appeal of an instruction which was more favorable to him than the law allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4062-4062; Dec. Dig. § 1033.\*]

**8. APPEAL AND ERROR (§ 1057\*)—REVIEW—HARMLESS ERROR.**

The exclusion of evidence of a fact abundantly established by other evidence is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

**9. MALICIOUS PROSECUTION (§ 59\*)—ACTIONS—EVIDENCE.**

In an action for malicious prosecution against a peace officer who arrested plaintiff on the theory that she was a thief wanted at another place, testimony that the description of the thief contained in the circular letters sent out to peace officers over the state fitted plaintiff is admissible.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.\*]

Appeal from Circuit Court, McCracken County.

Action by Mrs. Laura F. Keiner against James Collins. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Oliver & Oliver and Samuel H. Crossland, all of Paducah, for appellant. Berry & Grassham, of Paducah, for appellee.

**SETTLE, J.** This action for malicious prosecution was brought by appellant against appellee in the court below; the amount of damages claimed being \$5,475. It was alleged in the petition that appellee, who is the chief of police of the city of Paducah, arrested appellant under a warrant issued at his instigation by the judge of the police court of the city of Henderson, charging her with the crime of grand larceny; that after appellant's arrest she was taken by appellee to the city of Henderson, where she was guarded at her own expense until indicted, through his procurement, by the grand jury of Henderson county, for the crime charged; and that upon the return of the indictment she was committed to jail, where she remained in confinement for a week, and until able to give bond. It is further averred in the petition that at the succeeding term of the Henderson circuit court she was tried under the indictment for the crime therein charged, but that the case was not submitted to the jury on the evidence, because the commonwealth's attorney, before the conclusion of her evidence, announced to the court that the evidence relied on by the commonwealth did not warrant her conviction, and upon his motion the court peremptorily instructed the jury to acquit her, which was done, and, by the judgment entered, appellant discharged from custody; that appellant was innocent of the crime charged against her;

and that her arrest, indictment, and prosecution therefor were made, instigated, and procured by appellee maliciously and without probable cause.

The answer of appellee admitted the arrest of appellant by appellee and her delivery by him to the police judge of Henderson, but denied that her indictment or prosecution were instigated by him, or that, in effecting her arrest and delivering her to the police judge at Henderson, he acted maliciously or without probable cause. In the second paragraph of the answer the facts leading to the arrest, indictment, and trial of appellant were particularly set forth; and it was alleged that, in effecting her arrest and delivering her to the police judge at Henderson, appellee acted as a peace officer, upon probable cause, without malice and under a warrant, duly issued by the police judge of Henderson, charging her with the crime of grand larceny.

There were three trials of the case. On the first trial, appellant recovered a verdict for \$1,475 damages; on the second, a verdict for \$1,500 damages; but following the return of each of these verdicts the circuit court granted appellee a new trial. On the third trial, the jury returned a verdict for appellee, upon which judgment was duly entered. Following the last verdict and judgment appellant entered motion to set them aside, and substitute in lieu thereof, first, the verdict and judgment of \$1,475 recovered by her on the first trial, and, second, the verdict and judgment of \$1,500 recovered by her on the second trial, and at the same time filed motion and grounds to set aside the last verdict and judgment and for a new trial, all of which motions were overruled by the court. From these several rulings and the judgment entered upon the last verdict she prosecutes this appeal, which brings to us for review the following questions: (1) Did the court err in granting appellee a new trial following appellant's recovery of the first verdict and judgment? (2) Did the court err in granting appellee a new trial following appellant's recovery of the second verdict and judgment? (3) If there was no error in either of the above particulars, did the court err in refusing to grant appellant a new trial following the return of the verdict in behalf of appellee on the third and last trial?

In passing upon these questions a brief consideration of the facts appearing from the bill of evidence will prove helpful. In October, 1909, appellant, who then resided in Paducah, was practicing "palmistry," under a license from that city, and was known as Madam B. Castellano. A palmist is one who professes to be able to delineate the character and disposition of the individual, relates events of his past life, and foretells what his future life will be by examination

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the marks or lines in the palm of the hand. Appellee was at that time chief of police of the city of Paducah. On the 9th day of October, 1909, a gold watch was stolen in the city of Henderson from a colored woman named Daisy Moss, and by a woman professing to be a "fortune teller." Immediately thereafter circular letters were sent out by the marshal of the city of Henderson to peace officers in other towns in western Kentucky, giving an account of the theft, and stating that it was committed by a woman claiming to be a fortune teller. The circulars also gave a description of the person of the supposed thief and of the hat and clothes she was wearing when the theft was committed. One of these circular letters was received by the appellee, who, upon reading it, sent a postal card to the marshal of Henderson containing the following words:

"Satisfied that your party is here. Has license until January 1st in the name of Madam Castellano. Send warrant. James Collins, Chief Police."

On October 14, 1909, after receiving from appellee the postal card referred to, the marshal of Henderson procured from the judge of the Henderson police court a warrant for the arrest of appellant, charging her with the crime of grand larceny; namely, the theft of the watch from Daisy Moss. On October 15th S. H. Helldbroner, a peace officer of Henderson, went to Paducah, having in his possession the warrant which had been issued for the arrest of appellant, and on the night of that day Helldbroner, with appellee's assistance, arrested appellant and took her to the Paducah police station, where she was released for the remainder of the night and until October 18th or 19th, when appellee went with the warrant to her home in Paducah and arrested her, advising her that he was going to take her to Henderson for an examining trial. She was then taken to Henderson by appellee and surrendered into the custody of the peace officer, Helldbroner. On October 20th, and before appellee left Henderson, the grand jury of Henderson county returned an indictment against appellant, as Madam B. Castellano, charging her with the crime of grand larceny. She was guarded by Helldbroner until indicted by the grand jury, when she was placed in custody of the jailer of Henderson county. Appellant was held in jail for a week until bail was deposited for her. At the January term, 1910, of the Henderson circuit court she was tried under the indictment, and, before concluding her evidence, the commonwealth's attorney admitted his inability to make out a case, and on his motion the court gave a peremptory instruction directing them to find for the defendant. The verdict was accordingly returned, and judgment entered thereon, which resulted in appellant's discharge.

We think it manifest from the evidence introduced in appellant's behalf on the trial of this action that she was innocent of the

crime for which she was arrested and indicted, and, in fact, that she was in the city of Paducah during the whole of the day upon which the watch was said to have been stolen. Much of the evidence introduced in her behalf conduced to prove that appellee, with even slight investigation, ought to have learned before arresting her that she was innocent of the crime in question, and that in effecting her arrest appellee acted hastily and without probable cause, if not with actual malice. On the other hand, the evidence introduced in behalf of appellee conduced to prove that he was not hasty in arriving at the conclusion that she was guilty of the crime, and that, in order to satisfy himself of her guilt, he postponed her arrest from about the 10th until the 15th of October, and during this interval made such investigation as seemed practicable in endeavoring to ascertain whether she committed the crime. His evidence also tended to prove that the description of the fortune teller, and supposed thief, given in the circular letter sent out from Henderson, fairly fitted the appellant. In other words, the evidence introduced in appellee's behalf, as a whole, strongly conduced to prove that, in arresting appellant and delivering her to the police judge of the city of Henderson, he acted from probable cause and without malice. Without further discussing the evidence, we may say that the circuit court would not have been authorized to set aside a verdict for either of the parties upon the ground that it was not supported by evidence or was flagrantly against the evidence.

[1] We have not been favored with a brief by appellee's counsel, but that filed by counsel for appellant fails to indicate the ground or grounds upon which the circuit court acted in granting appellee a new trial following the return of the first and second verdicts in behalf of appellant. We are certain, however, that in neither instance could it have been granted upon the ground of an absence of evidence to support the verdict. Without discussing the several grounds filed in support of appellee's motion for a new trial following the return of the first verdict, we find that one of them presented the complaint that that court had erred in instructing the jury, and our examination of the instructions given on the first trial convinces us that instructions Nos. 3 and 4 did not properly state the law.

No. 3, which was as to the measure of damages, improperly authorized the jury, in the event they found for appellant, to allow her, in addition to damages for mental suffering or humiliation, such damages as would compensate her for any physical suffering that she may have endured by reason of her arrest and prosecution. Damages for physical suffering were not recoverable, because the evidence failed to show any physical suffering on the part of appellant. We do not

mean to say that, in a case for malicious prosecution, damages for physical suffering may not be recovered upon a proper state of facts, for we can imagine that an arrest and the duress resulting therefrom might be accompanied by such force or circumstances as to cause physical suffering, but no such force or circumstances were shown by the evidence in this case.

[2] We also find that instruction No. 4 incorrectly stated the law of probable cause as applicable to the facts of this case. That instruction is as follows:

"'Probable cause' is such reasonable grounds as ordinarily prudent persons are accustomed to act upon when engaged in a like business or the doing of a like thing, under like or similar circumstances of this case."

The defect in this instruction is that it did not tell the jury what facts constituted probable cause in this case. In *Ahrens & Ott Mfg. Co. v. Hoeher*, 106 Ky. 692, 51 S. W. 194, 21 Ky. Law Rep. 299, a similar instruction was condemned. In the opinion it is said:

"The court properly defined 'probable cause,' but he did not tell the jury what facts constituted probable cause in this case. What facts constitute probable cause is a question of law for the court. *Lancaster v. Langston*, 18 Ky. Law Rep. 299 [36 S. W. 521]; *Meyer v. L. St. L. & T. Ry. Co.* [98 Ky. 865, 33 S. W. 98] 17 Ky. Law Rep. 945. The court should tell the jury what facts constitute probable cause, and let them determine, in a case like this, whether these facts are proved."

In the recent case of *Schwartz v. Boswell*, 156 Ky. 103, 160 S. W. 748, we again condemned an instruction which defined probable cause in the following terms:

"Reasonable and probable cause means such cause as would induce a reasonably cautious and prudent person to have another arrested under the same or similar circumstances as are shown by the evidence in this case, with the expectation of causing a conviction of the party arrested on the charge preferred."

In holding this instruction defective, we expressly approved the statement of the law as found in the excerpt from the opinion in *Ahrens & Ott Mfg. Co. v. Hoeher*, supra, quoted above.

[3] In view of the incorrect statement made of the law in each of the two instructions referred to, we find sufficient cause for the circuit court granting appellee a new trial following the return of the first verdict in favor of appellant.

[4] The reason for the court granting appellee a new trial following the return of the second verdict in behalf of appellant is also readily discoverable. The cause is found in an instruction marked "Y," asked by appellant, which erroneously defined the word "maliciously," as used in other instructions given in the case. The instruction is in the following language:

"The word 'maliciously,' as used in these instructions, means intentionally doing a wrongful act towards another without legal excuse or justification."

This instruction is even more defective than the one defining malice, condemned in *Schwartz v. Boswell*, supra. In that case the instruction was in the following language:

"'Malice' means the intentional doing of a wrongful act without just cause or excuse."

Of this instruction it is in the opinion said:

"An instruction in practically these identical words was held erroneous by this court in the case of *Ahrens & Ott v. Hoeher*, 106 Ky. 692 [51 S. W. 194, 21 Ky. Law Rep. 299], cited and approved in *Metropolitan, etc., v. Miller*, 114 Ky. 754 [71 S. W. 921, 24 Ky. Law Rep. 1561]. In defining malice, the jury should be instructed that it is the intentional doing of a wrongful act to the injury of another, with an evil or unlawful motive or purpose. The instructions given authorized the jury to find for plaintiff if they believe: (1) That the suing out of the warrant was intentional; (2) that it was wrongful; and (3) that it was done without just cause or excuse. If the party arrested is innocent, the prosecution is always wrongful, and without just cause or excuse, and the procuring of the warrant intentional. Therefore, under the instruction given, all that would be necessary to authorize a recovery would be for plaintiff to establish his innocence of the charge. It precludes the consideration of purpose or motive on the part of the prosecutor; and there must be an evil or unlawful purpose before a recovery is authorized."

The instruction defining "malice," in *Ahrens & Ott Mfg. Co. v. Hoeher*, supra, referred to above, was in the following language.

"The court instructs the jury that by the terms 'maliciously' and 'malice,' as used in these instructions, is meant the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor." In *Bishop on Noncontract Law*, § 231, the learned author says that the meaning of the word 'malice' depends largely upon the subject to which it is applied, and that, in a general way, its meaning is as above defined. He then adds: "In the law of malicious prosecution it requires the mental condition or purpose, which judicial decision has made an indispensable element in the wrong. It is not a mere fiction of law, but it must be malice in fact. Taking these views for our guide, the malice in malicious prosecutions is not necessarily, while it may be, ill will to the individual; but it is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law."

It follows from what we have said as to the error in the instruction defining "malice," given by the circuit court on the second trial of this case, and its prejudicial effect, that the granting to appellee of the new trial following the return of the second verdict in favor of appellant was not error.

[5] The only question remaining for decision is as to the propriety of the action of the circuit court in overruling appellant's motion for a new trial following the return, on the third and last trial, of the verdict in behalf of appellee. While numerous grounds were filed by appellant in support of her motion for a new trial, it is strongly insisted that it should have been granted because of error in the instructions given by the court. A careful reading of the instructions convinces us that, with only one exception, they

admirably state the law, and the whole law, applicable to the case. The most of them are in the language contained in the instructions given on the previous trials, at appellant's instance. Instructions 4 and 5 were not given on the first trial, but are free of error. Instruction No. 4 is as follows:

"The court further instructs you that plaintiff does not sue in this case for false imprisonment or for an unlawful arrest, but for maliciously, and without probable cause, causing said warrant to be issued and said indictment to be returned against her, and the court now instructs you that, although you may believe from the evidence in this case that defendant, Collins, did arrest the plaintiff and carry her to Henderson, Ky., or, that she was arrested at his instance, and turned loose, yet you cannot find damages for her against defendant on account of said arrest or on account of said imprisonment, or for any expense incurred by her in going to Henderson or in defending herself against said prosecution, unless you shall further believe from the evidence that said defendant, Collins, maliciously, and without probable cause, procured, or aided or assisted in procuring, the issuance of said warrant or the return of said indictment against plaintiff as defined to you in instruction No. 1, herein."

Appellant's objection to this instruction is that it was improper for the court, as therein stated, to advise the jury that plaintiff could not recover for false imprisonment or for an unlawful arrest. This statement in the instruction was proper, because, in point of fact, appellant did not sue for false imprisonment or for unlawful arrest, but for the appellee maliciously and without probable cause procuring the warrant to be issued and the indictment to be returned against her. In other words, the action is not for a false arrest, but for a malicious prosecution; and, this being true, it was proper for the instruction to confine the recovery to the cause of action set out in the petition.

[6] Instruction No. 5, to which appellant also objects, is as follows:

"The court further instructs you that, if you shall believe from the evidence in this case that defendant, Collins, at the time complained of by plaintiff, had received information to the effect that a person of plaintiff's description had stolen a watch in the city of Henderson, and that said information was such as a reasonably prudent person would act upon, and that defendant, from such information, had reasonable grounds to believe, and in good faith did believe, that she was the person wanted in Henderson upon said charge, then defendant had probable cause for procuring the issuance of said warrant or the procuring of the return of said indictment or in aiding or assisting in so doing, if you believe from the evidence that he did so, or did aid or assist in doing either of these things, and the law in this case is for the defendant, and you will so find."

By this instruction the court for the first time in this case properly defined "probable cause," by calling to the attention of the jury a state of facts which, if proven by the evidence, would show probable cause for the arrest and prosecution of appellant. The instruction seems to conform to the method of defining "probable cause" approved in the

cases of *Ahrens & Ott v. Hoeher*, and *Schwartz v. Boswell*, supra.

[7] The instruction on the measure of damages also properly excluded from the recovery compensation for physical suffering, which had been improperly allowed by the instruction on the measure of damages given on the first trial. The only erroneous instruction we find among those given is No. 7, which attempts to define the word "maliciously," as used elsewhere in the instructions, but this instruction, while prejudicial to appellee, was more favorable to appellant than the law allowed.

[8] It is further insisted for appellant that the court erred in the matter of admitting incompetent evidence in behalf of appellee and excluding competent evidence offered in her behalf. Our examination of the evidence convinces us that the court committed no prejudicial error, either in admitting or excluding evidence. We think it would have been proper to have admitted the evidence of Mrs. Mary Knowles, appellant's witness, who would, if permitted, have testified as to certain facts that enabled her to know that appellant was at her home in Paducah on the day of the stealing of the watch in Henderson, but, as appellant's presence at her home and in Paducah during that day was abundantly established by other evidence found in the record, the exclusion of Mrs. Knowles' testimony could not have been prejudicial.

[9] We do not regard incompetent the testimony of certain witnesses to the effect that the description contained in the circular letter sent out from Henderson fitted appellant. Such evidence was admissible, as the letter furnished, in part, the information upon which appellee acted in arresting appellant, and conduced to establish his defense of probable cause.

As stated in a previous part of the opinion, there was sufficient evidence to support the verdict, and, the case having been submitted to the jury under substantially correct instructions, no reason is apparent for disturbing the verdict; wherefore the judgment is affirmed.

CHICAGO VENEER CO. v. ARNOLD et al.†

BRYANT v. ARNOLD et al.

GREENO v. SAME.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

1. LOGS AND LOGGING (§ 4\*)—LICENSE TO CUT TIMBER—CONSTRUCTION—PLACE.

A writing, authorizing defendant "to cut all timber on the Bryant land at the point known as the Spring Branch near Nobusiness creek and between Nobusiness creek and Rock creek," Spring Branch being a well-established point on the land, authorized the licensee to cut only the timber at that point, and not to cut all the timber on the land between the two creeks.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 13, 117, 119; Dec. Dig. § 4.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 20, 1915

## 2. PRINCIPAL AND AGENT (§ 169\*)—AGENT'S ACTS—RATIFICATION—LICENSE TO CUT TIMBER.

A writing, authorizing defendant to cut timber at a point on plaintiff's land within surveys claimed by third parties, made by an agent in order to force such third parties to bring suit which plaintiff would defend, so far as executed by the cutting of timber there, the bringing of the suit, and its successful defense by plaintiff herein, was binding on plaintiff, since to that extent she had ratified it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 636, 637; Dec. Dig. § 169.\*]

## 3. LOGS AND LOGGING (§ 4\*)—LICENSE—CONSTRUCTION.

Under such writing, the licensee assumed no obligation to cut any timber, since the writing did not purport to be a sale or to fix any time within which the timber should be cut, but on its face was only a present authority to cut at that place, and, after the suit was determined and he had stopped cutting, there was no obligation thereunder either on his part or on the part of the plaintiff, since the obligation of a contract must be mutual, and hence defendant had no right to any other timber and would be enjoined from cutting it.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 13, 117, 119; Dec. Dig. § 4.\*]

### Appeals from Circuit Court, Laurel County.

Separate actions for injunction by the Chicago Veneer Company against James H. Arnold and others, by Roberta S. Bryant against James H. Arnold and another, and by C. C. Greeno against James H. Arnold and another. Judgment for defendants, in each case, and plaintiffs in each case appeal. Reversed and remanded.

O. H. Waddle & Son, of Somerset, and Stephens & Steely, of Williamsburg, for appellants. Hazlewood & Johnson, of London, for appellees.

HOBSON, C. J. These three appeals, involving the same question, will be disposed of in one opinion. Mrs. Roberta S. Bryant is the owner of a large tract of land in Laurel county. In February, 1909, she sold to the Chicago Veneer Company, for \$6.50 per thousand feet, certain poplar and cucumber timber on the tract, and on July 29, 1909, she sold to C. C. Greeno certain white oak timber at \$1.50 a tree. In February, 1912, R. D. Arnold and James H. Arnold entered upon the land and began cutting timber thereon. Thereupon these three suits followed, brought by Roberta S. Bryant, the Chicago Veneer Company, and C. C. Greeno, to enjoin them from cutting the timber on the ground that they were cutting it without right. In defense of the suits which were heard together, the Arnolds set up a right to the timber under a contract in writing made with W. J. Hamilton as agent, which is as follows:

"This will authorize Boyd Arnold to cut all the timber on the Bryant land at a point known as Spring Branch near Nobusiness creek and between Nobusiness creek and Rock creek. He is to pay to L. E. Bryant one dollar per M for

log timber and two and one-half cents per tie for tie timber. Five dollars per M staves for 44-inch staves. Three dollars per M staves for beer staves, and ten dollars for each M staves for pipe staves. To be paid when said timber is inspected and logs delivered.

"This August 6, 1903.

"L. E. Bryant, by W. J. Hamilton, Agt."

The plaintiffs in substance pleaded that Hamilton was without authority to sell the timber and in fact did not sell it; the defendant replied pleading a ratification of the contract made by Mrs. Bryant. Proof was taken, and on final hearing the circuit court entered judgment in favor of the Arnolds. The plaintiffs appeal.

R. B., or Boyd, Arnold, as he is called in the contract, is a son of J. H. Arnold, who is a country merchant, and claims under the contract made with his son. Mrs. Roberta S. Bryant is a widow, 68 years of age, living in Danville. Her husband from whom she received this land, having died in the year 1888, her son Louis E. Bryant has looked after the land for her, but had no authority to sell the timber on the land without her approval of the contract in writing; she making it a rule to make no trades without the approval of her counsel. Louis E. Bryant has spent many years of his life in surveying the land, locating the lines, and keeping off trespassers. W. J. Hamilton was one of his tenants on the land, and Louis E. Bryant made Hamilton an agent by a writing. The writing is not produced, but the testimony is that Hamilton had no authority to sell without the approval of Roberta S. Bryant. Hamilton had no communication with Mrs. Bryant or authority from her directly. In the year 1903 Ford and Williams set up claim to two surveys, one for 64 acres and the other for 135 acres patented by one Pointer about the year 1890, and lying within the patent under which Mrs. Bryant claimed which was made in the year 1842. Louis E. Bryant wished to get the title to the land settled, and so he instructed Hamilton to make an arrangement with Arnold, by which Arnold would cut some timber within the Ford and Williams claim, to force them to bring a suit; Bryant to defend the suit, pay all the expenses, pay Arnold for his time, and give him some of the cross-tie timber for bringing on the suit. Under this authority Hamilton saw Arnold and delivered to him the writing above set out. Arnold commenced cutting the timber at the point referred to in the writing. Ford & Williams brought suit against him. Mrs. Bryant defended the suit in her own name, alleging that Arnold had cut the timber referred to by her authority; that she was the owner of the land and had authorized Arnold to cut it and he had not cut it without right. On the final hearing of that case, Mrs. Bryant won. Arnold did no cutting after the suit was brought, an injunction having been obtained

restraining him from further cutting. The suit was decided finally early in the year 1909, and, after the decision of it in her favor, Mrs. Bryant sold the timber on the land to the Chicago Veneer Company and C. C. Greeno as above stated. Nothing was done by Arnold until about the 5th of February, 1912, when he went upon the land and began cutting timber. Up to this time neither Mrs. Bryant nor her son had any knowledge of the writing given by Hamilton to Arnold or notice of any kind that Arnold claimed to have bought the timber from Hamilton.

[1] It will be observed that by the writing Boyd Arnold is authorized "to cut all timber on the Bryant land at the point known as the Spring Branch near Nobusiness creek and between Nobusiness creek and Rock creek." This point is well established; the Spring Branch, which is the only one on the Bryant tract, is known as the Pointer Spring Branch, and the purpose of authorizing him to cut at this point was to have the cutting done within the Pointer surveys under which Ford & Williams claimed. Arnold insists that he was authorized to cut all the timber on the Bryant land, not only at the point known as the Spring Branch near Nobusiness creek, but also all the timber on the Bryant land between Nobusiness and Rock creek. But this is not the natural meaning of the writing. He was authorized to cut all the timber at the point known as the Spring Branch. The other words are added to describe and fix the point meant; for, if all the timber between Nobusiness creek and Rock creek on the Bryant land was intended to be included, so much of the contract as designates a specific point in that area was meaningless.

[2, 3] By the writing Arnold assumed no obligation; he was not obliged to cut any timber; and, if he had failed to cut any timber, no action could have been brought against him for the enforcement of the contract. So far as he accepted the contract and executed it, it is binding on Mrs. Bryant, for to this extent at least she ratified it, but as to the timber that he did not cut, and as to which he has not accepted the contract, he has under the proof incurred no obligation, and, as the obligation of a contract must be mutual, she has incurred none. When the language of the writing is read in the light of the circumstances of the parties and the purpose they had in view, we think it is clear that the peculiar phraseology used was intentional and should be construed in the natural meaning of the words. The contract does not purport to be a sale of any timber. It does not describe or define the land from which the timber is to be cut. It does not impose any obligation upon Arnold. It simply authorizes him to cut the timber at a given point on certain terms. It fixes no time for the cutting of the timber.

It is on its face only a present authority to cut, and it clearly appears from the evidence that the purpose of the parties in making the contract was to have some of the timber cut then at this point to force Ford & Williams to bring suit. The paper, construed literally, accords perfectly with the purpose of the parties in executing it, and it should not be given a broader construction, defeating the purpose of the parties in its execution. It is true that people sometimes draw written contracts very informally, using words that do not aptly express their meaning; and many cases may be found where such informal contracts have been enforced according to the real intention of the parties; but such is not this case. Here the authority of the agent was limited, the language of the contract is within his limited authority, and that he was pursuing his authority is shown by the fact that by the writing he only authorized Arnold to cut the timber at a point known as the Spring Branch. The consideration which Arnold received in the arrangement was the low price he was to pay for the timber he cut, about one-fifth the price for which it was afterwards sold to the Chicago Veneer Company and Greeno. Arnold at the time so construed the contract, for he did the cutting at the point named. His subsequent conduct also indicates that he at the time put this construction upon the contract and that his present claim is an afterthought; for he took no steps to cut the timber until in February, 1912, or about three years after it had been sold to the Chicago Veneer Company. In the meantime he had not recorded his contract made with Hamilton, and in fact did not put it on record until March 29, 1913.

We therefore conclude that the Arnolds have no right to the timber, and that the circuit court should have so adjudged.

Judgment reversed, and cause remanded for a judgment as above indicated.

GREINER v. ALFRED STRUCK CO. et al.  
(Court of Appeals of Kentucky. Dec. 18, 1914.)

1. TRIAL (§§ 139, 143\*)—JURY QUESTION.

Where the evidence on a question of fact is conflicting, or there is any evidence to support plaintiff's contention, the question should be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–343, 365; Dec. Dig. §§ 139, 143.\*]

2. WATERS AND WATER COURSES (§ 179\*)—FLOWAGE — ACTIONS — EVIDENCE — QUESTION FOR JURY.

In an action for damages for the flooding of plaintiff's property, which he claimed was caused by defendant's erection of a covered bridge across a creek in such a manner that, upon the falling of heavy rains, the waters of the creek were dammed, evidence held insufficient to go to the jury, showing without conflict that the cause of the overflow was an unusual and extraordi-

nary rain which could not have been guarded against by ordinary prudence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Tobe Greiner against the Alfred Struck Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Dodd & Dodd, of Louisville, for appellant. Leon P. Lewis and Pendleton Beckley, both of Louisville, for appellee City of Louisville. H. H. Nettelroth, of Louisville, for appellee Alfred Struck Co.

NUNN, J. The appellant seeks to recover damages from the appellees, Struck Company and the city of Louisville, caused to his property by an overflow of the waters of Beargrass creek in the city of Louisville. The petition charges that in 1904, the Struck Company, under a permit from the city, erected a covered bridge across Beargrass creek, in such a manner as to interfere with its natural flow, and that by reason thereof, on February 23 and 24, 1909:

"The water that would have naturally flowed in the bed or through the channel of the said stream or water course of Beargrass creek was obstructed and backed up from the said structure so erected by the defendant, the Alfred Struck Company, as to accumulate southwardly of the said building, and between the said building and Broadway street, in such quantities as to overflow and wash away the roadbed or embankment of the Louisville & Nashville Railroad Company lying southeastwardly of the said building and between said property upon which the said building is erected and the property of the plaintiff, and thereby occasioned the flooding and overflow of water in and upon the premises of the plaintiff to a depth of several feet."

The appellees by separate answer traverse the material allegations, and defend affirmatively on the ground that the overflow was caused by such an unusual and extraordinary rain as could not have been anticipated by persons of ordinary experience and prudence.

[1, 2] At the conclusion of all the evidence, the court peremptorily instructed the jury to find for the defendant, and the reason assigned was that all the evidence went to show that it was such an unusual and extraordinary rain as could not have been guarded against by ordinary prudence, and that there was not a scintilla of evidence to the contrary. *Southern Railway Co. v. A. M. E. Church*, 121 S. W. 972; *Wallingford, etc., v. Maysville & B. S. Ry. Co.*, 107 S. W. 781, 32 Ky. Law Rep. 1049; *M. H. & E. R. Co. v. Renfro*, 127 S. W. 508; *M. H. & E. R. Co. v. Thomas*, 140 Ky. 143, 130 S. W. 975; *M. H. & E. R. Co. v. Graham*, 147 Ky. 604, 144 S. W. 737; *M. H. & E. R. Co. v. Cates*, 138 Ky. 257, 127 S. W. 988, 137 Am. St. Rep. 379. If there was a conflict in the testimony, or if there was any evidence, to show that the

rains which caused this overflow were not of such an unusual or extraordinary character as could not have been anticipated by ordinary prudence, then the question should have been submitted to the jury. To decide this case, it is only necessary to examine the proof on that question and see if there is any conflict. The only proof on this point was given by appellant and his witness Mr. Walz, the officer in charge of the United States Weather Bureau at Louisville. To understand the bridge references these witnesses make it should be explained that the property of both parties fronts on Broadway, and that Beargrass flows under Broadway at what is called Broadway arch, and near where the Louisville & Nashville crosses Broadway. From this arch at Broadway it flows through the Struck property and about 200 feet with the creek to the covered bridge erected by Struck. Then in about 25 feet it flows under the L. & N. bridge. We quote from the appellant's testimony:

"Q. Had there ever been any rains or rainfall as great as this since you had property there? A. Yes. Q. Since you had these improvements of which you speak? A. Yes. Q. When was that? A. That was 1896, on the 4th day of July. Q. Was that rain greater or less? A. It was a greater rain than this. I saw it in the paper. The Court: You can tell how the rain affected your premises. Q. How did the rain on the 4th day of July, 1896, affect your premises, if at all? A. Well, the rain from the street gutters, some of it got in my back yard. Q. Did any come over Beargrass creek on that occasion, either headwater or backwater? A. None at all. Q. Did you ever, on any occasion than the 23d and 24th days of February, 1909, sustain any injury to your property from the headwater? A. Never, as I know of."

On cross-examination the witness testified:

"Q. Now, you testified as to the rain on July 4, 1896, did the creek overflow Broadway on that occasion? A. No, sir, not to my recollection. Q. Was your property submerged? A. No, sir. Q. At that time state whether or not this railroad bridge was across the creek at that time. A. There was a bridge there, yes. Q. It has been raised since, a little bit? A. I think it had, I am not sure. All of that fill was raised I believe. Q. This same railroad bridge was there in '96, or one lower than this was there, that is true? A. Yes. Q. Either one of those conditions existed? A. Yes. Q. On July 4, 1896, when that other heavy rain occurred Beargrass creek didn't overflow? A. No, sir. Q. The bridge didn't fill up? A. No, sir. Q. How long have you lived in Louisville? A. About 58 years. Q. You have been familiar with Beargrass creek at this point practically all that time? A. Yes. Q. Since you were old enough to go fishing. Do you know of any occasion where Beargrass creek filled up the Broadway arch as the result of water that came down the creek, I am not speaking of backwater? A. I have no recollection of seeing anything like that, not even '96."

Although admitting that Beargrass did not get out of its banks in 1896, he says it was a greater rainfall. But it appears that what he saw in the newspaper is his authority for that statement. The author of the newspaper reports about rainfall is Mr. Wals of the Weather Bureau. He was introduced by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant and had before him the records of that office since 1871. Mr. Walz testifies that the rainfall in 1909, which caused the flood in question, was the greatest ever known. For any 24-hour period it was exceeded only by that of July 4, 1896, when there was a 5½-inch rainfall. On February 23, 1909, there was a fall of 5.02 inches, but it was only one of two or three days' continuous rain, and the records show that, when this rain began on the 23d, more rain had already fallen in that month than normally falls in the whole month. As the witness says, with the soil thus soaked, and being a general rain extending over the whole watershed of Beargrass creek, it easily ranks without a precedent. It is comparable only with that of July 4, 1896, in which slightly more rain fell in 10 hours than in any 24 hours of the February rain. The July 4th rain was a waterspout, local in character, and fell when the soil was relatively dry.

This being all the evidence on the point, we think the court properly concluded there was nothing for the jury to consider, because there was no evidence to show that ordinary prudence could have provided against such a flood, and that, in fact, it amounted to an act of God, affording relief from liability.

The covered bridge was built in 1904, and its waterway area under the bridge is materially larger than that under either the Broadway or Louisville & Nashville bridges, but those bridges were able to carry without difficulty all the water flow of July 4, 1896. The rain in question filled Broadway arch and overflowed Broadway street, and the Louisville & Nashville bridge and track.

Although appellant's property is below, that is, down the creek from the covered bridge, and while water backed up by an obstruction in a stream will ordinarily affect only upstream property owners, it will be noticed appellant's claim is based upon the idea that the backwater overflowed, that is, cut through, or washed away the embankment or roadbed of the Louisville & Nashville Railroad, and that this roadbed operated as a protecting levee to his place. The ground level of his property is about eight or ten feet below the level of the railroad track. Under these circumstances if the flood crest did not come higher than the embankment, and there was any proof to show that the covered bridge threw the current against the embankment, and in that way cut through or washed it away (and there was such proof), then the case should have gone to the jury. But when all the evidence shows that the flood crest both below and above the bridge was at least three feet above the levee, that is, above the railroad track, then it follows that his property is flooded of necessity, and independent of any diversion of the current, or of any washing away of the embankment.

In that state of case there is nothing to go to the jury. These conclusions make it unnecessary to consider the question of the city's liability growing out of the issue of a building permit.

For the reasons indicated, the judgment is affirmed.

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CONNECTICUT FIRE INS. CO. v. UNION  
MERCANTILE CO.  
INSURANCE CO. OF NORTH AMERICA  
v. SAME.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

1. INSURANCE (§ 629\*)—FIRE INSURANCE—ACTIONS—PETITION—SUFFICIENCY.

A petition in an action on a fire policy, which sets up the policy, and which sets forth the property embraced therein, and which alleges that the same was destroyed by fire, but which does not allege in terms that the property was of any value, is fatally defective.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.\*]

2. PLEADING (§ 433\*)—DEFECTS—TRIAL.

Where, in an action on a fire policy, the value of the property destroyed was determined as fully as if the question of value had been raised in a proper manner by the pleadings, the defect in the petition in failing to allege that the property had some value, and what that value was, was immaterial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

3. PLEADING (§ 433\*)—DEFECTS—TRIAL.

Where, in an action on a fire policy, the court considered evidence of value of the property destroyed, introduced to show fraud on the part of insured in fixing value, the defect in the petition in failing to allege that the property had any value was immaterial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

4. INSURANCE (§ 553\*) — FIRE INSURANCE — PROOFS OF LOSS—FRAUD.

Where the proofs of loss and the examination under oath of the officers of insured gave exaggerated statements of the value of the property destroyed, and made mistakes as to merchandise alleged to have been bought and placed in the stock destroyed, but their statements of value were based on an estimate of what it would cost to replace the property destroyed, and the value asserted by them was not far above the value fixed by the commissioner and approved by the trial court, there was no fraud vitiating the policy stipulating that it should be void if insured misrepresented any material fact before or after a loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.\*]

5. INSURANCE (§ 336\*) — FIRE INSURANCE — "CONCURRENT INSURANCE"—"CONCURRENT."

Where a fire policy insuring property to the extent of three-fourths of its value permitted other "concurrent insurance," a subsequent policy insuring the same property up to full value thereof was "concurrent insurance"; concurrent insurance being that which to any extent insures the same interest against the same casualty, at the same time as the primary insurance, on such terms that insurers would bear proportionately the loss happening within the provisions of both policies, and the word "concurrent" meaning literally a running together,

and in the policy meaning corroborating or contributing to the same effect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856-873; Dec. Dig. § 336.\*]

For other definitions, see Words and Phrases, Second Series, Concurrent, also, First and Second Series, Concurrent Insurance.]

**6. INSURANCE (§ 661\*) — FIRE INSURANCE — AMOUNT OF LOSS.**

Where parts of insured's books of account, including those showing inventories and cash sales were destroyed, the action of the court in adopting the bank deposits made in the name of insured, together with its unpaid accounts and bills receivable, as a basis for ascertaining the amount of the loss, was not erroneous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1696; Dec. Dig. § 661.\*]

**7. INSURANCE (§ 661\*) — FIRE INSURANCE — AMOUNT OF LOSS.**

Where the court, in determining the amount of a fire loss, adopted the bank deposits made in the name of the insured, together with its unpaid accounts and bills receivable, as the basis to ascertain the value, it was error to deduct an item designated as "expenses" either paid out of money not deposited in bank or paid out of merchandise, and such expenses should be added to the amount of the sale; but to the extent that the expenses represented payment out of moneys deposited, it should be neither added nor subtracted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1696; Dec. Dig. § 661.\*]

**8. APPEAL AND ERROR (§ 1106\*)—DISPOSITION OF CASE ON APPEAL.**

Where the court, on appeal in an equitable action, has not before it any basis on which to direct a proper judgment, the case must be referred to the commissioner to make report in accordance with the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386-4398, 4585; Dec. Dig. § 1106.\*]

**9. COURT COMMISSIONERS (§ 2\*)—APPOINTMENT OF SPECIAL COMMISSIONER—COMPENSATION—STATUTORY PROVISIONS.**

Under Ky. St. § 1740, fixing the amount which may be allowed a commissioner for each day actually engaged in a case at \$3, and section 390, providing that no such allowance shall be made until he has filed in court a written statement under oath showing the number of days he has acted, the court may not make an allowance until the verified statement has been made, and the allowance then cannot exceed \$3 per day.

[Ed. Note.—For other cases, see Court Commissioners, Cent. Dig. § 5; Dec. Dig. § 2.\*]

**Appeal from Circuit Court, Marshall County.**

Actions by the Union Mercantile Company against the Connecticut Fire Insurance Company and the Insurance Company of North America. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Flexner & Gordon and Frank M. Drake, all of Louisville, and Oliver & Oliver, of Paducah, for appellants. John G. Lovett, of Benton, and Wheeler & Hughes, of Paducah, for appellee.

**TURNER, J.** These were originally two common-law actions instituted by appellee on separate policies against the two appellants.

In August, 1911, while the policies were

each in force, nearly all the property covered by them was destroyed by fire. The policy of the Connecticut Fire Insurance Company was dated the 7th of February, 1911, and insured appellee's storehouse for \$1,000, and its stock of goods carried therein for \$4,000 against loss by fire. The policy of the Insurance Company of North America was dated the 1st of June, 1911, and insured appellee's storehouse for \$800, the fixtures therein for \$200, and the stock of merchandise for \$4,000 against such loss. The first-named policy had the three-quarter clause in it as to the personal property, and the second named policy did not.

The cases were transferred to the equity docket in the lower court, consolidated, and referred to a commissioner for the purpose of ascertaining the value of the property destroyed at the time of the fire.

The business of appellee was inaugurated and it begun operations in August, 1907, at Gilbertsville in Marshall county; for several months it was conducted as a partnership, but was in a short time incorporated under the corporate name now shown.

The commissioner in his final or supplemental report found the value of the storehouse to be \$1,600 at the time of the fire, and the value of the goods destroyed to be \$8,002.53. All exceptions to the report, as amended, were overruled and judgment entered against the two defendants under the terms of the policies.

[1, 2] The first question we are confronted with is one of pleading. The plaintiff in his petition set up the policy sued on, set forth the property embraced therein, and alleged same was destroyed by fire, but did not allege in terms that the property so destroyed was of any value whatsoever. Each of the defendants, however, in its answer alleged that at the time of the fire the value of the storehouse did not exceed \$1,000 and the value of the stock did not exceed \$2,409.95, which allegations were duly denied by reply, with an affirmative allegation therein of the value as claimed by the plaintiff.

It is urged for appellant that under this state of the pleading there should have been no judgment for the plaintiff in excess of \$2,409.95, for the merchandise destroyed, the value admitted in the answer. Undoubtedly the petition was fatally defective in failing to allege that the goods destroyed, as well as the house, had some value, and what that value was, because if they had no value it suffered no loss, and there could consequently have been no recovery. But the issues as to the value of the goods destroyed and the value of the house were fully contested by the parties in the lower court and thoroughly tried out by that court and its commissioner, voluminous evidence was taken on these precise issues, the books of the corporation were thoroughly overhauled and considered by

the commissioner with the purpose of ascertaining the values, and exceptions to the commissioner's report were filed and tried out before the court. In other words the question was determined by the lower court as to the value of the goods and the building destroyed just as fully as if the question had been accurately made in the pleadings. Under these circumstances it would be more than useless to send this cause back to have issues perfected which had already been so fully considered and tried out. It is, in fact, an ideal case for the application of the doctrine of intentment after the verdict.

The rule laid down in *Connecticut Fire Insurance Co. v. Moore*, 154 Ky. 18, 156 S. W. 857, Ann. Cas. 1914B, 1106, in no sense conflicts with what we have said, on the contrary the rule stated therein harmonizes with our view. The rule stated therein was this:

"While we have been very liberal in applying the rule that a verdict will cure a defect in the pleadings, we have never gone to the extent of holding that where the petition fails to state a cause of action or some fact essential to the cause of action, and there is neither an admission nor proof of this fact, nor a submission of the question to the jury, such defect in the petition will be cured by the verdict."

In that case there was no evidence of value heard or permitted to be heard by the jury, there was no submission of the question of value to the jury, and consequently the jury could not have passed upon that value; while in this case voluminous evidence was taken and heard, and both the commissioner and the court passed upon that evidence and fixed the value.

[3] But it is asserted for appellants that the evidence as to the value taken by them was not for the purpose of fixing the values, but was taken only for the purpose of showing fraud upon the part of the officers of the corporation in its alleged exorbitant and fraudulent claims against the companies. But, whatever may have been the purpose in submitting this evidence, the record discloses beyond question that both the commissioner and the lower court considered it in fixing the value of the property destroyed.

[4] There is a provision in each of the policies that:

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; \* \* \* or in case of any fraud or false swearing by the insured touching any matter relating to this insurance on the subject-matter thereof, whether before or after the loss."

It is insisted for appellant that the officers, directors, and owners of the assured corporation have been guilty of such fraud and false swearing in the proofs of loss submitted by them, and on their examination under oath, as will avoid the policies under the terms of the provision quoted. It is apparent from the proofs of loss and their examination under oath that these officers and directors gave

exaggerated statements, especially as to the value of the house destroyed, and did make some mistakes as to merchandise alleged to have been bought and placed in stock, but throughout all of these statements they consistently adhered to the statement, in a general way, that the value of the merchandise destroyed was approximately \$10,000. It appears that their statements of the value of the house was based upon an estimate of what it would cost to replace it, which might very well have been a mistaken basis; and it further appears, that while they made some mistakes in the details as to the amount of merchandise on hand at the time of the fire, that the report of the commissioner in this case, which was approved by the lower court, was not far below the general estimate placed by them on its value, not taking into account the ten per cent. deduction for depreciation in value. We do not believe that the record shows such deliberate misstatements of facts and values as would justify an avoidance of the policies within the meaning of the provision quoted. The general rule on this subject is thus stated by this court in the case of *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. 326, 20 Ky. Law Rep. 1360, in a quotation from *Richards on Insurance*:

"As a general rule, false swearing in a proof of loss, to vitiate the policy, must be intentionally false, whether by fraudulent overvaluation of the goods destroyed or a statement of items which really have no existence. An innocent mistake, or a mistaken, though exaggerated, estimate of value, is not sufficient to void the policy. An overvaluation, in order to work a forfeiture must be so plain that it cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate on the value of his property."

The commissioner found, in substance, that, while there was some exaggeration in the valuations, that there was no fraudulent purpose, and this finding was approved by the lower court, and we see no reason to disturb it.

[5] It was provided in the written application for insurance, signed by the appellee, that no other insurance would be permitted on the property covered by the policy of the Connecticut Company except by special indorsement on the policy, and that, when such other insurance is consented to by indorsement thereon, such indorsement should not be deemed a waiver of the three-quarters clause therein. There was indorsed on the policy of the Connecticut Company the words "Other concurrent insurance permitted."

It is now argued for the Connecticut Insurance Company that inasmuch as its policy only insured the personal property embraced therein to the extent of three-fourths of the value that the policy subsequently issued by the Insurance Company of North America, which insured the same personal property up to the full value of such thereof as might be destroyed, was not concurrent insurance, and therefore the policy of the Connecticut Company is avoided.

The decision of this question involves the ascertainment of what is meant by "concurrent insurance." We confess that we have found no adjudication of the precise question here involved.

The case of *Gough v. Davis*, 24 Misc. Rep. 245, 52 N. Y. Supp. 947, was where the validity of a policy, which expressly permitted other concurrent insurance, was called in question because the subsequent policy issued under this permit only covered a part, but not all, of the property embraced in the original policy. The court in answer to the argument that this was not concurrent insurance, said:

"The object was to give the insured permission to have other insurance on the property during the existence of the policy. This would be concurrent insurance in respect of time and of the property. It would be concurrent in respect of time though for a shorter period than that of the policy, and in respect of the property though not upon all of it. It would not be wholly but only partly concurrent, and that, I think, is sufficient in order to be within the terms of the permission. It does not seem to me that the insured could be expected to understand that the word was used in the precise and restricted sense that the additional policies must exactly concur in covering all of the property any more than all of the time."

It would seem that if a partial concurrence as to the property embraced in the two policies and as to the time covered by them is sufficient, that certainly a partial concurrence as to the extent of the insurance in the two policies would also be sufficient.

The case of *Caraher v. Royal Insurance Co.*, 63 Hun, 82, 17 N. Y. Supp. 858, was where the original policy was indorsed permitting other concurrent insurance, and further that, the loss, if any, was payable to the mortgagee. A subsequent policy was issued embracing the same property, but without the indorsement making the loss payable to the mortgagee. The court, in response to the argument that this deprived the latter insurance of its quality as concurrent insurance, said:

"Besides, it is not made clear that other insurance would fail to be concurrent in form, because the loss, if any, in the one case, would be payable to the assured, and in the other the company had, by indorsement, assented to its payment to a mortgagee as his interest might appear. The subject of the insurance and the interest insured would be the same in each case. The insurance in all the cases would run together."

Surely, if two policies of insurance embracing the same property be payable, in the event of loss, to different persons is concurrent insurance, then it cannot be said, with any degree of reason, that two policies embracing the same property, and payable, in the event of loss, to the same person, are not concurrent, merely because the one policy insured the same property to a greater extent than the other.

In the case of *East Texas Fire Insurance Co. v. Blum*, 76 Tex. 653, 13 S. W. 572, the word "concurrent" as used in an insurance

policy permitting concurrent insurance was defined as follows:

"The word 'concurrent' means literally 'running together,' and in the connection here used has the sense of 'co-operating,' 'contributing to the same event' (Worcester); 'acting in conjunction, agreeing in the same act, contributing to the same event, co-operating, accompanying' (Webster).

"In the absence of something in the context showing that the word was not used in its ordinary sense, it must be understood so to have been used, and nothing of that kind is found. To be concurrent the insurance must operate at the same time, upon the same property, and look to the indemnity of the insured in case of its loss or destruction from casualty insured against."

There is nothing in this seemingly accurate definition to suggest the idea that it is necessary for the two policies to have insured the property to the same extent and in the same way.

The case of *Corkery v. Fire Insurance Co.*, 99 Iowa, 382, 68 N. W. 792, was where the later policy embraced not only the property covered by the original policy, which permitted concurrent insurance, but also embraced other and additional property. Upon the contention that this deprived it of its quality as concurrent insurance the court said:

"'Concurrent' is defined by Webster as 'acting in conjunction, agreeing in the same act, contributing to the same event or effect, co-operating, accompanying, conjoined, associate, concomitant, joint and equal, existing together and operating on the same objects.' Taking the provisions of this policy quoted above together, and it seems clear that it was not intended that the additional insurance authorized should not include other property. The provision as to contribution precludes such a conclusion. The term 'concurrent,' as used in this policy, was used in the sense of contributing to the same event or effect, but not jointly and equally."

The case of *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. Law, 580, 46 Atl. 777, was where a suit on an insurance policy, which permitted concurrent insurance, was defended upon the ground that the later policy did not embrace all the items and all the property in the original policy, and that it thereby lost its quality of concurrent insurance. The court in answer to this contention, and defining "concurrent insurance," said:

"Concurrent insurance is that which to any extent insures the same interest against the same casualty, at the same time as the primary insurance, on such terms that the insurers would bear proportionally the loss happening within the provisions of both policies. It is this last quality—of sharing proportionally in the loss—that distinguishes concurrent insurance from mere double insurance."

While the question presented in the last-named case is not the same confronting us here, yet the language used seems to be peculiarly applicable to the instant case. It will be observed that the opinion says that if to any extent the two policies insure the same property against casualty, the insurers will bear the loss proportionally according to the terms of their policies. This language not only means that if one company issued

a \$10,000 policy and the other a \$5,000 policy on the same property that they should pay the loss proportionally, but it also necessarily means that if one company issued a policy for \$4,000 for the full value of the property, in the event of loss, up to that amount, and another company issued a \$4,000 policy on the same property, but limiting its liability to three-fourths of the value of the property destroyed, that they likewise would share the loss proportionally within the terms of their policies.

It results from what we have said that the two policies in this case represented concurrent insurance.

[6] It appears in this case that in the fire a part of appellee's books of account were destroyed including the one showing its inventories and showing the amount of cash sales. The commissioner was therefore confronted with the duty, in ascertaining the stock on hand at the time of the fire, of looking to other and less satisfactory evidence of the property bought and placed in stock by appellee during the four years of its business, and what part thereof had been sold and disposed of. From a memorandum of the last inventory taken, which had been preserved, and duplicate bills from the wholesale houses with whom appellee dealt, he was enabled to ascertain, with a reasonable degree of accuracy, the quantity of goods purchased during that time. But the destruction of the book containing the cash sales left him the alternative, in ascertaining what those sales had been, either to base his finding upon the statements of the officers and manager of the corporation, made from memory, as to its sales during this long period, which must necessarily have been inaccurate and unsatisfactory, or to adopt the bank deposits, made in the name of the corporation, together with the unpaid accounts and bills receivable of the company, which were preserved, as a basis. While, from the nature of things, neither method would produce an accurate result, we think the latter method adopted by the commissioner was the safer one.

The commissioner, after deducting certain goods returned and other goods saved from the fire, finds that during the four years appellee was in business the cost prices of its purchases of goods was \$69,836.06; and he finds that the sales, after deducting the profits, amounted during the same period to \$60,944.36, leaving a balance of \$8,991.70 from which he takes 10 per cent. for depreciation in value, leaving \$8,002.53 as the value of the merchandise destroyed. We have gone carefully over the report of the commissioner, and believe it to be substantially correct with the exception of two items.

After ascertaining the amount of the sale, by the method adopted, he deducted therefrom an item, designated as "borrowed money," of \$3,293.90, thereby necessarily reduc-

ing to that extent the amount of sales, and, of course, increasing to the same extent the merchandise supposed to be on hand at the time of the fire. Evidently the commissioner had in mind that this amount of money had been borrowed by somebody connected with appellee and deposited in bank to its credit, and that it did not therefore represent sales. But we have carefully and laboriously gone through this voluminous record with the view of finding some evidence upon which this deduction was made, and have been able to find nowhere in the record any reference to any such item except in the commissioner's report, and our investigation discloses no authority whatever for this action of the commissioner.

[7] The commissioner further deducts from the amount of sales an item, designated "expenses," of \$2,167.38. There is nothing in the record, so far as we can find, which shows the items going to make up this aggregate of expense. To the extent that this aggregate is made up of expenses either paid out of money not deposited in bank or paid out of merchandise, it should be added to, rather than deducted from, the amount of sales, but to the extent that it represents expenses paid out of money deposited in the bank it should neither be added to nor subtracted from the sales. That is to say, that the expense paid out of the cash drawer or paid in merchandise from the store represented additional sales and necessarily lessened the quantity of merchandise on hand; but to the extent it was paid out of money already deposited in bank, which had already been counted as part of the sales, it should neither be added nor deducted.

[8] Ordinarily, in equitable actions, this court upon reversal directs the judgment to be entered, but, owing to the confusion and uncertainty growing out of the last-named item of "expenses," and the failure of the report to show in detail the items composing this expense or how it was paid, the court has not before it any basis upon which to direct a proper judgment, therefore upon the return of the case, as to these two items of expense and borrowed money, the case will be re-referred to the commissioner to make a report in accord with the facts.

[9] The appellants complain of the allowance to the special commissioner of a fee of \$400 in this case. The commissioner filed an unsworn statement showing that he had been engaged in this case for 50 days, and upon that statement, and evidence heard in open court, the court allowed a fee of \$400. Our statute (section 1740) definitely and arbitrarily fixes the amount which may be allowed a commissioner for each day he is actually engaged in a case at \$3, and section 396 provides that no such allowance shall be made until he has filed in court a written statement, under oath, showing the number of days he has so acted. These sections have been held by this court to be mandatory,

and under them there the court has no right to make any allowance until the provisions of section 396 have been complied with, and even then none to make it in excess of the amount prescribed in section 1740. *Harding v. Harding*, 132 Ky. 133, 116 S. W. 305.

The judgment is reversed for the reasons given, and remanded for further proceedings as to the two items mentioned, and when they are correctly ascertained, to enter a judgment as herein indicated.

### CLINE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. EMBEZZLEMENT (§ 47\*) — SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

Evidence, in a prosecution for embezzlement, held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see *Embezzlement*, Dec. Dig. § 47.\*]

#### 2. EMBEZZLEMENT (§ 11\*)—NATURE OF CRIME — MISAPPROPRIATION OF MONEY BY TAX COLLECTOR.

Appropriation by a deputy sheriff of money collected by him as taxes is embezzlement.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.\*]

#### 3. EMBEZZLEMENT (§ 48\*)—INSTRUCTIONS.

In the prosecution of a deputy sheriff for embezzlement of money collected by him as taxes, in which his defense was that he lost it, instructions held erroneous for failure to state that, if accused lost the money or it was stolen from him, he was not guilty.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 72-75; Dec. Dig. § 48.\*]

Appeal from Circuit Court, Pike County.

Greeley Cline was convicted of embezzlement, and appeals. Reversed and remanded.

J. F. Butler and A. E. Auxier, both of Pikeville, for appellant. James Garnett, Atty. Gen., and Chas. H. Morris, Asst. Atty. Gen., for the Commonwealth.

HOBSON, C. J. Greeley Cline was a deputy of Hi Pauley, sheriff of Pike county, from January 1, 1912, until January 1, 1914, and among other things it was his duty to collect the state and county taxes in his home district. According to the custom between them, he settled every month with the sheriff and paid him then the amount he collected, less his commissions. He made his monthly settlements regularly until October, 1913, but he failed to settle for the month of October or to pay over the money, claiming to have lost it. He afterwards settled for the months of November and December, 1913, and was indicted for embezzlement, on the ground that he had converted to his own use the money referred to; the amount being \$249.84. The proof for the commonwealth on the trial showed, in substance, that Cline claimed to have lost more money than he had; that he made no efficient search to recover the money; that the rea-

son that he gave for his conduct was unsatisfactory; that he claimed to have lost \$504, when in fact he had collected in October only \$258.91, and said he did not have as much as \$75 of his own money. The commonwealth also proved that he had said that he had no money on that day when asked to pay a bill. On the other hand, the defendant testified that he started from his home to Pikeville with the money, but had some papers to serve which required him to cross the river, and that when he got back it was so late that he thought the bank would be closed at Pikeville, and he turned around and went home; that he had \$504 in his saddle pockets; that, when he got home and got off his horse, it came to his mind about the money being in his saddle pockets; that he went to the saddle pockets and one of the straps was loose; that he had buckled the straps when he put the money in there; that part of the time the saddle pockets were on the horse and part of the time on his shoulder; that he had no idea who opened the saddle pockets, but, when he opened them then, the roll of money was gone. This was the first time he missed it, and he did not know how it was taken or by whom. The defendant introduced several witnesses who testified to his good character. The proof showed that the sheriff had retained his commissions on the subsequent collections, and thus reduced the amount of the default to \$249.84. The court gave the jury these instructions:

"(1) If the jury believe and find from the evidence beyond a reasonable doubt that the defendant, Greeley Cline, in Pike county, before the finding of the indictment, did unlawfully, fraudulently, and feloniously, without the consent of Hi Pauley, then sheriff of Pike county, or the owner thereof, or either, convert to his own use good and lawful money of the United States, exceeding \$20, the same being the public moneys and taxes collected for said Hi Pauley, sheriff as aforesaid, by said defendant, Greeley Cline, as deputy sheriff for said Hi Pauley, which said money had then and there been intrusted to said Greeley Cline, or to his care, custody, and keeping as said deputy sheriff, they will find him guilty as charged in the indictment and say so and no more.

"(2) If the jury have a reasonable doubt of the defendant having been proven guilty, they will find him not guilty."

The jury found the defendant guilty, and, the court having entered judgment on the verdict and overruled his motion for a new trial, he appeals.

[1, 2] There was sufficient evidence to take the case to the jury. The appropriation of the money, if true, makes out a case of embezzlement. *Commonwealth v. Fisher*, 113 Ky. 491, 68 S. W. 855, 24 Ky. Law Rep. 300.

[3] The only error we see in the record is that the court by its instructions failed to submit to the jury the defendant's defense. His sole defense was that he lost the money. He admitted having collected it, and having failed to pay it over; but this did not establish his guilt of embezzlement. If he did

not use the money, but in fact accidentally or negligently lost it, he may be liable civilly for it, if negligent, but for this he is not guilty of embezzlement. It is true that by the first instruction the court told the jury that they should find the defendant guilty, if they believed from the evidence beyond a reasonable doubt that he did "unlawfully, fraudulently and feloniously" "without the consent of the owner convert to his own use" the money referred to. A lawyer, acquainted with the meaning of the words "fraudulently," "feloniously," and "convert to his own use" would understand that, if the defendant lost the money, he did not fraudulently or feloniously convert it to his own use; but a jury composed of men not acquainted with legal terms might reasonably conclude from the evidence that Cline had carelessly lost the money, and not apprehended the distinction between a civil and criminal liability. The instructions do not bring the mind of the jury to the precise question of fact on which the case turns, and an instruction presenting the defendant's side of the case should have been given. The following words should have been added to instruction No. 1: If, however, the defendant in fact lost the money referred to either accidentally or negligently, or it was in fact stolen from him, and he did not in any way use the money, or keep it, the jury should find him not guilty.

Judgment reversed and cause remanded for a new trial.

#### McILVAINE et al. v. ROBSON et al.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

#### 1. WILLS (§ 535\*) — CONSTRUCTION — EFFECT AS A WHOLE.

A testator by a second codicil to his will revoked the provisions of the original will, and the first codicil in favor of his son, W., and devised a life interest in a house and lot to W. and his wife, with reversion to the testator's heirs, provided that in the final settlement W. was to be charged with a cash advancement less a credit for services rendered, and stated that the codicil made all the provisions intended to be given to W. The original will had provided for the distribution of testator's property among his children equally, subject to advancements, one year after testator's death. W. died leaving a daughter and granddaughter as his heirs. His widow conveyed her life interest to two of the testator's children, and suit was brought to sell the house and lot devised to W. for partition among the children of the testator, excluding the heirs of W. from any share therein. Held that, in order to give meaning to the provision for charging the advancements to W. in the final settlement, the codicil should be construed to allow the heirs of W. to share in the distribution of the reversion in the house and lot.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157-1160; Dec. Dig. § 535.\*]

#### 2. WILLS (§ 452\*) — CONSTRUCTION — DISINHERITANCE.

The will is not to be construed to disinherit the heirs at law except by express words or necessary implication, since, in seeking the intent of testator which governs the construction

of the will, the rules of interpretation previously adopted by the courts must be followed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 968-970; Dec. Dig. § 452.\*]

#### 3. WILLS (§ 713\*)—DEVISE TO HEIRS.

Since the codicil disposed of the reversion among the heirs of testator, the same as it would have been distributed without the will, the heirs take under the statute and not under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1695-1697; Dec. Dig. § 713.\*]

#### 4. WILLS (§ 758\*)—RIGHTS OF DEVISEES—ADVANCEMENTS.

In the distribution of the proceeds of the sale of the house and lot, the children of testator are to be charged with what had been received by them or their representatives under the will, under Ky. St. § 1407, providing that any property devised by a parent to a descendant shall be charged to the descendant in the distribution of the undevise estate of the parent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1957-1960, 1976, 1977; Dec. Dig. § 758.\*]

Appeal from Circuit Court, Campbell County.

Action for partition by Henry W. Robson and others against Lulu McIlvaine and others. From a judgment of the chancellor that Lulu McIlvaine and another had no interest in the property, they appeal. Reversed and remanded.

Wm. Mart Miller and Irvin C. Zitt, both of Newport, for appellants. Frank V. Benton, of Newport, for appellees.

HOBSON, C. J. In the year 1899, George W. Robson, Sr., a resident of Campbell county, Ky., died, leaving a will, which was duly probated in the Campbell county court on March 3, 1899. In section 1 of his original will which is dated April 10, 1899, he directed that his debts be paid. In section 2 he devised to his grandson, Robson S. Moore, \$5,000 and also an interest in certain mines in Colorado, providing that:

"This item gives to the said Robson S. Moore the entire portion intended to be given him out of my estate in any event."

In section 3 he directed that his estate should remain in the hands of his executors and undistributed for a period of one year after his death, after which time all that remained should be equally divided among his eight children, including William H. Robson, and held by them and their heirs in fee simple forever. In section 4 he sets forth the advancements which should be charged to his eight children. In this section William H. Robson is charged with \$5,200, and with a certain house and lot in Bellevue as provided in section 5. Section 5 is as follows:

"I devise to my son Wm. H. Robson and to his wife Martha A. Robson during their natural lives the house and lots in the town of Bellevue, county of Campbell, state of Kentucky, on which they now reside being two lots binding on Ross and Lake avenues and Robson alley, being 50 feet by 210 feet, the value of this interest in said house and lots to be charged as an additional advancement to the said Wm. H.

Robson and as estimated at the time of final settlement."

By section 6 the testator provided for a monument, and by section 7 he appointed his sons, George W. and Wm. H. Robson, as executors.

By section 1 of the first codicil he changed the amount of the advancements to his son George. Section 2 is as follows:

"The clause in the fourth section of my will charging my son Wm. H. Robson for advancements with \$5,200 remains as stated in said section, subject however to a credit of \$1,000.00 for services rendered by him in the collections of rents and attending to repairs of property for which service he is entitled to \$200.00 per year for 5 years or \$1,000.00. The additional charge in said fourth section is revoked as to advancements for money stated in next section."

Section 3 is as follows:

"My son Wm. H. Robson has not been able to pay for the house and lots in the town of Bellevue described in the fifth section of my will as contemplated at the time of the making of the will, but I have paid for them about \$9,500.00 and thereby revoke the said fifth section and the devise therein of the said properties to said W. H. Robson and wife and the said properties remain as part of my estate subject however to the right of said W. H. Robson to purchase the same at \$9,500.00 at any time before the final settlement of my estate."

By section 4 he revoked the seventh section of the original will, and appointed George W. Robson, Jr., and Samuel W. Hill executors.

In section 1 of the second codicil he made a change in the amount of advancements to his daughter, Ida M. Hill. Section 2 is as follows:

"So much of section 4 of my will as charges advancements to my son W. H. Robson and section 5 of my will making a devise to W. H. Robson and his wife Martha A. Robson and section 2 and 3 of my first codicil are all hereby revoked and in lieu of all these the next succeeding section of this codicil will constitute fully my entire will in reference to my said son and his wife under said section."

Section 3 is as follows:

"I hereby devise to my son, W. H. Robson and his wife Martha A. Robson during their natural lives the house and lots in the town of Bellevue, county of Campbell and state of Kentucky, on which they now reside being two lots binding on Ross and Lake avenues and Robson alley each lot being 50 feet by 210 feet, and after the death of said W. H. Robson and of the said Martha A. Robson, the said property to my heirs to revert, the taxes and improvements and insurance to be paid and kept up by the said W. H. and Martha A. Robson, the said W. H. Robson in the final settlement of my estate is to be charged as for advancements made by me to him with the sum of \$5,200, subject however to a credit of \$1,000 for services rendered by him in the collection of rents and in attending to repairs of property for which service he is entitled to \$200 per year for 5 years or \$1,000. This third section of this codicil make all the provision intended to be given to my son W. H. Robson and the third section of my original will first named to the effect that what remains of my estate in the hands of my executors undistributed for the period of one year after my death shall be divided and distributed as equally as may be among my children so far as it applies to my said son Wm. H. Robson is hereby revoked."

The testator's son W. H. Robson is now dead, Lula McIlvaine, a daughter, and Martha A. Troxell, a granddaughter, are his only heirs at law. His widow, Martha A. Robson, who is now 85 years of age, has conveyed her life interest to the testator's children, Emma J. Gaddis and Ida M. Hills.

This action was brought by Harry W. Robson and others, grandchildren and children of the testator, against Mildred Gregor and others, also children and grandchildren of the testator, for the purpose of selling the house and lots in Bellevue devised to William H. Robson and wife for life, on the ground that plaintiffs and defendants are the joint owners thereof, and in possession, and that the property could not be divided without materially impairing its value. To this action Lulu McIlvaine and Martha A. Troxell were made parties. They answered and asserted an interest in the property in question under and by virtue of section 3 of the testator's second codicil. On final hearing the chancellor adjudged that they took no interest in the property. From that judgment they appeal.

It will be observed that by the original will W. H. Robson was to be charged with \$5,200, also the value of the life estate in the lots devised for life to him and his wife in the distribution to be made by the executor a year after the testator's death. It will also be observed that by the first codicil the charge of \$5,200 is reduced to \$4,200, and the devise of the land to him and his wife is revoked; he being given the right to purchase the property at \$9,500 at any time before the final settlement of the estate. If no other change had been made, W. H. Robson, under the will as it then stood, would have been chargeable with an advancement of \$4,200 and subject to this would have received an equal share with the other children in the distribution of the estate by the executor one year after the testator's death; and he would have had the right to purchase the property referred to at \$9,500 at any time before the final settlement of the estate. This being the condition of things, what was the purpose of the testator as to W. H. Robson in adding the second codicil? In the first place, in it he revokes so much of section 4 of the will as charges advancements to him; also, section 5 of the will devising him and his wife the lots for life as well as the second and third sections of the first codicil relating to these matters. He then devises the realty to W. H. Robson and wife for life as before, but adding that at their death:

"The said property at their death to my heirs to revert, the taxes and improvements and insurance to be paid and kept up by said W. H. Robson and Martha A. Robson, the said W. H. Robson in the final settlement of my estate to be charged as for advancements made by me to him with the sum of \$5,200.00, subject however, to a credit of \$1,000.00 for services rendered by him in the collection of rents and in attending to repairs of property for which service he is

entitled to \$200.00 per year for 5 years or \$1,000.00."

If the codicil had stopped here, it is clear that W. H. Robson would have come in for his equal share in the distribution of the estate by the executor one year after the death of the testator subject to a charge of \$4,200 against him for advancements. But the testator added these words:

"This third section of this codicil makes all the provision intended to be given to my son W. H. Robson and the third section of my original will first named to the effect that what remains of my estate in the hands of my executors undistributed for the period of one year after my death shall be divided and distributed as equally as may be among my children so far as it applies to my said son Wm. H. Robson is hereby revoked."

[1] It is insisted for the appellees that this means that W. H. Robson was to get nothing out of the estate except the life estate devised to him and his wife in the house and lots referred to. But if this is the meaning, the preceding clause of the codicil fixing the amount to be charged W. H. Robson for advancements and reducing the amounts previously charged to him is meaningless; for, if he was to get nothing under the will, there would be nothing to charge advancements to. And the rule is that some effect, if possible, must be given all the provisions of the will.

[2, 3] While it is true that the cardinal rule of construction of wills is to arrive at the intention of the testator, yet in seeking this intention we must construe the will in the light of the uniform rules of interpretation adopted by the courts. *Bradshaw v. Butler*, 125 Ky. 162, 100 S. W. 837; *Lawson v. Todd*, 129 Ky. 132, 110 S. W. 412. Among these rules of construction are the following: An heir at law will not be disinherited except by express words in the will or necessary implication arising therefrom. 40 Cyc. 1498; *Emmons v. Atchison*, 13 Ky. Law Rep. 142; *In re Sigel*, 213 Pa. 14, 62 Atl. 175, 1 L. R. A. (N. S.) 397, 110 Am. St. Rep. 515. The common law prevails in this state, and by that law, if a man seised of an estate, limited it to one for life, remainder to his right heirs, they would take, not as remaindermen, but as reversioners, and, the reversion being the same estate that the reversioners would take if there were no will, the will itself is not effectual, and consequently the heirs take the estate, not under the will, but by operation of law as heirs at law. *Alexander v. De Kermel*, 81 Ky. 345. Here if the property in question had been devised to William H. Robson and wife for life, without any provision as to the remainder, it would have gone to all the testator's heirs. Hence the heirs in this case take the same estate as they would have taken had there been no will.

The testator's heirs took at his death the remainder in the property referred to subject to the life estate of W. H. Robson and

wife. The estate being vested, W. H. Robson took an equal share with the other children, unless he was excluded by some provision of the will, and the interest which he took at his father's death passed at his death to his heirs at law. *Weil v. King*, 104 S. W. 381.

So the question recurs: Was W. H. Robson excluded by his father's will from any interest in this property?

It will be observed that in section 3 of the second codicil the testator provides that:

"The said W. H. Robson in the final settlement of my estate is to be charged as for advancements made by me to him with the sum of \$5,200, subject however, to a credit of \$1,000.00."

When the testator so provided, he must have contemplated that at some time a final settlement of the estate was to be made in which W. H. Robson was to be charged with \$4,200, and W. H. Robson could not be charged with \$4,200 in a final settlement of the estate, unless he was to get something in the settlement. The next paragraph of this section, providing that it makes all the provision intended to be given W. H. Robson, and revoking as to W. H. Robson the third section of the will to the effect that what remains of the estate in the hands of the executors undistributed for the period of one year after his death shall be distributed equally among his children, must be read in connection with the previous paragraph of the section in which the testator provides for the final settlement of the estate and the charge to be made to W. H. Robson for advancements in that settlement. In other words, the testator excluded W. H. Robson from the distribution to be made of what remained of his estate in the hands of the executors undistributed for the period of one year after his death, but did not exclude him from participating in the final settlement of the estate, which he evidently contemplated would take place later.

[4] The remainder in the lots referred to passing as it would pass if there had been no will disposing of it, the final settlement must be made under the statute. *Clarkson v. Clarkson*, 8 Bush, 655. Section 1407, Kentucky Statute, provides:

"Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant of those claiming through him in the division and distribution of the undivided estate of the parent or grandparent; and such party shall receive nothing further therefrom until the other descendants are made proportionally equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevise. The advancement shall be estimated according to the value of the property when given."

When the property in contest is sold, a final settlement of the estate should be made in which each of the children or his representatives should be charged with what has been received, and the proceeds of the sale

of the property should be distributed so as to equalize all as near as may be done. *Duff v. Duff*, 146 Ky. 201, 142 S. W. 242.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

### MORGAN et al. v. FIGG et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 475\*)—STREET IMPROVEMENTS—ASSESSMENT—VALIDITY.

Under Ky. St. § 3706, relating to improvement of streets in towns of the sixth class, and authorizing the board of trustees to order the improvement of a street at the cost of abutting owners upon petition of the owners, or without petition on vote of four trustees at a regular meeting, providing that the work be let to the lowest bidder, and providing, also, for an assessment and issuance of bonds on a ten-year payment plan, it was within the power of the trustees to contract for the improvement either on a cash basis or on a five-year deferred payment plan, or to give the property owners the option to any pay either in cash or on a deferred payment plan, especially where it did not appear that the contractor's bid was any higher because of that plan, and where the owners, if bound to pay at all, preferred to pay on that plan.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1125, 1126; Dec. Dig. § 475.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 519\*)—STREET IMPROVEMENTS—LIEN—STATUTES.

Under such statute it was the intent of the Legislature that, where the ten-year plan was not adopted, the assessment and cost of the improvement should be a lien on the abutting property, as it was not in the power of the Legislature to impose a personal liability on the abutting property owner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1220-1227; Dec. Dig. § 519.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by L. R. Figg and another against John S. Morgan and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Joseph S. Lawton and W. S. Sanford, both of Louisville, for appellants. Furlong, Woodbury & Furlong, of Louisville, for appellees.

CLAY, C. Plaintiffs, L. R. Figg, suing for the First National Bank, and the First National Bank, brought this action against defendants, John S. Morgan and others, abutting property owners, to enforce certain liens for the improvement of Third street in the town of Oakdale, between Young street and the Boulevard. The chancellor granted the relief prayed for, and the defendants appeal.

Oakdale is a town of the sixth class. Section 3706, Kentucky Statutes, providing for the improvement of streets in towns of the sixth class, is in part as follows:

"The board of trustees is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways, and public places of such towns. The cost and expenses incurred in repairing streets, avenues,

highways, sewers, and public places shall be paid out of the general fund of the town. The expense incurred in making and repairing sidewalks and curbing shall be paid by the owners of the land fronting and abutting thereon, if the board of trustees so order, each lot or portion of lot being separately assessed for the full value thereof in proportion to the frontage thereof to the entire length of the whole improvement, not to exceed a square sufficient to cover the total expense of the work. The cost and expense incurred in constructing or reconstructing sidewalks, curbing, streets, avenues, highways, sewers, and public places shall be paid out of the general fund of the town or by the owners of the lands fronting and abutting thereon, as the board of trustees may, in each case, determine; but the local assessment shall not exceed fifty per centum of the value of the ground after such improvement is made excluding the value of the buildings and other improvements upon the property so improved. Whenever the board of trustees shall determine upon the construction or reconstruction of streets, avenues, highways, sewers, and public places at the expense of the abutting property, they shall cause the same to be done as follows: The ordering of such improvement shall be by ordinance of the board of trustees, and the contract therefor shall be awarded to the lowest and best bidder after proper advertisement for bids. The said board of trustees shall require the accepted bidder to execute a bond to the town with good and sufficient surety to be approved by said board of trustees for the faithful performance of his contract. The original construction or reconstruction of any sidewalk, curbing, streets, sewers, avenues, highways, alleys, and public places may be made the exclusive cost of the owners of the lots and parts of lots or land fronting or abutting or bordering upon the proposed improvement be equally apportioned by the board of trustees according to the number of front feet owned by them respectively upon the petition of the majority of the property owners of lots or parts of lots, or land abutting or bordering upon the proposed improvement; or the board of trustees may cause same to be done without such petition upon the vote of four members-elect of said board of trustees at a regular meeting thereof; or the board of trustees may, by a majority vote at any regular meeting thereof, cause any such improvement to be made upon the ten-year bond plan."

The remainder of the foregoing section applies to improvements made on the ten-year bond plan, and is not material to this case. The improvement in question was ordered during the year 1905, by votes of four trustees. Bids were called for by proper advertisement. There were three bidders. Plaintiff Figg agreed to do the work for \$4.50 a lineal foot on each side of the street, payment thereof to be made in installments extending over a period of not exceeding five years from the completion of the work, and also agreed to do the work at \$4.29½ a lineal foot on each side of the street if the town itself would pay cash. Figg's bid was the lowest and was accepted by the board of trustees. The contract was drawn up and signed by the board of trustees and by Figg and his surety, providing that payments should be made either in cash or in equal quarterly annual payments, to extend over a period not exceeding five years. Pursuant to the above contract the improvement was completed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Figg testified that where he was required to look to the property owners for payment his bid would be the same, whether on a cash basis or deferred payment plan. There is no evidence to the effect that his bid was higher because of the method of payment. The property owners admit that if they had to pay at all they would prefer to pay on the deferred payment plan.

[1] The regularity of the proceedings is called in question in only one respect. It is insisted that the statute provides for two plans—one on a cash basis, and one on the ten-year bond plan; that, instead of adopting one or the other of these two plans, the board of trustees accepted the bid on the five-year payment plan, which, not being authorized by the statute in question, invalidates the whole assessment. It will be observed that section 3706, *supra*, authorizes the board of trustees to order the construction of a street at the cost of the lot owners abutting thereon, to be equally apportioned by the board of trustees according to the number of front feet owned by them respectively, either upon the petition of a majority of the abutting property owners, or without such petition upon a vote of four members-elect of the board of trustees, at a regular meeting thereof. The act in question is not as specific as the acts relating to street improvement in towns of other classes. The act provides for assessing the cost against the abutting property. It also provides for the issuing of bonds on the ten-year plan. When the latter plan is adopted, improvement taxes are divided into ten annual installments, and bear interest from date. In view of the latter provision, it is insisted that, when the first plan is followed, payment of the assessments must necessarily be in cash. This, however, is a mere inference. The statute is silent upon the subject. It contains no provision requiring payment to be made in cash. In the absence of such provision, we conclude that it is within the power of the trustees to contract for the improvement either on a cash basis or on a deferred payment plan, or to give to the property owner, as was done in this case, the option to pay either in cash or on a deferred payment plan. Certainly there can be no complaint of the deferred payment plan where, as in this case, it does not appear that the contractor's bid was any higher because of that plan, and the property owners say that if they have to pay at all they prefer to pay on that plan. Under this view of the statute it cannot be said that the trustees provided for a time of payment not authorized by the statute.

[2] While it is true that the act does not in terms provide, where the ten-year plan is not adopted, that the cost of the improvements shall be a lien on the abutting property, it is apparent from the act that such was the pur-

pose of the Legislature. It did not have the power to impose a personal liability on the abutting property owner. When, therefore, the act provided that the work should be done at the cost of the abutting property owner, and should be apportioned by the board of trustees according to the number of front feet owned by them respectively, there can be no escape from the conclusion that the assessment should be secured by a lien on the abutting property.

Judgment affirmed.

### STONE v. BURKHEAD.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

On petition for rehearing. Petition overruled.

For former opinion, see 160 Ky. 47, 169 S. W. 489.

TURNER, J. Nothing in the opinion of the court was intended to require appellee to remove his blacksmith shop; it being our understanding that the structure itself was in no sense an obstruction of the passway.

The injunction as to the shoeing of horses applied only to a small part of appellee's lot in front of and near the storehouse, and described in the judgment, and had no reference to his carrying on his business in the usual way within the blacksmith shop itself.

The petition for rehearing is overruled.

### NEW ERA LAND CO. v. CHILDS.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

1. EVIDENCE (§§ 335, 383\*)—PATENT—DESCRIPTION—PLAT—EFFECT.

The original plat accompanying a patent issued by the state is admissible to determine the location of the land, and is either preponderating or alone conclusive on the issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1278-1278, 1660-1677; Dec. Dig. §§ 335, 383.\*]

2. EVIDENCE (§ 383\*)—PATENTS—DESCRIPTION—PLAT—EFFECT.

Where copies of an original survey and a certified copy of the patent contain a clerical error when considered in the light of the map accompanying the patent, the error must be disregarded and the map must control in determining the location of the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

3. JUDGMENT (§ 712\*)—RES JUDICATA.

A judgment is not conclusive on the issue of the proper location of a patent for land, where the owner was not a party to the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1233; Dec. Dig. § 712.\*]

Appeal from Circuit Court, Jackson County.

Action between the New Era Land Company and James L. Childs. From a judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—27

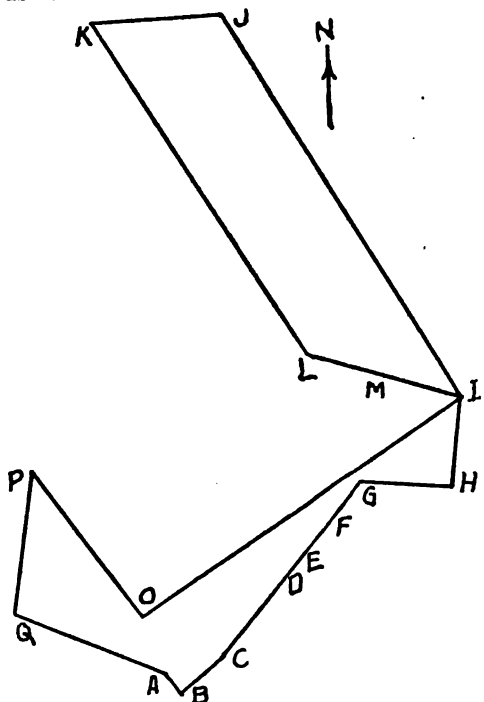
ment for the latter, the former appeals. Reversed and remanded.

Harrison & Harrison, of Louisville, and J. R. Llewellyn, of McKee, for appellant. A. W. Baker, of McKee, and W. E. Begley, of London, for appellee.

HOBSON, C. J. The only question to be determined on this appeal is the proper location of a patent for 100 acres of land issued by the state to Jacob Hughes August 6, 1856, on a survey bearing date September 17, 1855. The calls of the patent are as follows:

Beginning at two Chestnuts and poplar trees on the County line between Owsley and Estill thence S 44 E 14 poles to two hickories and black oak thence N 48 E 29 poles to a spotted oak in a line of J. Hughes thence N 83 E 56 poles to a pine, spotted oak and black gum thence N 46 E 14 poles N 36 E 24 poles thence N 48 E 30 poles to three Chestnuts and spotted oak and corner to Joseph Seal and John Anglin thence S 86 E 60 poles thence N 7 E 68 poles to a forked hickory and two white oaks thence N 89½ W 245 poles thence W 70 poles thence S 30 E 215 poles thence S 72 E 34 poles to a pine same course continued in all 88 poles to a forked hickory and two white oaks thence N 60 W 217 poles thence N 30 W 62 poles thence S 9½ E 78 poles thence S 61 E 86 poles to the beginning, excluding 20 acres prior claim.

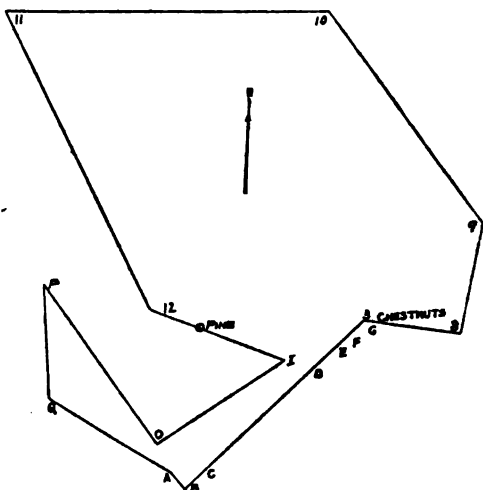
The survey and plat accompanying it are as follows:



September 17, 1855, Surveyed for Jacob Hughes 100 acres of land assee, of William McJunkin by virtue — a land warrant which issued from the Clerk's Office of said County situate and being in Owsley County on the Dry fork of Wild Dog Creek waters of Sturgeon Creek and waters of the Kentucky River and

bounded as followeth towit: Beginning at A two Chestnuts and Poplar trees on the County line between Owsley and Estill: thence S 44 E 14 poles to B. two Hickories and Black Oak: thence N 48 E 29 poles to C. a Spotted Oak in a line of J. Hughes: thence N. 83 E 56 poles to D. a Pine, Spotted Oak & Black Gum: thence N. 46 E 14 poles to E: thence N. 36 E 24 poles to F.: thence N. 48 E 30 poles to G. three Chestnuts & Spotted Oak trees & corner to Joseph Seal & John Anglin; thence S 86 E 60 poles to H.: thence N 7 E 68 poles to I. a forked Hickory & 2 White Oaks Thence N 89½ W 245 poles to J.: thence West 70 poles to K.: thence S 30 E 215 poles to L.: thence S. 72 E 34 poles to M. a Pine same course continued in all 88 poles to I. a forke Hickory & two White Oaks: thence N 60 W 217 poles to O.: thence N. 30 W 62 poles to P.: thence S 9½ E 78 poles to Q.: thence S 61 E 86 poles to A. the Beginning 20 acres of this Plat & certificate is on Jacob Hughs Land which was granted to Dudley Hill.

As located by three surveyors the patent covers something over 300 acres of land and is plated as follows:



This plat is made on a scale of 40 poles to the inch; the other on a scale of 100 poles to the inch, but they serve to show the difference in the shape of the tract of land under the two locations of the patent.

The line A, B, C, D, E, F, G is the same on the two plats; also the lines I, O, P, Q, A. The difference is that in the plat accompanying the original survey the corner "a forked hickory and two white oaks" in the ninth and thirteenth calls is placed at the same point, I; but in the location of the patent as made by the three surveyors the thirteenth corner is located at I. But the ninth corner is located at another point, (9 on plat) nearly three-quarters of a mile from I. The appellant, who was plaintiff below, insists on the location of the patent as shown on the plat accompanying the original survey; the appellees, who were the defendants below, insist the patent was properly located by the three surveyors. The circuit court having adopted the latter location of the pat-

ent, this appeal followed; the thing directly in controversy being the land on the north end of the patent. It will be observed that the location of the patent as established by the judgment of the circuit court gives the tract of land covered by the patent an entirely different shape from that shown by the surveyor's plat accompanying the original survey, and makes it contain about three times the quantity of land called for by the survey. The difference between the two locations is that the surveyors followed the courses and distances called for in the patent running from G to 8 and from 8 to 9 on the surveyor's plat instead of disregarding the courses and distances called for and running from G to I as shown in the plat accompanying the original survey. While the surveyors followed the courses and distances of the patent in running from G to 8 and 8 to 9, they had to disregard other calls of the patent to make a close. At the time the survey was made Jacob Hughes owned the Dudly Hill survey and was living upon it. The forked hickory and two white oaks at I were a well-known corner of that survey. The line from I to 12 and 12 to 11 on the surveyor's plat were well-known lines of that survey; the line from B to G crossed that survey and cut off about 20 acres of it. That the surveyor who made the original survey located the forked hickory and two white oaks called for in the ninth and thirteenth calls of the survey at the same point, there can be no question; for he begins at A on his plat and runs to B, thence to C to D to E to F to G to H to I to J to K to L to I to O to P to Q to A. This is shown, not only by the lines on the plat, but also by the lettering, for he begins with A and proceeds alphabetically until he reaches M then he goes to I then to O, P, Q, etc. What he meant is unmistakable; the pine at M is called for in the Dudly Hill survey, and that he was endeavoring to follow the lines of that survey is evident.

[1] In *Mercer v. Bate*, 4 J. J. Marsh. 334, the court said:

"The original plat is not only admissible as evidence, but it is intrinsically one of the most potent facts which can be adduced, and hence it has often been admitted by the court as always either preponderating or alone conclusive."

To the same effect see *Patrick v. Spradlin*, 42 S. W. 919, 19 Ky. Law Rep. 1038; *Bell Co. Land Co. v. Hendrickson*, 68 S. W. 842, 24 Ky. Law Rep. 371; *Hogg v. Lusk*, 120 Ky. 419, 86 S. W. 1128, 27 Ky. Law Rep. 840; *Daniel v. New Era Land Co.*, 137 Ky. 535, 126 S. W. 108; *Bryant v. Strunk*, 151 Ky. 97, 151 S. W. 381.

[2] About two years after the Jacob Hughes survey was made, Barton Potter made a 200-acre survey adjoining it, this survey being made by the same surveyor who had made the Hughes survey, and Hughes, who was then living on the Dudly

Hill tract, was one of the chain carriers. The Barton survey runs with the line from I to J on the plat accompanying the original survey, that is, with a line running from I parallel with the line from 12 to 11 on the surveyor's plat. To locate the Hughes survey as located by the surveyors, it will include about half of the Barton Potter survey, and it is incredible that the same surveyor, making the two surveys so close together, could have overlooked the location of the previous survey or that Hughes, who was one of the chain carriers, in the latter survey, could have been ignorant of the location of his line, and not have known that Potter was taking up 100 acres of his land. It is also unreasonable that a surveyor in running out a survey of 100 acres of land made a mistake so that the boundary located lay in a wholly different shape from what he supposed, and contained 300 acres, instead of 100 acres. In addition to this, Jacob Hughes, shortly thereafter, made a survey, the same surveyor doing the surveying, under which he obtained a patent for 8 acres lying in a triangular shape between the points G, I, and I, 12. This land was all included in his previous survey if that survey was located as adjudged by the lower court, and it is incredible that he made a survey of 8 acres within his larger survey of 100 acres to which he already had a perfect title. The evidence is also persuasive that Hughes recognized the line from I to J on the plat accompanying the original survey and never held beyond that line. The evidence that the line from G to 8 from 8 to 9 from 9 to 10 from 10 to 11 was ever marked or recognized is very unsatisfactory. There is some evidence that a marked white oak was found at 9, but there is no evidence that there was ever at that point a forked hickory and two white oaks, or that this point was ever recognized as a corner by Hughes or his son who held the land after him, or Lunsford, who held the land after him. We, therefore, conclude that the patent must be located by running from G to I with the line of Hughes' 8-acre survey, as this seems to be the location of the patent as adopted by the parties themselves when that survey was made. It not infrequently happens that in writing out the calls of a survey, by a clerical error N is used for S or E for W or vice versa. To illustrate: There are two office copies of the original survey in this record, and in each of them there is a clerical error of the kind. In the copy of the patent regularly certified, there are two clerical errors. While there are clerical errors in the report of the original survey, when the words written are read in the light of the accompanying map, no doubt of what it means as a whole can be entertained.

[3] The judgment in the case of *English v. Childs*, which was pleaded in bar of this action, is not conclusive here for the reason

that Sarah Childs, the owner of the land, was not a party to that action.

Judgment reversed, and cause remanded for a judgment locating the patent as above indicated.

### MULLIGAN v. MULLIGAN.

(Court of Appeals of Kentucky. Dec. 15, 1914.)

#### 1. DOWER (§ 32\*)—INCHOATE RIGHT—VALUE.

Where a sale under a trust deed executed by a husband alone was made to raise money to pay his debts, including a debt secured by a mortgage signed by the wife and covering a part of the property worth more than the debt, the amount of the mortgage debt must be deducted from the proceeds in fixing the amount on which to base a calculation of the value of her inchoate dower right, protected by the deed requiring the trustee to pay her the cash value of her inchoate dower right.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 84; Dec. Dig. § 32.\*]

#### 2. DOWER (§ 32\*)—INCHOATE RIGHTS—VALUE.

Where a sale under a trust deed executed by a husband alone was made to pay debts, including tax liens in favor of a city, the amount of the tax liens must be deducted from the proceeds to determine the value of the wife's inchoate right of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 84; Dec. Dig. § 32.\*]

#### 3. DOWER (§ 43\*)—SALE OF REAL ESTATE—TAX LIENS—STATUTORY PROVISIONS.

Ky. St. § 2132, conferring on the surviving spouse an estate for life in one-third of all the real estate of which the deceased spouse was seised in fee simple during coverture, unless the right thereto has been barred, forfeited, or relinquished, protects the rights of each spouse in the realty of the other, and cannot be construed in derogation of the right to enforce tax liens conferred by section 3176, for all property is subject to taxation, and the power to enforce collection thereof cannot be hampered by any want of authority to vest in the purchaser at tax sales full title, including a wife's inchoate dower right.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 90, 92; Dec. Dig. § 43.\*]

#### 4. MORTGAGES (§ 376\*)—SALE—PROCEEDS—RIGHTS OF PARTIES.

Where a sale under a trust deed executed by a husband alone was made to raise money to pay debts, including a debt secured by a mortgage, in which the wife joined, on a part of the property exceeding in value the debt, but a sale of the unmortgaged property was made, the proceeds must be applied as if sufficient mortgaged property had been sold to discharge the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1125-1132; Dec. Dig. § 376.\*]

#### 5. TRUSTS (§ 276\*)—RIGHTS OF PARTIES.

A husband who alone conveyed all his property by trust deed empowering the trustee to convey the property, but requiring him to pay to the wife the cash value of her inchoate right of dower and to support the wife and family, did not thereby relieve himself of the duty of providing a suitable home for his family, and he alone could complain of any action of the trustee in executing the provisions of the deed, so far as it required him to maintain his family.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 394, 395; Dec. Dig. § 276.\*]

#### 6. HUSBAND AND WIFE (§ 19\*)—CONTRACTS—“NECESSARIES.”

Where a trustee, under a trust deed executed by a husband alone, filed suit against the husband and wife for the construction of the deed and for guidance in the execution of the trust and for a settlement thereof, a claim for legal services for the wife was not “necessaries,” within Ky. St. § 2130; the trust deed being made to protect her interest and specifically providing for the protection of her interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. § 19.\*]

For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

#### 7. HUSBAND AND WIFE (§ 19\*)—CONVEYANCES—RIGHTS OF PARTIES.

In a suit by a trustee, in a trust deed executed by a husband alone, for the construction of the deed and for a settlement of the trust, the fees of the wife's counsel cannot be adjudged a proper charge on the estate of the husband, though deemed necessities, within Ky. St. § 2130.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. § 19.\*]

#### 8. TRUSTS (§ 276\*)—RIGHTS OF PARTIES.

A husband who alone executed a trust deed, whereby he conveyed all his property to a trustee to manage the property, maintain the wife and family, and on a sale pay the cash value of the wife's inchoate dower right, could alone complain of the refusal of the trustee to make an appropriation out of the trust estate for medical services for the wife, for the husband, financially responsible, remained liable for all necessities of the wife.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 394, 395; Dec. Dig. § 276.\*]

Appeal from Circuit Court, Fayette County.

Petition by the Lexington Banking & Trust Company against J. H. Mulligan and against Genevieve Morgan Mulligan, his wife, and others, for the construction of a trust deed and guidance in the execution thereof, and for a settlement thereof. From a judgment construing the deed and settling the rights of the parties, J. H. Mulligan appeals, and Genevieve Morgan Mulligan cross-appeals. Reversed on original appeal, and affirmed on cross-appeal.

Geo. B. Kinhead and James H. Mulligan, both of Lexington, for appellant Mulligan. Falconer & Falconer, of Lexington, for appellant Lexington Banking & Trust Co. O'Rear & Williams, of Frankfort, for appellee.

HANNAH, J. J. H. Mulligan, a citizen of Lexington, was in February, 1913, the owner of real estate valued at \$100,000 to \$125,000, and comprising a farm known as the “McCoy Place,” near Lexington, and various parcels of real estate within the city. Roughly speaking, about half of this real estate in value was nonproductive, while of the remainder there were a number of parcels, the income derived from which was so negligible, compared with their market value, as to render them unprofitable and undesirable investments.

Mr. Mulligan was in debt, and had been in that condition for some years. In point of fact, some of his indebtedness seems to have been inherited along with some of his real estate. His obligations included approximately \$7,000 of accrued and delinquent taxes due the city of Lexington, approximately \$14,000 of indebtedness secured by mortgages on parts of his real estate, and other unsecured debts aggregating in all a rough total of about \$25,000. The interest on this indebtedness, together with the taxes, repairs, insurance, and other fixed charges on his real estate, absorbed such an undue proportion of the income derived therefrom as to confront him with the necessity for a readjustment and lightening of the burden. It seems that he and his wife were unable to reach any agreement, however, as to what particular pieces of real property should be sold. It is contended that she refused to unite in a conveyance of any of it. It is clear that she firmly declined to unite in any conveyance of the property occupied by the Mulligans as a home, which is known as "Maxwell Place," and consists of some 13 acres of land in the city of Lexington, which is quite valuable. She suggests in her answer that it was the home of her husband's parents; "that it is suitable at present only for a residence; that it furnishes pasturage for the milch cow and driving horse and a kitchen garden." Mr. Mulligan desired, however, to sell this place, or part of it at least, suggesting that to one in his financial condition this land was much too valuable to be kept for a "garden which yields only its accustomed crop of weeds," and for pasturage for one "pathetic cow," and as a recreation ground on which one old grey mare might "occasionally kick up her heels in the sunshine, congratulating herself that in her old age she is still left 'to trod alone some banquet hall deserted,' if pasture land at \$2,000 per acre to the eyes of an ancient equine could be so likened."

Mr. Mulligan had no personal property out of which he could pay anything on his indebtedness. He was 69 years of age, and, so far as the record shows, had no income other than that derived from his real estate. With matters in this condition, he executed on February 25, 1913, to the Lexington Banking & Trust Company a trust deed, conveying to it in trust his entire estate in Kentucky, consisting of about 20 pieces of real estate. By the terms of that conveyance, the trustee was to collect the rents, pay the taxes, make the necessary repairs on the real estate, sell so much of it as was necessary to pay Mr. Mulligan's debts, and reconvey the residue to him.

The deed contained a provision that, should Mrs. Mulligan fail to unite therein, the trustee should out of the proceeds of the sale of any of the property which might be sold by it, and in which she had not released dower, pay to her the cash value of her in-

choate right of dower in the property so sold upon her release thereof. Mrs. Mulligan failed to unite in the execution of the trust deed. On the next day after its execution, the trustee, Lexington Banking & Trust Company, filed its petition in the Fayette circuit court against James H. Mulligan, Genevieve Mulligan, his wife, and certain mortgage creditors, seeking an interpretation of the trust deed and the guidance of the chancellor in the execution of same and for a settlement thereof. Notwithstanding the fact that her inchoate right of dower was arranged for in the trust deed, and was besides the subject of judicial protection, Mrs. Mulligan filed an answer in which she stated that her release of her inchoate right of dower in any of her husband's real estate would depend upon what properties were sold.

On May 24, 1913, the cause was referred to the court's master commissioner to receive proof of claims against Mr. Mulligan, and to determine which of his properties it was best to sell for the purpose of paying his indebtedness. The commissioner fixed May 29, 1913, for a hearing; but the parties by agreement adjourned to June 11, 1913, pending an effort to bring about an agreement between Mr. Mulligan and his wife. This having failed, the commissioner fixed November 3, 1913, for a hearing; and on December 13, 1913, he filed his report of claims presented and recommendations as to what real estate should be sold, and the order in which it should be offered, recommending the sale only of property upon which there were already mortgage liens, and as to which Mrs. Mulligan had theretofore released her inchoate right of dower by joining in the mortgages thereon. However, after the filing of the commissioner's report, Mrs. Mulligan filed an amended answer, consenting and agreeing to relinquish dower in any of the lands mentioned in the trust deed, except Maxwell Place, and agreeing to take the cash value of her dower right, to be ascertained by the court, in those tracts which were not mortgaged, and in the excess of the sale price over the mortgage in respect of those that were mortgaged.

On February 21, 1914, a judgment and order of sale was entered, whereby it was ordered that so much of Mr. Mulligan's real estate as was necessary to pay his debts should be sold; Mrs. Mulligan to have the same dower interest in the proceeds of sale as she had in the property sold. The judgment further provided that:

"In the event of the sale of any mortgaged property of said James H. Mulligan, in which mortgage his wife has heretofore joined and relinquished her dower therein, it is adjudged that if said properties or any of them bring a sum or sums in excess of said mortgage thereon, respectively, then said Mrs. Mulligan would have dower in such excess; and that such dower in such excess should be estimated and paid to her as above provided."

The master commissioner was directed to "hear evidence of the value of Mrs. Mulli-

gan's inchoate dower in such properties, taking the accepted bids at which the properties were sold as the valuation of said properties for the purpose of estimating the value of her dower right."

On April 18, 1914, the master commissioner filed his report of sale, and on April 25, 1914, filed his report on the value of Mrs. Mulligan's inchoate right of dower. The property ordered to be sold, and the precedence in which it was to be sold under the judgment, was as designated by Mr. Mulligan.

There were five tracts included in a mortgage executed by Mr. Mulligan to the Transylvania University, in which mortgage Mrs. Mulligan had joined, releasing dower. Of these, Nos. 2, 3, and 4 were ordered to be sold, and were sold. The amount of that mortgage was \$6,041.93 on the day of sale. The sale price of these properties was \$13,550. Of the two tracts included in the mortgage to the Security Trust Company, No. 1 was ordered to be sold, but was not sold. The amount of that mortgage on the day of sale, not including the amount of proportionate costs, etc., was \$7,709.15. There were also ordered to be sold five pieces of un-mortgaged property, one of which we are unable to identify with any of the properties described in the trust deed. These five were all sold, and brought \$15,045.

Under the judgment, as has been seen, Mrs. Mulligan was to have the cash value of her inchoate right of dower in the un-mortgaged properties sold, and also in such sum as was derived from a sale of the mortgaged properties over and above the amount of the mortgages.

The commissioner reported that the mortgaged and un-mortgaged properties sold realized the sum of \$28,595; that the liens on the properties sold were as follows: Mortgage liens, \$13,550; judgment liens, \$183.43; tax liens due city of Lexington, \$5,855.85—which, including an allowance of \$800 for probable costs, made a total of \$18,641.72, leaving \$9,953.28, in which sum Mrs. Mulligan is entitled to dower therein, which, according to the dower tables, would be \$844.04. Mrs. Mulligan filed exceptions to this report, and the same were sustained. The court then referred the cause back to the commissioner for amended calculations, directing him not to deduct the amount of the tax liens in fixing the amount in which the cash value of her dower was to be ascertained, and not to deduct the amount of the Security Trust Company mortgage lien, to pay which certain un-mortgaged properties had been sold. The commissioner then filed an amended report reciting that the total sale price of all the properties sold was \$28,959; deducting from this \$6,041.93, the amount of the Transylvania University mortgage, left \$22,553.07; and the cash value of Mrs. Mulligan's dower right in that sum was \$1,912.50. To this report Mr. Mulligan ex-

cepted because the amount of the tax liens was not deducted, and also because the commissioner did not deduct, from the total sum realized by the sale of the properties, the amount of the Security Trust Company mortgage lien.

The court overruled these exceptions and ordered the commissioner to pay Mrs. Mulligan \$1,912.50 out of the funds in his hands. Mr. Mulligan appeals.

[1] The various properties were sold for the express purpose of raising enough money to pay Mr. Mulligan's debts, and included in the debts which are to be paid out of the proceeds of these properties is the mortgage debt due to the Security Trust Company. The property included in the mortgage to the Security Trust Company was of a value greatly in excess of the amount of that mortgage. Out of the proceeds of the sale of un-mortgaged properties, the lien of that mortgage will in this proceeding be discharged, and her inchoate right of dower which she had relinquished in such properties, by uniting in the execution of that mortgage, will again attach thereto. It is therefore manifestly proper and equitable that the amount of the Security Trust Company mortgage debt should have been deducted from the proceeds of the properties sold herein, in fixing the amount upon which to base the calculation of the value of the wife's inchoate right of dower.

[2, 3] As to the deduction of the tax liens, the court is of the opinion that the amount of these liens should also be deducted from the proceeds of the properties sold, in fixing the amount upon which to base a calculation of the value of the wife's inchoate right of dower.

In this case the property was not sold to enforce the city's lien for taxes by a direct proceeding instituted for that purpose, but was sold in a proceeding for the purpose of obtaining the money wherewith to discharge such tax liens existing in the city's behalf; and the same effect should be given thereto in respect of the wife's inchoate right of dower as would have resulted from a sale of property in a direct proceeding to enforce tax liens.

We have had no difficulty in reaching the conclusion that a sale of any of Mr. Mulligan's property, in a proceeding by the city to enforce its lien for taxes conferred by section 3176, Kentucky Statutes, would operate to extinguish his wife's inchoate right of dower. The statute (Kentucky Statutes, § 2132) confers upon the surviving spouse an estate for life in one-third of all the real estate of which the deceased marital partner was seised in fee simple during the coverture, unless the right thereto has been barred, forfeited, or relinquished. But this statute has for its purpose the protection and conservation of the rights of each in the realty of the other, and is not to be construed in derogation of the right of the sovereign to enforce

the payment of taxes. All property is held subject to the right of taxation exercised as an incident of sovereignty; and the power to enforce the collection of taxes imposed under authority of law should not be embarrassed or hampered by any want of authority to vest in the purchaser at tax sales the full title and interest of the owner thereof, including the wife's inchoate right of dower.

[4] Appellant also contends that the chancellor erred in ordering the payment to Mrs. Mulligan of the cash value of her inchoate right of dower as of the date of the judgment; i. e., out of the first money which should come to the hands of the commissioner. Inasmuch as unmortgaged property was sold for the purpose of providing money with which to discharge the lien on mortgaged property, the application of the fund so derived and the priority of payments should be determined in the same manner as if sufficient mortgaged property had been sold to discharge the mortgage lien.

The mortgage liens on the real estate owned by Mr. Mulligan amounted to approximately \$14,000; and these liens, as well as the tax liens mentioned, were, of course, superior to the wife's inchoate right of dower, and must be removed before she is entitled to anything. The fund derived from the sale of the real estate should therefore first be applied to the discharge of the mortgages and tax liens. After these are discharged, the fund derived from the sale of the real estate, as it comes to the hands of the commissioner, should be prorated between Mrs. Mulligan and the unsecured creditors until the liquidation is fully consummated.

[5] 2. From certain rulings of the court which will now be taken up, Mrs. Mulligan prosecutes a cross-appeal.

There was in the trust deed executed by Mr. Mulligan to the Lexington Bank & Trust Company a provision which reads as follows:

"Said trustee shall take possession of and control of all of said property, rent it out, and keep it under rent for the best price and upon the best terms that can be obtained, and appropriate the same for the support and maintenance of the wife and family of first party in such manner as it shall be necessary and proper. \* \* \* Said trustee shall maintain the personal home of the said James H. Mulligan, and support and maintain his wife and family therein not longer than it is absolutely necessary for it in carrying out the terms of the trust herein mentioned."

When Mrs. Mulligan filed her answer herein, she made it a counterclaim against the trust company, averring that Mr. Mulligan and herself were husband and wife; that it was the duty of the trustee, under the trust imposed in the deed, to maintain the personal home of James H. Mulligan; that Maxwell Place was that home; that he had inherited it from his father and mother; and that "he (Mulligan) is now living at said home, and of course may, if he chooses, continue to live there—a choice which this defendant earnest-

ly hopes he will be pleased to exercise." She further charged that it was necessary and, under the terms of the deed, the duty of the trust company to make to her individually an allowance for clothing for herself and children and for incidental expenditures (i. e., "pin money"); and that this the trustee had declined to do. She prayed for an allowance of \$1,800 per annum, and also for an allowance of \$500 per annum for each of her two daughters, to be paid to her, although both of these daughters were of age. On the same day a motion was entered for the immediate granting of such allowance.

On March 22, 1913, the chancellor entered an order requiring the trustee to pay to Mrs. Mulligan, for herself and her two daughters, the sum of \$150, and \$50 per week thereafter. On April 19, 1913, complaint having been made by Mrs. Mulligan, the chancellor rescinded the former order and ordered the trustee to pay the sum of \$60 per week for the maintenance and support of the family of James H. Mulligan; the said sum to be by the trustee paid to such person as the trustee might select—

"it being the purpose of this order to give the trustee full authority and direction to carry out the express provisions of said trust with reference to the support of the family, said expenditures to include food, raiment, and such incidental and necessary expenses as may be incident to the support of the family of said Mulligan; and in expending said money it may make payment to the persons from whom such necessities may be purchased, or may make cash allowances to any individual member of said family for any necessary purchase as it may deem proper."

Mrs. Mulligan insists that the trustee should have been required to pay direct to her the sum of not less than \$150 per month for the support of herself and \$40 per month for each of the two daughters, and that it should now be directed to pay to her this amount. In the answer which she filed, she took the position that her husband had abdicated to the trustee the duty of providing a suitable home for his family. But we do not think this a fair interpretation of the plan and purpose of the trust. While it might be said that Mr. Mulligan temporarily delegated to the trustee the duty of providing the money with which to maintain his home, his rightful position as the head of his family, he did not abdicate; nor could he abdicate it thereby, so long as the marital relation continued. He was, therefore, in our opinion, the only person having a right to complain of any action upon the part of the trustee in interpreting and executing the provision of the trust deed that "said trustee shall maintain the personal home of the said James H. Mulligan and support and maintain his family therein."

[6, 7] 3. It appears from the report of the master commissioner, filed December 13, 1913, that Mrs. Mulligan's attorneys filed a claim against the trust estate for \$1,000 for professional services rendered to Mrs. Mul-

ligan. This claim the commissioner declined to allow. Mrs. Mulligan filed exceptions to the report, and same were overruled. Of that ruling she complains upon her cross-appeal herein. It is conceded that, unless the services mentioned may be classed as "necessaries" coming within the purview of section 2130, Kentucky Statutes, the claim was not a proper charge against Mr. Mulligan's estate.

The plaintiff, Lexington Bank & Trust Company, in its petition set up the fact that the trust deed executed to it by Mr. Mulligan provides for the protection of Mrs. Mulligan's inchoate right of dower; and, in the absence of such provision in the deed or allegation in the petition, the wife's inchoate right of dower is the subject of judicial protection. On the other hand, the matter of a personal allowance to Mrs. Mulligan was one, the trustee's action in respect of which was not and could not be the subject of a competent objection or complaint upon her part.

While it was proper, if she so desired, that Mrs. Mulligan should be represented by counsel in this cause, we are of the opinion that such representation cannot be classed as one of those necessities for the wife for which the statute renders the husband liable.

The act of Mr. Mulligan in making provision for the payment of his debts and the removal of the various liens from his real estate was in fact as much an effort to protect his wife's present as well as expected future interest in his real estate as it was to protect his own; and the trust deed protected her legal interest in express terms. An effort on her part to obtain from the estate of her husband a greater sum than she was in law entitled to was not a "necessary," within the purview of the statute, but, on the contrary, was in this case deleterious to her own interest in prolonging the settlement of the trust, and thereby increasing the claims against her husband's estate, in which she had an inchoate right of dower. Her effort was an endeavor to enforce a claim to which she thought herself entitled, but was not necessary in this instance. However, had it been necessary, we do not think that, in a proceeding of this nature, the fees of her counsel are a proper charge upon the estate of her husband.

[8] 4. On March 22, 1913, the date on which Mrs. Mulligan filed her first application for an allowance, it appears from her affidavit then filed that she was in good health; but pending this litigation she was found to be affected with a form of carcinoma. On January 17, 1914, she filed the affidavit of her physician and entered a motion that the trustee herein be directed to provide out of the trust estate, for her medical attention and treatment, a sum sufficient to enable her to be carried either to Baltimore or New York City, where she could have ap-

plied the radium treatment to her ailment, and that the trustee be directed to raise such sum as might be necessary for this purpose out of the trust estate, not exceeding \$5,000. The affidavit mentioned is not copied in the record; the clerk certifying that it could not be found.

Upon the entry of this motion, Mr. Mulligan filed his own affidavit stating that when he was advised, by the physician attendant up his wife, of the grave nature of her malady, and learned that radium treatment might be found necessary, he made arrangements with his son, whereby his son arranged to procure and furnish to him at once the sum of \$1,000 to defray said expense; that this sum had been held by him awaiting the advice and wishes of the attending physician; that this sum he had at command, supposing it to be ample for present needs; and that he stood ready to afford such comfort, hope, or consolation to his wife as might result from such treatment, even though it brought no promise of benefit.

The affidavit further states that the "affiant needs the intervention of no lawyers or other persons to suggest to him the impulses of sympathy or humanity to any person, more especially to his wife or any member of his family or any person in short, having a claim upon him. He but awaits the direction of Dr. Bullock as to what shall be done on his part." This money, it seems, Mrs. Mulligan refused to accept; and Mr. Mulligan immediately thereafter borrowed from the trustee, Lexington Banking & Trust Company, the sum of \$1,000 for the purpose mentioned, which was delivered to Mrs. Mulligan and retained by her. Upon a consideration of this motion the chancellor ruled that he had no authority to direct the trustee to make such appropriation out of the trust estate, and of this ruling Mrs. Mulligan complains and contends that this sum should now be ordered paid to her.

The statute imposes upon the husband liability for necessities furnished to the wife. Medical services are certainly necessities; and the reasonable value thereof, when same have been rendered, may be recovered from the husband. But the refusal of the trustee to make an appropriation therefor out of the trust estate before such services were rendered was a matter concerning which only Mr. Mulligan has the right to complain.

6. From the record, there can be no doubt that Mr. Mulligan is financially responsible for all necessities which his wife may need. Nor do we understand from this record that he has been derelict in this regard or unwilling to meet all reasonable and proper demands made upon or suggested to him, either by her or others, or by the exigencies of her condition.

The merits of the differences which seem to have arisen between this husband and wife are not for us to pass upon. In fact,

there seems to have been no marked dissension between them other than that the wife seemed to think that the husband, by his act in temporarily conveying his property to a trustee, failed to provide her with available funds, termed by her "pin money," to enable her to maintain a place in society suitable to her station as the wife of her husband; and the husband seemed to be of the opinion that the wife was unnecessarily embarrassing him financially in refusing to join him in conveying some part of his real estate to enable him to be relieved of the unpleasant pressure of his obligations.

There is no charge or intimation upon the part of the husband that Mrs. Mulligan has been in fault in any manner other than an attempt to interfere with his management of his own estate; nor is there charge or intimation upon the part of the wife that Mr. Mulligan has been guilty of conduct questionable in the remotest degree. She does not intimate that he has been guilty of wasting his estate, nor does she charge that he is incapable of its proper and judicious management. On the contrary, she says that he is an able lawyer of good standing and unusual ability. His only imperfection seems to have been that he found himself unable to extricate himself from the burden of accumulated and accumulating obligations created in an honorable way, except by disposing of some of his real estate for that purpose.

The judgment of the circuit court is reversed on the original appeal for proceedings consistent with this opinion, and affirmed on the cross-appeal.

#### SMITH v. JOHNSON.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

ELECTIONS (§ 305\*) — CONTESTS — APPEAL — BONDS—EFFECT OF FAILURE TO GIVE.

Under Ky. St. § 1596a, subsec. 12, providing that either party in election cases may appeal from the judgment of the circuit court by giving a bond to the clerk of the circuit court to pay all costs within 30 days after final judgment, the giving of a bond is a condition precedent to the right of appeal, and, where the bond was not executed within time, the appellant has no standing in court, and the appellate court cannot allow subsequent execution of the bond.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. § 305.\*]

Appeal from Circuit Court, Pike County.

Election contest between C. B. Smith and James Johnson. There was a judgment for the latter, and the former appeals. Appeal dismissed.

Childers & Childers, of Pikeville, for appellant. John F. Butler and J. J. Moore, both of Pikeville, for appellee.

HOBSON, C. J. This is an appeal in a contested election case. Appellant failed to execute bond within 30 days and has entered

a motion that he be now allowed by the court to execute the bond before the circuit clerk. Appellee has entered a motion to dismiss the appeal.

Section 1596a, Ky. Stat., subsec. 12, provides:

"Either party may appeal from the judgment of the circuit court to the court of appeals by giving bond to the clerk of the circuit court, with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal and by filing the record in the clerk's office of the court of appeals, within thirty days after final judgment in the circuit court."

In *Patterson v. Davis*, 114 Ky. 77, 70 S. W. 47, 24 Ky. Law Rep. 842, we said:

"In our opinion, the requirement of this bond within the time is made a condition precedent to a right of appeal, and, unless complied with, an appellant has no standing in this court."

See, also, *Galloway v. Bradburn*, 119 Ky. 49, 82 S. W. 1013, 26 Ky. Law Rep. 977.

The bond not having been executed within the time allowed, the court is without power to allow it to be executed now, and the motion to dismiss the appeal must be sustained.

Appeal dismissed.

McKEE v. CINCINNATI, F. & S. E. R. CO.†  
(Court of Appeals of Kentucky. Dec. 18, 1914.)

1. NEW TRIAL (§ 42\*)—GROUNDS—PRIOR SERVICE OF JUROR.

That a juror had served as a juror on a prior trial of an action was not ground for a new trial, in the absence of further facts or circumstances prejudicial to the complaining party, especially where a peremptory instruction was given on the former trial, and the juror was a well-known citizen, personally known to such party's local attorney, and slight diligence would therefore have disclosed the fact of his prior service; the jury list being preserved in the records of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 74-79; Dec. Dig. § 42.\*]

2. MASTER AND SERVANT (§ 291\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a railway employe's action for injuries, the court properly refused to submit an issue as to whether insufficient hands were supplied for the work in which plaintiff was engaged, where the uncontradicted evidence showed that four men constituted a crew for doing such work, and that at least five men were engaged therein.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

3. MASTER AND SERVANT (§ 291\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In a railway employe's action for injuries, there was evidence that plaintiff, under the orders and with the knowledge of D., his superior, went between standing cars to couple the air brakes, and that D. was in a position to see a train which backed into the cars between which plaintiff was working. The court refused to charge that it was D.'s duty to stop the cars in time to prevent the injury, unless he knew that plaintiff had emerged from between the cars. It charged that it was admitted that D. saw the train, and could have signaled the engineer to stop it; that if the defendant's engineer, agents, or employes, directing or controlling the movements of the train, knew, or by the exercise of ordinary care could have known,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 22, 1915.

or reasonably anticipated, plaintiff's presence between the cars, when the train was backing, under the directions and signals from D., into and against the standing cars, then defendant was negligent, but, if the jury did not so believe, to find for defendant; that it was plaintiff's duty to perform his duties in a reasonable time and in the ordinary and customary manner under all the circumstances; that if he failed to use ordinary care for his own safety, and by his negligent acts and conduct caused his injury or contributed thereto, and but for his contributory negligence he would not have been injured, to find for defendant. *Held*, that these instructions fairly gave the law of the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

#### 4. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

Though a further instruction that if sufficient time had elapsed, after D. told plaintiff to couple the air brakes for him, to reasonably obey the order, and if D. saw plaintiff in a place of safety before the train was backed against the standing cars, he had a right to presume that plaintiff had obeyed the order and was in a place of safety was unnecessary and merely repeated, in a more specific form, the matters already presented in the other instructions, and therefore should not have been given, it was not prejudicial to plaintiff's substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

Appeal from Circuit Court, Fleming County.

Action by Sam McKee against the Cincinnati, Flemingsburg & Southeastern Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. H. Power and Paul Hefin, both of Flemingsburg, and Scott & Hamilton, of Frankfort, for appellant. B. S. Grannis, O. R. Bright, and John P. McCartney, all of Flemingsburg, for appellee.

MILLER, J. This is the second appeal of this case. The opinion upon the first appeal may be found in 151 Ky. 698, 152 S. W. 759, where the facts are stated somewhat minutely. The facts shown at the last trial differ in no material respect from those shown upon the first trial. They need not therefore be repeated, except to say that McKee was a general laborer for the defendant railroad company, at Flemingsburg, and was injured while coupling the air brakes between two cars. He had been directed to do that work by Dudley, the defendant's superintendent; and the question in issue was whether Dudley, who was supervising the shifting of certain cars from the main track to a side track upon which McKee was working, directed other cars to be sent against the cars between which McKee was working, without giving him a sufficient opportunity to get from between the cars. Upon the first trial the circuit court peremptorily instructed the jury to find for the defendant; but that judgment was reversed, and the case

remanded for further proceedings. The second trial resulted in a hung jury; and, the third trial having resulted in a verdict and judgment for the defendant, McKee appeals.

The first opinion, in dealing with the question of the relations between McKee and Dudley, in connection with the accident, said:

"It may be that appellant was an unusual length of time in making the coupling of the air brakes, and that Dudley assumed, from the time that had passed, that appellant had made the couplings, and had come from between the cars; but it matters not how long it took him to make the coupling, if Dudley knew that he had gone in between the cars a short time before and did not know that he had emerged therefrom, it was the grossest negligence for him to permit the engine and cars to back on that switch and into the cars on it, and thereby necessarily injure appellant."

For a reversal appellant relies upon two grounds: (1) That he had learned after the verdict, and it was true, that William Donaldson, one of the jurors upon the last trial held in November, 1913, was also a juror in the first trial held in January, 1912; and (2) that the trial court erred in refusing and in giving instructions.

[1] 1. The fact that Donaldson had served upon the first jury was made a ground for a new trial, which was supported by the affidavits of McKee and his attorneys. In his affidavit McKee merely stated that, when he accepted Donaldson on the jury at the last trial, he did not know that Donaldson had served upon the first jury, while McKee's attorneys, Power and Hefin, say the fact that Donaldson had served upon the first jury was unknown to them and to the other attorneys for McKee when Donaldson was accepted, and that, before they accepted him as a juror, they asked him if he was able to try the case and give the parties a fair trial, to which Donaldson answered that he could and would. On the other hand, Dudley, the general manager of the defendant company, states in his affidavit that Donaldson was a well-known citizen of Fleming county, and was, in fact, well and personally known to the plaintiff's attorneys, Hefin and Power, and further that Dudley did not know that Donaldson had been on the jury at the first trial nearly two years before.

It is earnestly contended for McKee that he should have been granted a new trial in order that he might have a trial before 12 qualified and unprejudiced jurors, and that the trial court erred in refusing it.

In *Taylor v. Combs*, 50 S. W. 64, 20 Ky. Law Rep. 1828, it appeared that, while the plaintiff's attorney was stating the case, one of the jurors announced that he had been on the former jury which tried the case, and that he did not think of it when he was sworn. Taylor moved that the order swearing the juror be set aside, and that the juror be discharged from the panel; but the cir-

cuit court overruled the motion. In reversing that ruling, this court said:

"In *Fitzpatrick v. Harris*, 16 B. Mon. 564, the appellant was present at the trial, and was a neighbor and acquaintance of the juror. The objection was not made until after the verdict, and the court held that the failure to disclose it before raised a presumption of bad faith or willful neglect. Here it does not appear that any of the plaintiffs were residents of Breathitt county or present at the trial, and, as soon as the fact was known, the court was asked to discharge the juror. There being nothing to raise a presumption of bad faith or neglect, the court should have set aside the juror, and, failing to do so, should have granted a new trial."

See, also, *McKinley v. Smith*, Hardin, 167; *Pierce v. Bush*, 3 Bibb, 347; and *Herndon v. Bradshaw*, 4 Bibb, 45.

The question was again before this court in *Netter's Adm'r v. Louisville Railway Co.*, 134 Ky. 678, 689, 121 S. W. 636, where objection was taken, after the verdict, to a juror who had served on the regular panel within 12 months before the trial, in violation of section 2247 of the Kentucky Statutes. In holding the fact that the juror had served within 12 months did not justify setting aside the verdict, this court quoted from *Finley v. Hayden*, 3 A. K. Marsh. 330, as follows:

"The exception to a juror, because he is not a housekeeper of the county, is, no doubt, a valid one, and ought to be sustained when taken in proper time; but, as it is an exception which does not affect the impartiality or intelligence of the juror, it can furnish no presumption against the justice of the verdict; and it was held, in the case of *Bratton v. Bryan*, 1 A. K. Marsh. 212, and in the case of *Rennick v. Walthal*, 2 A. K. Marsh. 23, that it was too late to take the exception after the trial of the cause."

And in the *Netter Case* the court further said:

"If, however, in civil cases, the fact that a juror is related to one of the parties, or is shown to have expressed an opinion as to the merits of the case, or for other substantial cause is not fit, by reason of prejudice or partiality for or against one of the parties, to render a fair decision, and the fact of his incompetency for this reason is not discovered until after the trial, it will be cause for setting aside the verdict, if it appears that due diligence was exercised to discover the facts disclosing his incompetency before he was selected as a juror. *Vance v. Haslett*, 4 Bibb, 191; *Taylor v. Combs*, 50 S. W. 64, 20 Ky. Law Rep. 1828."

Applying this rule to the case at bar, it will be noticed that the disability of Donaldson did not relate to any partiality, prejudice, or want of intelligence upon his part, or to some statutory disqualification, but merely to the fact that he had served upon the first jury. Furthermore, it does not appear that counsel for appellant exercised due diligence in the premises, since it is shown by the affidavit of Dudley, and not denied, that Donaldson was a prominent citizen of the county and well known to the plaintiff's local attorneys. Since the trial jury list is preserved in the records of a case, it requires but little diligence or attention upon the part of either the litigant or his attorney to keep himself informed in this respect; and, unless it is

shown that a party has been prejudiced by the double service, the verdict will not be disturbed.

The mere fact that a juror served as a juror upon a former trial of the case, without any further facts or circumstances appearing that might prejudice a party to the action, will not require the verdict to be set aside. Moreover, in this case the jury in the first trial were not called upon to consider the evidence because of the peremptory instruction. The court properly held that this ground for a new trial was without merit.

[2] 2. Upon a return of the case, plaintiff amended his petition and alleged that the defendant did not supply sufficient hands to do the work in which he was engaged at the time of the injury, and he offered an instruction to that effect, which the trial judge refused to give. The uncontradicted evidence, however, shows that four men constituted a crew for doing this work, and that at least five men were engaged in it. Under this proof, the court properly refused an instruction based upon the amended petition.

[3, 4] Plaintiff also asked an instruction in the language above quoted from the opinion, to the effect that it was Dudley's duty to stop the cars in time to prevent the injury to McKee, unless he knew that McKee had emerged from between the cars, thus putting upon Dudley the positive duty of knowing that McKee had emerged from between the cars before Dudley could permit the coupling of the other cars, which, by the impact, caused the injury to McKee. The trial court refused to give the offered instruction, and in lieu thereof gave the following instructions:

"(1) The court instructs the jury that it is admitted by the pleadings herein that R. L. Dudley, the superintendent of defendant's road, was in a position to see and did see the engineer running the train onto the switch, and that said Dudley, superintendent, could have signaled to the engineer to stop the train from running against the cars that injured plaintiff; and if the jury believe from the evidence that the defendant's engineer, agents, or employees directing or controlling the movements of its engine and train knew, or by the exercise of ordinary care could have known, or reasonably anticipated, the presence of plaintiff between the two cars, where he was injured, at the time said engine and train were backing, under the directions and signals from Superintendent Dudley, upon the switch or siding and into or against the cut of cars standing thereon, between two of which plaintiff was injured, then the defendant is chargeable with negligence, and the jury will find damages for plaintiff; and, unless the jury so believe from the evidence, they will find for defendant.

"(2) The court instructs the jury that it was the duty of the plaintiff, Sam McKee, while in the employ of the defendant, the Cincinnati, Flemingsburg & Southeastern Railroad Company, to perform the duties incident to his employment in a reasonable time and in the ordinary and customary manner under all the circumstances; and if the jury believe from the evidence that the plaintiff, McKee, failed to use ordinary care for his own safety on the occasion of the accident to him, and by negligent acts and conduct of his own caused his injury or so contributed to it that, but for his con-

tributory negligence, he would not have been injured, then they will find for the defendant."

The fourth instruction gave the measure of damages to which there is no complaint, while the fifth instruction properly defined ordinary care and negligence.

We think these instructions fairly gave the law of the case. Exception was taken to the third instruction, which told the jury that if sufficient time had elapsed after Dudley told McKee to couple the air brake between the two cars for him to reasonably obey said order, and that Dudley saw McKee in a place of safety before the car was backed against the two cars between which McKee was injured, Dudley had the right to presume that McKee had obeyed his order, and was in a place of safety. While this instruction was unnecessary, since it merely repeated in a more specific form the matters already presented in the other instructions, and should not, for that reason, have been given, it was not prejudicial to any of plaintiff's substantial rights.

Upon the whole case, we are satisfied the appellant's case was fairly tried, and that the verdict of the jury should not be disturbed.

Judgment affirmed.

#### ADAMS EXPRESS CO. v. TUCKER.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

##### 1. EVIDENCE (§ 408\*)—PAROL EVIDENCE—RECEIPT—CONCLUSIVENESS.

Where an express company issued a receipt, reciting that a sealed package was said to contain diamonds, the receipt was not conclusive that the package contained them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

##### 2. APPEAL AND ERROR (§ 1003\*)—REVIEW—VERDICTS.

Under Civ. Code Prac. § 340, subsec. 6, declaring that a new trial may be granted when the verdict is not sustained by sufficient evidence, the appellate court will not reverse simply because the verdict is not sustained by the preponderance of the evidence, but only when it is clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

##### 3. CARRIERS (§ 134\*)—CARRIAGE OF GOODS—ACTIONS—EVIDENCE.

In an action against an express company for the loss of diamonds claimed to have been delivered to the company, evidence held insufficient to show a delivery of the gems to the company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134.\*]

Appeal from Circuit Court, Franklin County.

Action by C. T. Tucker against the Adams Express Company. From a judgment for plaintiff, defendant appeals. Reversed.

T. L. Edelen, of Frankfort, for appellant. Guy H. Briggs, James H. Polsgrove, and L. W. Morris, all of Frankfort, for appellee.

MILLER, J. On August 17, 1911, the appellee, C. T. Tucker, delivered to the Adams Express Company, in Frankfort, a small pasteboard box tied with a string, for shipment to "R. Russell, 2145 South Grand Avenue, St. Louis, Mo." The express agent gave Tucker the usual receipt for the box, which recited that it was "sealed and said to contain diamonds valued at \$500.00." Tucker testified that he told Huhn, the agent, to look and see that the diamonds were in the box, and that Huhn replied that he was not permitted to do so by the company. Tucker further testified that Huhn put some paper around the box, that either Huhn or Tucker addressed it, and that Huhn put the seals on it, in Tucker's presence. Tucker further says the box contained two diamonds, specifying their weight, for which he had agreed to pay \$500. The ordinary charge for sending the diamonds to St. Louis was 25 cents, but Tucker had them insured and paid 75 cents as charges therefor. Under cross-examination Tucker further testified:

"Q. Were you indicted in the federal court at Frankfort for a fraudulent scheme to use the United States mails for the purpose of swindling W. A. Gill out of these two diamonds? A. The charge I was indicted for was for performing a scheme of artifice. Q. For these two diamonds? A. These same two diamonds. Q. Were you tried on that indictment? A. Yes, sir; I was tried on it. Q. What was the verdict? A. The verdict, upon the false testimony of Gill, was 'Guilty.'"

"Q. By the Court: Mr. Tucker, he just asked you what the verdict was? A. The verdict was 'Guilty.' Q. Has that verdict ever been set aside? A. Not that I know of. Q. I will ask you if the court did not, at your request, extend the time of the passing of the judgment until the next September term, or January term? (Objected to and overruled.) Q. I will ask you if you do not now stand subject to the punishment at the next term of the federal court here? A. I guess I do. Q. And these are the same diamonds that you are suing on here? A. They are the same diamonds."

Huhn, the agent, testified as follows:

"Before issuing the receipt I seen the package. It was wrapped in paper and tied with a string and addressed to Rebecca Russell (I don't remember the exact number), and it had no value or anything else marked on it. I inquired of Mr. Tucker what it contained and he said it contained diamonds; and I entered it into the receipt and asked him the value, and he stated he didn't think it was necessary to state the value; that he had been shipping packages to Lexington, or somewhere else, and they went through all right. I told him I would prefer that he declare a value, so in case they were lost he would have something to show for them, and he declared a value of \$500, and I issued a receipt, and I sealed the package in his presence; and after sealing the package I issued the receipt and he said if I cared to examine them I could examine them. Q. After you put the seals on? A. Yes, sir. I could have examined the package to see, but I told him, after the seals were on we could not open it. He didn't say what they were until I put the seals on the package, and then I asked him what they were, and he said 'Diamonds,' and I took his word for it and put the seal on it. The package does not state specifically that it

contains diamonds, but it says, 'Said to contain.'"

Watson, a young man employed in the express office, entered the office about the time Tucker was leaving, and corroborated Huhn, as far as his testimony went. There is really little difference between Tucker and Huhn as to what passed between them in the office; the only difference being that Tucker says he told Huhn before he sealed the box that he could examine the diamonds; while Huhn says Tucker made that remark after the box had been sealed. This difference, however, is not material. Mrs. Rebecca Russell, to whom the package was addressed, received it in due course of transportation and put it in her stocking, where she kept it for about two hours before opening it. She says the seals were intact, and it bore no evidence of having been opened; but when she opened it there were not diamonds in it. Tucker brought this action on March 22, 1912, to recover the value of the diamonds, and recovered a verdict and judgment for \$500. The express company appeals upon the single ground that the verdict is clearly against the weight of the evidence.

The single question involved was whether the diamonds were in the box when it was delivered to Huhn. The appellee's contention is sustained by his own testimony, and the corroborating testimony of Mrs. Russell, to the effect that the diamonds were not in the box when it was delivered to her in St. Louis.

[1] The company did not give a receipt for the diamonds; it gave a receipt for a package which was sealed, and was "said to contain diamonds." The receipt, therefore, is not conclusive against the appellant; the case was to be tried under the parol testimony.

[2, 3] Elwood Hamilton, as attorney for Gill, testified as follows:

"Q. I will ask you to state in your own way whether you ever had any transactions with Mr. Tucker or conversation with him about these diamonds that he got from Mr. Gill? A. Yes, sir. Mr. Gill, from St. Louis, employed our firm to get the diamonds from Mr. Tucker, or the money. I went to see Mr. Tucker about it. Q. State about the matter just as far as you can. A. I can't remember just hardly about it now—that was in 1910 or maybe in 1911—I don't recall the year even. Mr. Tucker was running a poolroom across on St. Clair street. I went over there to see Mr. Tucker, and found him in his poolroom and told him that Mr. Gill had been to see us and wanted to get his diamonds back; and I talked to Tucker about the matter and asked him where the diamonds were. Mr. Tucker said he didn't have the diamonds, and said he had pawned them for \$300, and if we would pay the \$300 we could get the diamonds back. I wired Mr. Gill as to what Mr. Tucker had told me, and Mr. Gill was not willing to pay the \$300. Q. Did anything further take place between you and Mr. Tucker about the diamonds? A. I think I talked to Mr. Tucker about it again, and I told him that Mr. Gill was willing to give \$200 or \$225. I tried to find out the name of the man who had the

diamonds—who he pawned them to—and he wouldn't tell me, and just said that a friend of his let him have the money. He wouldn't tell me who it was. That was about all the conversation I had with Mr. Tucker."

Upon cross-examination, Mr. Hamilton fixed the time of the conversation as follows:

"Q. When was it you called to see Mr. Tucker about the diamonds? A. I don't even remember the year. I think it was about the latter part of April or first of May, 1911. Q. He told you at that time— A. It might have been in 1912. Q. And he told you at that time he had the diamonds pawned for \$300? A. Yes, sir; that is my recollection."

Hamilton, James Andrew Scott, and Judge B. G. Williams, prominent attorneys at the Frankfort bar, and Mace Lucas, the county jailer, all testified that Tucker's character for truthfulness was bad. Furthermore, Tucker did not contradict the statement of Hamilton relating to the conversation about the diamonds. If the conversation occurred in April or May, 1912, it was after the box said to contain the diamonds was delivered to the company on August 17, 1911; if, on the other hand, the conversation between Hamilton and Tucker occurred in April or May, 1911, it was only about three months before the shipment. Appellee offers no explanation as to how he secured a return of the diamonds from his friend with whom he had pledged them; and, if they were pledged in May, 1912, of course, they had not been shipped and lost in August, 1911. Although subsection 6 of section 340 of the Civil Code of Practice provides, in terms, that a new trial may be granted when the verdict is not sustained by sufficient evidence, the rule is that this court will not reverse simply because the verdict is not, in our opinion, sustained by a preponderance or the weight of the evidence, but only where the verdict is clearly and palpably against the weight of the evidence. *Bell v. Keach*, 80 Ky. 42; *L. & N. R. R. Co. v. Graves*, 78 Ky. 74; *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373. Considering all the evidence, we think the verdict was clearly and palpably against the weight of it, thus bringing the case within the exception to the general rule above announced.

Judgment reversed.

## HERSHEY v. TAYLOR.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

**VENDOR AND PURCHASER (§ 44\*)—FRAUD ON SALE—EVIDENCE.**

Evidence, in a suit to rescind a contract of purchase of a farm for fraudulent representations as to value and productiveness, held to show that any representations made were substantially true.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 60-76; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Breckinridge County.

Suit by J. D. Hershey against M. F. Taylor. Judgment for defendant, and plaintiff appeals. Affirmed.

Claude Mercer, of Hardinsburg, for appellant. Moorman & Ball, of Hardinsburg, for appellee.

TURNER, J. Appellant, prior to 1911, was a carpenter living in Tennessee. Some time prior to that, a friend of his by the name of Hale had moved from the same locality in Tennessee to Breckinridge County, Ky., and bought a farm in that county at or near what is known as Holt's Bottom. On a visit to Tennessee, Hale in a talk with appellant suggested that he also come to Breckinridge county and buy him a farm. Thereafter in January, 1911, appellant came to Breckinridge county and examined several farms in the neighborhood of Holt's Bottom. Among others, he looked at a farm of 200 acres belonging to appellee, which at the time was in the possession of appellee's agent Osborne; appellee himself being a nonresident of Kentucky. Appellant, together with Osborne and Hale, went over the farm, and it was finally priced to him by Osborne at the price of \$9,000, or \$45 an acre. He finally said that he would take it at that price, but entered into no writings or obligations. By a title bond, dated the 19th of April, 1911, but which was not actually executed by Taylor until the 29th of April, he undertook to convey to appellant the 200 acres of land mentioned upon the payment by appellant of \$3,000 in cash and the execution by him of four notes of \$1,500 each, payable in 1, 2, 3, and 4 years, with the stipulation that if any one of them should not be paid at maturity they should all then become due. Appellant appeared in Breckinridge county in the latter part of May, 1911, and finally on the 6th or 7th of June, upon his payment of the \$3,000, possession of the place was given to him. After having retained possession of the farm for about two years without having paid either of the deferred payments, and during which time he frequently promised to pay them, and attempted to sell a part of the land for that purpose, he instituted this action asking a rescission of the contract of sale upon the ground that appellee's agents had falsely and fraudulently represented the farm to be worth what he paid for it when in fact it was not worth exceeding \$5,000; that they had represented to him that certain of the bottom lands on the farm would produce from 70 to 90 bushels of corn per acre; and that the uplands would produce 35 or 40 bushels of corn per acre each year; also, that there was a fine orchard of about 600 apple trees, the produce from which each year would pay the interest on the deferred payments under the proposed contract; and that

each and all of the representations were false and fraudulent, and were made for the purpose of inducing him to enter into the contract.

The evidence shows that the farm was situated in the river valley; that a part of it was very productive; that it had an unusually fine farm house on it, which probably in the first place cost \$5,000; that there was a good barn which cost several hundred dollars; and that the orchard in favorable years was very productive. A great mass of testimony was taken as to the value of the farm and as to its productiveness. It would be useless for us to go into an analysis of this mass of evidence. Upon such issues the evidence usually takes a wide range, and the witnesses in giving their opinions and estimates usually differ very widely, and this case is no exception.

The chancellor below filed a carefully prepared opinion on the facts in the case, and reached the conclusion, from the evidence, that, even if the representations claimed had been made, they were substantially true, and that the farm when sold to appellant was worth practically as much as the purchase price; and our own examination of the evidence has convinced us of the correctness of his conclusion. In view of this finding of fact, we need not pass upon the many questions of law raised.

The chief trouble seems to have been that a carpenter, without experience as a farmer or a fruit raiser, had a mistaken idea that he could, by making one cash payment, make the farm pay the deferred payments by the produce he hoped to raise from it. It is not altogether improbable that with a practical and experienced farmer the result might have been different.

Judgment affirmed.

#### CINCINNATI, N. O. & T. P. RY. CO. v. WILSON'S ADM'R.†

(Court of Appeals of Kentucky. Dec. 15, 1914.)

#### 1. STATUTES (§ 222\*)—CONSTRUCTION—COMMON LAW.

Statutes must be construed with reference to the principles of the common law in force at the time of their enactment, and they do not change the common law beyond that which is expressed or which follows by necessary implication therefrom.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. § 222.\*]

#### 2. MASTER AND SERVANT (§ 159\*)—INJURY TO SERVANT—FELLOW SERVANTS.

The fellow-servant doctrine is a limitation on the common-law rule that a master is responsible for the negligent acts of his servants while acting as such in the course of their employment, though unauthorized or even forbidden by the master, and without regard to the notice of the servants, and a servant injured by the negligence of a fellow servant may not recover at common law from the master, whether the negligence was committed in the course of the fellow servant's employment or not, unless

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied January 28, 1915.

the facts render the fellow-servant doctrine inapplicable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 313-325; Dec. Dig. § 159.\*]

**3. MASTER AND SERVANT (§ 179\*)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.**

The Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), imposes on an employer liability for the negligent acts of his servants, performed within the course of their employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

**4. MASTER AND SERVANT (§ 190\*)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—COURSE OF EMPLOYMENT.**

A section foreman in charge of a crew and a superior foreman in charge of the work and men under him were on a work train on a passing track waiting for the passing of a regular train. The section foreman on observing the approach of the train, and believing that it would run on the passing track, called to the men on the work train to alight and run across the main track, on which the train ran. A workman under the superior foreman undertook to obey, and was struck by the train. *Held*, that the act of the section foreman was within the course of employment, within the federal Employers' Liability Act, so that the railroad company was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

Appeal from Circuit Court, McCreary County.

Action by John Wilson's Administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward Colston and John Galvin, both of Cincinnati, Ohio, and Tye & Siler, of Williamsburg, for appellant. Henry C. Gillis, J. B. Snyder, and B. B. Snyder, all of Williamsburg, for appellee.

HANNAH, J. John Wilson was a section hand in the employment of the Cincinnati, New Orleans & Texas Pacific Railway Company at Pine Knot. The foreman of the section crew of which he was a member was Gran Ramsey. On April 25, 1911, Ramsey and his crew were ordered to board a work train which had been loaded at Oakdale, Tenn., with ballast material, and which was proceeding northward to a point near to and south of Flat Rock, Ky., at which place the section crew was to assist in unloading the material for ballasting the tracks.

Nate Sumner, another section foreman with his crew, and Joe Spradlin, a third section foreman with his crew, were also aboard this work train for the same purpose; Ramsey, however, being what might be termed the "senior" or superior foreman of the force.

After arriving at the place where the

ballast material was to be unloaded and there working for a while, it became necessary to yield the right of way to a regular train coming from the south. The work train for this reason proceeded north to Flat Rock, followed by the regular train mentioned.

Flat Rock is approached from the south by two main line tracks, one known as the north main, over which trains proceed when running north, and the other known as the south main, over which trains pass when proceeding south. At Flat Rock, a passing track is connected to the south main by a switch at both ends of the passing track; the south main being between this passing track and the north main. A short distance to the north of this passing track, the north main and south main tracks merge into a single track leaving Flat Rock to the north. This work train came into Flat Rock over the north main, and then backed onto the south main in order to permit the regular train behind it to pass; but, after being transferred to the south main, the operator of the signal tower at that point informed the conductor that an extra freight train was approaching Flat Rock from the north, which, when it reached Flat Rock, would, of course, proceed south over the south main; and for that reason the work train was required to take a position on the passing track. The work train was then placed on this passing track. The regular train which had followed it into Flat Rock was on the north main, thus leaving the south main track, between the passing track and the north main, clear for the passage of the extra freight train from the north. A few minutes thereafter this extra freight came into Flat Rock.

During the time the work train had been at Flat Rock, the section men had remained on the train, and they were thereon when the extra freight train approached. Nate Sumner and a part of his crew and Gran Ramsey and part of his crew were sitting on a car of the ballast material just behind the locomotive of the work train.

Just as the extra freight train was discovered to be approaching, Nate Sumner, laboring under the mistaken impression that the operator in the signal tower had neglected to close the switch connecting the south main with the passing track, after letting the work train in on the passing track, and believing that the extra freight train, which was approaching at a speed of 40 or more miles per hour, would be thrown upon the passing track and crash into the work train, shouted the warning: "Fall off; it is going to hit us." He himself jumped off the car and ran across the south main track. Gran Ramsey, the senior foreman, followed his example, as did others of the section crews. John Wilson likewise jumped off of the work

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

train, but, in attempting to cross the south main, was struck by the locomotive of the extra freight train and killed.

This action was instituted in the McCreary circuit court by the administrator of Wilson's estate under the federal Employers' Liability Act, to recover damages for his death. There was a verdict and judgment for \$6,000—\$4,000 for the use and benefit of his widow and \$2,000 for the use and benefit of an infant child. The railway company appeals.

1. The facts in the case are undisputed; and the appeal really presents but a single question of law. That Nate Sumner was guilty of negligence cannot be seriously denied. The only question is whether the railway company is answerable for his negligence. Appellant disclaims such responsibility, insisting that the act of Sumner in shouting to the men on the cars and jumping off himself was one not performed within the course of his employment.

Construing the federal Employers' Liability Act literally, it imposes liability upon the employer for the negligent acts of its officers, agents, or employes. But appellant contends that it is only for such acts as are performed by its officers, agents, and employes within the course of their employment that the statute imposes liability; and this involves and requires an interpretation of the act. That the avowed and principal purpose of the enactment of this legislation was to abolish the fellow-servant doctrine in certain cases has many times been written and is here conceded. But, in the absence of ruling of the federal courts to the contrary, we do not believe that it may fairly be said that by this act Congress undertook to abrogate the fundamental principles of the common law in respect of the vicarious responsibility of the master for the negligent acts of his servants.

[1] Statutes are to be construed with reference to the principles of the common law in force at the time of their enactment, and are not to be understood as affecting any change therein beyond that which is expressed, or which follows by necessary implication therefrom. 36 Cyc. 1145.

[2] At the time of the enactment of the statute in question, it was the well-established doctrine of the common law that the master is responsible for the negligent acts of his servants while acting as such servants, if committed in the course of their employment, although unauthorized or even forbidden by the master, and without regard to their motives. *Shearman & Redfield on Negligence* (8th Ed.) § 146; 26 Cyc. 1529; 27 L. R. A. 161, note; *Philadelphia & R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502. And see the following Kentucky cases; *Winnegar's Adm'r v. Cent. Pass. R.*, 85 Ky. 552, 4 S. W. 237, 9 Ky. Law Rep. 156; *Williams' Adm'r v. Southern Railway*, 115 Ky. 320, 73 S. W. 779, 24 Ky. Law Rep. 2214; *Sullivan v. L. & N.*

*R. Co.*, 115 Ky. 447, 74 S. W. 171, 24 Ky. Law Rep. 2344, 103 Am. St. Rep. 330; *L. & N. v. Routt*, 76 S. W. 513, 25 Ky. Law Rep. 887; *Patterson v. M. & B. S. R. Co.*, 78 S. W. 870, 25 Ky. Law Rep. 1750; *Mace v. A. C. & I. Ry.*, 118 Ky. 885, 82 S. W. 612, 26 Ky. Law Rep. 865; *South Cov. Ry. v. Cleveland*, 100 S. W. 283, 30 Ky. Law Rep. 1072, 11 L. R. A. (N. S.) 853; *Davis' Adm'r v. Ohio Valley Banking & Trust Co.*, 127 Ky. 800, 106 S. W. 843, 32 Ky. Law Rep. 627, 15 L. R. A. (N. S.) 402; *Robards v. Bannon Sewer Pipe Co.*, 130 Ky. 380, 133 S. W. 429, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394; *C. & N. O. & T. P. v. Rue*, 142 Ky. 699, 134 S. W. 1144, 34 L. R. A. (N. S.) 200; *Ches. & Ohio Ry. v. Ford*, 158 Ky. 800, 166 S. W. 605.

It is true that this phase of the rule of respondeat superior has, generally speaking, been applied only when the servant's neglect operated upon third persons (i. e., persons other than servants of the common master); but this has resulted, we apprehend, because the fellow-servant doctrine is really a limitation upon the rule of respondeat superior. So that, in those cases where a servant of the common master was injured by another servant's negligence, it was immaterial whether the negligent act was committed in the course of the servant's employment, because under the fellow-servant doctrine the master was not answerable therefor.

Our attention has been directed to but one case in which this particular phase of the rule of respondeat superior has been invoked and applied, in an action by a servant to recover from his master, for injuries caused by the neglect of another servant of the common master. *Sullivan v. L. & N. R. Co.*, supra. In that case, had the negligent act complained of been performed within the course of the servant's employment, a recovery could have been had, although the negligent servant and the injured servant were employed by a common master, for the reason that the negligent servant was a "superior servant," for whose negligence, if gross, under a doctrine peculiar to Kentucky, the master would have been liable.

However, notwithstanding the dearth of authority upon the precise point, we have had no hesitancy in reaching the conclusion that, where legal liability is sought to be imposed upon a master for the negligent act of his servant, the act must have been performed within the course of the servant's employment, whether it operated upon third persons (i. e. strangers) or caused the injury of a servant of the common master under conditions of fact or law rendering the fellow-servant doctrine inapplicable or inoperative to deny recovery. The whole doctrine of the vicarious responsibility of the master for the neglect of his servants inevitably rests upon this requirement, for, unless the negligent act be one performed within the course of the servant's employment, it is not

fairly imputable to the master as his own, and the maxim, "Qui facit per alium, facit per se—He who acts through another, acts himself"—is not applicable.

[3] These were fundamental and well-settled principles of common law at the time of the enactment of the federal Employers' Liability Act; and, in the absence of specific provisions to the contrary, that act should be interpreted so as to embrace these principles, and should not be construed as imposing liability upon the master for the neglect of his servants, unless their negligent acts were performed within the course of their employment.

[4] 2. It being settled, then, that the liability imposed under the act in question covers only such negligent acts as are committed in the course of the servant's employment, the question is presented whether the act of Nate Sumner in calling to the men on the work train to jump off, and in jumping off himself and running across the south main, was committed within the course of his employment, was it really the act of a servant as a servant; or did he step aside from the course of his employment to pursue and effect some purpose of his own? Many text-writers and many courts have considered this question of what constitutes "course of employment." None have attempted to lay down any hard and fast rule defining it; nor are we disposed to undertake that which others have declined. It has been said that an act cannot be considered as within the course of the servant's employment merely because the servant performed it with intent to benefit or further the interests of his master; but this is not universally true, although strong evidence thereof.

In this case Nate Sumner was a section foreman there in charge of his crew. True, Ramsey was the senior or superior foreman in charge of the work, and Wilson was one of Ramsey's men; but Sumner was nevertheless a foreman, and section hands had a right to believe that there was imposed upon him, by virtue of his position, at least a secondary responsibility—a greater responsibility than a mere section hand—for their safety, and some measure of duty in their behalf. He was discharging that obligation when he shouted. Had he been acting for Nate Sumner alone, he would have jumped and ran, but remained silent; but, in his mistaken belief as to the position of peril in which the section hands on the work train were placed, he undertook to do that which every master expects those servants to do whom he places in authority over other servants—that is, to prevent injury to all persons, be they servants of the master or strangers. His act was such an act as a personal master there present, and laboring under the same mistaken belief as Nate Sumner, would have performed. And, because of that qual-

ity, his act was fairly imputable to the master, imposing legal liability therefor.

3. In view of what has been said, it will be seen that the trial court would properly have directed a verdict for the plaintiff. The ruling of the trial court upon the defendant's motion for a continuance was therefore not prejudicial, for the evidence sought to be made available would not have constituted a defense. Nor are the criticisms of the instructions which appellant advances material to be considered.

The judgment is affirmed.

CRUTCHER & STARKS et al. v. STARKS et al.

STARKS CO. et al. v. CRUTCHER & STARKS et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

1. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—"UNFAIR COMPETITION"—USE OF NAMES.

C. & S., as a partnership, and later as a corporation, had been in business in a city for 28 years under the active management and control of the S. brothers, who had subsequently retired from the corporation. It had built up a business having a value, by reason of its reputation and name, far in excess of the value of its stock of goods. Parties, none of whom were named S., organized the S. Company, which engaged in the same business, on the same street, and only two blocks away. Persons had been deceived and confused by the similarity of names, believing that C. & S. had moved or opened a branch store, or that the S.'s had opened a business of their own. Held that, assuming that the organizers of the new company selected its name to associate it in the public mind with the S. building, in which its business was located, the use of such name was nevertheless "unfair competition," which is the passing off or attempted passing off upon the public of the goods or business of one man as those of another, and which embraces any conduct tending to produce this effect, regardless of the means employed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

2. GOOD WILL (§ 7\*)—COVENANTS NOT TO ENGAGE IN BUSINESS.

J. S. and I. S., who had been in active control of C. & S., a corporation, sold their stock, agreeing not to engage in the same business, and that if J. S. erected a building on land owned by him he would give C. & S. a preference over others in leasing space therein, the agreement providing that the sellers should not be prohibited from renting property to persons in the same business. J. S. did erect a building called the S. building, and, after giving C. & S. a fair opportunity to avail itself of its right to lease space therein, leased a part of the building to the S. Company, organized to engage in the same business as C. & S. by persons none of whom were named S. A sister, two nephews, and a nephew by marriage of J. S. were interested in the S. Company. Held that though the S. Company was properly enjoined from using the name S. as a part of its name, the court properly refused to cancel its lease of space in the S. building, at the instance of C. & S.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 6-9; Dec. Dig. § 7.\*]

### 3. DISMISSAL AND NONSUIT (§ 75\*)—DISMISSAL WITHOUT PREJUDICE—WHEN PROPER.

Where, in a suit by C. & S. against J. S., the S. Company, and others, the use of the name S. by the S. Company was enjoined as unfair competition, without determining whether J. S. had broken his contract with C. & S., or conspired with the other defendants to break it, the dismissal of the action as against him was properly made without prejudice to an action at law.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 169; Dec. Dig. § 75.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Crutcher & Starks and others against John P. Starks and others. From a judgment for plaintiffs for insufficient relief, they appeal, and certain defendants bring separate cross-appeals. Affirmed.

A. C. Van Winkle, Gibson & Crawford, and T. M. Gilmore, Jr., all of Louisville, for appellant Starks Co. Jno. Bryce Baskin and Humphrey, Middleton & Humphrey, all of Louisville, for Crutcher & Starks. Helm Bruce and Bruce & Bullitt, all of Louisville, for Starks Realty Co. and John P. Starks.

TURNER, J. In 1886, D. C. Crutcher and John P. Starks, under the firm name of Crutcher & Starks, began business as retail clothing merchants at the northeast corner of Fourth and Jefferson streets in Louisville, at which place there has ever since been conducted the same business under the same style, with the exception of about one year while that building was being reconstructed. Some years later I. F. Starks, a brother of John P. Starks, became interested in the firm, but withdrew from it in about 1891 for a period of about two years, and was again admitted as a member thereof in 1893.

Crutcher never, in fact, lived in Louisville during all the period he was interested in this firm, and the active management thereof was almost wholly in the hands of the Starks. In 1895 Crutcher disposed of his interest in the firm to the Starks, and in 1901 the business was incorporated under the corporate name of Crutcher & Starks, and so continued to be operated, chiefly under the management and control of the Starks, until March 25, 1911.

The capital stock of the corporation consisted of 2,000 shares of the par value of \$100 each, of which shares, on March 25, 1911, John P. Starks and I. F. Starks owned 1,500, and G. R. Burton, John McGinn, and M. S. Moise the remaining 500. On that day the parties entered into a written contract, under the terms of which John P. and I. F. Starks sold their 1,500 shares of stock in the corporation of Crutcher & Starks to Burton, McGinn, and Moise for the sum of \$350,000, the sale to become operative on August 31, 1911. On that day the sale was consummated, as contemplated in the contract, and the two Starks ceased to be interested in

the corporation of Crutcher & Starks, and the other three gentlemen became the sole owners of the capital stock of that corporation.

In the contract of March 25, 1911, among other things, it was provided:

"The parties of the first part (the Starks) hereby further agree that neither of them will on his own account or as a member of a firm or as a stockholder in a corporation, engage, in the city of Louisville, in a similar line of business, or promote or encourage a similar business, to that now conducted by Crutcher & Starks, for a period of ten years from the date that said transfer of stock and leaseholds shall become effective, but in case either of the parties of the first part shall become the owner of improved property in the city of Louisville, this clause of this agreement shall not be construed as prohibiting him from renting his said property, or space therein, to a third party who may be engaged in such business. And said John P. Starks, who is the owner of certain property at Fourth and Walnut streets, in said city binds himself in the event of his erecting, or in the event a firm or corporation in which he may become interested erects a building, on said property, that if the parties of the second part herein shall desire to lease or rent any part of said building for the purpose of conducting the business of Crutcher & Starks, preference will be given to them at the same price at which it could be rented to others in a similar line of business."

Thereafter, as seems to have been contemplated in the contract, John P. Starks erected on a lot owned by him on the northeast corner of Fourth and Walnut streets in Louisville, just two blocks south of the corner so long occupied by Crutcher & Starks, a large office building, the ground floor of which was intended for the occupancy of retail stores. This building was called the Starks building. About the time of the completion of this building in November, 1913, W. H. Rapier, W. Reid Embry, and John S. Rodas organized a corporation, which was first styled the "Starks Clothing Company," but the title was afterwards changed to the "Starks Company." Besides the incorporators the other stockholders therein were Clifton Rodas, Mrs. Bettie F. Rodas, and T. M. Gilmore, Jr.; Mrs. Rodas being a sister of John P. Starks, and the other two Rodas his nephews, and Embry his nephew by marriage.

The Starks Realty Company is a corporation controlled by John P. Starks, organized for the purpose of leasing the Starks building, and that corporation entered in to a lease for a term of eight years with the Starks Company for a part of the ground floor of the Starks building at Fourth and Walnut streets, where, in March, 1914, the Starks Company opened up a retail business of the same kind and nature as that which had been conducted by Crutcher & Starks, two blocks away, for this long period.

This is an equitable action by Crutcher & Starks and its present stockholders against John P. Starks, Starks Realty Company,

Starks Company, and the incorporators of the last-named company, wherein an injunction is sought against Starks Company restraining it from the use of the word "Starks" in its corporate name, and also seeking a cancellation of the lease from Starks Realty Company to Starks Company.

The chancellor below perpetually enjoined Starks Company and its incorporators from the use of the name "Starks" in its corporate name, and from the use of the word "Starks" in any way connected with the business they were conducting, further than to show, if conducted under a title without "Starks" in it, that it was conducted in the Starks building. He further declined to grant any relief as against John P. Starks and the Starks Realty Company, and dismissed the action as to them without prejudice to an action at law, and declined to cancel the lease between Starks Realty Company and Starks Company. From that judgment Starks Company appeals because it is denied the right of the use of the word "Starks" in its corporate name; Crutcher & Starks appeal because of the court's refusal to cancel the lease between Starks Realty Company and Starks Company; and John P. Starks and Starks Realty Company appeal because the judgment as to them is not dismissed absolutely, instead of only without prejudice to an action at law.

[1] While the pleadings clearly made the issue as to whether there had been a conspiracy between John P. Starks and Starks Company and its incorporators to violate the contract with Crutcher & Starks (it being alleged that each of the defendants were fully aware of its provisions), yet the chancellor, in his opinion, granted the injunction against Starks Company and its incorporators solely upon the ground that they were engaged in unfair competition by the use of the name "Starks." We also will ignore the contract relations between the parties, as we have concluded that the injunction was properly granted upon the ground of unfair competition.

The evidence shows that at the time Starks Company opened its business under that name, Crutcher & Starks, either as a firm or a corporation of the same name, had been engaged in a similar business in the city of Louisville for about 28 years, only two blocks from the place where Starks Company proposed to operate its similar business; that, while the firm or corporation name had been Crutcher & Starks, the Starks brothers had been the active managers and operators of the business, and had, by their good business methods and foresight, built up the business until it was highly profitable, and that in this way the name "Starks" had been for that long time associated with the business; that Crutcher had never, in fact, lived in Louisville, while both of the Starks had, and, as stated, during all that time had taken the active management and control of

the business, and in this way the name of "Starks" became and was much more intimately connected with the business so conducted than the name of "Crutcher." With this long course of business at the same place, conducted under the same name, built up through up-to-date and efficient business methods, the business had a value by reason of its reputation and name far in excess of the mere value of the stock of goods on hand. This is unmistakably evidenced by the fact that Burton, McGinn, and Moise paid the Starks for their stock in the company \$125,000 in excess of the value of the goods on hand. Under these conditions it cannot be doubted that where another party, none of whom are named "Starks," organized a company called "Starks Company," and opened a business, two blocks away on the same street, of the same character, that it is unfair competition, or an unfair effort to appropriate and get the benefit of the established name of "Starks" in the clothing business in that city.

Unfair competition has been defined by this court in the case of Newport Sand Bank Co. v. Monarch Sand Mining Co., 144 Ky. 7, 137 S. W. 784, 34 L. R. A. (N. S.) 1040, as follows:

"Unfair competition may be defined as passing off, or attempting to pass off, upon the public the goods or business of one man as being the goods or business of another. Any conduct tending to produce this effect constitutes unfair competition and may be enjoined. The means employed are wholly immaterial."

The evidence in this case shows that at least in several instances the use of the name "Starks" by the Starks Company in its advertisements, and in its name as printed upon its place of business, had deceived and confused several persons. The evidence is that some of them thought that "Crutcher & Starks" had moved their place of business, or that "Crutcher & Starks" had opened up a branch store, or that the "Starks" had severed their connection with "Crutcher & Starks" and had opened up a business of their own. Under the express rule laid down in the Sand Bank Case, above quoted, it is not necessary to show deceit or confusion, or that anybody had actually been misled; it is sufficient if the similarity in name is such as that it will likely produce that result.

But it is the contention of Starks Company and its incorporators that the name "Starks" in their corporate name was used for the reason that they were going to occupy the "Starks building," which was a new building at a prominent location, and in that way the location of the new concern would be fixed in the public mind and associated with this handsome new structure. If it be assumed that these gentlemen appropriated the name "Starks" solely with this view, and not with the purpose of gaining unfair advantage by the use of the name "Starks," and conceding for the sake of the argument that their intentions were above suspicion in this regard,

still can it be contended that merely because they were in good faith, that they might with impunity appropriate the name "Starks" in the establishment of a new business when that same name had been associated for a long term of years with a similar business located near by? Would not it be unfair competition, and have the same effect upon "Crutcher & Starks" and the public, whatever their motives may have been?

[2] The chancellor very properly held, as we think, that the cancellation of the lease by the Starks Realty Company to the Starks Company would be inequitable, and work an unnecessary hardship upon these young men starting in business. They were within their lawful rights in going into the business at the place they did, and the corporation had a right to lease the property it did; the only thing they did wrong was to attempt to appropriate the name "Starks."

The correspondence between John P. Starks and Crutcher & Starks is convincing that John P. Starks gave to that corporation every fair opportunity to avail itself of its right, under its contract, to lease space in the proposed new Starks building.

[3] The chancellor based his injunction against Starks Company wholly upon the fact that the use of the name "Starks" constituted unfair competition, and did not pass upon the question whether or not John P. Starks had violated his contract with Crutcher & Starks, or whether there had been a conspiracy between him and the other defendants to violate the contract, and, for that reason, he properly dismissed the action as to John P. Starks and Starks Realty Company without prejudice to an action at law.

The judgment of the chancellor did substantial justice between the parties, and is in all respects affirmed.

#### STANDARD OIL CO. v. MARLOW.\*

(Court of Appeals of Kentucky. Dec. 18, 1914.)

##### 1. APPEAL AND ERROR (§ 1195\*)—DECISION OF APPELLATE COURT AS LAW OF CASE.

Instructions not criticized on appeal are tacitly approved, and become the law of the case, and should be given on another trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

##### 2. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

Admissions of a company's servant having been admitted, which were competent against him and not against the company, his codefendant, it was error to give an instruction requiring a finding against both defendants, if the jury believed he was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

##### 3. MASTER AND SERVANT (§ 268\*)—EVIDENCE OF EMPLOYMENT.

Evidence that, shortly before the accident to plaintiff, defendant's manager attempted to

employ another, is inadmissible to show plaintiff's employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 910; Dec. Dig. § 268.\*]

Nunn, J., dissenting.

Appeal from Circuit Court, Pulaski County.

Action by Joe E. Marlow, suing by his next friend, against the Standard Oil Company and another. From a judgment for plaintiff, defendant named appeals. Reversed.

O. H. Waddle & Son, of Somerset, for appellant. Robert Harding, of Danville, D. E. McQueary, of Pine Knot, and Emmet Puryear, of Danville, for appellee.

CLAY, C. [1, 2] Joe E. Marlow, an infant, suing by his next friend, brought this action against the Standard Oil Company and its manager, William Uhl, to recover damages for personal injuries. On the first trial of the case he recovered a verdict and judgment against the Standard Oil Company for \$3,500, and against William Uhl for \$500. On appeal to this court, the judgment was reversed for errors in the instructions. *Standard Oil Co. v. Marlow*, 150 Ky. 647, 150 S. W. 832. On the return of the case another trial was had, which resulted in a verdict and judgment against the Standard Oil Company for \$5,000 and against its codefendant, William Uhl, for \$1,000. The Standard Oil Company appeals.

On the second trial several witnesses testified to certain admissions of Uhl, made a day or two after the accident, which tended to show negligence on his part. As these admissions were not a part of the *res gestæ*, the trial court admonished the jury that they could not be considered in determining the liability of the Standard Oil Company. Counsel for the Standard Oil Company offered instructions as follows:

"A. In determining the question as to whether defendant Uhl told Cox and Marlow, when they quit painting barrels, to wash their hands and clothes in gasoline, and burn the gasoline, if dirty, in the street, as referred to in instruction No. 1, you will not consider any evidence introduced by plaintiff tending to show that, in conversations by Uhl with other parties during the night after the accident, said Uhl either admitted or said he had so told said Cox and Marlow; and unless you believe from the evidence, independent of such alleged admission or conversation, that Uhl did so tell or instruct Cox and Marlow, you will find for defendant Standard Oil Company.

"B. If you shall find for plaintiff at all, you may find against or in favor of either of the defendants; and if you shall find against both of the defendants, you may say in your verdict how much of your finding shall be paid by each of the defendants."

It is insisted that the court erred in refusing to give one or the other of the offered instructions, or an instruction similar in effect. In support of this proposition counsel relies on the case of *C. N. O. & T. P. Ry. Co. v. Cook's Adm'r*, 118 Ky. 161, 67 S. W. 383.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 23, 1915.

23 Ky. Law Rep. 2410, where an action for damages was brought against the railroad and its engineer. It appears that some time after the accident the engineer made certain admissions, which the court held were competent against him, but were not competent against the company, as they were not part of the *res gestæ*. At the time the evidence was received the court admonished the jury that the evidence was not competent against the company, but was competent only against the engineer. The only instruction given by the court required the jury, if they believed that the engineer was negligent, to find against both him and the company. The court held that the admonition of the court that the evidence complained of was not competent against the company was rendered of no effect by the instruction given, which required a finding against both defendants if they believed the engineer was guilty of negligence. The court said:

"The effect of the instruction was, therefore, to deny the company all benefit from the exclusion of this evidence as to it, and place it in the same position it would have occupied if that ruling had not been made."

On the first trial of the case the court gave to the jury six instructions which were offered by the plaintiff, and one instruction which was offered by the defendant. Instruction No. 1 authorized a finding against defendant Standard Oil Company if they believed that Uhl or Cox, a painter employed by Uhl, was negligent. Instruction No. 2 authorized a finding against both defendants if they believed that Uhl was negligent. Instruction No. 3 prescribed the measure of damages. Instruction No. 4 defined gross negligence. Instruction No. 5 defined ordinary care. Instruction No. 6 covered the question of contributory negligence. Instruction D, which was the seventh instruction, was as follows:

"If you shall find for plaintiff at all, you may find against or in favor of either of the defendants; and if you shall find against both of the defendants, you may say in your verdict how much of your finding shall be paid by each of the defendants."

In the opinion on the first appeal the court did not set forth all the instructions given, but set forth instructions 1, 2, and 3. Instruction No. 1 was held erroneous, because neither Uhl nor the company was responsible for the action of Cox, who was not their agent. Instruction No. 2 was modified in certain respects and directed to be given on another trial. It was further held that no instruction on gross negligence should be given. The court also said that a certain instruction offered by defendant should have been given. The court did not criticize instruction D, or direct that it should not be given. The court did not say that on another trial the trial court should have instructed the jury as follows, and then set out the instructions to be given. It did not in terms or by implication say that the instructions

considered by the court were all the instructions that should be given on the next trial. It is well settled that, where the instructions given on a trial are before this court and not criticized, they are tacitly approved, and become the law of the case. *Cox's Adm'r v. Louisville & A. R. Co.*, 137 Ky. 388, 125 S. W. 1056.

As instruction D, authorizing a finding against either of the defendants or both, was not criticized on the former appeal, but was tacitly approved, it became a part of the law of the case, and should have been given, either in that form or in a form that would not have materially changed the effect thereof. If it were not the rule that an instruction not criticized, but tacitly approved on a former appeal, should be given, then the trial court in this instance would not have been justified in giving instructions defining ordinary care and contributory negligence, given on the first trial. As the court on the first appeal considered only certain instructions, and did not say that they were all the instructions to be given on the next trial, the trial court was not precluded by the former opinion from giving instruction A offered by the defendant, or one similar in effect. Instruction D was asked on the first trial by the defendants, and was given on their motion. They appealed. There was no complaint on that appeal of the instructions which had been given on their motion, and the attention of the court was not directed to them. When this court indicated errors in certain instructions which were there complained of, the lower court was not precluded from giving on the return of the case a proper instruction on another subject, which had been covered by an instruction given on the other trial and not criticized in the opinion. That the action was prejudicial there can be no doubt, for the admonition of the court that Uhl's admissions were not competent against the Standard Oil Company was rendered of no effect by the instruction of the court, which required a finding against both defendants if the jury believed that Uhl was negligent. A reversal of the case, therefore, cannot be avoided, unless the well-established rule laid down in *C. N. O. & T. P. Ry. Co. v. Cook's Adm'r*, *supra*, be disregarded.

[3] The trial court should not have permitted plaintiff to prove that Uhl, a short time before the accident to plaintiff, attempted to hire a boy by the name of Hughes to assist Cox in painting the barrels. This evidence introduced an issue entirely foreign to the case. The effort to employ Hughes has no bearing on the employment of Marlow, or defendant's knowledge that he was engaged in assisting Cox. The fact that an effort was made to employ one boy does not tend to show that Uhl employed plaintiff, or knew that he was engaged in assisting Cox.

In view of the foregoing, we deem it un-

necessary to determine whether or not the verdict is excessive.

In view of the fact that instruction A, offered by the defendant on the last trial, more clearly presents defendant's case with respect to the admissions of Uhl, the court will give that instruction, instead of instruction B. It will also give the same instructions given on the second trial.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

NUNN, J., dissents.

### LOUISVILLE RY. CO. v. DOTT.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### CARRIERS (§ 284\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A carrier must exercise the highest degree of care to protect passengers from assault by fellow passengers or strangers, but is not an insurer of the absolute safety of passengers or of their entire immunity from misconduct of fellow passengers or strangers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127–1135, 1173, 1222; Dec. Dig. § 284.\*]

#### 2. CARRIERS (§ 284\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A street car stopped to allow passengers to alight and board it. A difficulty had arisen between rowdies and intending passengers. The difficulty continued as the passengers and some of the rowdies boarded the car. The conductor and motorman attempted to expel the rowdies, but before that was done, one of the passengers was injured by a missile thrown into the car. None of the servants of the company were responsible for the difficulty, and without their knowledge or consent the difficulty was transferred to the car. *Held*, that the company was not liable for the injuries inflicted on the passenger, for the company only assumed the burden of protecting him as a passenger, and the conductor, failing to signal the car to move until the rowdies were expelled, did not violate any duty in the handling of his car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127–1135, 1173, 1222; Dec. Dig. § 284.\*]

#### 3. CARRIERS (§ 280\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

The duty of a street car conductor to move his car is unaffected by requests of passengers to move the car, and any advice or suggestion from passengers as to what the conductor should or should not do cannot affect the liability of the company for injuries to a passenger struck by a missile thrown into the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.\*]

#### 4. CARRIERS (§ 280\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

Where a street car passenger's peril is seen or notice thereof is given, car men must avert it if possible, and any suggestions from passengers as to what the conductor shall or shall not do merely carries knowledge to the conductor of the danger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Fourth Division.

Action by Albert Dott against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Frank P. Straus and Howard B. Lee, both of Louisville, for appellant. Popham, Trusty & Roose, of Louisville, for appellee.

NUNN, J. The appellee had just become a passenger on one of appellant's street cars in the city of Louisville, when some one outside, unknown to him, threw a brick or piece of ice into the car that struck him in the face, breaking his jawbone, and causing very painful and permanent injuries. He sued to recover \$10,000 general damages, and \$1,329, special damages for loss of time and expense of surgical treatment. He recovered a verdict for \$5,200, and the Street Railway Company appeals. As we view the case, the only question is whether there was any evidence of negligence on the part of the appellant which was the proximate cause of the injury.

About 10 o'clock one night in January, 1912, the appellee, Dott, whom we shall refer to as the plaintiff, was standing at the corner of Preston and Chestnut streets, waiting for a car. Mr. Robbins, Mr. Baldes, and Mr. Ochsenhirt, a mail carrier, were also waiting at that corner for the same purpose. While so waiting, three rowdies passed, and one jostled against the mail carrier. When he warned them to be careful, they came back and got into a fight with him. Of the prospective passengers, the mail carrier was the only one involved in the difficulty, and he seems to have been getting the best of it. About the time the car came the rowdies took flight, but before the passengers could get aboard, the rowdies with five recruits renewed the attack. The plaintiff had boarded the car, paid his fare, and was standing on the rear platform, while the letter carrier and others named were getting aboard. A rowdy on the step at each side of the car was trying to enter, and it seems that others on the outside were throwing missiles aboard. It was during the progress of this fight that some one on the outside threw something through the rear of the car and hit the plaintiff, as above stated. For cause of action, it is contended that the motorman and conductor detained the car an unreasonable length of time, whereas, if they had broken away from the fight, the plaintiff might not have been injured. After averring that he hailed and boarded the car, paid his fare, and became a passenger, the petition states:

"That at said time and place, an altercation and a general fight and disturbance was in progress at said intersection between a number of drunken, rowdy, and bolsterous persons, who were creating violent demonstrations, hurling missiles in various directions, and creating danger to plaintiff and other passengers upon said car and to persons generally. He states that said conditions, facts, and dangers were well known to and were observed by the defendant and its agents in charge of said car at said time,

and that the passengers of defendant on said car at said time requested and implored the agents of defendant in charge of said car at said time to proceed with said car and to move said car from said danger and said scene, and that said agents could have so moved said car from said scene and from said danger, and have prevented any injury to plaintiff by so doing. He states that the defendant and its agents in charge of said car, with gross negligence and carelessness, caused and permitted said car to stand at said scene and in said zone of danger for an unreasonable length of time, and negligently and wrongfully failed and refused to start or move said car with reasonable promptness and regard for the safety of plaintiff and other passengers, and with further gross negligence and carelessness allowed and permitted certain persons engaged in said fight and altercation whose names are unknown to plaintiff, to throw and hurl particles of bricks and other missiles onto, in, and against said car and against this plaintiff and his person, thereby fracturing the right side of his jaw. \* \* \* Plaintiff states that by the exercise of proper care upon the part of defendant and its agents in charge of said car at said time, said attack upon him could have been prevented and his injury and damage could have been prevented."

As to the fighting on the arrival of the car, we reduce plaintiff's evidence to narrative form:

Three young men came along Preston street going north, and they ran into—bumped into—Mr. Ochsenhirt (the letter carrier), though they had plenty of room. They got into an argument, and the fight began. "I never had anything to do with the fight at all. They were still fighting when the car came, and I got on the car as quick as I could; stayed in the rear, because people were coming in and out at the time—it was sorter crowded. Q. How long did the conductor allow that car to stand there? A. Well, I suppose somewhere around three or four minutes; it looked a mighty long time. Q. Did anybody say anything to him during that time? A. Who? Q. The conductor? A. Yes, sir; I told him to ring off several times. Q. Why? A. I knew there was a whole lot of trouble; they were throwing bricks and ice and everything else."

As to when he was struck by the missile plaintiff testified as follows:

"Q. Mr. Dott, had any bricks hit that car or anything before you were hit? A. Well, there was a lot of racket going on there. Q. Well—A. I think so. Q. Did that make much or little noise? A. Well, it was quite an excitement there. Q. Did that make a noise that the conductor did or could hear? A. Certainly he could hear it; everybody in the car heard it. Q. After the car was first hit, did the conductor then move on, or still standing there? A. Still standing there."

On cross-examination the plaintiff testified as follows:

"Q. After the people on the car had gotten off, then you were the first one on the street to get on? A. As soon as I could get on, as soon as it stopped. Q. After you got on did you say right away to the conductor, 'Pull away from here'? A. No, sir. Q. Was the fighting going on when you stepped on? A. They had to wait until somebody else got on; that man in the fight got on. Q. The letter carrier? A. Yes, sir. Q. And still another man got on? A. Then these fellows came up closer; I said, 'You had better pull the bell.' Q. After the carrier got on, wasn't there a third man got on? A. I don't remember. Q. Wasn't there a man got his hand cut standing there on the corner? A. I don't know; after I was hit I didn't know

anything. Q. Before you got hit? A. I could not say. Q. After the letter carrier got on the car, these other men rushed on there after him? A. I suppose so; after I turned my back I don't know what happened. Q. When you got on the car you turned your back to the fight? A. No, sir; it was turned in getting on. Q. Did you see one of those three rowdies, as you call them, or two of them, get on that car, and one of them had a knife? A. One got on—I don't know which one—there was one of them got on. Q. What? A. I think one got on the car. Q. Did you see a man hop on that car immediately behind the letter carrier, with a knife in his hand? A. No, sir. Q. Did you see any one get cut there on that rear platform? A. No, sir; he must have been cut the same time I was hit, I didn't notice that. Q. Did the motorman come back there, that you saw? A. I don't know; he must have come after I was hit."

As to the hurling of missiles at the car, plaintiff also testified as follows:

"Q. Now, I will ask you if it wasn't one of the men that the conductor put off that car; after he got off he then threw the rock at the letter carrier? A. I didn't see that. Q. How many rocks were thrown there that you saw? A. How many rocks? Q. Yes, at the street car? A. I didn't see any—just there was a lot of commotion there. Q. A great deal of excitement around there? A. Yes, sir. Q. All the people on the rear platform were disturbed and excited? A. I suppose the whole car of people were disturbed. Q. Did you say anything to the conductor there on that occasion? A. Told him to ring off several times."

Plaintiff introduced R. C. Kissler, who was a passenger on the front end of the car, and testifies as follows:

"Well, the conductor rang twice to go ahead, and gave three bells again, three bells in rapid succession (stop signal). I opened the folding doors, thought somebody had got throwed off the car; passing on back some one said something about a fight, and when I got about a foot of the back door somebody hit me with a brick; who it was I don't know, and that made me mad. Q. Did that come through the car? A. Yes, sir; it was a brick or a piece of ice, I stood by the money box, and there was a fellow coming on the car with a knife in his hand; he said something to me, he passed some remark, and I kicked him off the car, and another fellow was coming on in the back end, and Will Ochsenhirt kicked him off, and they started throwing again, and like here is the money box, Dott was standing over here, like anybody would pay their fare and step aside; he got hurt, and he went down to his knees, and I said, 'You stopped something;' he didn't say a word. Q. Did he seem like he would be knocked out or not? A. You can imagine—yes, sir; one of those fellows started to the front end of the car, and I went through, and Lucas, the motorman, and myself got off. One fellow halloed, 'Don't hit those fellows.' I know that they made several passes at us; Lucas didn't make any pass—I made one. Lucas said, 'Let's get away before they do any more damage.' We got on the front end of the car, and Lucas struck his bell twice to go on, and the conductor didn't give a signal to go, and then he gave a signal, I don't know how much time elapsed, maybe five or ten seconds elapsed, and we pulled away from there and got to Preston and Breckenridge, and we took Baldes off. Q. Do you know how many minutes the car stood there while the fight was going on? A. About three minutes."

Plaintiff introduced B. C. Robbins, who also boarded the car at Preston and Chestnut

streets, and testified as follows in regard to the fight:

"Q. What was the first you saw about any trouble? A. The first I saw was the conductor rang the motorman down and gave him three bells, and I supposed that meant trouble some way, so I go back into the car to see what was going on, and then when I saw what was going on I came back out on the front end. Q. What was going on back there when you went back? A. There was a bunch of fellows fighting. Q. How were they fighting? A. Throwing bricks and cutting one another. Q. How close were they standing to the street car? A. They were right upon the street car. Q. Can you point out about how many feet it was, if you know? A. No, I never paid that much attention. Q. Was it more or less than 15 feet? A. Right up on the street car. Q. Do you mean to say they were on the street car? A. No, sir. Q. Can you tell the jury about how many feet they were away from the street car? A. I could not exactly say, but as I say, they were right up against it. Q. Were they close enough for their missiles and bricks and things to hit the car when they threw them? A. Certainly, could not hardly miss it. Q. How many minutes did the conductor let the car stand there? A. I would judge, for this boy to go back in the car as he did and come back on the front end and the motorman to get off and go back, I would judge about three minutes."

Samuel Goldsmith, plaintiff's witness, who was also a passenger on the car, testified as follows:

"Q. Did you notice any trouble going on on the street? A. I never noticed any on the street, but on the car. Q. What was the first that attracted your attention? A. Well, one fellow he jumped up and hit another man and another one got hit with a rock or lump of ice—I could not tell what it was. Q. In the car? A. In the car. Q. After you stopped there, could you tell the jury as best you remember, how many minutes, if you know, the conductor left the car standing there? A. I said to the conductor myself, 'Ring that bell off,' but he looked like he was kind of amazed, and meantime the motorman thought the conductor was in trouble, and he came back on the rear end before I realized what had happened. Q. Could you state how many minutes the street car stayed there? A. I know at least it was over a minute, it was uncalled for. Q. Did you see Mr. Dott get hit? A. I saw him, and the same time I never seen it."

He further testifies as to the occurrence while the car was standing:

"Q. During the minute or two the car stayed there, as you have mentioned, was there anything to keep the conductor from seeing these men fighting and going on? A. No, sir; he was on the rear end of the car, it was right there in front of him. Q. Why was it you had to tell the conductor to ring off and go ahead? A. It looked like this fellow became excited and didn't know what to do; I mentioned it myself, 'Ring your bell off.' Q. Did he still stay there? A. He did, for the motorman to get back to the front before he could go. The motorman thought the conductor was in trouble and came around the rear end; meantime he goes back on the other end before he rang off, after I mentioned it to him. Q. How long did the car stand there, which made the motorman think he was in trouble? A. Fully a minute after all this thing had happened. Q. Before Dott was hit? A. Yes, sir. Q. Did you hear anybody else trying to get the conductor to ring off and go on? A. Not after I seen this one young fellow was cut and Dott was hit; I became kind of excited myself."

J. A. Baldes, who also boarded the car with the plaintiff, testified for him as follows:

"Q. When the car came up, what about the fight, what was the stage of it? A. They had run—Mr. Ochsenhirt had run them—we thought everything was over and started to get on the car, and I don't know who got on first, I was one of the last ones to get on; we got on, and the first I knew, I don't know whether it was a lump of ice or brick went through the window on the back platform. Several of them came; I don't know how many; one of them hit Mr. Dott in the mouth. Q. How many bricks and cakes of ice and things were thrown before he was hit? A. When they came back I judge there was about eight fellows. Q. I wasn't asking about the men; how many bricks and cakes of ice were thrown around the car before Mr. Dott was hit? A. I could not tell you, he got hit by some of the first thrown, I judge."

As to when the plaintiff was struck and injured he testified as follows:

"Q. Do you know how long it was after Kissler was hit before Dott was hit? A. I could not tell you that, the car went out the street, and everything was in commotion."

William N. Ochsenhirt, who seems to have been the principal figure in the fight, testified for plaintiff as follows:

"Q. What was the first of any trouble that happened Mr. Ochsenhirt? A. Why, Mr. Dott and Jack Baldes and another boy, I can't think of his name, in fact I don't know who he was, was standing in the crowd with myself, all standing there, when these three young men, I don't know who they were, never seen them before, I don't know whether I could recognize any of them now, they came along, and we were talking and waiting for the car; it was an awful cold night; they came along and bumped into us and nearly walked all over us. I said, 'Why,' I said, 'be a little careful where you are going,' and with that they came back and one of them struck at me. At that I struck back, but I am sure I didn't hit him, and with that the three started to throwing ice, and one picked up a board and threw at me. I raised up my arm and warded off the blow. I picked up the board and threw it back, and the three started to run. The car came about that time and all three of us got on the car, and before Mr. Dott said to them, he said, 'Here, why don't you go ahead, don't start any fight,' like that. The car came, and we got on; as we got on they started to throwing again; he was on the back of the car, the one kicking at me, I kicked back and think he went off the car. Q. How many minutes did the conductor hold the car while the fight was going on? A. Between three and five minutes. Q. And was everybody on the car? A. Yes, sir; the car was crowded. Q. Any reason for him holding it? A. No, there was no reason for him holding it, he could have rang off and went ahead; perhaps Mr. Dott wouldn't have been hit."

As to when the plaintiff was hit, Ochsenhirt testified as follows:

"Q. When was it Mr. Dott got hit, right after he got on? A. He was on the car possibly two or three minutes. Q. Were you all fighting there on the rear platform two or three minutes? A. Possibly two minutes—yes, sir; they were kicking me, and I kicked back. Q. Was there a man there with a knife? A. Came in the side by the conductor with a knife open, and one came after me, and this man came after Mr. Kissler with the knife and he kicked at him."

Defendant's witness, B. P. Ferguson, the conductor on the car, gave the following de-

scription as to what took place when the car stopped:

"A. When we rolled up to Chestnut street there was some passengers there to get on, and if they were fighting I never saw nothing; then they got on the car; three or four boarded the car; there was three other fellows that started to jump on the car, they were fighting, and I got these fellows off the car that was trying to fight these other fellows, and we went on. Q. Was anything thrown at the car while they were fighting on the platform? A. Yes, sir; one of the fellows right back of the car, he picked up a big chunk of ice and threwed it and hit a passenger on the back end of the car. Q. Any other missiles besides the lump of ice thrown? A. No, sir. Q. I will ask you, when you came up there, if the fighting was going on, and anything thrown at the car? A. Nothing thrown at the car at all. Q. What did you do when the fight started on the platform? A. Tried to get them to quit and get these fellows off. Q. Did any one have a weapon in his hand? A. Yes, a fellow had a knife in his hand. Q. Did you know which ones wanted to become passengers and which ones were just getting on to attack them? A. No, sir; when they went to get on the car I did not. Q. How long did your car stand there? A. Not more than, I would say, a minute or a minute and a half, something like that."

On cross-examination Ferguson testified as follows:

"Q. You gave an emergency stop after he had already started once? A. No, sir. Q. What kind was it? A. Gave him one bell. Q. To stop again? A. Yes, sir. Q. And he did stop? A. Stopped. Q. And you stood there a couple of minutes these men were fighting. A. Yes, sir. Q. Why did you stand your car for two minutes with this fighting going on? A. Pulled off with them on the car, and they were fighting."

The motorman on the car, John C. Lucas, gave the following description of what he saw:

"Q. Just go ahead and tell what took place. A. When I was approaching Chestnut, after I crossed Gray and saw this little commotion, I never thought anything about it. I saw these fellows go down that way, and some women passengers standing on the south side. I went over and stopped and got the go ahead signal—a bell—but the same time I got a signal to stop, and somebody said there was fighting on the back end and opened the front vestibule door and went back and as I got to the back some fellow swung off the car and struck at me and just knocked his lick off, and somebody else on the street said, 'Don't hit that man.' He said why did I butt in, and used an oath, and I said it didn't make any difference. I said to the conductor, 'Let's get away as quick as we can; and I hopped on the car and went on.' \* \* \* Q. About how long, altogether, were you standing there? A. I suppose not more than two minutes, at the most."

[1, 2] The instructions of the court submitted the case in the following manner:

"If you believe from the evidence that when the car in question, at the time mentioned, stopped at the south side of Chestnut street for the purpose of permitting passengers to alight from said car and persons to board same, a fight occurred on the rear end of said car, being brought about by parties coming from the street renewing an attack on certain passengers on the rear end of said car, and that said parties so boarding said car for the purpose of attack were thrown or kicked off of the car, and that when all the passengers who were destined to said point, and the parties desiring to

board same to become passengers, had done so, the parties on the street continued or renewed the attack by throwing missiles against or in said car or at parties thereon, and that thereupon the passengers on said car requested the conductor to ring off the car and allow it to pass on out of danger, and that the conductor and motorman in charge of said car knew of the conditions existing at the time, as above stated, and that the passengers were in danger of injury by reason thereof, and had a reasonable time in which to move said car out of danger from said missiles, and failed to do so, but permitted said car to stand in its then position an unreasonable length of time, and that by reason thereof the plaintiff, Dott, was struck and injured as complained of in his petition, then the law is for the plaintiff, and the jury should so find."

Certainly this instruction was erroneous, because there was no evidence that while the car was stopped there was either a cessation of the difficulty or renewal of the attack. All the evidence makes it clear that the fight was continuous, and if there was any difference in the intensity of it, it was at its highest when plaintiff was hit. The passengers, of course, were all excited. The onslaught was sudden, and all were fearful for their safety. Some suggested, and others demanded that the conductor ring off, that is, give the motorman orders to start the car, and because he did not obey argument is made that the company is liable. While the carrier must exercise the highest degree of care for the protection of passengers from assault by fellow passengers, even strangers, it does not follow that it owes obedience to them. All the evidence does show that when the car was rid of the intruders, the conductor signaled the motorman to move on, and the motorman did not delay in obeying the signal. When the car stopped, the passengers began to get aboard, and the others followed so closely that it was impossible for the conductor to tell one from the other. When it became apparent that their purpose was not lawful, the conductor, with the help of some passengers and the motorman, who ran back to assist, did their best to expel them, but before this was accomplished the plaintiff had been injured. There is no proof that plaintiff would not have been injured if the car had started. The mere starting of the car would not have prevented the ruffians throwing missiles, and had the conductor started it any time earlier than he did, he would have violated other duties that he owed. With possible passengers hanging on the platform attempting to get aboard—even trespassers, it was the duty of the conductor to either get them safely aboard, if passengers, or expel them, if trespassers, before starting the car. If it owed plaintiff the duty of starting the car, it owed the on-coming passengers the duty of holding the car until they could safely get aboard. There were those on the car steps who it developed did not intend to become passengers; in fact they were trespassers. They would have been imperiled by starting the car, and, the

conductor knowing this, he owed them the duty of not starting the car or doing anything to increase their peril. Neither appellant nor its servants were in any wise responsible for the difficulty. It arose before the car reached there. It did not originate on their property, nor were the participants subject to their control. Without their knowledge or consent the difficulty and the participants were transferred to the car. The carrier undertakes to transport a passenger to his destination—not to carry him away from his pursuers. In other words, its business is the carrying of passengers, not fugitives.

It is conceded that the case of *Kinney v. I. & N. R. R. Co.*, 99 Ky. 61, 34 S. W. 1066, 17 Ky. Law Rep. 1405, gives a clear statement of the protection the carrier owes to passengers:

"Carriers are not held to be the insurers of the absolute safety of their passengers or of their entire immunity from the misconduct of fellow passengers or of strangers; but there is an implied obligation, growing out of the contract between the carrier and the passenger that the former shall afford to the latter reasonable protection and immunity from the insults, violence, and wanton interference of intruders, fellow passengers, and the carrier and his servants. *Winnegar's Adm'r v. Central Passenger Ry. Co.*, 85 Ky. 553 [4 S. W. 237, 9 Ky. Law Rep. 156]; *Sherley, etc. v. Billings*, 8 Bush, 147 [8 Am. Rep. 451]. Out of this obligation, and the doctrine that carriers of passengers are required to use the utmost care in the management of their trains in order to prevent or avoid injury to their passengers, arises the rule that makes it the duty of carriers to exercise the highest practicable degree of care and diligence in protecting and guarding their passengers from violence and assaults, from whatever source, which may be reasonably anticipated or naturally expected to occur under the circumstances of the case and the condition of the parties; and, if this duty is neglected or, without good cause, omitted by the carrier or his servant, the carrier will be held responsible for any injury to a passenger resulting from such neglect or omission, and which, but for same, might have reasonably been foreseen and prevented. These principles, it seems, are recognized and enforced by an almost unbroken line of decisions in this country."

But all the cases to which our attention has been called where a passenger has been allowed to recover for injury inflicted upon him by a fellow passenger, trespasser, or intruder arise from circumstances or altercations originating on the car or property of the carrier; that is, in places where the carrier or its servants have such control over the parties as to make the failure to exercise such control a matter of negligence. Appellant says that plaintiff could have avoided the injury by running away from the rowdies before the car came. But he had a right to wait for the car, and he had a right to become a passenger. However, when he became a passenger, appellant only assumed the burden of protecting him as a passenger. If in becoming a passenger he carried a difficulty with him, he cannot burden appellant

with that unless appellant knew of it and accepted him as a passenger notwithstanding. The conductor was confronted with uncertain, if not conflicting, duties. He stopped his car unwittingly in the middle of a difficulty going on in the street, and the place of difficulty was almost immediately transferred to his car. During the course of it, and after plaintiff boarded the car, he was struck by a missile which it seems was hurled from some one without. What could the conductor have done in the exercise of ordinary or the highest degree of care to prevent the injury? He might have moved his car out of the danger zone, but by moving the car he might have injured passengers or trespassers whom he saw on the rear steps. Was it not a safer plan to hold his car until the trespassers were expelled? It certainly cannot be maintained that he was guilty of any wrong, or violated any duty which he owed to on-coming passengers in so handling his car; and, unless he was so guilty, they have no right of recovery, although injured during the time.

[3] In this case it is immaterial that passengers requested the conductor to move his car. His duty was not in any wise altered or changed by those requests. If there was negligence in failing to move the car, it existed independently of any requests, nor did the requests enhance the degree of it. No one contends that the conductor or motorman had knowledge of the difficulty before the car reached the point, and after that time there is no pretense that any one remained in ignorance of it. Consequently advice or suggestion from passengers as to what the conductor should or should not do could not affect the liability.

[4] Advice, requests, or suggestions to those upon whom a duty is imposed merely go to carry knowledge of the danger. In cases where one's peril is seen or notice is given of it, of course it becomes the duty of those in charge to avert it if possible.

No such case is here presented. Believing there was no evidence of negligence on the part of appellant, a peremptory instruction should have been given, and the case is reversed for that reason.

#### HOWARD & CALLAHAN v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. COMMERCE (§§ 8, 16\*) — INTERSTATE COMMERCE—REGULATION.

Where a contract of carriage was made in Illinois for shipment of animals to a point in Kentucky, it was an interstate contract, governed exclusively by federal laws and regulations, notwithstanding they might conflict with the state Constitution and laws.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 2, 5; Dec. Dig. §§ 8, 16.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

**2. CARRIERS (§ 218\*)—INTERSTATE COMMERCE—REGULATIONS—CLAIMS—PRESENTATION.**

A provision of an interstate stock transportation contract that no claim for loss or damage should be valid against the carrier unless it should be made in writing, verified by affidavit, and delivered to specified agents of the carrier within ten days from the time the stock was removed from the cars was valid and enforceable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**3. CARRIERS (§ 218\*)—INTERSTATE COMMERCE—STOCK CONTRACT—FILING CLAIMS—WAIVER.**

A provision of an interstate stock transportation contract that claims shall be filed within ten days and shall be in writing, verified by affidavit, and delivered to certain agents of the carrier is for the carrier's benefit and can be waived.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**4. CARRIERS (§ 218\*) — TRANSPORTATION OF STOCK—INTERSTATE COMMERCE—CLAIMS FOR DAMAGES—SWORN NOTICE—WAIVER.**

Where a carrier's agent at the place of destination of certain stock was notified that the shipper would not receive them because of their damaged condition, and thereupon told the shipper to take the stock and do the best he could with them, and that he would be treated right about it, and the agent was present when the stock was unloaded, actually saw their condition, knew the cause to which it was attributed, paid a veterinary to attend the stock, and wrote on the bill of lading a notation that the stock was received in a damaged condition under protest, with the cause of the damage, such conduct constituted a waiver of a provision in the transportation contract requiring the shipper to give verified notice of loss or damage to specified representatives of the carrier within ten days after removal of the animals from the cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**5. CARRIERS (§ 218\*)—INTERSTATE COMMERCE—TRANSPORTATION CONTRACT—CLAIMS—WAIVER.**

Where an interstate stock transportation contract provided that claims for damages must be verified and filed with specified agents of the carrier within ten days after removal of the stock from the cars, and that no employé of the carrier was authorized to change or waive the provisions of the contract, the provision for notice could be waived by any person mentioned in the clause as having authority to receive the sworn claim for damages, who had knowledge of the condition of the stock or cause to which it was attributed, and that the owner asserted a claim for damages, which waiver might be effected by such acts or conduct as might reasonably be calculated to induce the shipper to believe that written notice would not be required, provided the acts or conduct occurred within the time in which the written notice must have been given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Fulton County.

Action by Howard & Callahan against the Illinois Central Railroad Company. Judgment for defendant, and plaintiffs appeal. Reversed, with directions.

Herschel T. Smith, of Fulton, for appellants. Trabue, Doolan & Cox, of Louisville, R. V. Fletcher, of Chicago, Ill., Carr & Carr, of Fulton, and Thomas & Webb, of Mayfield, for appellee.

CARROLL, J. The appellants, Howard & Callahan, shipped from Coulterville, Ill., to Fulton, Ky., a car load of mules. These mules, in course of shipment, and at Mounds, Ill., were left standing in open pens in a cold rain for several hours, and by reason of the exposure a number of them were seriously injured and damaged. To recover compensation for the loss sustained by the injuries to the stock so occurring, they brought this suit.

For answer to the petition, the railroad company, after denying negligence in the carriage of the stock, set up: That it was engaged as a common carrier in commerce between the states of Kentucky and Illinois and other states, and that the stock was delivered to it for transportation and accepted by it in interstate commerce. That the parties at the point of shipment in the state of Illinois entered into a written contract for the shipment of the stock that contained, among others, these clauses:

"(6) It is further agreed by the shipper that no claim for loss or damage to stock shall be valid against the railroad company, unless it shall be made in writing, verified by affidavit, and delivered to the general freight agent or freight claim agent of the railroad company, or to the agent of the company at the station from which the stock is shipped, or to the agent of the company at the point of destination, within ten days from the time said stock is removed from said cars.

"(7) The rules and regulations printed at the head of this contract are an essential part of the said contract. No employé of the railroad company is authorized to change or waive the provisions of this contract."

It further pleaded:

"That, prior to the delivering to it of said shipment of cattle for transportation, it had published and filed with the Interstate Commerce Commission its schedule of tariffs and charges for the transportation of the mules from Coulterville and Carbondale, both in the state of Illinois, to Fulton, Ky., and as a part of such tariffs had filed official classification No. 37, under which schedule and tariff classification it was provided that shipments of the character mentioned in the petition should be made subject to a limitation of liability as to the valuation, and as to the time of presenting claim on account of such shipments, as set forth in the contract herewith filed as exhibit. \* \* \* Defendant says that no claim for loss or damage to any of the stock embraced in any of said shipments was ever made or presented to it or to any of its officers or agents in writing or otherwise within ten days from the time the said stock embraced in said shipment was removed from the cars, and no such claim was ever presented to this defendant or to any of its officers or agents in writing, verified by affidavit. \* \* \*"

And it pleaded and relied on these provisions of the contract, and the failure of the plaintiffs to observe them, as a bar to the action.

For reply to this answer the plaintiffs, after a general denial of the averments of the petition, averred, in avoidance of the stipulation in the contract above quoted, that when the mules arrived at Fulton, the place of destination, they—

"were in bad condition, but upon the promise of the defendant to pay them the damages sustained by reason of having unloaded and left standing in a cold rain the mules in Mounds, Ill., plaintiffs accepted the mules immediately and paid the charges under protest; and they allege that, when they paid the freight charges, the defendant promised that it would make good any and all damages they had sustained, and would pay the bill of the veterinary, and did in fact pay the same, and, when it promised to pay the damages the mules had sustained, it wrote upon the receipted freight bill as follows: 'Shipment delivered January 16th, under protest; colds developing; throats swelling; flanks drawing, indicating serious conditions account unloading in cold rain at Mounds, Illinois, January 11, 1913.' And they allege that by reason of the promise to pay the damage the mules had sustained, and written acknowledgment of the condition of the mules, and the payment of the veterinary's bill, all of which occurred within less than ten days of the unloading of the mules, they were quieted in their fears and lulled to inaction in the belief that the defendant would pay the damages until more than ten days had elapsed; and they allege that, by reason of the action and conduct on the part of defendant, it has waived clause 6 relied on in its answer, and, after lulling them to sleep and inaction for more than a period of ten days after the stock was delivered by its act and conduct, it is now estopped to rely upon clause 6 in the contract requiring claims to be filed in writing within ten days after delivery at destination or at all. They further allege the defendant had all the information about the condition of the mules plaintiffs had, and a written statement of the damages would not have aided it in ascertaining the extent of the damage, nor would it have increased or diminished the damage to the shipment."

The trial judge overruled a demurrer to this reply, and thereafter the case went to trial before a jury, whereupon, at the conclusion of the evidence for the plaintiffs, the lower court directed a verdict for the defendant upon the ground that, as clause 6 in the contract had not been complied with or waived, it presented a bar to any recovery by the plaintiffs.

Passing what occurred before the mules arrived at Fulton, the place of destination, as not necessary to a decision of the case, the evidence shows that, when the mules arrived at Fulton, L. T. Callahan, one of the plaintiffs, unloaded the mules in the presence of Mr. Woods, the general freight agent at that place. Callahan testified as follows:

"Q. What was the condition of the mules the night they arrived and next morning? A. Very bad. I refused to receive them. I knew they were exposed. I talked to Mr. Woods. I told him I would not accept them. I felt that they were responsible, and I would not take them; but Mr. Woods told me if I had a barn or stable to put them in we should take these mules and do the best we could for them. We woke the men up at the office. I think Mr. Pelley was there. Q. The superintendent? A. Yes, the superintendent. They told me to do the best we could in handling them, and possibly we would get along without any trouble. Q. You

did take them? A. Yes. Q. Did the railroad company have any veterinary look after them and doctor them? A. Yes; Dr. Cathcart. Q. Who paid his bill? A. The railroad company, I think. In fact, I know they did. Q. Did you ever make any statement in writing, sworn to by either you or Mr. Howard, to any agent of the railroad company of your expected claim, or the claim you are suing on here? A. No, I asked them for it, but they didn't pay me any attention at all. Q. You made no claim in writing whatever? A. I don't think I did. Q. You say the agent of the company helped to unload them? A. Yes; the station agent, Mr. Woods. Q. He was present and helped unload them? A. Yes, sir. Q. Is he the one that wrote on the freight bill the condition of the mules? A. I presume he wrote it or had it written. Q. Who was it who told you to do the best you could with them and that they would treat you right about it? A. I think it was Mr. Pelley and Mr. Woods. Q. Who is Mr. Pelley? A. Superintendent of the Tennessee division."

Dr. Cathcart testified that he treated the mules, and that the railroad company paid his bill.

It is admitted that on the freight bill presented to the plaintiffs at Fulton, Ky., at the time of the delivery of the mules, there was written by the agent of the railroad company this:

"Shipment delivered January 16th, under protest; colds developing; throats swelling; flanks drawing, indicating serious conditions account unloading in cold rain at Mounds, Illinois, January 11, 1913."

With the pleadings and evidence in this condition, three questions are presented for our decision: First, was clause 6 in the contract of shipment a reasonable and valid stipulation? Second, could it be waived? Third, was it waived?

[1] The contract of carriage here involved was made in Illinois for shipment to a point in Kentucky, and therefore it was an interstate contract, under the federal legislation regulating interstate commerce, and this legislation has been held to be controlling notwithstanding that it may conflict with state Constitutions and laws. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *M. K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

[2] In this last-mentioned case the contract of carriage, in addition to placing a limited value on the live stock shipped, provided that an action on the contract could not be sustained, unless brought within 90 days after the damages sought to be recovered had accrued. In holding that both of these limitations were valid, the court said:

"The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn act of June 29, 1906. The validity of any stipulation in such a contract, which involves the construction of the statute and the validity of a limitation upon the liability thereby imposed, is a federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. \* \* \* The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited

or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. \* \* \* The policy of statutes of limitation is to encourage promptness in the bringing of actions that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short."

In *Hutchinson on Carriers*, vol. 1, §§ 442, 443, it is also said that a provision in the contract of carriage, imposing upon the owner of the property injured, as a condition precedent to enforcing the carrier's liability, the duty of giving notice of such claim within a reasonable time, is a valid stipulation. To the same effect is *Elliott on Railroads*, vol. 4, § 1512.

Section 196 of our Constitution provides in part that "no common carrier shall be permitted to contract for relief from its common-law liability"; and it was held in *Ohio & Mississippi Ry. Co. v. Tabor*, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 17 Ky. Law Rep. 568, 1411, 34 L. R. A. 685, that a condition in a contract made in this state for the carriage of live stock to a point in another state, limiting the time in which written notice of a claim for damages should be given to the carrier, was in violation of this provision of the Constitution, and therefore void. The same ruling was made in *Brown v. Illinois Central R. R. Co.*, 100 Ky. 525, 38 S. W. 862, 18 Ky. Law Rep. 974.

But in *Adams Express Co. v. Walker*, 119 Ky. 121, 83 S. W. 106, 26 Ky. Law Rep. 1025, 67 L. R. A. 412, it was ruled that a stipulation limiting the liability of the carrier was not a violation of this section of the Constitution if the contract of carriage was made and the injury for which damages were sought to be recovered by the owner occurred in another state, although the contract of carriage provided for the transportation of the stock to a point in this state. To the same effect is *Cleveland & St. Louis Ry. Co. v. Drulen*, 118 Ky. 237, 80 S. W. 778, 26 Ky. Law Rep. 103, 66 L. R. A. 275, 4 Ann. Cas. 1102.

Treating this case, however, as an interstate transaction, subject to the federal statute regulating interstate commerce, the stipulation in the contract limiting the time in which the claim for damages should be presented as a condition precedent to the maintenance of a cause of action will be regarded as a valid condition, and we also think that it was a reasonable one, at least under the facts of this case. It allowed the shipper ten days from the time the stock was removed from the car in which to present a claim for damages, and manifestly this afforded him in this case reasonable opportunity to ascertain the damage, if any, the stock sustained in carriage and to prepare and present his claim.

[3] The next question is: Could this condition in the contract of carriage be waived? Upon this subject it is said in *Hutchinson on Carriers*, vol. 1, § 444, that:

"A condition requiring that notice of a claim must be presented within a certain time being intended for the benefit of the carrier, he may, either expressly or by conduct inconsistent with an intent to rely upon it, waive the benefits of the condition. Thus, if the carrier by his conduct should induce the owner to delay the presentation of the notice until after the time fixed for presenting it had expired, he would not be permitted to escape liability on the ground that the notice of claim was not presented within the stipulated time. And if the agent of the carrier should induce the owner to go to the trouble and expense of making out a notice of his claim, and should lead him to believe that its presentation would not be insisted upon within the stipulated time, the carrier would be estopped from availing himself of the owner's failure to present it within such time as a defense. So if the carrier should accept a verbal notice without objection, and should treat the claim as pending, his conduct would amount to a waiver of a condition that the notice should be in writing."

In *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; *A. T. & S. F. Ry. Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Lasky v. Southern Express Co.*, 92 Miss. 268, 45 South. 869; *Adams v. Colorado & Southern Ry. Co.*, 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412; *Hudson v. Northern Pacific Ry. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550; *Gilliland v. Southern Ry. Co.*, 85 S. C. 26, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861; *A. T. & S. F. Ry. Co. v. Robinson*, 36 Okl. 435, 129 Pac. 20; *St. Louis & San Francisco R. R. Co. v. James*, 36 Okl. 196, 128 Pac. 279—it was held that a provision like the one embodied in this contract of carriage could be waived, and upon principle there seems no good reason why this character of condition in a contract for carriage cannot be waived.

[4] The purpose of this condition in the contract was, of course, to give the carrier timely notice of the condition of the stock and of the assertion of the claim for damages and opportunity to investigate the matter while the facts were fresh and accessible. This being the purpose of the condition, we think it is as well satisfied when the agent of the carrier, to whom notice might be given, has actual knowledge of the condition of the stock at the time of their delivery at the point of destination and of the fact that a claim for damages will be asserted as it would be by the service of a written notice; and so if the agent, to whom written notice might be given, induces the owner by his conduct or assurances to believe that written notice will not be necessary, and, acting upon this belief, the owner fails to give the written notice, the carrier should not be allowed to defeat his claim because he failed to give the written notice. There is no particular sanctity about a contract for the shipment of live stock or about the conditions in

such a contract, nor is there any reason why the same rules of law that govern other persons in their relations to contracts and their right to waive provisions inserted for their benefit should not be applied to the parties to these contracts. In private affairs, uncontrolled by statute, there is scarcely any provision in a contract that a party to the contract may not waive if he pleases to do so. The general rule being that a party to a contract, who is fully advised of the facts, will not be permitted, by his conduct manifesting a waiver, and upon which the other party relied and had a right to rely, to prejudice the rights of the other party by asserting that the stipulation could only be waived in writing, and this well-established principle should be applied to contracts like this.

In *Owen & McKinney v. L. & N. R. R. Co.*, 87 Ky. 626, 9 S. W. 698, 10 Ky. Law Rep. 554, which was a suit to recover damages for injury to a horse caused by the negligence of the carrier, the contract contained a stipulation requiring the owner to give notice in writing of his claim for damages as a condition precedent to a right of recovery for injury to stock. The owner failed to give the written notice, which the court held to be a reasonable requirement in the contract, but ruled that the notice was waived by the actual notice received by the agent, to whom written notice should have been given, of the injury to the horse, upon which the cause of action was based. The court said:

"The fact of the injury and of appellants' claim was not only known to the officers and agents of the company, but an actual inspection or examination of the horse made, as the proof conduces to show, by a surgeon, at the instance of the company, skilled in the treatment of such injuries as the horse had received."

In *Railway Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261, *Kidwell v. Oregon Short Line R. Co.*, 208 Fed. 1, 125 C. C. A. 313, and *Clegg v. St. Louis R. Co.*, 203 Fed. 971, 122 C. C. A. 273, there are expressions to be found indicating that the court was of the opinion that a clause like the one here in question could not be waived; but we think an examination of these cases will show that these courts really said that the facts in the cases under consideration did not amount to a waiver, and not that a condition like this could not be waived under any circumstances.

But whatever views other courts may entertain of this question, it is our opinion that the condition in the contract could be waived, unless it be that clause 7, providing that "no employé of the railroad company is authorized to change or waive the provisions of this contract," makes indispensable the written notice required by clause 6.

We are not prepared to say, nor is it necessary in disposing of this case, that we should rule that any employé of the railroad company might waive the condition in clause 6, or other provisions of the contract. But we think any agent of the railroad company,

to whom the shipper may give the notice provided for in clause 6, may waive the written notice, and that the stipulation in clause 7 does not have the effect of nullifying a valid waiver made by the agent to whom the written notice might be given.

If the provision in clause 7 is absolutely controlling, and no employé of the railroad company can waive any provision in clause 6 or any other parts of the contract, then under no circumstances could there be a waiver of the stipulation requiring written notice. We are not inclined to adopt a construction of the contract that would enable carriers through their agent to practice in effect a fraud on shippers by inducing them to believe that no written notice would be required and then defeat their just claim because the written notice had not been given. To avoid the unreasonable and unfair effect of such a construction, our opinion is that the word "employé" in clause 7 does not include, in cases like this, the persons mentioned in clause 6, to whom notice must be given. Whether any other employés are exempted from the operation of the provision in clause 7, it is not necessary here to consider.

[5] We therefore think the proper construction of the contract is that the condition in clause 6 requiring written notice may be waived by any of the persons mentioned in this clause who had knowledge of the condition of the stock, the cause to which it was attributed, and that the owner asserted or intended to assert a claim for damages, and that the waiver may be effected by such acts or conduct as might reasonably be calculated to induce the shipper to believe that written notice was not required. This waiver, however, to be effective, should occur within the time in which the written notice must be given, and the sufficiency of it, unless the facts are admitted, should be submitted to the jury in a proper instruction.

Some claim is made by counsel for the railroad company that, because it filed with the Interstate Commerce Commission its tariff classifications and schedules showing the limitations in its contract, the effect of this was to take the contract out of the general rules that control in the construction of contracts and to put this contract beyond the power of the parties to waive its conditions.

We think it a sufficient answer to this to say that the Interstate Commerce Commission does not attempt to enforce contracts made between carrier and shipper and has no authority to determine the validity or legality of such contracts; the construction, validity and effect of these contracts being left to the courts. *Traders' & Travelers' Union v. P. & R. Co.*, 1 Interst. Com. Com'n'r. R. 371; *Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co.*, 2 Interst. Com. Com'n'r. R. 162; *Greenbaum Co. v. C. & O. Ry.*, 25 Interst. Com. Com'n'r. R. 352.

The remaining question is: Do the facts

disclosed by the record amount to a waiver? If the facts of this case do not establish a waiver, it would be difficult to describe acts or conduct that would. As shown by the undisputed evidence, the railroad agent at the place of destination was notified that the shipper would not receive the stock because of their damaged condition, and thereupon he told the shipper to take the stock and do the best he could for them, and that he would be treated right about it. The agent was also present when they were unloaded and actually saw their condition and knew the cause to which it was attributed. In addition to this, the railroad company employed and paid a veterinary to attend the stock, and the agent of the company wrote on the bill of lading the damaged condition of the stock, the cause that produced it, and that it was received by the shipper under protest.

We think this conduct fully meets all of the conditions of a valid and sufficient waiver. In short, the actual notice the agent had was much fuller and more accurate than he would have had if the written notice had been given. *A., T. & S. F. Ry. Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; *Lasky v. Southern Express Co.*, 92 Miss. 268, 45 South. 869.

Wherefore the judgment is reversed, with directions for a new trial.

### HAYS et al. v. WICKER.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. APPEAL AND ERROR (§ 349\*)—TIME FOR APPEAL—INFANTS.

Under Civ. Code Prac. § 745, giving an infant defendant one year after removal of disability in which to appeal, where suit is against two infants to sell land, in which each owns an undivided interest, either being entitled to appeal without joining the other, appeal taken more than a year after removal of the disability of one, but within the year after removal of that of the other, is too late as to the one, but effectual as to the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1905-1912; Dec. Dig. § 349.\*]

#### 2. INFANTS (§ 34\*)—SALE OF LAND—POWER OF COURT.

The power of a court of equity to sell an infant's land is wholly statutory, so that such a sale by it, if not authorized by statute, is void.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 64, 67; Dec. Dig. § 34.\*]

#### 3. INFANTS (§ 37\*)—SALE OF MINERALS SEPARATE FROM SURFACE—POWER OF COURT—STATUTES.

Under Civ. Code Prac. § 489, providing that a vested estate of an infant in real property may be sold by a court of equity for his maintenance and education, it may sell the underlying coal, without selling the surface, though both are owned by him.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 82, 83, 97; Dec. Dig. § 37.\*]

#### 4. INFANTS (§ 37\*)—SALE OF MINERALS BY COURT—BURDENING SURFACE.

A sale by a court of equity, nominally of the mineral rights in an infant's lands, should not be made with such indefinite and unlimited rights to the purchaser, as to use of the surface and timber for mining purposes, as to make it impossible to sell the surface, except at a great sacrifice.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 82, 83, 97; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Floyd County. Suit by William Wicker, guardian, against Ephraim Hays and another. From the judgment, defendants appeal. Dismissed as to one, and reversed and remanded as to the other.

James Goble and W. W. Williams, both of Prestonsburg, for appellants. Smith & Combs, of Hindman, O'Rear & Williams, of Frankfort, Neal & Strickling, of Huntington, W. Va., and Hager & Stewart, of Ashland, for appellee.

HOBSON, C. J. On April 19, 1907, William Wicker, as guardian of Oscar Hays and Ephraim Hays, filed a petition in equity against them in the Floyd circuit court, alleging that they owned an undivided one-half interest in a tract of 88 acres of land, each owning an undivided one-fourth interest, and that a sale of the mineral rights in the land was necessary to educate them and prepare them for life. He prayed a sale of the mineral rights, the proceeds to be applied to their education and maintenance. Proof was taken upon the petition sustaining its allegations as to necessity. No guardian ad litem was appointed. The guardian executed bond, and at the November term, 1907, a judgment was entered for the sale of the property; the property was sold; the master commissioner filed report of sale; the purchaser filed exceptions to the sale; and on the hearing of the exceptions the court set aside the sale and the judgment previously entered in the case, and appointed a guardian ad litem for the infants, who filed a report, and thereafter, proof being again taken, the court, at the March term, 1909, entered a second judgment for the sale of the mineral rights under the land. Under this judgment the property was again sold, and the sale was confirmed at the April term, 1909; each infant's part being \$105. On March 19, 1914, this appeal was sued out before the clerk of this court by Ephraim Hays and Oscar Hays, by which they seek to reverse the judgment ordering the sale and to set aside the sale.

[1] At the time the petition was filed Oscar Hays was 18 years of age, and Ephraim Hays was 14 years of age. Oscar became of age in 1910, or 4 years before the appeal was taken. Ephraim became of age in the year 1914. Section 745, Civil Code, provides:

"An appeal shall not be granted except within two years next after the right to appeal first accrued, unless the party applying therefor

was then a defendant in the action, and an infant not under coverture; or of unsound mind; or a prisoner who did not appear by his attorney—in which cases an appeal may be granted to such parties, or their representatives, within one year next after their deaths or the removal of their disabilities, whichever may first happen.”

The appellees have pleaded limitation and entered a motion to dismiss the appeal. The motion must be sustained as to Oscar Hays, as the appeal was not taken within one year after the removal of his disability; but the appeal by Ephraim Hays is in time, and he has a right to appeal from the judgment selling his land, although his brother has lost the right to appeal from the judgment selling his land. They were both defendants to the action, and each owned an undivided one-fourth of the land; either could appeal without joining the other.

[2, 3] It is earnestly insisted that the circuit court was without authority to sell the mineral right under the land without selling the surface also. It is well settled in Kentucky that the power of a court of equity to sell an infant's land is wholly statutory, and that a sale which is not authorized by statute is void. *Walker v. Smyser*, 80 Ky. 620; *Elliott v. Fowler*, 112 Ky. 381, 65 S. W. 849; *Graham v. Kitchen*, 118 Ky. 22, 80 S. W. 464, and cases cited. But section 489 of the Civil Code provides:

“A vested estate of an infant \* \* \* in real property, may be sold by order of a court of equity \* \* \* in an action by a guardian against his ward, for the sale of the estate for the maintenance and education of the ward.”

In *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289, we said:

“Minerals in place are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both, in such a case, are landowners.”

Under such a statute, it is generally held that the court may order the sale of any interest in land which an infant may hold, whether legal or equitable, vested or contingent. 22 Cyc. 568. Thus it has been held that an infant's interest in a homestead may be sold, and we have in two cases assumed or recognized the power of a court of equity under the statute to sell the timber on an infant's land without selling the surface, when to the interest of the infant. *Carpenter v. Carpenter*, 145 Ky. 473, 140 S. W. 645; *Ayer & Lord Tie Co. v. Witherspoon*, 100 S. W. 259, 30 Ky. Law Rep. 1068.

We do not see that a substantial distinction can be made between selling the coal under the land without selling the surface and selling the timber on the land without selling the surface. The chancellor should sell only so much of the ward's estate as his interest requires to be sold, and if he may sell half the land, we do not see why he may not sell a severable estate in the land, retaining for the infant the surface, so as to give him a home. *Ball v. Clark*, 150 Ky. 384, 150 S. W. 359, involved a very different question.

There the owner of an undivided interest in the minerals undertook to sever the holding of the infant in the land. We therefore conclude that the judgment complained of is not void for want of authority in the court to order the sale.

[4] It is also insisted that the circuit court, in ordering the sale of the mineral rights, gave the purchaser such rights in the surface as to destroy the value of the remaining estate, and that in so ordering the sale he abused a sound discretion, although the judgment followed the petition, and that the judgment for this reason is erroneous. The thing ordered to be sold is thus described in the judgment:

“The undivided one-fourth interest each of the said Oscar Hays and Ephraim Hays in and to the coal, minerals, and mineral substances and products, all oils and gases, all salt and salt mineral waters, all fire and potters clay, all iron and iron ores, all stone, all slate, all ores and mines, and all subterranean substances and products, and all combinations of same, or any or all of the same, or that may be hereafter found thereon, therein, or thereunder, and such of the standing timber as may, at the time of the use thereof, be, or by the purchaser, its successors and assigns, be deemed, necessary or convenient for the exercise or enjoyment of any and all property rights and privileges herein adjudged to be sold, granted or conveyed, including timber necessary for dams or railroads, or branch lines thereof, as may hereafter be constructed upon the said land, and exclusive right of way for any and all railroads, tramroads, haulroads, other ways, pipe lines, telephone and telegraph lines that may hereafter be located on said land by the purchaser, its heirs, representatives, or assigns, or by any person or corporation, and also the right to maintain, keep in repair, and operate the same, and said railroads, tramroads, haulroads, ways, pipe lines, telephone and telegraph lines, and also the exclusive right to enter upon said land and drill thereon for oil and gas, and to pump for and store the same upon said land, and remove, pipe, and transport the same therefrom, and to use and operate the said land and surface thereof, including the right to use, divert, dam, and pollute water courses thereon in any and every manner that may, by the purchaser, its successors and assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property rights and privileges hereby adjudged to be sold, including, but not limiting, to that of drilling, mining, pumping, and therefrom removing, or otherwise using the said pipe, telegraph and telephone lines, rights of way, roads, ways, timber, coal, minerals, salt, oil, gas, salt water, clay, iron, ore, mines, stone, and subterranean substances and products thereof, and any and all other properties and rights hereby adjudged to be sold, and for the transportation therefrom of said articles, and also the right to build, erect, alter, repair, maintain, and operate upon said land, and at its option to therefrom remove, any and all houses, shops, buildings, tanks, derricks, inclines, tipples, dams, coke ovens, store and ware rooms, and machinery and mining, and any and all equipments that may, by the purchaser, by its successor or assign, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the properties, rights, and privileges hereby adjudged to be sold, and the right to thereupon convert, reduce, refine, store, dump, and manufacture the said, or any or all the said, property or produce in, upon, or under the said land, and the right to dump,

store, and leave upon the said lands any and all muck, bone, shale, water, or any other refuse from said mines, wells, ovens, or houses, and any and all matters and products that may be excavated from mines or produced by the exercise or enjoyment of any or all property, rights, and privileges hereby adjudged to be sold, and the right to remove all pillars and other lateral and subjacent supports without leaving pillars to support the roof or surface, and the right to use said land for the removal or storage of the products, and the right to erect upon said land, and maintain, use, repair, and operate, and at their pleasure remove therefrom, any and all buildings and structures and machinery and mining, and any and all equipments, whether specifically enumerated here or not, that may, by the purchaser, by his successor or assign, be deemed necessary or convenient for the exercise and enjoyment of any or all the property, rights, and privileges hereby adjudged to be sold, and also the free access to, upon, and over the said land for the purpose of surveying and protecting for said property and interests, be sold, reserving, and not adjudged hereby to be sold, all the timber upon the said land, except that necessary for the purposes hereinbefore mentioned, and to the enjoyment of the property, rights, and privileges hereinbefore mentioned, the free use of said land for agricultural purposes by said infant defendants, so far as such use is consistent with the rights hereby adjudged to be sold, and the right to mine and use coal for their own household and domestic purposes."

We think it manifest that no infant's land should be sold with such provisions as these. While the purchaser was nominally buying only the mineral rights, he will acquire such rights in the surface as would make it impossible for the owner to sell the surface, except at a great sacrifice. Reasonable provisions may be made in such a judgment, but those in question are unreasonable, and as the infant cannot speak for himself, the chancellor must protect his interest. We therefore conclude that the judgment complained of as to Ephraim must be reversed, and on the return of the case to the circuit court the sale will be set aside, but the purchaser will be adjudged a lien on the land for his money with interest from the time the sale is set aside.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### SELLERS v. SELLERS et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. CANCELLATION OF INSTRUMENTS (§ 51\*)—TRIAL—INSTRUCTIONS—MENTAL CAPACITY

In a suit to set aside a deed for mental incapacity, an instruction that testator must not merely know the objects of his bounty and the nature of his property, but also "his property rights," was erroneous, as leading the jury to conclude that it requires a higher degree of mental soundness to know one's property rights than to know what property one has.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 108; Dec. Dig. § 51.\*]

#### 2. WILLS (§ 88\*)—DEEDS DISTINGUISHED.

Courts make a distinction between testamentary deeds and a deed which is the result of an ordinary business transaction, where the

parties are dealing with each other as business antagonists.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.\*]

#### 3. DEEDS (§ 211\*)—VALIDITY—SUFFICIENCY OF EVIDENCE.

In a suit by the children of a deceased grantor to set aside his deed of a home to their stepmother on the ground of undue influence and mental incapacity, evidence held not to sustain a decree for plaintiffs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

#### 4. TRIAL (§§ 370, 374\*)—SUBMISSION OF ISSUES—VERDICT—EFFECT.

In a suit to set aside a deed for undue influence and mental incapacity, the chancellor in his discretion might submit an issue of fact to obtain the advisory aid of the jury, but their verdict was not necessarily conclusive.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 622; Dec. Dig. §§ 370, 374.\*]

Appeal from Circuit Court, Harrison County.

Suit by John J. Sellers and others against Sallie Sellers. Decree for complainants, and defendant appeals. Reversed, with direction.

W. S. Cason and Cason & Cox, all of Cynthiana, for appellant. M. C. Swinford, of Cynthiana, for appellees.

NUNN, J. This is a controversy between a widow and her stepchildren. Eleven Sellers owned a farm and a small home in a little town. During his last illness he conveyed the home to his wife in fee. This is a suit in equity by the children to set aside that deed, on the grounds of undue influence and mental incapacity. The farm is not involved. The court submitted the issues of fact to a jury, and nine of them signed a verdict against the deed. The court rendered a judgment thereon, holding the deed invalid. The widow appeals.

Eleven Sellers was married to the appellant in 1899. He was 64 years old, and she was 49. It was his second marriage and her first. He had three children by his first wife, and they are the appellees. There was no issue of the second marriage. At the time of the second marriage his three children had married and were raising families of their own. Mr. Sellers lived 13 years after this marriage, and died at the age of 77. At the time of the marriage he owned a farm of 117 acres, 4 or 5 miles from the town of Berry, in Harrison county. About a year after the marriage he became afflicted with weeping eczema, a foul and loathsome disease. The physician says it covered his whole body and was the worst case he ever saw. For years he suffered from this, and required the services of a physician. Mrs. Sellers had to bathe and wash and change his clothing and bed linen every day. Besides this, she cooked and did all the washing and housekeeping. During a part of the first year, she had for help a little 10 year old girl, but from that time until her husband's

death she did all the work. After living on the farm 7 years they moved to Berry; that is, in 1906. Mr. Sellers bought a little house there for \$600, and they lived in it until his death.

The proof shows that he went back and forth to his farm every day or so, as the weather would permit, but along in January, before his death in March, 1912, he sold about 10 acres off of his farm. No one doubts that at this time he was mentally capable of protecting himself in a business transaction. His children were displeased when they heard that he had sold part of the farm, and, as they say, they heard he was about to sell the remainder. So, by agreement among themselves, they met at Berry in the latter part of January, 1912, and went in a body to the home of their father and "Mrs. Sellers," as they speak of her. They told him, in Mrs. Sellers' presence, that they did not want the farm sold, and asked him to transfer or turn it over to them for division, and they would give him a contract to pay him \$15 per month for his support. He was surprised, and his feelings hurt, and in tears told them that it was his property, and he felt capable of managing his own affairs. After this, he talked with several of his neighbors, told them the facts of his children's visit and his disappointment, and fear that they would try to deprive his widow of a home when he died. He told them he wanted to secure to Mrs. Sellers the home in Berry, and inquired of them about the efficacy of wills and deeds, and said he was afraid of wills, because they were sometimes broken. On March 29th, he was taken down with acute bladder trouble. Dr. Lang, who for years had been treating him for eczema, was called in. This doctor was also a notary public. On April 6th Mr. Sellers had the doctor prepare a deed, by which he conveyed to his wife the little town home. The doctor says that up to and including this time Mr. Sellers possessed all his mental faculties, and understood what he was doing and the effect of the deed.

Dr. Lang testifies that Mr. Sellers told him what he wanted done and why he wanted to do it. In fact, Mr. Sellers had advised with him two months before, and said that as soon as he could get time he wanted the doctor to fix up some papers for him, and in that connection told him of the visit of his children, and their desire to have him divide his farm between them. He gave to the doctor the same reason for having the deed written that he had expressed to his neighbors—the fear that his children would not deal fairly with his widow. He also made mention of the burden he had been, and of Mrs. Sellers' faithfulness in caring for him during all of his afflictions, and that it would be doing too little for her to give her the town home. As soon as Mr. Sellers was taken sick, his children began to visit him, and, as they say,

aided in caring for him, and administered medicine. They testify to giving him tablets prior to April 6th, which acted like opiates, and say that at no time after he was taken sick and these medicines were administered to him was he mentally capable of understanding a business transaction.

[1] The trial proceeded on the idea that the deed was of a testamentary character, and the same wide range was permitted in the introduction of testimony; but the instructions to the jury were based rather upon the idea that the instrument in question was an ordinary deed, executed under circumstances when the parties are supposed to be dealing at arm's length, and required the jury to believe that Mr. Sellers not merely knew the objects of his bounty and the nature of his property, but also *his property rights*. Naturally the jury must have concluded that it requires a higher degree of mental soundness to know one's property rights than it does to know what property one has. Under these instructions, the jury found against Mrs. Sellers and set the deed aside.

[2] The courts make a distinction between testamentary deeds and a deed which is the result of an ordinary business transaction, and where the parties are dealing with each other as business antagonists. *Meuth's Ex'r v. Meuth*, 157 Ky. 784, 164 S. W. 63; *Best v. House*, 113 S. W. 849; *Bramel v. Bramel*, 101 Ky. 75, 39 S. W. 520, 18 Ky. Law Rep. 1074; *American & Eng. Enc. of Law*, vol. 28, p. 74.

[3] Aside from his age and sickness, three circumstances are relied on by the children to show that Mrs. Sellers unduly influenced him to make the deed:

(1) She carried the purse. During his last illness they proved by two or three witnesses that they went to his home to make collections. Mr. Sellers would examine the accounts and hand them to his wife for approval and request her to pay them. She went to the purse, procured the money, and paid them as directed.

(2) In January, when the children wanted him to divide the farm between them, and offered him \$15 per month, they say he made no objection at first, but that when he called his wife and talked to her about it in their presence—they could not hear the conversation—he turned to them with the remark that it was his property, he was not dead yet, and he was capable and desirous of managing his own affairs.

(3) Dr. Lang says that, when requested to prepare the deed, he found in the sick room a printed blank form of deed on the table with pen and ink—everything ready to write it. The argument is that Mr. Sellers had been confined to his room for a week and could not have procured the blank form, and therefore his wife was responsible for it being there. Some facts are presented on the motion for a new trial tending to

show that Dr. Lang, on reflection, was convinced that his testimony in this respect was erroneous. But disregarding these facts, and accepting the case as it went to the jury, we do not believe the presence of the blank form, and the fact that he had been sick for a week, is proof either that Mr. Sellers did not, or that she did, make the preparation. If he advised with friends about making the deed more than two months before, and spoke to the doctor about writing it, when his sanity is certain, and expressed a desire to convey by deed rather than devise by will, is it unreasonable that he took steps to perfect the plan and himself procured the blank form before he got sick?

Except the testimony of his children and their children, all the evidence tending to show mental incapacity during his last illness relates to times after the deed was made, and when it is admitted that he was frequently under the influence of opiates. From Dr. Lang's testimony we gather that prior to April 6th opiates were administered to him only on occasions of extreme pain, and the effect was temporary, so that, when the pain was relieved and he would come from under the influence of the opiates, he was bright and had a good understanding of everything. It was not until after April 6th that opiates were regularly administered, and even then he possessed his mental faculties when not under their immediate influence. From his testimony there can be no question as to his mental soundness at the time he made the deed. He was introduced as a witness by the children, and his disinterestedness is conceded by all parties.

For the purpose of showing mental incapacity, two instances are shown before his illness: One witness, Sandy Simpson, about 55 years of age, says that he met Mr. Sellers on the road during the previous summer, and that Mr. Sellers called him "Uncle Sandy." While the witness displays no resentment over this, he does say it never occurred before. Other witnesses, even younger, in giving their testimony, repeat conversations they had with Mr. Sellers, and it appears that he spoke to them as "uncle" or "aunt." The fact that these witnesses were not astonished by this familiar form of address indicates that they accepted it as a sign of close intimacy. The other instance is about a witness writing a rent contract for Mr. Sellers when the witness knew that Mr. Sellers had already contracted the land to another party. But the other party testifies that he had surrendered that portion of the land and consented to the making of another contract.

We have reached the conclusion that the weight of the evidence is against the verdict. We are unable to see that his conveyance of the town home to his wife was the result

of any influence other than that produced by the children themselves, when they requested him to let them administer on his estate. Through all their married life Mrs. Sellers was kind and attentive. There is no conflict in the evidence as to his affection for her, and the great service she rendered him. That he appreciated it his neighbors testify, and from their testimony it is clear that the conveyance was not only rational and commendable, but the result of a determination formed months before his last illness.

[4] We would be disposed to give more effect to the verdict, were it not for the error in the instructions above referred to. But this being purely an equitable action, the court out of its discretion, and not under any requirement of law, submitted the issue of fact in order to obtain advisory aid of the jury. Their verdict is not necessarily conclusive, and the chancellor may disregard it. *Hill v. Phillips*, 87 Ky. 169, 7 S. W. 917, 10 Ky. Law Rep. 31; *McElwain v. Russell*, 12 S. W. 777, 11 Ky. Law Rep. 649; *Ford v. Ellis*, 56 S. W. 512, 21 Ky. Law Rep. 1837; *Morawick v. Martineck*, 128 Ky. 155, 107 S. W. 759, 32 Ky. Law Rep. 971; *Bannon v. Patrick-Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843.

Feeling that the weight of the evidence favors the validity of the deed, we are of the opinion that the lower court should have disregarded the verdict, and the judgment is reversed, with directions to enter a decree upholding the deed.

# NORFOLK & W. RY. CO. v. THOMPSON.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

## 1. MASTER AND SERVANT (§ 145\*)—PERSONAL INJURIES — CONSTRUCTION OF RAILROAD RULES.

A rule of a railroad company prohibiting employees from riding on the pilots of engines in road service has no application to the act of a servant mounting a step in the rear of the pilot in order to reach the cab, with no intention of riding on the pilot.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.\*]

## 2. MASTER AND SERVANT (§ 145\*)—PERSONAL INJURIES—CONSTRUCTION OF RULES.

A rule of a railroad company that when a following train is within sight or hearing a flagman must remain until such train has been stopped, and will then proceed thereon until his train is overtaken, has no application to a flagman who has stopped a train, ridden on the engine thereof to catch up with his train as required by the rules, and who then dismounts to catch his train, a little ahead of him, but falls, and then returns to the engine which he has just left and attempts to mount thereon while in motion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.\*]

## 3. TRIAL (§ 260\*)—INSTRUCTIONS—COVERED BY OTHER INSTRUCTIONS.

Where a brakeman of an extra freight train was riding in the engine of a following

train which he had flagged, in order to catch up to his train, which had gone ahead, as the rules required, and when the engine reached the yards of the station of destination, was injured by attempting to mount such engine after having left it to go to his train, an instruction that if on arrival of the following train he did not see his own train, or have reasonable ground to believe he could catch his train, but left the engine without necessity and out of line of his employment, then he could not recover, covers a requested instruction that if the conductor of the extra put his train away and checked plaintiff out, and he at the time of the injury had no duty to perform on either train, then he could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**4. MASTER AND SERVANT (§ 288\*)—ASSUMPTION OF RISK—QUESTION FOR JURY.**

A brakeman does not assume, as a matter of law, the risk of injury occurring while attempting to board an engine by stepping on a step on the pilot of an engine, where there was evidence that the step was defective, and it was doubtful whether his injuries were caused by the defective step of which he had no knowledge, or by his effort to mount the engine while in motion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**5. APPEAL AND ERROR (§ 1004\*)—AMOUNT OF AWARD—COMPARATIVE NEGLIGENCE—REDUCTION OF RECOVERY.**

It is for the jury, not the appellate court, to compare plaintiff's contributory negligence with that of the defendant and, after ascertaining the full amount of his damages, to award such proportional part thereof as the negligence attributable to the defendant bore to the entire negligence attributable to both.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

**6. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE AMOUNT—COMPARATIVE NEGLIGENCE.**

\$10,000 is not excessive damages for injuries to a brakeman, 28 years of age, resulting in amputation of his leg near the hip, where the physical and mental suffering lasted for a long time, and his earning capacity was necessarily decreased, even conceding that plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

**7. MASTER AND SERVANT (§ 270\*)—INJURIES TO FLAGMAN—ADMISSIBILITY OF EVIDENCE.**

Where, in an action for injuries to a brakeman while attempting to mount a moving engine by stepping on the stirrup in the rear of the pilot, defendant showed that the stirrup was designated for the use of shopmen only, while the engine was at rest, testimony that it had long been the custom of trainmen to use the stirrup in the rear of the pilot to mount the engine while in motion was proper in rebuttal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

Appeal from Circuit Court, Boyd County.

Action by F. S. Thompson against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Johnson, Jr., of Pikeville, and Holt, Duncan & Holt, of Huntington, W. Va., for appellant. Proctor K. Malin, of Ashland, and M. S. Burns, of Louisa, for appellee.

**CLAY, C.** In this action for damages for personal injuries against the defendant, Norfolk & Western Railway Company, plaintiff, F. S. Thompson, recovered a verdict and judgment for \$10,000. The railway company appeals.

At the time of the accident defendant was engaged and plaintiff was employed in interstate commerce, and the action is based on the federal Employers' Liability Act. According to the evidence for plaintiff, the accident occurred under the following circumstances: Plaintiff, who was about 28 years of age, had been employed by defendant as a freight brakeman for about 18 months, in running between Bluefield and Williamson, W. Va. The accident occurred on September 11, 1911. On the night previous to the accident plaintiff left Vivian on train extra 1090 west, and was performing the duties of rear brakeman. When the train reached Grapevine, 12 miles east of Williamson, and stopped there, plaintiff, as required by the rules of the company, went back east for the purpose of flagging first 85, another freight train which was due about that time. While so engaged his train (extra 1090) pulled out and left him. Under these circumstances, it was his duty, under the rules of the company, to take the next train and ride it until his train was overtaken. When first 85 came along, he flagged it, and, boarding the engine at the gangway, rode thereon to the east Williamson yard, as far as the telephone box, where the train stopped for the purpose of permitting the head brakeman to telephone to the yard office and procure a track on which to put away his train. This occurred some time between 8 and 9 o'clock a. m. The point at which the train stopped is about a mile and a half or two miles from the station at Williamson. When the Williamson yards were reached, plaintiff saw his own train standing on the track about 250 or 300 yards ahead of first 85. Under these circumstances he claims that it was his duty to attempt to overtake his own train. With that end in view he announced to the engineer that he was going to try to catch his own train, and left the engine and proceeded along the track. Before reaching his train it pulled out, and he could not overtake it. Not being able to overtake his own train at that point, it was his duty to return to first 85, and ride that engine until his train was overtaken. It was customary to ride the engine in order to be in a position promptly to reach the preceding train. When he returned to board first 85 it had started up. As the train approached him, he gave the engineer, who was looking at him, the steady signal, and stepped to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

left hand side of the track for the purpose of mounting the engine as it passed him. When the engine reached him he undertook to board it at the step just back of the pilot beam. There is a step of this kind on each side of the engine. It consists of a piece of iron about five or six inches wide which hangs down from the rear of the pilot. From the bottom it turns out at right angles. On the pilot beam is a flagstaff which is used as a handhold in mounting the engine on this step. After catching hold of the flagstaff, plaintiff made several attempts, first with one foot and then with the other, to get on the step. Each time his foot would slip off. Finally his right foot slipped off the step and went under the trucks of the engine. His leg was so mangled and crushed that amputation was necessary. After the operation only about eight inches of his right leg remained attached to his body. The step which he attempted to mount, and which should have stood at right angles, was bent down to an angle of about 45 degrees. The bottom of the step should have been "notched" or "scalloped" to prevent one's foot from slipping, but instead it was worn smooth. The bent and smooth condition of the step caused his foot to slip off. It further appears from plaintiff's evidence that there are three sets of steps on an engine, those in the rear of the pilot, those in the gangway, and those in the rear of the tender. It was customary for the trainmen to use the steps in the rear of the pilot for the purpose of getting on the engine. In mounting the engine at that point plaintiff did not intend to ride on the pilot, but his purpose was to step on the pilot and then proceed along the running board until the cab of the engine was reached, a custom which he and his witnesses claim was frequently followed by brakemen. While admitting that he had no duties to perform on the engine which he mounted, and it was proper for the engineer to take his signals from the head brakeman, who had gone forward to secure a track for the train, plaintiff says that, as the rules required him to ride on train 85 until his own train was overtaken, and as he was unable to reach his train at the point where train 85 stopped, it was his duty to again flag train 85 and ride thereon until his own train was overtaken. For that reason it was the duty of the engineer of train 85 to heed his signal to stop the train.

The defendant introduced in evidence rule No. 32, providing as follows:

"Employees are prohibited from riding on pilots of engines in road service, and they must not under any circumstances ride on engine foot boards between engine and cars."

Defendant also introduced evidence to the effect that the step by which plaintiff attempted to mount the engine was designed and placed on the engine for the use of shop employes for the purpose of cleaning and repairing the engine while stationary, and was not for use by employes while the engine

was in road service in motion. The reason for this restricted use was that all the machinery and the boiler, for its entire length, were between that step and the cab, and it was therefore extremely dangerous to get on the engine in that way. It was much safer to get on the engine through the gangway. The engineer on train first 85 testifies that Head Brakeman Fox went forward to secure a track for the train. After securing the track, Fox signaled him to proceed. Both Fox and plaintiff gave him the signal to go ahead. It was his duty to take his signals from Fox. Plaintiff never told him that he was going to get off and overtake his train. Did not remember of seeing plaintiff get off at all. Witness admitted that brakemen very frequently mounted the engine at the step at the pilot beam. Defendant also introduced in evidence rule 90, requiring the rear and head brakeman to protect their trains when stopped or delayed under such circumstances that they might be overtaken by another train. Rule 90a on the same subject was also introduced, and provides in part as follows:

"When a train is within sight or hearing, the flagman must remain until such train has been stopped, and will then proceed thereon until his train is overtaken."

The conductor of train 1090 testified that his train reached the telephone box in the Williamson yards at 7:25 a. m. He remained there about three minutes before a track was assigned. He put the train in on the assigned track, cut the engine loose, and registered off himself and crew, including plaintiff, at 7:50 a. m. There was further evidence to the effect that the pilot step was in good condition and met all the requirements of the Interstate Commerce Commission, and was in common use upon engines of the style in question.

In instruction No. 1 the court told the jury that plaintiff was employed and defendant was engaged in interstate commerce, and that the action was controlled by the federal Employers' Liability Act. Instructions Nos. 2 and 3 are as follows:

"(2) The court instructs the jury that if they find and believe from the evidence that the plaintiff, F. S. Thompson, was, at the time of his injury, at a place where his duties as an employe of the defendant required him to be, and engaged in the performance of such duties when and at the time he attempted to mount the engine, and if the jury shall further find and believe from the evidence that the defendant negligently suffered or permitted the step upon said engine to be defective, or bent, or insufficient, or out of repair, and that the defendant knew, or by the exercise of ordinary care upon its part could have known, of said step being defective, or insufficient, or bent, or out of repair, if such existed, in time to have avoided the injury to plaintiff, by the exercise of ordinary care upon its part, and that as a direct and proximate result of such negligence of the defendant in the particulars hereinabove set forth, if any there was, the plaintiff, while in the discharge of his duties as brakeman, on the occasion in question, received the injuries complained of, then the law is for the plaintiff,

and the jury will so find and fix his damages as indicated in instruction No. 7.

"And the court further instructs the jury that if they believe and find from the evidence that the plaintiff, Thompson, was, at the time he received the injuries complained of, at a place where his duties as an employé of the defendant required him to be, and was engaged in the performance of such duties, and shall further believe and find from the evidence that at the time that he attempted to board the engine in question the engineer thereon knew that said plaintiff was about to board said train, and with such knowledge carelessly or recklessly or negligently operated said train, and that as a direct and proximate result of such negligence of the defendant in this particular, if any there was, the plaintiff, while in the discharge of his duties as brakeman, on the occasion in question, received the injuries complained of, then the law is for the plaintiff, and the jury should so find and fix his damages as indicated in instruction No. 7.

"(3) The court instructs the jury that if they find from the evidence in the case that the plaintiff, F. S. Thompson, on the occasion in question, when the train on which he came from Grapevine arrived at or near to the yards of defendant at Williamson and stopped at the east end of said yards at the telephone station to phone for orders for track to switch train on, did not then see his own train (No. 1090) and believe and have reasonable grounds to believe that he could catch his said train, and under such circumstances left the train on which he was riding in an effort to get on his train 1090, but without necessity and out of the line of his employment left the engine of train 85 and was injured in an effort to return to said engine, then and in that event they must find a verdict for defendant.

"The phrase 'reasonable grounds to believe,' as used in this instruction, are such grounds as would induce one of ordinary prudence to believe it under the circumstances."

Instruction No. 4 covers the question of contributory negligence and the measure of damages applicable to that state of case.

In instruction No. 5, the court told the jury that the defendant company was not an insurer of the safety of its employé, but was bound only to exercise ordinary care to provide for them a reasonably safe place for them to work, taking into consideration the surrounding circumstances and conditions and the nature and character of the work to be performed, and that they should find for the defendant unless they believed from the evidence that the accident to plaintiff was the direct and proximate result of the negligence of defendant as set forth in instruction No. 2.

Instruction No. 6 covers the plea of assumed risk, and instruction No. 7 presents the measure of damages.

[1] (1) The contention is made that plaintiff's injuries were caused solely by his own negligence in disregarding the rules of the company. It is first insisted that he violated rule 32, prohibiting employé from riding on the pilots of engines in road service. In support of this proposition it is argued that the engine of train 85 was in the road service, and it is conclusively shown by the evidence that, in order to mount the engine by means of the stirrup in the rear of the pilot, it was absolutely necessary to step on the pilot, and

therefore to ride on the pilot in violation of the above rule. We are not, however, disposed to give the rule such a broad and comprehensive meaning. The rule is evidently intended to guard against the actual use of the pilot for the purpose of riding thereon. It was not, we think, intended to cover the case of the use of the pilot for a mere temporary step in passing from one part of the engine to another, though the person whose foot was placed on the pilot might, for that instant, be riding thereon. On the sides of many freight cars there are ladders used by trainmen in mounting the cars. Suppose the company promulgated a rule prohibiting trainmen from riding on these ladders. Would it be contended that a person using a ladder for the purpose of mounting a car would violate that rule? We think not, and for the same reason conclude that the act of plaintiff in stepping on the pilot was not a violation of rule 32.

[2] But it is further insisted that plaintiff violated rule 99a, above quoted, because he did not wait until the engine of train 85 stopped before attempting to board it. It is reasonably clear, we think, that rule 99a did not control plaintiff's conduct at the time of the accident. The purpose of that rule, as we understand it, was to require the rear brakeman to see that the train approaching in the rear of his own train was stopped, not for the purpose of enabling him to mount the train, but to protect his train in front. In the case under consideration plaintiff was not engaged in flagging train 85. He was merely performing his duty by attempting to overtake his own train.

(2) Another error relied on is the refusal of the trial court to give the following instruction:

"The court instructs the jury that, if they believe and find from the evidence that the step attached to the pilot beam of the engine in question, and in front of the cylinder head, was placed there for the sole use of shopmen and others working upon the front part of the engine while not in motion, not stationary, and that trainmen were forbidden by the rules of the defendant to use the same while the engine was in road service and in motion, and that the plaintiff was familiar with such rule at the time of his injury, but, in violation of the same, undertook, by means of said step, to board said engine while in road service and running, and was injured by his foot slipping from said step and under the wheels of said engine, then, and in that event the plaintiff cannot recover, and their verdict should be for the defendant."

It will be observed that this instruction is predicated on defendant's construction of rule 32 that it prohibited the mere stepping on the pilot for the purpose of mounting the engine. Being of the opinion that the rule does not bear this construction, it follows that the offered instruction was properly refused.

[3] (3) The failure to give the following instruction is also assigned as error:

"The court instructs the jury that, if they find and believe from the evidence in this case

that C. M. McQueen, the conductor of train No. 1090, had, after the plaintiff was left at Grapevine and picked up by train No. 85, performed for the plaintiff his duties upon train No. 1090, and had, before the injury to the plaintiff, put said train No. 1090 away, and had taken its engine to the roundhouse or spark track, and registered himself and train crew off, including the plaintiff, and that the plaintiff, at the time of his injury, had no duties to perform, either upon train 1090 or train 85, then and in that event the plaintiff, while attempting to board the engine attached to train No. 85, was out of the line of his employment, and cannot recover."

This instruction presents for the consideration of the jury certain facts which, if true, would show that plaintiff did not mount the engine for the purpose of overtaking his own train, but did so at a time when he had no duties to perform and was out of the line of his employment. This phase of the case, we think, is fully covered by instruction No. 3, wherein the jury was told, in substance, that if upon the arrival of train 85 plaintiff did not then see his own train and believe and have reasonable grounds to believe he could catch his train, but left train 85 without necessity therefor, and out of the line of his employment, they should find for the defendant.

[4] (4) The court gave an instruction on assumed risk, which is not criticized by defendant. It is insisted, however, that the jury wholly disregarded this instruction, and that the facts make out a case where plaintiff should be held as a matter of law to have assumed the risk. It must be remembered, however, that there is evidence tending to show that the step was defective. There is no evidence from which it could be inferred that plaintiff knew of this defective condition, or that it was plainly observable. Under these circumstances, of course, it cannot be said that he assumed the risk of injury from the defective step. It being doubtful whether his injuries were caused by the defective step or by his effort to mount the engine while in motion, and the facts not being such that all reasonable men must draw the same conclusion from them, but presenting a question about which reasonable men may fairly differ, we cannot say, as a matter of law, that plaintiff knew and appreciated the danger, and therefore assumed the risk of injury.

[5, 6] (5) It is next insisted that the verdict is excessive. This contention is based on the assumption that plaintiff was guilty of contributory negligence, and that the jury failed altogether to take into consideration such negligence in fixing the amount of the verdict. The evidence shows that plaintiff was only 28 years of age, and therefore had a long expectancy of life. His leg was so badly crushed that amputation became necessary. The physical and mental suffering growing out of his injuries were not only intense, but lasted for a long time. His leg

having been amputated near the hip, his power to earn money has been largely impaired. Even if it be admitted that plaintiff was guilty of contributory negligence, still it was peculiarly within the province of the jury to compare his negligence with that of the defendant and, after ascertaining the full amount of the damages, to award plaintiff such proportional part thereof as the negligence attributable to the defendant bore to the entire negligence attributable to both. *N. & W. R. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. Larger verdicts have been sustained by the courts, and, taking into consideration the serious character of plaintiff's injury, the consequent impairment of his earning capacity, and the suffering, both physical and mental, which he necessarily endured, we are not prepared to say that the verdict is excessive.

[7] (6) Lastly it is insisted that the trial court erred in admitting evidence of the customary violation of rule 32 without showing knowledge of such violation on the part of defendant's officers superior in authority to plaintiff. The evidence complained of was to the effect that it had long been the custom of trainmen to use the stirrup in the rear of the pilot for the purpose of mounting the engine. This evidence was not introduced for the purpose of showing a customary violation of rule 32, for, as we have before said, that rule did not prohibit trainmen from stepping on the pilot for the purpose of mounting the engine. The evidence referred to was clearly admissible to counteract the effect of defendant's evidence that the step in question was designed for use by shopmen only, and was not intended to be used by trainmen.

Judgment affirmed.

## BROTHERHOOD OF RAILROAD TRAINMEN v. SWEARINGEN.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

### 1. INSURANCE (§ 805\*) — FRATERNAL BENEFICIARY ASSOCIATION — REASONABLENESS OF RULES—RELIEF WITHIN ASSOCIATION.

Fraternal beneficiary associations, may, by adopting a constitution and by-laws, provide reasonable rules and regulations for settling their own disputes and for the granting or refusing of benefits, and may establish their own tribunals of original, intermediate, and appellate jurisdiction; and the members must conform to their reasonable rules and regulations and exhaust their remedies within the association before the civil courts will take cognizance of their grievances.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1987, 1988; Dec. Dig. § 805.\*]

### 2. INSURANCE (§ 805\*) — FRATERNAL INSURANCE—ACTION ON CERTIFICATE—CONDITIONS PRECEDENT.

The rules of a fraternal benefit association required a claim for death to be passed on first by the general secretary, and, if disapproved by him, to be referred to the beneficiary board,

from whose adverse decision the claimant could appeal in writing, within 60 days, to the insurance board. A claim for death benefits was received by the secretary in January, 1912, but his disapproval was not notified to claimant until April, nor that of the beneficiary board till May 17th. In that notice claimant was advised that the insurance board would not meet till January, 1913. Claimant promptly appealed, insisting on an early hearing. In January, 1913, the insurance board declined to pass on the claim, because not duly taken. *Held*, that claimant had exhausted her remedies within the association, as required by its constitution, and could appeal to the courts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1987, 1988; Dec. Dig. § 805.\*]

**3. INSURANCE (§ 819\*)—FRATERNAL BENEFICIARY ASSOCIATION—ACTION—SUFFICIENCY OF EVIDENCE—EMPLOYMENT.**

In an action on a certificate issued by a fraternal beneficiary association, evidence *held* to sustain a finding that the insured did not make false statements in his application for membership in regard to his employment as an assistant yardmaster.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.\*]

**4. INSURANCE (§ 825\*)—FRATERNAL BENEFICIARY ASSOCIATION—ACTION—QUESTION FOR JURY—REPRESENTATIONS AS TO HEALTH.**

On the evidence in an action on the certificate of a fraternal beneficiary association, *held*, that whether insured made false statements in his application as to the condition of his health, especially in saying that he had not consulted a physician during the last five years, was properly left to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

**5. INSURANCE (§ 825\*)—FRATERNAL BENEFICIARY ASSOCIATIONS—QUESTION FOR JURY—QUESTION AND ANSWER AS TO HEALTH.**

On the evidence in an action on a fraternal beneficiary certificate, *held*, that whether the question, "Have you ever had any disease of the alimentary, genital, or urinary organs?" was understood by deceased, and, if so, whether his negative answer was false because he had suffered from and been treated for kidney disease, were for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

**6. INSURANCE (§ 723\*)—APPLICATION — ANSWERS—EFFECTS.**

If an answer in the application is material and untrue, and relates to some transaction or act that the applicant then knew of, the fact that he might have then forgotten it would not entitle him to recover against the defense of material and untrue statements therein; but where he was asked if he had had a certain disease, and in good faith answered in the negative, and there was no evidence, or only conflicting evidence as to whether he knew that he had had such disease, the literal untruth of his answer would not of itself defeat recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.\*]

Appeal from Circuit Court, Kenton County, Common-Law and Equity Division.

Action by Henrietta Swearingen against the Brotherhood of Railroad Trainmen. Judgment for plaintiff, and defendant appeals. Affirmed.

Ed. W. Pfueger, of Covington, for appellant. F. J. Hanlon, of Covington, for appellee.

SETTLE, J. On February 3, 1911, Harry G. Swearingen, of Covington, signed an application for membership in Simon Kenton Lodge, No. 345, of the fraternal association known as the Brotherhood of Railroad Trainmen, and for a beneficiary certificate that would entitle him to benefits and insurance under the constitution and by-laws of the association. The application was presented to the lodge February 16, 1911. He was admitted to membership February 23, 1911. The beneficiary designated by his certificate was his mother, the appellee, Henrietta Swearingen. Harry G. Swearingen died January 1, 1912, and his mother, as the beneficiary under his certificate, furnished to the general secretary of the brotherhood proofs of his death on January 22, 1912, which disclosed that the cause of his death was Bright's disease and organic heart disease.

The Brotherhood of Railroad Trainmen is an unincorporated, secret fraternal society, having a grand lodge and subordinate lodges. Its main purpose, as shown by its constitution and by-laws is the promotion of the welfare of its members, and as a part of its plan of mutual assistance, it has a beneficiary department through which benefits are accorded members in case of disability or death. Membership in the order is restricted to employes in certain branches of the railroad service; the membership consisting of two classes—beneficiary and nonbeneficiary. To beneficiary members are issued beneficiary certificates, which in appearance and provisions are much like insurance policies. The certificate states that the member is entitled to participate in certain benefits in case of disability, limited in amount by the constitution, and, in case of his death, a different and larger sum shall, as therein provided, be paid to the beneficiary named in his certificate. No sum is specified in the face of the certificate, but reference must be had to the constitution to ascertain the benefits provided therein.

The appellant, Brotherhood of Railroad Trainmen, having refused to pay to the beneficiary, the appellee, Henrietta Swearingen, the sum provided by its constitution, she brought this action against it in the court below to recover same. As amended, the petition, in substance, alleges that Harry G. Swearingen made application for membership in the appellant brotherhood February 3, 1911; that his application was accepted, and a certificate of insurance issued to him, by reason of which he became a member, and was entitled to participate in the beneficiary department known as class C, which class, according to the constitution of the brotherhood, provided for the payment of \$1,500, in case of his death, to the beneficiary named in the certificate issued to him; that on the 1st day of January, 1912, while the certificate of insurance was in full force, Harry

G. Swearingen died in the city of Covington, Ky.; that he had theretofore, and down to the time of his death, complied with all of the provisions of the appellant brotherhood by paying the required premiums; that following his death, and within the time required by the certificate of insurance appellee, as the beneficiary under the same, submitted proofs of his death to appellant, but that it retained the certificate, and refused to return same to appellee or pay to her the \$1,500 to which it entitled her.

The defense interposed by appellant's answer was: (1) That appellee did not exhaust her remedies within the order, for which reason the court was without jurisdiction of the action; (2) that Harry G. Swearingen had made false and fraudulent answers in his application as to his employment and as to his previous medical history and the condition of his health, which were warranties; (3) that the statements referred to were material representations, substantially untrue and fraudulent, and, if appellant had known the truth, it would not have issued to him the certificate.

The appellee by reply denied that the decedent was not employed in train or yard service at the time his application was presented and made; denied that he made any false, or fraudulent statements at the time of giving the application with respect to the condition of his health, that such statements were warranties or material to the risk, or that, if appellant had known the truth, it would not have issued to him the certificate; also denied that she did not exhaust her remedies as provided in the constitution and by-laws of the appellant organization, and admitted that she had brought suit in the Kenton circuit court before the beneficiary board of the appellant brotherhood passed upon her claim, but alleged that she was compelled to do so because it secured the certificate of insurance from her and refused to return it, which prevented her from enforcing her rights thereunder, as she was unable to determine what they were in the absence of the certificate, and that that action was not, however, determined on its merits, but was dismissed by her without prejudice as soon as she obtained the certificate of insurance, which the court required appellant to file in the case. It was further alleged in the reply that appellant, its officers and agents, adopted dilatory tactics to delay and defeat appellee's claim; that it had ample time after the date of her son's death, and before the insurance board met on January 8, 1912, to consider and pass upon her claim and reject or order it paid; but that it refused to act upon the claim at all, and that the provisions of appellant's constitution and by-laws in regard to appealing to the beneficiary board and the board of insurance are unreasonable rules and regulations, and, by reason thereof, unenforceable. A rejoinder

was filed by appellant controverting the affirmative allegations of the reply. After thus completing the issues a writing containing the following agreed facts was filed of record by the parties:

"It is agreed between the parties hereto that the amount provided by the constitution and by-laws of the defendant organization payable to the beneficiary under class C, as set forth in said constitution, is \$1,350. It is agreed that the certificate attached to the pleadings in this case is the certificate issued to the deceased, Harry G. Swearingen. It is agreed that the decedent was in good standing, so far as payment of dues and assessments were concerned, at the time of his death. It is further agreed that the copy of the constitution and by-laws attached to the petition in this case is a true and correct copy of said constitution and by-laws, and is filed as evidence in this case for all purposes relative to the issue herein."

By an amendment to her petition, appellee alleged that after Harry G. Swearingen became a member of the appellant association, and before his death, its constitution was so amended as to increase the amount payable to a beneficiary on the death of a member of class C from \$1,350 to \$1,500, and this was admitted by appellant.

On the trial the jury returned a verdict in favor of appellee for \$1,500. From the judgment entered thereon this appeal is prosecuted. The grounds relied on by appellant for a new trial were that the circuit court erred in overruling its motion for a peremptory instruction; also in giving instruction No. 4; and that the verdict was flagrantly against the weight of the evidence.

The peremptory instruction was asked by appellant on the ground that appellee had failed to show that she exhausted her remedies within the order before instituting her action, for which reason the action should have been dismissed. It appears from section 67 of appellant's constitution that there are three tribunals of the order empowered to act upon such claims as that of appellee. It is first presented, with the proofs of death, to the general secretary and treasurer. If that officer disapproves the claim, it is made his duty to refer it to the beneficiary board. If disapproved by that board, the claimant may appeal to the board of insurance, whose action seems to be final. Section 76 of the constitution provides that, if the claimant desires to appeal to the board of insurance, he must give to the general secretary and treasurer a written notice of the desire to appeal the claim from the decision of the beneficiary board to the board of insurance. Section 15 of the same instrument apparently fixes a time and place for the meeting of the board of insurance and the hearing of claims, and section 75 provides:

"No suit or action at law or equity shall ever be commenced upon any beneficiary certificate by any claimant until after such claimant by appeal has exhausted all remedies provided for in this constitution, within the time allowed by this constitution."

Although appellee's claim and the proofs of death were received by the general secretary and treasurer January 22, 1912, he did not notify appellee of his disapproval of it until April 18, 1912, nor did she receive notice until May 17, 1912, that the beneficiary board had disapproved the claim. This notice was given through the general secretary and treasurer. The notice advised her that she had the right of appeal to the insurance board, the association's tribunal of last resort, and that there would be no meeting of that board until the second Monday in January, 1913, which would defer final action on the claim eight months longer. On May 23, 1912, appellee, through her attorney, wrote to the general secretary and treasurer, telling him that she appealed from the decision of the beneficiary board to the board of insurance, demanded that that board take action upon it one way or the other without further delay, and protested against the delay that would ensue from the meeting of the board in January, 1913, insisting that any rule of the order requiring such delay was unreasonable and dilatory. January 18, 1913, appellant's general secretary and treasurer, in reply to a letter of January 14, 1913, from appellee's attorney, asking what action the board of insurance took on her claim, wrote the attorney that, as the appeal was not taken in accordance with the provisions of appellant's constitution, the insurance board did not act upon the claim of appellee. It appears, therefore, that appellant's insurance board neither approved nor rejected appellee's claim, but merely declined to entertain the appeal.

[1] It will be conceded that where men organize themselves into a fraternal association, such as the one under consideration, they may, by adopting a constitution and by-laws, provide reasonable rules and regulations for settling their own disputes and for the granting or refusing of benefits, and to this end establish their own tribunals of original, intermediate, and appellate jurisdiction. It will also be conceded that the members of such an association must conform to the reasonable rules and regulations thereof, and exhaust their remedies within the association and before its tribunals, before the civil courts will take cognizance of their grievances. Ky. Lodge No. 39, I. O. O. F. v. Limeback, 9 Ky. Law Rep. 320; Winterburg v. Brotherhood of Locomotive Firemen & Enginemen, 148 Ky. 501, 146 S. W. 1105.

[2] But we regard it unnecessary to enter upon a discussion of the reasonableness or unreasonableness of the rules established by the appellant association with respect to the awarding or rejection of benefits to its members; for, in our opinion, it is fairly apparent from the evidence furnished by the record in this case that appellee did comply with those rules, and did, in fact, appeal from the decision of appellant's beneficiary

board to its insurance board in the manner, within 60 days' time, and upon such notice as was required by the provisions of its constitution above referred to. If the action first instituted by appellee was premature, in so far as it attempted to recover the benefit or insurance claimed under the certificate issued by appellant to her son, because brought before its beneficiary and insurance boards had acted upon the claim, it at least accomplished its principal object, which was to compel the return by appellant of the certificate it had received from appellee, with the proofs of her son's death, and was improperly withholding from her. The present action was not instituted by her until after the meeting of the insurance board in January, 1913, at which it failed to take cognizance of her appeal, which was practically a year after the death of her son. Without saying whether the rules and regulations established by appellant's constitution for the adjustment of claims for insurance arising out of the death of its members are reasonable or unreasonable, it is patent that the manner in which they were taken advantage of by appellant in this case unreasonably delayed the determination of appellee's rights under the certificate to her son, of which she was made the beneficiary. In our opinion, appellee did exhaust her remedies within the association; therefore the refusal of the trial court to grant the peremptory instruction on the ground urged by appellant was not error. Whether appellee did, within 60 days after the rejection of her claim by appellant's beneficiary board, give it notice of her intention to take an appeal to the board of insurance was treated by the trial court as a disputed question of fact, which the court properly submitted to the jury under instruction No. 2, reading as follows:

"If you believe from the evidence that plaintiff did not, within 60 days of the rejection or disapproval of her claim by the beneficiary board of the defendant, give, or cause to be given, to the general secretary and treasurer of the defendant association written notice of a desire and intention to appeal said claim from said beneficiary board to the board of insurance of defendant, you will find for defendant."

The finding of the jury was that appellee did give the written notice of her intention to appeal, within the time indicated, and there was sufficient evidence to support its finding.

[3] Section 120 of appellant's constitution provides:

"A candidate for admission to this (Simon Kenton) lodge by initiation shall have served at least six months as a railroad trainman, and must be actually employed in train or yard service in the jurisdiction of this lodge, and on the road named in his application at least three months prior to and at the time he makes application. The term 'railroad trainmen' herein mentioned shall be held to cover the following occupations: In road service—conductor, train baggageman, etc. In yard service—yardmaster, assistant yardmaster, yard conductor, foreman, flagman, etc."

It appears that in his application for membership in the appellant brotherhood Harry G. Swearingen stated his occupation was that of assistant yardmaster in the employ of the Chesapeake & Ohio Railway Company at Covington. If such was then his occupation, he was eligible for membership in the brotherhood. It is the contention of appellant that Swearingen made a false answer as to his occupation and that he was not then assistant yardmaster. As previously stated, the application was made out and signed by the decedent on February 3, 1911. It appears from the testimony of several witnesses introduced by appellant that for some months previous to the date of his application the decedent had been in the employ of the Chesapeake & Ohio Railway Company as assistant yardmaster. Some of these were uncertain as to when he was relieved or discharged as assistant yardmaster, but practically all of them agreed that he was so acting on February 3, 1911, the date of the application. According to McNamara, one of these witnesses, the decedent was not granted a discharge voucher as assistant yardmaster until February 7, 1911. Neal, the general yardmaster of the Chesapeake & Ohio Railway Company, testified that he relieved the decedent of his duties as assistant yardmaster because of temporary illness, but did not discharge him, and that he may have worked as much as two or three days in the beginning of February, 1911. L. C. Brink testified that the word "discharge," which appeared on the decedent's voucher of February 7th, did not necessarily mean that he was discharged from his position, but that it entitled him to get his money to that date. J. M. Pepper, a witness introduced by appellee, testified that he is a carpenter for the Chesapeake & Ohio Railway Company; that he knew Harry G. Swearingen; that Swearingen was employed by the Chesapeake & Ohio Railway Company as a carpenter for several years; but that he was in its employ as assistant yardmaster until his sickness in June, 1911.

It further appears from the evidence that on February 3d, the day that Swearingen made application for the beneficiary certificate in the Brotherhood of Railroad Trainmen, he appeared before its medical examiner, Dr. Beckett, who then examined him and recommended his admission; and, further, that a committee appointed by Simon Kenton Lodge, composed of C. Sanders, B. L. Marshall, and J. C. Robinson, made an investigation of Swearingen and the facts stated in his application, and on February 23, 1911, made the following report:

"We, the undersigned committee of investigation, have carefully examined into the qualifications of Harry G. Swearingen, and recommend that he be admitted to membership."

Carefully analyzed, the evidence furnished by appellant's witnesses shows that when Swearingen's application was signed and

made, February 3, 1911, he was in the employ of the Chesapeake & Ohio Railway Company as assistant yardmaster; that he was given a discharge voucher February 7, 1911, which did not necessarily indicate that he was then actually discharged by the railroad company; and that the committee of the local lodge charged with the investigation of his case, on February 23, 1911, reported him qualified for membership in the appellant brotherhood, and then recommended him for membership therein. It is true the books of the railroad company show that Swearingen did no work after February 3, 1911, but they do not show that he was, in fact, discharged in February. It may be inferred from the evidence that he laid off from work after February 3d, on account of illness, but there was no positive evidence to that effect, or that he was discharged from the railroad company's service prior to February 23, 1911. The question whether or not the decedent made false statements in his application for membership, in regard to his employment as assistant yardmaster, was submitted to the jury by a proper instruction, and, their finding thereon being in favor of appellee, it cannot be said that there was no evidence to support it.

[4] Appellant insists that the decedent made false statements in his application as to the condition of his health, especially in giving a negative answer to the question, "Have you consulted a physician during the last five years?" and that he was at that time afflicted with Bright's disease, which, if then known to appellant, would have caused the rejection of the application and prevented his becoming a member of the order. The only evidence introduced by appellant on this point was furnished by physicians, some of whom testified that they treated the decedent for a trouble of the kidneys several years before he became an applicant for membership in the appellant order. Perhaps one of them treated him within the five years next before the date of his application, for some ailment, but it is not apparent from the testimony they treated him, or that it was Bright's disease or other serious kidney trouble. The most positive witness among these physicians was Dr. C. C. Owens, who testified, in substance, that he treated Harry G. Swearingen as far back as 1907 for kidney trouble, which the following quotation from his testimony will better explain:

"He did not have symptoms that kept him from his duties at the county judge's office. He was able to go back and forth, but complained a good deal. I suppose it was a condition that did not absolutely mean Bright's disease, but he had kidney complaint, which a man will have of ordinary good health, until in the spring of 1911."

The kidney trouble, according to Dr. Owens' further testimony, in the spring of 1911 developed into Bright's disease. The doctor admitted, however, that he did not, while attending the decedent, or at any time, tell

him or his family he had Bright's disease. His recollection was indefinite as to how long he treated Swearingen and the dates upon which the treatment was administered. He produced no books showing such dates, and admitted that his books of account contained no items of charge against Harry G. Swearingen, but said that such treatment as he gave him was charged to his father, F. B. Swearingen. Upon being asked as to the physical appearance of Swearingen, Dr. Owens said:

"He was a fine type of young manhood. He was very well developed, full-blooded, and did not look like he ought to have been sick at all."

It does not appear from the testimony of Dr. Owens that he treated the decedent in the months of January or February, 1911. Numerous witnesses introduced in behalf of appellee testified to an intimate acquaintance and daily association with Harry G. Swearingen and that until the summer of 1911 he was a fine-looking, robust young man, 6 feet in height, and weighing over 200 pounds; that he was industrious, and they never heard him complain of having any trouble with the kidneys; that he looked to be in perfect health down to the summer previous to his death. Among these witnesses was J. A. Robertson, who testified that Swearingen was a fine specimen of physical manhood; that he was present when he was initiated in Simon Kenton Lodge; and that he then appeared to be a healthy man. Appellee testified that her son, Harry G. Swearingen, was 5 feet 11 inches in height, his average weight 235 pounds, and that his general appearance in January and February, 1911, was that of a man of good health; that he had no kidney trouble prior to February 3, 1911; that he had worked in the capacity of a carpenter in June, 1906, and continuously until February, 1908, and then secured employment in the yards of the Chesapeake & Ohio Railway Company, where he continued at work until some time in February, 1911. Appellee further testified that her son was never treated for kidney trouble, or by Dr. Owens, prior to February 23, 1911. In addition to the above testimony of appellee's witnesses was the evidence furnished by appellant's medical examiner's (Dr. Beckett's) personal examination of the decedent at the date of his application, which included an analysis of his urine by the approved scientific tests. This examination disclosed no disease of the kidneys, and manifests the decedent's good health and fitness for membership in the appellant order.

It will thus be seen that appellee's evidence conduced to show that, if Swearingen had Bright's disease, even in incipient form, in February, 1911, or prior thereto, neither he nor his family were aware of it, and that he was then or prior thereto afflicted at all with Bright's disease or other kidney disease was an issue of fact with respect to which there was a contrariety of evidence. This is-

sue, with that as to whether the decedent's statement in the application of February 3, 1911, that he had not consulted a physician "during the last five years" was false, was properly submitted to the jury by the instruction marked No. 3, to which appellant makes no objection.

[6, 6] It is alleged in appellant's answer that the decedent also made a false statement in giving a negative answer to the following question in his application: "Have you ever been afflicted with any of the following complaints or diseases: Any disease of the alimentary, genital, or urinary organs?" The contention as to the falsity of this answer rests upon the assumption that the decedent had been afflicted with kidney trouble or Bright's disease, which he intended by the foregoing answer to conceal. The evidence introduced by appellant to sustain this contention, as well as that presented by appellee to refute it, has already been referred to and commented upon. It will be observed that the application contains no such question as, "Have you ever had any disease of the kidneys?" or "Have you ever had Bright's disease?" and it is not perceived that the question, "Have you ever had any disease of the alimentary, genital, or urinary organs?" would be understood as conveying to the mind of an ordinarily intelligent person, not a medical or surgical expert, that an answer was demanded as to diseases of the kidneys. In other words, the question does not necessarily include diseases of the kidneys. At any rate, three physicians and an experienced life insurance agent agreed, in testifying, that the average layman would, or might, not understand the question as containing an inquiry as to diseases of the kidneys, or Bright's disease. This question was submitted to the jury by instruction No. 4, which is the only instruction in the case to which the appellant objects. The instruction is as follows:

"If you believe from the evidence that the question, 'Have you ever been afflicted with any of the following complaints or diseases: Any diseases of the alimentary, genital, or urinary organs?' did not convey to an ordinarily intelligent person, under circumstances such as described by the proof, that an answer was required as to diseases of the kidneys, and you further believe from the evidence that said question was not explained to decedent, Harry Swearingen, as requiring such an answer, and that such decedent did not know or understand, and could not by the exercise of such diligence and understanding, as persons of ordinary diligence and understanding ordinarily exercise under the same or similar circumstances to those in this case, then you will not find decedent's answer to said question untrue, even though you may believe from the evidence that decedent, at the time he so answered said question, had been afflicted with a disease of the urinary organs."

It is insisted for appellant that the instruction was misleading and unauthorized, because the decedent possessed more intelligence than the average layman as to the diseases mentioned in the question referred to

in the instruction, and his experience respecting kidney troubles, resulting from his treatment for kidney disease received at the hands of several physicians, qualified him to understand the full import of the question. This contention rests upon a mere inference arising out of some of its evidence that the decedent had been treated by more than one physician for kidney trouble, and not from any direct evidence tending to show him possessed of more than the average knowledge upon such subjects. We understand it to be a rule of the law of insurance that if an answer in the application is material and untrue, and relates to some transaction or act that the applicant at some time had knowledge of, the fact that he may have forgotten it when the application was prepared will not entitle him to the insurance, if its collection is resisted upon the ground that the application made material and untrue statements. But if the applicant is asked if he had a certain disease, and in good faith answer, "No," and there is no evidence that he ever knew or had information that he had had such disease, or there is contrariety of evidence as to whether he had such knowledge or information, the fact that his answer is literally untrue will not, of itself, defeat the collection of the policy. *Blenke v. Citizens Life Insurance Co.*, 145 Ky. 332, 140 S. W. 561.

In *2 Joyce on Insurance*, § 846, the principle under consideration is thus stated:

"There are two important factors involved in cases of concealment. One is the assured's knowledge, and the other the insurer's knowledge. In both cases the knowledge may be actual, or rest upon a presumption based upon the fact that the circumstances are of such a character that they ought to be known, and may reasonably be presumed to be known. The assured could not reasonably be held to have concealed a fact of which he had no knowledge, actual or presumed, or one concerning which it cannot be said that he ought to have known it. Even the strict rule in marine insurance does not require this." *Metropolitan Life Ins. Co. v. Ford*, 126 Ky. 49, 102 S. W. 876.

The question, "Have you ever had any disease of the alimentary, genital, or urinary organs?" is admittedly one not usually found in an application for insurance, and, as there was evidence to the effect that it would not necessarily be understood by a man of average intelligence, engaged in the railroad business, as suggesting kidney disease, the issue as to whether it was so understood by the decedent, and if so, whether his answer thereto was false, was properly submitted to the jury, and the above instruction, which seems unobjectionable in form, was necessary to enable them to understand and properly decide the question.

The evidence upon practically every issue of fact made by the pleadings being conflicting, under the practice obtaining in this jurisdiction, the case was one for the jury; and as the instructions were substantially

correct, and it cannot be said the verdict is flagrantly against the evidence, the judgment is affirmed.

### CITY OF ASHLAND v. BOGGS.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 755\*) — DEFECT IN STREETS—LIABILITY.

A municipality is not an insurer against accidents to persons using its thoroughfares.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 788\*) — DEFECT IN STREET—NOTICE OF DEFECT.

A municipality is not liable for injuries caused by defective streets, in the absence of actual notice of such defect, or unless it has existed so long that notice or knowledge thereof should be imputed, and notice will not be imputed where the defect is of recent origin, and particularly where it is in any way concealed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 821\*) — DEFECT IN STREET—QUESTION FOR JURY—NOTICE.

Generally it is a question of fact for the jury whether a city had notice of a defect in a street, yet where the facts are undisputed and but one reasonable inference can be drawn from them, it becomes a question for the court.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

#### 4. BRIDGES (§ 46\*)—DEFECT—SUFFICIENCY OF EVIDENCE—NOTICE.

In an action against a city for personal injuries from falling upon a small wooden foot-bridge over a drain, one board of which was loose, leaving a hole in the bridge, evidence held to sustain a finding of the city's imputed notice of such defect and its negligence.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 108, 110-122; Dec. Dig. § 46.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 806\*) — DEFECTS IN STREET — CONTRIBUTORY NEGLIGENCE.

A pedestrian has the right to the free use of any part of the sidewalk open for public use, and the right to assume that it is free from obstruction and in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.\*]

#### 6. BRIDGES (§ 46\*)—DEFECTS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action against the city for personal injury from falling through a hole in a small bridge built across a drain, where plaintiff, by reason of bundles which she was carrying home in her arms, could not see the hole as she crossed, evidence held to make her contributory negligence a question for the jury; even though, where but one conclusion can be reasonably drawn, it would be for the court to say whether the acts relied upon constituted contributory negligence on her part.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 108, 110-122; Dec. Dig. § 46.\*]

Appeal from Circuit Court, Boyd County.

Action by Alice Boggs against the city of Ashland. Judgment for plaintiff, and defendant appeals. Affirmed.

John T. Diederich and D. H. Putnam, both of Ashland, for appellant. James A. Williams, of Catlettsburg, for appellee.

MILLER, J. The appellee, Mrs. Alice Boggs, lived on the south side of Greenup avenue, between Twenty-Second and Twenty-Third streets, in the city of Ashland. About 11 o'clock on the morning of March 22, 1913, she went to Preston's grocery store on the north side of Greenup avenue, between Eighteenth and Nineteenth streets, and bought a boy's hat, a broom, a bundle of lettuce, and a quantity of groceries. Carrying the hat, the broom, the lettuce, and a portion of the groceries, which she, in her testimony, called a "load of groceries," Mrs. Boggs started home, walking on the north side of Greenup avenue. At the northwest corner of Twenty-First street and Greenup avenue a small wooden footbridge, from three to four feet wide and about five feet long, stretched across the gutter or drain that carried the surface water into a neighboring sewer. The gutter was from 12 to 18 inches wide and from three to four feet long, the boards on the bridge being laid crosswise, stretching side to side.

The weight of the evidence shows that the western board which formed a part of the top of the footbridge had been removed, leaving a hole in the bridge from 12 to 18 inches wide, and of about the same depth. When Mrs. Boggs started to cross the bridge, the groceries and other articles which she was carrying in her arms were so placed that she was unable to see the hole in the bridge, and, stepping into the hole, she was thrown upon her left side, sustaining injuries to her back and internal organs. She was 43 years old.

In stating plaintiff's cause of action the petition alleges that:

She, "while in the exercise of reasonable and ordinary care for her own safety, stepped onto a small bridge covering a ditch about two feet deep, running across the sidewalk, and a plank in the said bridge had been removed, and lost or broken, and plaintiff stepped into said hole, which threw her across the left side of said bridge and into said ditch. That plaintiff was at the time carrying a large armful of groceries from a store to her residence, which was on the opposite side of Greenup avenue, and she presumed, and had a right to presume, that said sidewalk was in reasonably safe repair for use and travel by the public. That it was in the daytime, but the load that plaintiff had in her arms prevented her from seeing directly in front of her, and prevented her from seeing the hole in said sidewalk, even though she had been looking."

Her testimony fully corroborates the petition.

For answer, the city traversed the allegations of the petition, interposed, a plea of contributory negligence upon the part of the plaintiff, and further affirmatively alleged that the city had no notice of the hole which had existed for only about two or three hours, and not for a sufficient length of time

for defendant to learn of it by the exercise of ordinary diligence.

The plaintiff recovered a verdict and judgment for \$329, and the city appeals.

While appellant complains of the instructions given, and the action of the court in refusing instructions offered by it, it relies for a reversal chiefly upon its contention that its motion for a peremptory instruction, made at the close of the plaintiff's evidence, and renewed at the close of all the evidence, should have been sustained.

[1-3] The rule of law governing cases of this character was laid down in *Bell v. City of Henderson*, 74 S. W. 207, 24 Ky. Law Rep. 2435, as follows:

"A municipality is not an insurer against accidents to persons using its thoroughfares. It is not liable for injuries caused by defective streets in the absence of actual notice of such defect, or unless they have existed so long that notice or knowledge thereof should be imputed to them. And notice should not be imputed where the defects are of recent origin, and particularly where they are concealed in anywise. Whilst generally the jury should determine, as a question of fact, whether a city had such notice, yet where the facts are undisputed, and but one reasonable inference can be drawn from them, it becomes a question for the court to decide. *Smith's Modern Law of Municipal Corporations*, §§ 1545-1546; *Elliott on Roads and Streets*, §§ 626-627; *City of Covington v. Assman* [113 Ky. 608, 68 S. W. 646] 24 Ky. Law Rep. 415; *Canfield v. City of Newport* [73 S. W. 788] 24 Ky. Law Rep. 2213."

*City of Midway v. Lloyd*, 74 S. W. 195, 24 Ky. Law Rep. 2448; *Hazelrigg v. Board of Councilmen of Frankfort*, 92 S. W. 584, 29 Ky. Law Rep. 208; *City of Harrodsburg v. Sallee*, 142 Ky. 830, 135 S. W. 405, are to the same effect.

[4] There is little controversy over the facts of this case. Undoubtedly, the first or second board on the western end of the footbridge had been removed, leaving a hole which caused the injury to the appellee. And, although appellant has shown by several witnesses that this board probably had been removed for only a few hours, and certainly that appellant had no notice of it before the accident, nevertheless appellee has shown by several witnesses that the board had been loose, and dropped down, with one end sticking up and one down, for at least several days, and, according to some of the witnesses, for a week or more. And, although several witnesses saw the board lying nearby immediately after the injury, unbroken, and with the appearance of having lately been removed by some one, or had become displaced in some way not explained, the condition of the bridge was a question for the jury under the contradictory evidence.

Upon the issue, therefore, of imputed notice to the city, and negligence upon its part, the proof was sufficient to sustain the verdict of the jury, and, as we view the instructions, they are substantially correct.

[5, 6] Ordinarily, the question of contribu-

tory negligence is for the jury, but where the evidence is all one way, and but one conclusion can reasonably be drawn therefrom, it is for the court to say whether the acts relied upon constitute contributory negligence upon the part of the plaintiff; and if they do constitute such negligence, it is the duty of the court to take the case from the jury, by directing a verdict for the defendant.

In view of the controlling effect we are called upon to give the case of *Merchants' Ice & Cold Storage Co. v. Bargholt*, 129 Ky. 60, 110 S. W. 364, 33 Ky. Law Rep. 488, 16 Ann. Cas. 965, where the question is thoroughly discussed, it will not be necessary to consider the other cases decided by this court, and in other jurisdictions, and referred to in the briefs of counsel.

In the note in 16 Ann. Cas. 969, *supra*, it is said:

"It may be stated as a general rule that where a pedestrian, while proceeding along the sidewalk of a municipality, sustains an injury by reason of a defect or obstruction which he might have observed if he had looked, the fact that his attention was diverted from the surface of the street at the moment when he encountered the defect does not establish negligence on his part as a matter of law. Whether he was negligent is in such case a question for the jury."

And, in support of the rule, the annotator cites, among other cases, *Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923, where the plaintiff's attention was diverted by a person addressing her; *Mathews v. Cedar Rapids*, 80 Iowa, 459, 45 N. W. 894, 20 Am. St. Rep. 436, where the plaintiff fell into an opening in front of a shop while looking at goods displayed in the window; *Kaiser v. Hahn*, 126 Iowa, 561, 102 N. W. 504, and *Fulmer v. Hyde Park*, 162 Mass. 51, 37 N. E. 782, where the plaintiff, with face averted, was talking with a companion; *Sampson v. Boston*, 184 Mass. 46, 67 N. E. 866, where the plaintiff was looking at a street car to see whether seats were vacant; *Keith v. Worcester, etc., St. R. Co.*, 196 Mass. 478, 82 N. E. 680, 14 L. R. A. (N. S.) 648, where the plaintiff's attention was diverted by hurrying to board a street car; *Woods v. Boston*, 121 Mass. 337, and *Le Beau v. Telephone, etc., Constr. Co.*, 109 Mich. 302, 67 N. W. 339, where the plaintiff, while watching workmen tearing up a pavement, walked into a manhole guarded by a barrel placed beside it; *Graves v. Battle Creek*, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561, and *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483, where the plaintiff fell into a manhole while his attention was attracted to an acquaintance; *Lattimore v. Union Electric Light, etc., Co.*, 128 Mo. App. 37, 106 S. W. 543, where the plaintiff tripped over a hose, colored like the sidewalk, while watching the building operations; *Houston v. Traphagen*, 47 N. J. Law, 23, where the plaintiff fell into an opening in the sidewalk while attracted by the contents of the shop win-

dow; *Webb v. Heintz*, 52 Or. 444, 97 Pac. 753, where the plaintiff's attention was diverted to an approaching street car; *Barstow v. Berlin*, 34 Wis. 357; *West v. Eau Claire*, 89 Wis. 31, 61 N. W. 313; *Kenyon v. Mondovi*, 98 Wis. 50, 73 N. W. 314, where the plaintiff slipped on ice, his attention having been diverted by being accosted by another person; *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322; *Collins v. Janesville*, 117 Wis. 415, 94 N. W. 309, and *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311, where the plaintiff, having knowledge of the defect, was carrying several articles, and was hurrying in response to the request of her husband who preceded her.

In the *Bargholt* Case, *supra*, this court sustained a recovery for injuries received by *Bargholt* in stumbling over a block of ice negligently left upon a sidewalk, while his attention was attracted to a handsome new building that was in course of construction on the opposite side of the street. There was nothing in the way, and as *Bargholt* could have seen the block of ice if he had looked where he was walking, the appellant insisted that *Bargholt's* failure to so look was conclusive of such negligence on his part as to bar any right to recover.

The court stated the question for decision in the *Bargholt* Case, as follows:

"Was it negligence for him to fail to see the cake of ice on the sidewalk, when he could have seen it if he had been looking in that direction, or might he, while walking along the sidewalk at a point other than a public crossing, presume that the walk was clear and the way safe, and take notice of objects across the street or passing or overhead, and not be guilty of such contributory negligence as would deny him the right to recover?"

After a thorough examination of the authorities, the court held that the question of *Bargholt's* negligence was for the jury, and sustained a verdict awarding him a substantial recovery. And, in concluding the opinion, the court stated its conclusions of law as follows:

"Courts generally hold, and our court has recognized it to be the correct rule, that a pedestrian has a right to the free use of any portion of the sidewalk which is open for public use, and he has a right to assume that it is free from obstruction and in a reasonably safe condition for travel; and if, while passing over and upon a sidewalk in a street, his attention is distracted so that he fails to observe an obstruction placed upon the sidewalk where he has no right to expect it, and falls over same and is injured, the question as to whether or not he was proceeding with due care for his own safety is properly a question for the jury. It is likewise held that if, while passing along the pavement, the attention of the pedestrian is attracted across the street, or overhead, and away from the pavement, and while so attracted he comes upon and falls over an obstruction in the street at a point where he has no right to reasonably expect it to be and is injured, it is the province of the jury to say whether or not, under all of the circumstances, he is guilty of such contributory negligence as to deny him the right to recover. We are aware that in some jurisdictions a contrary rule is held, notably in Pennsylvania, and a distinction is there made between subjective cases and cases external or

objective, but no such distinction is made in this state, and the same rule applies whether the detracting cause is some external object or the concentration of the plaintiff's mind and thought upon some absorbing topic or question."

Furthermore, in pointing out the distinction between the Bargholt Case and similar cases, wherein the question of the plaintiff's contributory negligence was under consideration, the court said:

"Undoubtedly if appellee saw the cake of ice, and, seeing it, walked against it or fell over it, it would have been the duty of the court to have instructed the jury to find for the defendant; and, likewise, if the evidence had shown that appellee's attention had not been distracted at the time, and he had not been looking at the building across the street, or at some other object which took his attention and vision from the sidewalk, then a case might have been made out which would have warranted the court in instructing the jury to find for the defendant, though upon this point the decisions are not uniform. In other words, the court will only instruct to find for the defendant when the facts admitted or proven leave no room for doubt that he failed to exercise that degree of care which an ordinarily prudent person would have exercised under like or similar circumstances for his own safety, and this is all that the case of the Ashland Coal & Iron Company v. Wallace, 101 Ky. 637, 42 S. W. 744, 43 S. W. 207, 19 Ky. Law Rep. 849, decided." 129 Ky. 68, 110 S. W. 367, 33 Ky. Law Rep. 492.

So the question before us is, Did the fact that Mrs. Boggs' attention was consumed by her burdens, voluntarily assumed, exclude her from the benefit of the rule announced in the Bargholt Case, which directs the question of the pedestrian's contributory negligence to be submitted to the jury, when his attention has been distracted so that he fails to observe an obstruction upon the sidewalk? A careful reading of the authorities leads us to the conclusion that she is not to be excluded, but that she is entitled to the benefit of the rule.

In *Lattimore v. Union Electric Light Co.*, 128 Mo. App. 37, 106 S. W. 543, the court said:

"People constantly divert their attention from their footsteps when on sidewalks, and to pronounce such an act necessarily one of negligence would amount to denouncing the entire public as careless."

In the recent case of *Webb v. Heintz*, 52 Or. 444, 97 Pac. 753, above cited, the court said that when a pedestrian has no notice of, or reason to anticipate, the dangerous condition of the walk, he is not bound to keep his eye constantly fixed on it in search of possible defects, and, if his attention is momentarily or temporarily diverted, by reason of which he does not see the defect or obstruction in time to avoid it, he is not thereby precluded from recovery as a matter of law.

To the same effect, see *Birmingham v. Tayloe*, 105 Ala. 170, 16 South. 576; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; *Brown v. Weaver* (Pa.) 5 Atl. 32; *Weisenberg v. Appleton*, 26 Wis. 56, 7 Am. Rep. 89.

In *Crites v. City of New Richmond*, 98 Wis. 55, 73 N. W. 322, it was held that although the plaintiff knew of a hole in a generally traveled sidewalk, he was not bound, at all times, by day or night, when passing over the sidewalk, to bear the defect in mind, and, where he was injured while his attention was momentarily diverted by conversation with a friend, the question of the plaintiff's contributory negligence was for the jury.

Furthermore, it has been held that the rule applicable to persons walking on sidewalks applies to injuries received while crossing streets. *Nokomis v. Salter*, 61 Ill. App. 150; *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147; *Dale v. Syracuse*, 71 Hun, 449, 24 N. Y. Supp. 968, affirmed in 148 N. Y. 750, 43 N. E. 986.

In *Flynn v. Watertown*, supra, the court said:

"It seems to us impossible to say, as matter of law that one crossing a street is obliged to keep his attention fixed upon the ground. The danger usually encountered is that of being run over by passing vehicles."

And in *Nokomis v. Salter*, supra, it appeared that the plaintiff knew the street crossing was in a defective condition, and was walking with her face averted, talking with a person behind her. Nevertheless, the court held that the plaintiff acted as persons ordinarily do under similar circumstances, and that her conduct as above recited did not justify a reversal of the jury's finding that she was exercising due care.

We do not think the fact that Mrs. Boggs had voluntarily burdened herself with her purchases so that she could not see the hole in the sidewalk, deprives her of the right to submit the question of her contributory negligence to the decision of the jury. She had the right to so burden herself; the condition in which she was thus placed no more constituted negligence per se upon her part, than the voluntary acts of conversation, or averted attention, constituted negligence in the cases above cited.

We conclude, therefore, that the trial court properly overruled defendant's motion for a peremptory instruction, and submitted the question of appellee's negligence to the jury.

Judgment affirmed.

#### ROGERS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

##### 1. CRIMINAL LAW (§ 366\*)—EVIDENCE—RES GESTÆ.

Testimony that immediately after the shot deceased called to witness, a few feet away, and she hurrying there, and asking why he did not get out of the way, he said, "I didn't know he was fixing to shoot me," is admissible as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. CRIMINAL LAW (§ 368\*)—EVIDENCE—RES GESTÆ.

A statement to be admissible as *res gestæ* need not have been in the presence or hearing of accused, but need only be contemporaneous with or immediately subsequent to the exciting cause, and while the person making it was laboring under the excitement and strain of the circumstance; each case depending on its own circumstance as to the limit of time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. § 368.\*]

## 3. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

It being admitted that defendant was "fixing to shoot" deceased, and shot him, and that he made no move towards his pistol till defendant was on his feet prepared to shoot, admission of deceased's statement, that had he known defendant was fixing to shoot him he would have gotten away, was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

## 4. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admission of opinion of a physician from examination of deceased's bullet wound, as to relative position of the parties where the shot was fired, was cured by exclusion thereof before submission of the case to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3187-3143; Dec. Dig. § 1169.\*]

## 5. CRIMINAL LAW (§ 351\*) — EVIDENCE — FLIGHT—RESISTING RETURN.

As against proof that defendant, immediately after shooting deceased, fled to another state, where he remained till brought back under arrest, he cannot show that he came back without requiring a requisition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.\*]

## 6. CRIMINAL LAW (§ 726\*)—APPEAL—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Questionable remarks in argument of the commonwealth's attorney, objections to which were overruled, appearing to have been in reply to questionable argument of defendant's attorney, will not work a reversal, where they do not plainly transcend the bounds of reasonable argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. § 726.\*]

## 7. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction to acquit if, at the time of the shooting, defendant believed and had reasonable ground to believe he was in danger, and used such means as were reasonably necessary or as seemed to him, in the exercise of a reasonable discretion, to be necessary to avert such danger, is not objectionable as making the jury judges of the reasonableness of the means of averting the injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from Circuit Court, Nelson County. Ike Rogers was convicted of manslaughter, and appeals. Affirmed.

Nat W. Halstead, E. N. Fulton, and Osso W. Stanley, all of Bardstown, for appellant. James Garnett, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. The appellant was indicted, charged with the murder of Charles Howard. He was convicted of manslaughter, and adjudged to serve a term of from 2 to 21 years in the penitentiary. The offense was committed at a crap game near Bloomfield, some time in October, 1910, and about midnight. The game was in progress near the pike, and, as estimated by the witnesses, from 25 feet to 60 yards distant. The deceased, with his wife and brother-in-law, was riding in a buggy on their way home, and, discovering the game while passing, he left his wife in the buggy and went over to engage in it. All the witnesses and participants are negroes. Appellant had lost at a throw of the dice, and rising from the ground began to swear pretty vigorously about it. The deceased remonstrated with him, told him his wife was near by in a buggy, and requested him to keep quiet on her account. Appellant's cursing and abuse was then directed more particularly to the deceased. It was deceased's turn to throw the dice. With the winnings in his left hand, and dice in the other, and while on his knees in the attitude of making the throw, he said to appellant, who was then standing a few steps away from the circle:

"I know you have got a gun, and, if you don't quit, I will get up and make you eat it."

Soon after this statement—the witnesses estimate it from the moment to ten minutes—the appellant moved back two or three steps, and with his pistol, which he seems to have drawn in rising from the game, shot deceased while he was still on his knees in the attitude of throwing dice. The bullet entered his neck from the left side, and just under his ear, and from this wound he died. The appellant does not testify, but introduced four witnesses who saw the affair. Two of them say that the deceased was reaching to get his pistol, which was lying on the ground to his right, and that he also made an attempt to get up. These two witnesses are positive they saw the pistol. Another witness says that he saw something "shiny" on the ground, but did not know whether it was a pistol or bottle. His other witness did not see any pistol or anything resembling it, but says that at the time he was shot the deceased was making a motion as if to get up. The commonwealth introduced four witnesses who were present, and they say that deceased did not have a pistol on the ground or upon his person, and made no threatening move.

[1] The appellant urges four grounds for reversal. The first is that the court permitted deceased's wife, Lillian Howard, to give certain incompetent evidence. She said that from her place in the buggy she could hear all the swearing, and that immediately the shot was fired her brother told her to come quick, and she "rushed up there and says, 'Charlie, why didn't you get out of the way'";

and he said, 'Lillian, I didn't know he was fixing to shoot me.'" The appellant insists that this remark was incompetent and prejudicial, because it was a mere narration by the deceased of a past occurrence, and no part of the *res gestæ*. At the time the remark was made, the appellant and all of his associates had fled, and no one heard it but the witness. The commonwealth relies upon the case of *Daniel v. Commonwealth*, 154 Ky. 601, 608, 157 S. W. 1127, 1131, and quotes the following from the opinion:

"The statement made by deceased to his mother, who ran to him immediately that he was shot, might well have been admitted as a part of the *res gestæ*."

The court was considering its competency as a dying declaration. The deceased had been shot from ambush, and the commonwealth claimed that he recognized his assassins, and told their names to his mother. Quoting again from the opinion:

"He told Mary Gabbard, his mother, who was the first person to reach him, that he was killed, that he was going to die, and that Jerry Rice and Bradley Daniel had shot him."

The statement was admitted and held by this court to be competent upon the rules of evidence applicable to dying declarations, and added might well have been admitted as a part of the *res gestæ*. In all probability, in this case this was a dying statement, but there is no proof that he so considered it. If he ever uttered another word, the record does not show it. While he lived from midnight Saturday until Monday morning, and the physician says he was paralyzed and his case hopeless from the start, yet that fact was never made known to him.

While there is some slight conflict in the evidence, as to the distance between the witness and the place where the shooting occurred, varying all the way from 25 feet to 60 yards, yet as soon as the shot was fired the witness ran to the place, and she must have reached there in a time so short as to give the wounded person no time for reflection or to recover from the excitement, and the statement must therefore be regarded as impulsive and instinctive. Considering the rules of evidence with reference to *res gestæ*, Wigmore, in his work on Evidence (section 1750), says:

"The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement must be supposed still to predominate and the reflective powers to be yet in abeyance. It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and be dissipated."

Also, Wharton on Evidence, § 262:

"Declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*; remembering that immediateness is tested by closeness, not of time, but by causal relation."

[2] The utterance relates to the circumstances of the occurrence just preceding it.

Otherwise it would not be competent as a part of the *res gestæ*, and claim of appellant's counsel that it relates to a past circumstance is not, therefore, accurate. His argument, taken literally, would destroy the *res gestæ* rule. As soon as the shot was fired, the appellant and the participants in the game fled, and, as they were leaving, the witness came to the place. It has never been held, as an essential to make a statement part of the *res gestæ*, that it should be uttered in the presence or hearing of the accused. It is only necessary that they be contemporaneous with or immediately subsequent to the exciting cause, and while the party is laboring under the excitement and strain of the circumstance. As has been frequently said, each case must depend upon its own circumstance and there can be no definite and fixed limit of time.

The case of *Commonwealth v. Hargis*, 124 Ky. 372, 99 S. W. 348, 30 Ky. Law Rep. 510, holds admissible, as a part of the *res gestæ*, evidence of a witness who testified that he "heard the shots, \* \* \* and that Cockrill walked a few feet and fell, and immediately the witness went to him, when the statement \* \* \* was made." *Norfleet v. Commonwealth*, 88 S. W. 938, 17 Ky. Law Rep. 1137; *Hughes v. Commonwealth*, 41 S. W. 294, 19 Ky. Law Rep. 497; *Shotwell v. Commonwealth*, 68 S. W. 403, 24 Ky. Law Rep. 255.

The same principles apply to the admissibility of *res gestæ* in both civil and criminal cases. In the case of *C. N. O. & T. P. Ry. Co. v. Evans*, 129 Ky. 189, 110 S. W. 844, 23 Ky. Law Rep. 596, the subject is discussed and numerous cases cited to illustrate the rule, where the statement was made under circumstances similar to this.

[3] We are of the opinion that the court did not err in admitting the evidence. But in any event the appellant was not prejudiced. It is admitted that appellant "was fixing to shoot him," and that he did shoot him. The effect of the statement is that, had the deceased known appellant was fixing to shoot him, he would have gotten away. If in fact he suspected appellant's purpose, the result was not affected, for, according to appellant's witnesses, Howard made no move towards his pistol until appellant was on his feet and prepared to shoot. The jury gave him the lightest punishment, while the proof warranted more.

[4] Certain evidence of the physician, who examined the wound and from the direction of the bullet undertook to give an opinion as to the relative positions of the parties, was objected to as incompetent. But the court cured the error by excluding that evidence before the case was submitted to the jury.

[5] The third complaint arises from these circumstances: The commonwealth proved that the appellant fled as soon as he fired the shot and remained a fugitive until he was

arrested in Ohio, some three years afterwards. The appellant desired to prove by the Kentucky sheriff, who went to Ohio after him, that he came back without requiring a requisition. The court held this evidence incompetent. We think this was the correct ruling. It would have been just as competent for the appellant to show that he submitted to arrest without physical resistance. Whether he submitted to arrest peaceably or suffered the officers to bring him back without requisition are alike immaterial. The fact remains that he fled and was brought before the court under arrest.

[6] We see no prejudicial error in the rulings of the court with reference to argument of the commonwealth's attorney. Some objections to it were sustained and others overruled. In argument counsel on each side should confine themselves to the evidence and the law of the case; but when questionable remarks of one side are presented to us, and the remarks appear to be in reply to questionable argument of the other side, the lower court who heard both sides is in a better position to judge of their propriety, and, unless they plainly transcend the bounds of reasonable argument, we are not disposed to disturb the verdict.

[7] We have also considered appellant's objection to the sixth instruction. On the ground of self-defense an acquittal is directed, if, at the time of the shooting, the defendant believed and had reasonable grounds to believe he was in danger of losing his life or receiving great bodily injury at the hands of Howard, and that the defendant used such means "as were reasonably necessary or as seemed to him, in the exercise of a reasonable discretion, to be necessary to avert such danger." Appellant complains that this instruction made the jury the judges of the reasonableness of the means of averting the injury. He refers to an instruction approved by this court in the case of *Austin v. Commonwealth*, 91 S. W. 267, 28 Ky. Law Rep. 1087, and cited in the case of *Sizemore v. Commonwealth*, 158 Ky. 496, 165 S. W. 669. We perceive no material difference in the instructions. In the *Austin* case the word "appeared" is used where the word "seemed" is used in this case. In one case the safe means of escape is made to depend on how it "seemed" to appellant, and in the other how it "appeared."

The judgment is therefore affirmed.

#### COMMISSIONERS OF CAMPBELL COUNTY COURTHOUSE DIST. v. LIST et al.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

##### 1. COUNTIES (§ 218\*)—SUITS AGAINST—COURTHOUSE DISTRICT.

Under Acts 1881-82, c. 1107, creating a courthouse district in Campbell county and providing that the commissioners for the district shall be a body corporate and politic under the

name of commissioners for the courthouse district, a suit against the district is properly brought against the commissioners for the courthouse district, naming the individuals also, and not against the courthouse district.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 347-351; Dec. Dig. § 218.\*]

##### 2. COUNTIES (§ 89\*) — CLERK OF COUNTY COURTS—DUTIES—INDEX OF RECORDS.

Ky. St. § 513, requiring the clerk of the county court to index the papers recorded in his office, does not require the clerk of that court for Campbell county to index the papers affecting titles in the courthouse district and recorded in the office at Newport.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 118, 135, 136; Dec. Dig. § 89.\*]

##### 3. COUNTIES (§ 81\*) — COMMISSIONERS OF COURTHOUSE DISTRICT—POWERS—INDEX OF RECORDS.

Under Acts 1898, c. 50, repealing previous acts for the payment of county expenses by the commissioners for the courthouse district in Campbell county, except for the payment of the bonds and interest, and the expenses of maintaining the courthouse and the courts and officers, the commissioners have no power to have indexes made of the records, since the power to determine the necessity for that work and to let contracts therefor was vested in the county judge and the justices of the peace living in the district by Acts 1883-84, c. 956.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 118-121; Dec. Dig. § 81.\*]

Appeal from Circuit Court, Campbell County.

Suit for injunction by William List and another against the Commissioners of the Campbell County Courthouse District. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Kelly & Regenstein, of Newport, for appellants. L. J. Crawford, of Newport, for appellees.

SETTLE, J. This is an appeal from a judgment of the Campbell circuit court whereby appellants' special demurrer to the petition was overruled and appellees' general demurrer to the answer sustained and an injunction granted to prevent the appellants, commissioners of the Campbell county courthouse district, from entering into a contract to renew and further index the records relating to real estate in the county clerk's office in the city of Newport.

Alexandria is the county seat of Campbell county, and Newport, a city of the second class, is also situated in that county. The county is a separate judicial district having a circuit court of continuous session; a part of such sessions being held at Alexandria, the county seat, and a part of them in the city of Newport. There is but one clerk of the Campbell county court, and by an act of the General Assembly approved February 23, 1863, he maintains an office in the city of Newport as well as at Alexandria, the county seat, and is required to record at his office in the city of Newport, in suitable books procured for that purpose, all recordable instruments affecting real es-

tate within a certain district which includes that city and the contiguous surrounding territory.

By an act of the General Assembly approved February 26, 1863, the county judge of Campbell county, in addition to the county courts then held at Alexandria, the county seat, was required to hold annual monthly terms of the Campbell county court in the city of Newport. Acts 1861-63, p. 495.

In the year 1882 the General Assembly enacted a law laying off and designating by boundary, including the city of Newport, certain territory of Campbell county, which it was declared, should constitute a separate district, to be styled the "Courthouse District" (Acts 1881-82, vol. 2, p. 569), and providing for the appointment of three commissioners designated by the act as "Commissioners for the Courthouse District"; these commissioners to be appointed by the circuit court. The act gave the commissioners the power to construct a courthouse in Newport at a cost of \$50,000, and to levy a tax, not exceeding 12 cents on the \$100 of the property of the district, to pay the interest on and redeem the bonds issued and sold for the purpose of erecting the courthouse. The courthouse was thereafter erected. Out of this tax the commissioners were also authorized to pay the cost of maintaining the courthouse, including the salaries of the county judge and county attorney "as pro rata in the proportion that said district bears to the whole county." The act likewise provided that:

"All deeds, mortgages, leases, and conveyances for the sale, transfer, pledge, or lease of property within said district, shall be recorded in the city of Newport, and for all property outside of said district said deeds, mortgages, leases, and conveyances shall be recorded at Alexandria."

By an act of the General Assembly approved March 13, 1886 (Acts 1885-86, c. 232), entitled "An act to amend an act to authorize the construction and maintenance of a courthouse in Newport, in Campbell county, and to increase the powers and duties of the commissioners of said district," the commissioners were given control of the courthouse and grounds belonging thereto, were required to cause the courthouse and jury rooms therein to be properly lighted, warmed, and kept clean for the holding of the several circuit and county courts; also the office rooms of the circuit, county clerks, master commissioner, and sheriff; to cause the dial of the clock in the tower of the courthouse to be illuminated at night; to appoint a janitor of the courthouse, and the necessary expenses of maintaining the courthouse were to be paid by the commissioners out of the tax they were empowered by the act of 1882 to levy and collect.

By a further act of the General Assembly of March 15, 1898 (Acts 1898, p. 129), the commissioners of the courthouse district, in making the levy of the tax referred to, were limited to a rate not exceeding six cents on

the \$100 of property in the district, and section 2 of the act provides:

"That all of said acts which provide for the commissioners paying any part of the county expenses, or paying anything more than the bonds and interest coupons thereon, issued to build the courthouse and the expense of maintaining the courthouse and the courts and officers therein, be and the same is now repealed; and said commissioners shall continue to levy and collect the tax provided for in said act for said purposes, and none other."

The present action was instituted by the appellees, William List and C. W. Nagel, residents and taxpayers of the city of Newport, against the appellants, Phil J. Veith, George Lindsey, and F. A. Stein, "commissioners for the courthouse district," in Campbell county, Ky., for the purpose of enjoining them from entering into a contract to expend \$18,000, or any other amount of money, raised and to be raised by taxes levied upon the property of appellees and all other taxpayers of the courthouse district, for the purpose of having made cross-indexes and abstracts of all deeds, and mortgages relating to real estate, and wills disposing of real estate, situated in the district and recorded therein in the office of the clerk of the county court at Newport; it being alleged that the work contemplated would include the making of plats of each lot or parcel of land in the district and of each city block, so that the history and title of each lot or parcel of land will be shown upon the cross-indexes to be made, that the doing of the acts and work contemplated by the contract would result in an unnecessary expenditure of money, that the commissioners were and are without power to levy or collect taxes, or expend same, for the purpose of making cross-indexes or indexes of deeds or other recorded instruments manifesting title to real estate in the district, and that their power with respect to the expenditure of the taxes collected by them is limited to the expense of maintaining the courthouse, courts held therein, and the officers thereof. Furthermore, that all the records now in the courthouse are provided with cross-indexes which were made under an act of the General Assembly of Kentucky entitled "An act providing for making indexes of deeds and mortgages in the clerk's office at Newport and Alexandria in Campbell," approved April 22, 1884 (Acts 1883-84, c. 956), and which since that date have been continued and kept up by the county clerk of the county.

The answer of the appellants traversed so much of the petition as alleged that the work of cross-indexing contemplated by them was or would be an unnecessary expenditure of the taxes received or collected by them, or that their power to levy and collect taxes is limited to such amount or amounts as are required to maintain the courthouse, the courts, and officers thereof. The answer also denies that the records now in the Newport

courthouse are provided with cross-indexes, or that the county clerk has kept up any cross-indexes since April 28, 1884; also, denies that it is the purpose of the commissioners to abstract or plat, as alleged in the petition or otherwise, records relating to lots or parcels of land lying within the territory of the courthouse district. In paragraph 2 of the answer it is alleged, in substance, that the few books containing the indexes and cross-indexes of recorded deeds and other recorded instruments in the district in question were made in 1884 and have not since been kept up; that these books of indexes are now old, worn, dilapidated, and no longer fit for the purposes for which they were intended; and that this condition makes it imperatively necessary that some action be taken by appellants looking to the continuation and bringing down to the present time of such indexes and cross-indexes as will make the tracing and ascertaining of title to real estate within the district possible; that after due advertisement appellants have received bids from various persons willing to undertake the work of making the required indexes and cross-indexes, and the lowest of these bids was \$14,000; that this bid they will, if not enjoined from so doing, accept, as for that amount the bidder will perform and complete within two years the work of indexing and cross-indexing required to make easy of ascertainment the titles to all the real estate in the territory constituting the courthouse district. Paragraph 2 of the answer further alleges that the work of indexing and cross-indexing necessary to be performed will be reasonably worth the sum of \$14,000, and the person proposing to do it for that price will be required to execute bond with approved security for the faithful performance of the work, and it can be paid for by appellants out of any surplus funds in their hands as commissioners of the courthouse district, raised from the collection of taxes at the rate of six cents on each \$100 of taxable property in the district, that may be unexpended at the time the work is to be paid for under the contract; and that these taxes they are authorized to levy, collect, and so expend, under authority conferred by the acts of the Legislature mentioned in the petition.

[1] Appellants' first contention is that the circuit court erred in overruling their special demurrer to the petition. The special demurrer was filed upon the theory that the petition shows a defect of parties; the defect consisting in the failure of the appellees to make the "courthouse district," as such, a party defendant. This contention must be overruled. The act of April 17, 1882 (Acts 1881-82, vol. 2, p. 569), which constitutes the courthouse district and provides for the appointment of the commissioners therefor, declares:

"Said commissioners are hereby constituted a body corporate and politic, under the name

and style of the 'commissioners for the courthouse district'; and as such shall have perpetual succession; may contract and be contracted with; may sue and be sued, and may plead and be impleaded, in the courts of this commonwealth."

It is patent from this language that the courthouse district, created by the act in question, cannot, as such, sue or be sued, but suits affecting it must be brought for it by the "commissioners for the courthouse district" as plaintiffs, and suits against it must, as in this case, be brought against the "commissioners for the courthouse district" as defendants; the name of each commissioner being set forth as a defendant to enable the court to know that the proper persons are sued and the sheriff to know upon whom to serve the summons. There was no defect of parties. Therefore the special demurrer was properly overruled.

[2, 3] Appellants further complain that the court erred in sustaining appellees' general demurrer to their answer. The general demurrer goes to the insufficiency of the defense interposed by the answer and raises the question of want of authority or power in the commissioners to expend the money of the district, raised by taxing the property of its citizens, for such an object; and this is the principal question presented for our decision. It may be conceded that the work of indexing or cross-indexing contemplated by appellants is necessary; but the question of necessity is not material if they have not the power to contract, or expend the money, for having it done. We do not, however, agree with appellees' counsel that section 513, Kentucky Statutes, imposes upon the county clerk the duty to make such cross-indexes as are needed in his Newport office; nor do we agree with appellants' counsel that they derive the power to have the cross-indexing done, from the several special acts concerning the courthouse district in Campbell county, referred to in their answer, including that of March 15, 1898, for none of them confers such power, and section 2 of the act of March 15, 1898, expressly repeals all provisions of the previous acts concerning the district, that authorizes the commissioners for the district to pay any part of the county expenses or for "anything more than the bonds and interest coupons thereon, issued to build the courthouse, and the expense of maintaining the courthouse and the courts and officers therein," and only permits them to levy and collect the tax provided for in the act, for those purposes and none other.

We might be inclined to hold that the power claimed by appellants is implied from the authority given them by the act of 1898 to pay the expense of "maintaining the courthouse and the courts and officers therein," but for the fact that authority to have such cross-indexing done seems to have been lodged by the Legislature in other hands. This appears from an act entitled "An act provid-

ing for making indexes of deeds and mortgages in the clerk's offices at Newport and Alexandria in Campbell county," approved April 22, 1884 (Acts 1883-84, p. 295). Section 1 of the act provides:

"That the county court of Campbell county shall have authority to cause to be made such new cross-indexes as may be found necessary of all deeds and mortgages in the county clerk's offices at Newport, in said county, and such indexes shall remain in and be for use in said office."

Section 2 confers upon the county court authority to make such new cross-indexes of deeds recorded in the county clerk's office at Alexandria, the county seat, contained in deed books from A to Z, inclusive, as may be found necessary to be made.

Section 3 provides:

"For the purpose of determining the necessity for making such new cross-indexes at the clerk's office at Newport, the justices of the peace residing in the courthouse district in said county, or such of them as may attend, after being duly summoned, shall form a part of said court."

Section 4 provides that the necessity for making such new cross-indexes at the clerk's office at Alexandria shall be determined by the justices of the peace residing south of said courthouse district in said county (i. e., outside of the courthouse district).

Section 5 provides that the court at either Newport or Alexandria, upon being satisfied of the necessity of making such new indexes, in whole or in part as the case may be, shall, in a newspaper published in Campbell county or a newspaper of general circulation, and in such other manner as the court shall deem proper, advertise for sealed bids to perform the work, which shall be let by the court to the lowest and best bidder; the court to have the right to reject any and all bids. But upon the acceptance of a bid the court shall take good and sufficient bond with security for the faithful performance of the work to be done.

"After the said work shall have been done according to the contract, and received by said court, the cost of making said indexes of the deeds and mortgages in the office at Newport shall be paid for by the courthouse commissioners in said county (i. e., commissioners of the courthouse district), out of any surplus annual funds in their hands as commissioners. And the cost of making the new cross-indexes of deeds, from books A to Z, inclusive, in the office at Alexandria, shall be paid out of the county levy from that part of Campbell county south (outside) of the courthouse district. The court of claims, the justices, or such of them as may be present, residing in the part of said county south of said courthouse district, sitting with the county judge, shall have power to levy and collect, in the same manner as the county levy is now made and collected, such additional amount on the real property in said district (outside of the courthouse district) as may be necessary to pay for the indexes made for the office at Alexandria."

Section 6 provides:

"Upon the refusal or failure of the said courthouse commissioners to pay the amount necessary for the making of said indexes for the office at Newport, said county court, composed of the county judge and a majority of the justices

of said courthouse district, sitting at Newport, shall have power to levy and cause to be collected a tax on the real property in said district subject to tax for general revenue purposes, sufficient to pay for making said indexes and costs of collection, and no more."

It is manifest that appellants are without power to contract for the cross-indexes contemplated by the action taken by them. The act of April 22, 1884, mentioned, gives such power to the county court of Campbell county, composed of the county judge and the justices of the peace residing in the courthouse district of Campbell county, or such of them as may attend the court, after being duly summoned. The power or jurisdiction thus conferred upon the county judge, and justices of the peace residing in the courthouse district, both as to determining the necessity for the making of the cross-indexes in the courthouse district and the matter of contracting for the doing of the work, is exclusive and complete. Neither the commissioners for the courthouse district nor the justices of the peace of Campbell county outside of the courthouse district have any right or authority to participate in any action that may be taken by the county court and justices of the peace residing in the courthouse district, either in determining the necessity for making cross-indexes in the county clerk's Newport office, or in having the work done. Indeed, the only connection that the act in question allows the commissioners for the courthouse district to have with the indexing or cross-indexing that may be required in the Newport office of the county clerk, is to pay the cost of making such indexes out of any surplus annual funds in their hands as commissioners; and it is provided by section 6 of the act that, if the commissioners of the courthouse district refuse or fail to pay the amount necessary for the making of indexes for the county clerk's office at Newport, then the county court, composed of the county judge and a majority of the justices of the courthouse district, sitting at Newport, shall have power to levy and cause to be collected a tax on the real property in the district subject to taxation for general revenue purposes, sufficient to pay for making such indexes and cost of collection.

We have not been advised, nor have we been able to find, that the act of April 22, 1884, has been repealed or amended; therefore its provisions are in full force and necessarily conclusive of this case. This being true, it follows that the circuit court did not err in sustaining the demurrer to appellants' answer or in rendering judgment enjoining appellants from proceeding further in the attempt to contract for the indexing and cross-indexing of deeds, mortgages, and other instruments conveying or disposing of titles to real estate recorded in the Newport office of the Campbell county court clerk.

Wherefore the judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. WILSON.  
(No. 10.)(Supreme Court of Arkansas. Nov. 30, 1914.)  
1. RAILROADS (§ 408\*)—ATTRACTING ANIMALS  
—LIABILITY FOR INJURIES.

A railroad company is under no duty to construct and maintain a fence along its right of way to prevent cattle pastured upon the commons from going upon the right of way, but it has no right to allow feed to be emptied and accumulated on its right of way in such a manner as to attract cattle browsing upon the commons onto the right of way, and if cattle so attracted are injured by a defective fence the railroad company is liable.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1404; Dec. Dig. § 408.\*]

2. RAILROADS (§ 441\*)—INJURIES TO STOCK—  
BURDEN OF PROOF.

Where the owner of a cow, pastured on the commons, claimed that she was attracted on a railroad company's right of way by reason of its negligence in leaving out food, and was injured on the sagging wires of the right of way fence, the owner has the burden of proving the railroad company's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.\*]

3. RAILROADS (§ 446\*)—INJURIES TO CATTLE—  
EVIDENCE.

In an action against a railroad company for injuries to a cow, which strayed onto the right of way in quest of food, evidence of the railroad company's negligence in leaving out food to attract the animal and in allowing its fences to fall into disrepair held insufficient to go to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

Appeal from Circuit Court, Garland County; Calvin T. Cotham, Judge.

Action by R. W. Wilson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

The appellee sued appellant for damages caused by an injury to his cow, alleging that "defendant negligently caused hay, grain, and other feedstuff to be scattered upon and near the railroad track in quantities sufficient to induce and toll cattle upon said land, and that said cow was attracted and tolled to said land and railroad track; that said lands were surrounded by barbed wire attached to posts lying on the ground, some of the strands being 2 or 3 feet above the ground at places; that the barbed wire fence was so dangerously kept as to endanger stock that would be attracted or tolled on the land where said feed lay; that the cow became entangled in the barbed wire and was so permanently injured thereby as to unfit her for a milk cow." The appellant denied the allegations of negligence.

The testimony for the appellee tended to show that the cow was injured at a point north of Old Gibbs Mill. The first panel of the fence just north of the mill was entirely out. Directly across from there were three bottom wires in place. When the cow was dis-

covered by the appellee, she was standing 20 or 30 feet off of the right of way. Appellee went to where she was standing and found flesh hanging on the barbed wires and milk scattered on the weeds and hay at about 20 or 30 feet from the fence. There were box cars on the siding there. Feedstuff and grain were emptied there, and were lying on the right of way within 10 or 15 feet of the opening in the fence.

The section foreman testified that there was a spur track, called Gibbs Spur, used to set out cars. When he found the fence out of repair, he tried to keep it in repair; but it was a hard matter, because people cut the wires along the road. When he discovered the fence in that condition, he fixed it, or had it done. He did not know that the fence was out of repair at that place. After he was notified of the injury to the cow, he made an investigation of the track the next day, and if there was any feedstuff scattered along there he did not see it. Another witness testified that he was a yardman in August, 1912, at the time the cow was injured. It was his duty to repair the fence when it was down. The section foreman told him the fence was out of repair, and immediately after hearing about the cow being injured he repaired the fence. Some one had broken a post down and knocked the wires all loose. One wire had been cut, but not at this place. There was nothing wrong with the fence at the place where the cow was supposed to have been injured. It was out of repair about 100 feet from there on the opposite side. Some people lived there and cut the wire to make a gate to come out.

There was testimony tending to show that the cow was unfitted, by reason of the injury, for a milk cow, and tending to show her value as a milk cow.

The appellant asked the court to direct the jury to return a verdict in its favor, duly objected and excepted to the ruling of the court in refusing such prayer, and made such refusal of the court cue of its grounds for a new trial. The appellant also assigned as one of its grounds for a new trial that the verdict was contrary to the evidence. From a verdict and judgment in favor of the appellee for \$50, this appeal has been duly prosecuted.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and W. R. Donham, of Benton, for appellant.

WOOD, J. (after stating the facts as above). [1] The appellant was under no duty to construct and maintain a fence along its right of way to prevent cattle that were pastured upon the commons from going upon such right of way. The appellee, in permitting his cow to run at large, assumed all the risks incident thereto. *Railway Co. v. Ferguson*, 57 Ark. 16, 20 S. W. 545, 18 L. R. A.

110, 38 Am. St. Rep. 217. But the appellant would have no right to allow feedstuff to be emptied or to accumulate upon its right of way in such manner as would be attractive to cattle that might be browsing upon the commons. This would be luring such animals, by reason of their natural instincts, into places of danger, and if appellant did this it would be negligent. If appellant permitted feedstuff to be placed upon its right of way in such manner as was calculated to attract cattle thereto, it would be liable for damages to the owner of animals that were injured by reason of such negligence. If appellant negligently permitted the fence inclosing its right of way to become so out of repair that cattle were injured thereby in attempting to reach feedstuff placed upon its right of way in proximity to the defective fence, the appellant would be liable in damages to the owner for such injuries. See *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

[2, 3] Applying the above principles to the facts of this record, appellee, having the burden of proof, has failed to sustain the allegations of his complaint. There is no proof as to how long the defective condition in the fence had existed. There is nothing to show that the defective condition had existed for so long a time as to warrant the inference that appellant had notice of such defective condition, and that it was therefore negligent in not having the same repaired before the alleged injury. It was shown on behalf of appellant that the section foreman and the yardman, whose duties were to keep the fence in repair, did not know that the fence was out of repair at that place until after the injury. They testified that people were continuously cutting the fence. For aught that appears to the contrary, the defective condition in the fence may have existed for so short a time that appellant, in the exercise of ordinary care, could not have repaired the same before the injury to the cow occurred. There is no proof on which to predicate a charge of negligence. Negligence under the circumstances would not be presumed, but would have to be affirmatively shown.

For the error in not granting appellant's motion for a new trial, the judgment is reversed, and the cause is dismissed.

FERGUSON et al. v. MARTINEAU et al.  
(No. 244.)

(Supreme Court of Arkansas. Nov. 20, 1914.)

1. COURTS (§ 207\*)—STATE COURTS—JURISDICTION OF ARKANSAS SUPREME COURT.

As the Arkansas Supreme Court controls inferior courts only through its supervisory jurisdiction over the circuit court, it cannot issue a writ of prohibition against the probate court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 508; Dec. Dig. § 207.\*]

2. INJUNCTION (§ 105\*)—JURISDICTION—PROSECUTIONS.

Courts of equity have no jurisdiction to interfere by injunction with criminal proceedings; their jurisdiction to be confined solely to civil and property rights.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.\*]

3. PROHIBITION (§ 10\*)—NATURE OF WRIT—"WRITS OF PROHIBITION."

The writ of prohibition is that process by which a superior court prevents an inferior tribunal from exercising jurisdiction with which it has not been vested by law. Hence, where the chancery court attempted to enjoin execution of a judgment in a criminal proceeding, a writ of prohibition will be issued to prevent the court from exceeding its jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, First and Second Series, Prohibition.]

4. PROHIBITION (§ 13\*)—ISSUANCE OF WRIT—DEFENSES.

That a chancery court which enjoined the execution of a criminal judgment did not propose to issue any further order is no ground for the denial of a writ of prohibition, for the denial of the writ would leave the injunction in force.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 62; Dec. Dig. § 13.\*]

5. CRIMINAL LAW (§ 981\*)—INSANITY AFTER CONVICTION—INQUEST—STATUTE.

Kirby's Dig. § 4003, providing for insanity inquests by the probate court, was enacted solely for the purpose of protecting the civil and property rights of insane persons, and has no reference to determining the question of the sanity of one who has been convicted and sentenced to be executed for a criminal offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2497, 2498; Dec. Dig. § 981.\*]

6. INJUNCTION (§ 105\*)—EXECUTION OF SENTENCE—INSANITY.

Kirby's Dig. § 2454, providing for an inquest by sheriff's jury into the insanity of persons sentenced to be executed, affords such person a remedy in case he becomes insane after trial. Hence the chancery court cannot, on the ground that such person has no other remedy, justify an order enjoining his execution.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.\*]

7. CRIMINAL LAW (§ 981\*)—INSANITY OF ACCUSED—INQUEST—STATUTES—REPEAL BY IMPLICATION.

Acts 1913, p. 172, providing that, when a judgment of death is pronounced on any person, such person shall be conveyed to the state penitentiary and there kept until executed, does not by implication repeal Kirby's Dig. § 2454, authorizing the sheriff to hold an inquest into the sanity of the person sentenced to be executed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2497, 2498; Dec. Dig. § 981.\*]

8. INJUNCTION (§ 105\*)—CRIMINAL SENTENCE—INSANITY.

Regardless of statute, one convicted and sentenced to execution will, where he becomes insane after trial, be granted a stay of execution. Hence the chancery court cannot justify an order enjoining execution on the ground that the party had no remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.\*]

Petition by J. V. Ferguson and others, as Commissioners of the Arkansas Penitentiary.

for writ of prohibition against J. E. Martineau, Chancellor, and Joe Asher, County Judge. Writ issued against the Chancellor, and injunctive order of chancery court quashed.

One Arthur Hodges was convicted of murder in the first degree in the Clark circuit court. He appealed to this court and the judgment of the circuit court was affirmed. After the judgment of the Clark circuit court, Hodges made application to that court for a writ of coram nobis to inquire into the issue of his sanity at the time of the alleged offense for which he was convicted. The writ was issued, and upon a trial of that issue before a jury it was determined that Hodges was sane. Hodges was then conveyed to the state penitentiary and delivered to the superintendent thereof to await his execution under the provisions of the act approved February 15, 1913, Act 55 of the Acts of 1913. On the 6th day of November, 1914, upon the petition of W. M. Rankin, with accompanying affidavits, setting forth that Arthur Hodges is now insane, and asking that inquiry be made into the question of his sanity at the present time, the county and probate judge of Pulaski county, upon consideration of the petition, granted the same and ordered a warrant to issue for the arrest of Arthur Hodges, and directed the sheriff to have him before the probate court on the 23d day of November, 1914, to have the question of his sanity determined. On the 7th of November, 1914, application was made to the chancery court of Pulaski county for an injunction against the commissioners of the Arkansas penitentiary, restraining them from executing Hodges on the day set for his execution. The chancery court granted the petition and issued an order enjoining the commissioners from executing Hodges on the 14th day of November, 1914, or on any other date until the further orders of the chancery court. The petitioners apply to this court for writs of prohibition, directed to the judge of the chancery court of Pulaski county and to the judge of the county and probate court of said county, prohibiting them from interfering with the execution of Arthur Hodges on the day set for his execution under the sentence and judgment of the Clark circuit court. The judge of the probate court of Pulaski county set up, in response to the petition, that the writ of prohibition should not issue for the reason that this court has no jurisdiction to issue a writ prohibiting the probate court of Pulaski county from exercising its jurisdiction to inquire into the question of the sanity of Hodges, and further set up that he had such jurisdiction and that he had exercised it for good cause shown. The chancellor of the Pulaski chancery court responded that he issued the injunction restraining the commissioners from executing Hodges until his sanity could be determined by the probate court on the 23d day of No-

vember, 1914, the day set by that court for the inquisition; that he had issued all the orders that he could issue or would issue; and that the petitioners, if aggrieved by his action, had their remedy by way of appeal, and not by writ of prohibition. For convenience of hearing the cases are consolidated here and disposed of in one opinion.

Jones & Owens and Bradshaw, Rhoton & Helm, all of Little Rock, for petitioners. Wm. L. Moose, Atty. Gen., and Jno. P. Streepsey, Asst. Atty. Gen., for defendants.

WOOD, J. (after stating the facts as above). [1] In *Featherstone v. Folbre*, 75 Ark. 510-512, 88 S. W. 554, 555, we said:

"This court has no original jurisdiction to control or supervise any proceedings of the probate court. That all belongs to the circuit courts, as matters of original jurisdiction, and to this court by appellate and supervisory jurisdiction over the circuit courts. This court supervises and controls all courts inferior to the circuit courts only through the latter courts. In no other way can the harmony of our judicial system, as at present constituted, be preserved."

In the same case we held that the supervisory jurisdiction of this court over the probate court "comes, not originally, but by way of appeal and supervision through the circuit courts."

It follows that this court has no jurisdiction to issue the writ of prohibition in this case, directed to the probate court. If the application for a writ of prohibition directed to the probate court had been first made in the circuit court and refused, then this court would have jurisdiction by reason of its superintending control over the circuit court, but this was not done. The petition for the writ of prohibition directed to the probate court must be denied.

[2] II. Courts of equity have to do with civil and property rights, and they have no jurisdiction to interfere by injunction with criminal proceedings. They cannot stay processes of courts having the exclusive jurisdiction of criminal matters, where no civil or property rights are involved. *Portis v. Fall et al.*, 34 Ark. 375; *Medical Institute v. Hot Springs*, 34 Ark. 559; *Taylor v. Pine Bluff*, 34 Ark. 603; *Waters-Peirce Oil Co. v. City of Little Rock*, 39 Ark. 412; *High on Injunctions*, § 68; *Kerr on Injunctions in Equity*, p. 2, star; 1 *Wharton, Cr. Law*, 403.

This court, in *State v. Vaughan*, 81 Ark. 125, 98 S. W. 689 (7 L. R. A. [N. S.] 899, 118 Am. St. Rep. 29, 11 Ann. Cas. 277), quoting from the Illinois Supreme Court, said:

"It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. \* \* \* The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. \* \* \* It is no part of the mission of equity to administer the criminal law of the state. \* \* \* A court of equity has no jurisdiction over matters merely criminal or merely immoral."

The Supreme Court of the United States, in *Re Sawyer*, 124 U. S. 200, 209, 210, 8 Sup. Ct. 482, 487 (31 L. Ed. 402), says:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative departments of the government."

See, also, *Fitz v. McGee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; *Pom. Eq. Jur.* § 644, and authorities cited. Such suit is in effect a suit against the state.

It follows that the chancery court was wholly without jurisdiction to stay the execution of the judgment of the Clark circuit court.

[3, 4] "The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising jurisdiction with which it has not been vested by law." 2 *Spelling on Injunctions & Other Extraordinary Remedies*, § 1716.

See, also, *Short on Informations, Mandamus & Prohibition*, p. 436.

Here the want of jurisdiction on the part of the chancery court appears on the face of the proceedings, and the writ of prohibition to quash and to restrain the enforcement of its order will go.

Learned counsel for the respondents insists that the writ should not be issued in this case because the chancellor shows that he has done everything that he proposes or can do in the matter. But the injunction issued by the chancellor is outstanding, and it will be presumed that unless recalled the officers will obey the same, or, if they do not, the chancellor will proceed to punish them for contempt of court in disobedience of his order.

"If," said Lord Mansfield, "it appears from the face of the proceedings that the court below has no jurisdiction, a writ of prohibition may issue at any time either before or after sentence, because all is a nullity; it is *coram non judice*." *Bedgin v. Bennett*, 4 Burr. 2037; *Short on Informations, etc.*, § 447, and cases cited in note.

[5] It is further insisted that the chancery court had jurisdiction to issue the injunction ancillary to or in aid of the jurisdiction of the probate court to enable it to enforce its orders. The chancery court has no such jurisdiction; but, if it were conceded that the chancery court had such jurisdiction, the injunction could not properly issue in aid of the probate court's jurisdiction, for the probate court itself was without jurisdiction. The statute under which the respondents claim that the probate court has jurisdiction, to wit, section 4003 of Kirby's Digest, is as follows:

"If any person shall give information in writing to such court that any person in his county is an idiot, lunatic, or of unsound mind, and pray that an inquiry thereof be had, the court,

if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such court, and inquire into the facts by a jury, if the facts be doubtful."

This statute was enacted solely for the purpose of protecting the civil and property rights of insane persons, as is clearly shown by the section itself and the other sections of the same chapter (chapter 83, Kirby's Dig.). It has no reference whatever to determining the issue of the sanity of one who has been convicted and sentenced to be executed for a criminal offense, and who is already in the custody of the law for that purpose.

[6-8] It is further contended that the injunction should go because if Hodges is now insane he had no other legal remedy than to apply to the probate court and to the chancery court as he has done, and that a great wrong would be perpetrated upon him for which there was no other remedy.

Section 2454 of Kirby's Digest provides that, when the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane, he may summon a jury to inquire as to his insanity, and, if the jury finds that he is insane, then the sheriff shall suspend the execution and immediately transmit the inquisition to the Governor.

The respondents contend that this section has been repealed by Act 55 of the Acts of 1913 (pages 172, 173, §§ 3, 4), providing that:

"When a judgment of death is pronounced upon any person upon conviction of a capital offense, said person shall be immediately conveyed to the state penitentiary \* \* \* and there kept awaiting execution." etc. And also that the "said superintendent, or the assistants appointed by him, shall proceed, unless a suspension of execution be ordered, at the time named in said sentence, to cause the said felon under sentence of death to be electrocuted until he is dead."

There is no express repeal of the statute conferring power upon the sheriff of the county where the defendant has been convicted of inquiring into his sanity at the time set for his execution, and this statute conferring upon him such power is not repealed by implication, and if it came to his knowledge that the defendant was insane at the time set for his execution the sheriff would still have the power to make the inquiry, and if the superintendent of the penitentiary should refuse him the custody of the prisoner for that purpose he could invoke the aid of the circuit court or the judge of that court in vacation to have the custody of the defendant surrendered to him for the purpose of making the inquisition as to his alleged insanity. But if it be conceded that Act 55 of the Acts of 1913, supra, repealed, by implication, the statute conferring such power upon the sheriff, still there would be an adequate remedy for the defendant at the common law, in the absence of any statute upon the subject, for all of our statutes passed for the protection of insane persons against the punishment

that the law would otherwise inflict upon them for the commission of criminal offenses are but declaratory of the common law, or cumulative of the remedies that were there provided for their protection in such cases.

In *Taffe v. State*, 23 Ark. 34, this court said:

"The first principles of the elementary books are that whenever a person is disqualified from defending himself, by the loss or want of reason, he shall not be the subject of a legal prosecution or penalty." And, further, quoting from 4 Blk. Com. 24 and 395: "If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy, but be remitted to prison until that incapacity be removed; the reason is because he cannot advisedly plead to the indictment; and this holds as well in cases of treason, as felony, even though the delinquent in his sound mind were examined, and confessed the offense before his arraignment. \* \* \* And if such person, after his plea, and before his trial, become of nonsane memory, he shall not be tried; or, if after his trial he becomes of nonsane memory, he shall not receive judgment; or, if after judgment he becomes of ponsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."

See, also, *State v. Helm*, 69 Ark. 167-171, 61 S. W. 915.

III. It cannot be doubted therefore that, even in the absence of any statute upon the subject, the circuit court or judge thereof, in vacation, would have the inherent power to say that the execution of the judgment of that court was not in force upon a person who was insane at the time set for his execution. A writ upon proper application could be issued by the court or the judge thereof returnable to the court to inquire into the alleged insanity of the defendant at the time set for the execution, to the end that the sentence of the law might not be carried out if it were determined by a jury impaneled for the purpose that the defendant were insane. See *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Steward v. State*, 124 Wis. 623, 102 N. W. 1079, 4 Ann. Cas. 389, note on page 393.

Therefore there is a complete and adequate remedy at law and there was no reason to justify the issuance of the injunction, even if the chancery court had jurisdiction to do so.

The writ of prohibition will therefore be granted, and the injunctive order in the chancery court will be quashed.

#### JOHNSON v. JOHNSON. (No. 13.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

##### 1. HUSBAND AND WIFE (§ 49½\*)—PROPERTY IN WIFE'S NAME—PRESUMPTION.

Where a husband furnished money to purchase stock in a building and loan association, and had it transferred on the association's books to the name of his wife, the presumption, in the absence of evidence to the contrary, was that any money he furnished at the time of the

purchase and transfer was intended by him as an advancement or gift to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.\*]

##### 2. HUSBAND AND WIFE (§ 49½\*)—PROPERTY IN WIFE'S NAME—PRESUMPTION AND BURDEN OF PROOF.

The presumption that, when a man purchases property and takes the title in the name of his wife, he intends it as a gift to her is not conclusive, and may be overcome by testimony of the antecedent or contemporaneous declarations or circumstances.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.\*]

##### 3. HUSBAND AND WIFE (§ 49½\*)—GIFT TO WIFE—SUFFICIENCY OF EVIDENCE.

In a wife's action to recover stock of an association, alleged to have been paid for with her own money and to have been transferred to her name on the books of the association, held that a finding in her favor was not against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.\*]

Appeal from Craighead Chancery Court; Chas. D. Frierson, Chancellor.

Action by Minnie Johnson against the Young Men's Building & Loan Association, in which defendant impleaded R. L. Johnson. Judgment against R. L. Johnson and he appeals. Affirmed.

On the 18th of August, 1913, the appellee instituted an action in the Craighead circuit court, for the Jonesboro district, against the Young Men's Building & Loan Association, and alleged that in the year 1902 the Young Men's Building & Loan Association issued to C. N. Carson 40 shares of stock; that after he had made several payments in monthly dues he assigned the shares of stock to Johnson Bros., and about the year 1908 Johnson Bros. assigned and transferred the shares of stock to the appellee; that the stock matured on the 1st day of July, 1912; and that the building and loan association was indebted to her in the sum of \$1,000, with interest thereon.

The association answered, admitting the maturity of the stock, and that the same had been transferred to the appellee, but alleged that Lee Johnson (appellant) claimed some interest in the matter, and asked that he be made a party. The court ordered Lee Johnson to be made a party, and also ordered the association to deposit the funds in court.

Lee Johnson answered, denying that Minnie Johnson was the owner of the stock, and alleging that he was the owner. He denied that the stock had been transferred to the appellee, and alleged that she was his wedded wife, and prayed that the case be transferred to equity, which was granted without objection.

The cause was, by consent, heard in vacation. The appellee testified that in February, 1908, she bought the stock, paying \$400 for the same, that she drew a check for that

amount upon the Bank of Jonesboro, and that her husband, the appellant, delivered the same to D. B. Johnson, his brother. She attaches a copy of the check in favor of D. B. Johnson in the sum of \$400 drawn on the Bank of Jonesboro. The appellant acted as her agent in purchasing the stock, stating that the stock was a good investment. She inherited a small amount from her grandfather which, when added to the amount saved by her from her allowance given her by her husband for pin money, made the \$400 which she paid for the stock. Her husband matured the stock after the purchase for her, with the understanding that it was hers, and with the suggestion that if she bought the stock he would mature the same for her. It was understood between them at the time of the purchase that appellant would mature the same as a gift to her. The investment was made for her, with her money, and to be used as she wished at maturity of the stock. It was understood at the time that her husband would pay the dues if she used her money in buying the stock. The money representing the matured value of the stock was to be hers and not shared by him nor used by them jointly. She stated that she gave her husband at one time a check for \$100, and attached the check in favor of R. L. Johnson for that amount, on the American Trust Company, dated Nov. 2, 1910, which, by the indorsement thereon, shows that it was paid, and the money had never been repaid to her. The money with which she purchased the building and loan stock was her money. It was put in the Bank of Jonesboro by Lee Johnson for her. He knew at the time that the money was hers. He attended to her banking business for her. She used the American Trust Company in drawing out the money she had in it. Probably a portion of the money she had inherited from her grandfather was used in the purchase of the stock. She attached as an exhibit to her deposition an account with the American Trust Company, of Jonesboro, Ark., showing a total deposit and interest from September 5, 1908, until March, 1911, of \$341.61, and checks drawn in favor of various parties from May 15, 1909, to February 24, 1911, covering the full amount of her deposits. Among these checks was one in favor of R. L. Johnson for \$100. She also made an account with the Bank of Jonesboro, showing total deposits from December 12, 1904, to January 2, 1908, of \$860, and exhibited checks, drawn from June 6, 1905, until March 30, 1909, for \$860, and among these was a check payable to the order of D. B. Johnson, dated February 18, 1908, for \$400. Among these canceled checks were three in favor of Lee Johnson, aggregating \$140.

A witness on behalf of appellant testified that during the years 1907, 1908 and 1909, he had remitted to appellee for money representing her interest in the estate of John

Bailey \$411.02. The remittances were: June 6, 1907, \$165; September 1, 1908, \$183.33; and November 29, 1909, \$62.69.

The appellant testified that he purchased the stock in controversy from the firm of Johnson Bros., composed of appellant and D. B. Johnson. Appellant paid D. B. Johnson \$400 for the stock, and D. B. Johnson afterwards credited appellant with \$200 on the transaction. He bought the stock in 1908 and paid for it with a check. The stock was matured in September, 1912. The certificate of stock was in his possession, but he was unable to find it. It had never been delivered to Mrs. Johnson. As far as he was able to determine, the stock was bought with his money. He deposited his money in the Bank of Jonesboro to the credit of Mrs. Johnson. It was his own money, and he had Mrs. Johnson to sign the check for it, and gave it to his brother. When asked how the money happened to be deposited in her name, he stated that he was a partner with D. B. Johnson and they had a drawing account. He wished to prepare a sinking fund to take care of a home for himself, and he deposited that money in the name of Mrs. Johnson for that purpose. He denied having an understanding with Mrs. Johnson that he was to mature the stock for her, and stated that he did not put the money in the bank for her as a gift. He stated that he had no knowledge that Mrs. Johnson was drawing checks against her account in the bank other than those he mentioned to her. He was very much surprised to know that the checks had been drawn by her as he had amply provided for her.

He stated, on cross-examination, that his wife, the appellee, inherited some money, but that he did not know the dates when she received it. The money was deposited with the American Trust Company, as near as he could remember. She gave him two checks out of that money. He was unable to say how much money he deposited to the credit of Mrs. Johnson in the American Trust Company or in the Bank of Jonesboro. The appellant did not have any individual account in the bank at the time she started her account. Stated that he did not remember whether he had an individual account with the Bank of Jonesboro between the years 1905 and 1910. He stated that he deposited money in the American Trust Company that belonged to him; that he had nothing to do with her estate. He did not know that his wife was using the money that she had deposited to pay family bills. He had an account with the Bank of Jonesboro when he began to build his place, and collected insurance money in the name of Lee Johnson. Previous to that time the account was in the name of Mrs. Lee Johnson. He never drew any checks on the account of Minnie Johnson. If he needed any money she would sign the check. He did not think he ever told

Mrs. Johnson that the stock had been transferred in her name. He deposited all the money in the Bank of Jonesboro in her name, unless she deposited some without his knowledge.

• The appellee, in rebuttal, testified that Johnson knew she was using the money she deposited in her name as pin money and to pay her other little indebtedness with, and made no objections to it. At the time he deposited the money for her, he was giving her expense money for the house, and she lived within it and also saved some out of the money given her by him, which the appellee banked, and sometimes gave her more as a compliment on her saving.

It was stipulated that Lee Johnson did an individual banking business with the Bank of Jonesboro during the years 1907, 1908, 1909, and 1910, and that during that time he deposited \$2,534.55. It was further stipulated that the appellant and the appellee were living apart at the date of the institution of the suit, and that the certificate of stock in the building and loan association was transferred to the appellee on the books of the association at the time appellee claims to have purchased it.

The court found that the stock was the sole and separate property of the appellee, and that the amount due on the stock from the building and loan association was \$1,133.35, and rendered a judgment in her favor against the association for that sum. To reverse that judgment, appellant duly prosecutes this appeal.

Gordon Frierson, of Jonesboro, for appellant. Hawthorne & Hawthorne, of Jonesboro, for appellee.

WOOD, J. (after stating the facts as above).  
[1] Even if appellant had furnished the money with which the building and loan stock in controversy was purchased, under the evidence, he would not be entitled to claim the stock, for the proof shows that he had the stock transferred on the books of the company in the name of his wife. He positively asserts that this was done for his own benefit, while she as positively denies that it was so transferred. The presumption is, in the absence of evidence to the contrary, that any money that he furnished at the time of the purchase and transfer of the stock was intended by him as an advancement or gift to her. Very much the same contention as made by appellant here was made in the case of *Wood v. Wood*, 100 Ark. 372, 140 S. W. 275, where a husband purchased lands in part with his own funds and took the deeds in the name of his wife. In that case we said:

"As to the real estate in the name of the appellee, even if appellant purchased and paid for same in part with his own funds, since the deeds were taken in the name of his wife, and not in his own or their joint names, the presumption is that the money of his own thus used was intended by him as a gift to her. The law in such cases will not imply a promise or obligation on her part to refund the money or to divide the property purchased, or to hold the same in trust for him. His conduct will be referable to his duty and affection, rather than to a desire to cover up his property or to any intention on his part to have her hold as a trustee for him."

[2, 3] The presumption that, when a man purchases property, and takes the title in the name of his wife, he intends the same as a gift to her is not a conclusive presumption. It may be overcome by testimony of antecedent or contemporaneous declarations or circumstances, as was said in *Della v. Della*, 98 Ark. 540, 136 S. W. 927. But there is no testimony of any antecedent or contemporaneous declarations of the appellant here at the time the purchase of the stock was consummated in the name of his wife to show that his intention was any other than to make her a gift of the stock; nor were there any declarations contemporaneous or antecedent to the various deposits that appellant claims to have made in the name of his wife, but for his own benefit, tending to show that such deposits were not intended as gifts to her. There were positive conflicts in the evidence as to who owned the \$400 of the purchase money for the stock at the time the same was transferred on the books of the company in the name of appellee.

It could serve no useful purpose to discuss the evidence in detail. We are of the opinion that the appellee's testimony is more consistent and worthy of credit, when considered in connection with all the circumstances developed in proof, than that of the appellant. The facts set forth in the statement speak for themselves, and certainly it could not be said that the finding of the chancellor was clearly against the preponderance of the evidence.

Since the stock was transferred, and appears on the books of the company, in the name of appellee, the burden was upon appellant to show that the stock was not her property; hence, appellant must fail, even if it were correct to say that the testimony on the question of ownership was evenly balanced. But, as already stated, in our opinion the decided preponderance is in favor of the finding of the chancellor.

This is peculiarly a case where the finding of the chancellor should be treated as persuasive, and allowed to stand in the absence of proof clearly showing that his finding was erroneous. The judgment is therefore affirmed.

MISSOURI & N. A. R. CO. et al. v. JOHN-  
SON. (No. 25.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

1. APPEAL AND ERROR (§ 1003\*)—QUESTIONS  
OF FACT—WEIGHT OF EVIDENCE.

Where it was not physically impossible under the evidence that plaintiff was injured by catching his foot in an unblocked frog, as he claimed, a judgment for plaintiff will not be reversed, though it was highly improbable that the accident so occurred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

2. DEPOSITIONS (§ 105\*)—EXCEPTIONS — AP-  
PLICABILITY OF STATUTE.

Where depositions were taken in a cause in which a nonsuit was taken before the court convened, and the depositions were sought to be used in another action on the same cause of action, Kirby's Dig. § 3191, providing that no exception other than to the competency of witnesses, etc., shall be regarded, unless filed before the commencement of trial, can have no application.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 302-305; Dec. Dig. § 105.\*]

3. DEPOSITIONS (§ 77\*) — ADMISSIBILITY IN  
OTHER ACTION—EFFECT OF NONSUIT.

Depositions taken in a cause in which a nonsuit is taken before the court convenes are not admissible in another action between the same parties on the same cause of action, since, the nonsuit having been taken before exception could have been filed to the conceded omission of the notary to seal them, as required by Kirby's Dig. § 3186, the depositions were prima facie inadmissible, and hence never became depositions in the former case.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 197-199; Dec. Dig. § 77.\*]

4. DEPOSITIONS (§ 111\*) — OBJECTIONS —  
WAIVER.

A certificate of a notary to a deposition that by consent the signatures of the witnesses were expressly waived, and the testimony taken in shorthand and afterwards transcribed on the typewriter, and that all objections of any and all testimony were reserved for the trial, and all objections to the manner and form of taking were waived, does not cover the act of the notary in sending the deposition unsealed to the attorney, who sealed it and transmitted it to the clerk, contrary to Kirby's Dig. § 3186, requiring the notary to seal and transmit.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 329-338; Dec. Dig. § 111.\*]

5. EVIDENCE (§ 366\*) — PLEADING IN THE  
CAUSE—CONSENT TO WITHDRAWAL.

The introduction of an original complaint in another suit in evidence should not be permitted, without proof of permission to withdraw the complaint from the files of the other court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. § 366.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by J. H. Johnson against the Missouri & North Arkansas Railroad Company and others. From a judgment for plaintiff, defendant railroad company appeals. Reversed, and cause remanded for a new trial.

Appellee was employed by the appellant railroad company as a brakeman, and was injured while engaged in switching a freight

train at Baker, a station in Searcy county on appellant's road on the 22d of September, 1912, by stepping into an unblocked frog, as a result of which he says he was thrown under the train and run over by it and very severely injured. The great preponderance of the evidence appears to be that appellee was not injured in the manner testified by him, indeed, that he was not injured at the frog at all; and one of the grounds upon which we are asked to reverse this case is that the evidence shows it was physically impossible for appellee to have been hurt in the manner testified to by him. Appellee was corroborated in his version of the occurrence by the testimony of a woman named Charity Holbrook and a man named Roy Goodman. The evidence of these two witnesses was offered in the form of depositions, and the use of these depositions at the trial presents the second ground upon which we are asked to reverse the judgment in this case.

It appears that a suit was brought by appellee in the Van Buren circuit court, but before that court convened a nonsuit was taken, and another suit brought in the circuit court of Monroe county, where the judgment was rendered from which this appeal is prosecuted. These depositions were taken before a notary public upon notice given by appellee, and they were filed with the clerk of the Monroe circuit court on the 1st of December, immediately preceding the trial, which commenced on the 3d day of that month. The depositions were first offered as having been taken in the case at bar; but the court sustained appellant's objection to them when they were so offered, whereupon appellee announced that he would later offer them in evidence as depositions taken in another action between the same parties, where the same subject-matter was involved. To lay a foundation for their introduction, the following evidence was offered:

The attorneys for appellee testified that the pending suit was the same cause of action in which the nonsuit had been taken, and offered in evidence the original complaint which had been filed with the clerk of the Van Buren circuit court. One of the attorneys testified that he wrote counsel who had been associated with him in the first case to take a nonsuit and to send him the complaint in the first case, and that this had been done, and the original complaint, which was exhibited, bore the filing marks of the clerk of the Van Buren circuit court. Gardner Oliphant, the notary who took the depositions, testified that he took them in shorthand, and brought his notes to Little Rock, where he transcribed them, after which he took the depositions to the office of the attorneys for appellee and left them there, and that the attorneys forwarded the depositions to the clerk of the Van Buren circuit court. It was then shown by the attorney to whom the

depositions were delivered that he merely looked over the depositions to see in what shape they were, and that after looking them over, and without having made any change of any kind in them, he mailed them, in a sealed envelope, to the clerk of the Van Buren circuit court. Oilphant testified that no change had been made in the depositions since they left his possession. It was also testified by appellee and his attorneys that the cause of action sued upon was the same in both courts.

J. Merrick Moore and W. B. Smith, both of Little Rock, for appellant. Robertson & De Mers, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). [1] We will not reverse the judgment because of the insufficiency of the evidence; for, as we view this evidence, it is not physically impossible that appellee was injured as the result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner.

[2] Appellee's statement is corroborated by the witnesses whose depositions were taken, and the decision of this case turns upon the admissibility of those depositions. It is urged that appellant waived all right to object to these depositions because no exceptions were filed before the beginning of the trial. Section 3191 of Kirby's Digest provides that:

"No exception, other than to the competency of the witness, or to the relevancy or competency of the testimony, shall be regarded, unless filed and noted on the record before the commencement of the trial."

But we think that section has no application here, for the reason that these depositions were taken for use in a trial in the Van Buren circuit court, and no opportunity to file exceptions was ever afforded, as a nonsuit was taken before that court convened.

[3] Appellee says the depositions were admissible in evidence, because they were taken in another action between the same parties, where the same subject-matter was involved. But they never became depositions in that case, for before any exceptions could be filed to them the nonsuit was taken, after which there was no suit pending, and the depositions could not have been, and were never, offered in evidence in that case.

It is conceded that the statute was not complied with by the officer who took the depositions in their transmission to the clerk of the Van Buren circuit court. Section 3186 of Kirby's Digest provides that, when the depositions are completed, they shall be sealed up by the officer taking them, and directed to the clerk of the court in which the action is pending, with a note showing them to be depositions and the style of the case in which they were taken, and either delivered to the clerk or mailed to him by the officer taking them. The section contains certain exceptions which have no application here.

In the case of St. Louis, I. M. & S. R. Co.

v. Webster, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913B, 141, there is an extended discussion of the interpretation to be given our statute in regard to the manner of taking and transmitting depositions. In that case the statute had not been complied with in regard to signing the depositions, nor in their transmission. At the trial in the court below evidence was offered to the effect that there was an agreement between the attorneys at the taking of the depositions, in addition to the agreement recited in the stipulation which accompanied the depositions. This stipulation was to the effect that:

"All objections and exceptions to any part of direct or cross examination may be made and submitted to the court when the deposition is offered."

In the opinion it was said that this stipulation did not cover the question as to formalities in the taking or transmission of the deposition, and that no rule of evidence was violated in permitting proof of an oral agreement in regard to the taking and transmission of the deposition, because such an agreement did not vary, contradict, or enlarge the written agreement, which covered another subject. There was an extended discussion of the subject in a dissenting opinion in that case, but in both the majority and the dissenting opinions the provision of the statute in regard to the taking and transmission of depositions was treated as mandatory, unless waived, although it was not expressly held to be mandatory, and the point of difference between the judges was whether there was proper proof of a waiver. In the case at bar, there is no proof of any waiver except that recited in the notary's certificate, which does not relate to the transmission of the depositions. One purpose of the above section is to prevent any possibility of alteration, and where that section has not been complied with, or waived, the showing must be made that this purpose has not been defeated.

It is urged that this showing was made by appellee's attorneys and the officer who took the depositions, who testified that no change had been made. But, as has been said, these purported depositions were not properly transmitted; therefore they were *prima facie* inadmissible in evidence, and they never became depositions in fact, because, before any question could be raised, or any showing made, touching their verity, the nonsuit was taken, and the whole proceeding was at an end. The decision of those questions, which would have determined whether the purported depositions were in fact admissible in evidence, vested in the Van Buren circuit court, and that court was never afforded an opportunity to pass upon those questions.

[4] The certificate of the notary recites:

"That by consent of counsel on both sides the signatures of the witnesses were expressly waived, and their testimony was, by express agreement, taken by me in shorthand and afterwards transcribed on the typewriter; that all objections of any and all testimony were reserved to

be interposed at the trial of said cause, and all objections and exceptions as to the manner and form of taking were expressly waived."

We think the agreement recited in this certificate does not relate to the transmission of depositions, and would not constitute a waiver where the provisions of section 3186 of Kirby's Digest apply, and that a party to such an agreement will not be held to have assented that the depositions, when transcribed, be delivered to some attorney, instead of being transmitted to the clerk of the court in which they are to be used.

[5] We think it improper for the court to have permitted the introduction in evidence of the original complaint filed in the Van Buren circuit court, in the absence of some showing of permission to withdraw that pleading from the files of that court. A similar question was involved in the case of *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740, in which a judgment was reversed because the trial court permitted the introduction in evidence of the original of a written pleading filed in another court; and while we are not called upon to approve all that was there said, we think this a proper occasion to condemn the practice of withdrawing the pleadings of one court for use in another, particularly where no showing is made of authority therefor granted by the presiding judge.

For the error committed in the admission of the depositions, the judgment of the court below will be reversed, and the cause remanded for a new trial.

#### GIST et al. v. PETTUS et al. (No. 14.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

#### 1. WILLS (§ 614\*) — CONSTRUCTION — ESTATE BEQUEATHED.

Testator devised real estate to his son, to him and his heirs forever, and by a codicil declared that it was his intention that all the real estate so devised to his son should descend at his death to the heirs of his body, and, in case he died without issue, to the bodily heirs of testator's daughter. *Held*, that the will and codicil, construed together, vested in the son a life estate, with remainder to his heirs in fee, and, if this construction was improper and the two were construed as repugnant, the same effect would result, since the codicil would control, and such was the estate devised by it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

#### 2. WILLS (§ 607\*) — ESTATES CREATED — LIFE ESTATE — FEE TAIL.

Where testator devised land to his son, and at his death to the heirs of his body, such devise vested in the son a life estate under the statute abolishing fee tails; the fee passing at the son's death to his children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1368-1371; Dec. Dig. § 607.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by Irvin Pettus and others against

A. J. F. Gist and others. Judgment for plaintiffs, and defendants appeal. **Affirmed.**

These suits were instituted by the appellees against the appellants for the possession of certain lands. The suits were consolidated and tried together. The appellees set up in their complaints that they were the children and heirs at law of John W. Pettus, who died on the 8th of January, 1912; that they were the owners of the land by virtue of the will of W. W. Pettus, which, omitting clauses that are merely formal (and not necessary for the proper construction of the will), is as follows:

"Third. I give and bequeath and devise to my son John Wright Pettus to have and take at my death all that two hundred acres of land where I now reside including my present residence and mansion house, to have the same to him and his heirs forever, subject to the dower of my beloved wife, Sarah Pettus, also my son John Wright Pettus, shall have all my personal property and effects subject to the payment of my just debts and the dower of my said wife Sarah.

"Fourth. In case I shall die owning any other real estate than the lands given to my son John Wright Pettus as herein before set forth, the same shall be equally divided between my son John Wright Pettus and my daughter Mary Lovelace, and her heirs, and should I die seized of no other lands then in that event my former advancements to my said daughter Mary shall constitute all my estate which she or her heirs shall receive from my estate, the said lands herein last referred to if there should be any at my death, aside from the two hundred acres including the home and mansion house, shall be subject to the payment of my debts should there be an insufficiency of personal property for that purpose."

The will was executed on the 3d day of April, 1871. There was a codicil to the will, executed on the 24th of April, 1873, as follows:

"It is the intention that I do hereby devise and direct that all the real estate devised and given in the above and foregoing instrument to my son John W. Pettus shall descend at his death to the heirs of his body, and in case he die without issue to the bodily heirs of my said daughter Mary—and the property given to my daughter Mary in the above and foregoing instrument shall descend to the heirs of her body."

Appellants were the grantees of John W. Pettus and claimed to have a fee-simple title under him.

The court instructed the jury that under the will of W. W. Pettus the lands devised therein to John W. Pettus, on the death of the latter, passed to his children, the appellees herein. From a judgment in favor of appellees the appellants have duly prosecuted this appeal.

Pryor & Miles, of Ft. Smith, and Geo. S. Evans, of Greenwood, for appellants. Roberts & Kincannon, of Booneville, for appellees.

WOOD, J. (after stating the facts as above). [1] The appellants contend that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testator, W. W. Pettus, devised to his son, John W. Pettus, a fee-simple title to the lands in controversy under the third paragraph of the will, and that the codicil, in attempting to dispose of the lands devised in a manner inconsistent with the terms of the devise in the third paragraph, is repugnant to this devise and should be declared void. Appellants rely upon the case of *Bernstein v. Bramble*, 81 Ark. 485, 99 S. W. 683, 8 L. R. A. (N. S.) 1028, 11 Ann. Cas. 343, where Judge Battle, speaking for the court, quoted from *Underhill on the Law of Wills*, as follows:

"It is the rule that, where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, cut down, or diminished by any subsequent vague and general expressions. \* \* \* If it is clearly the intention of the testator that the devisee shall own the fee simple, his subsequent language, directing that what remains of the property at the death of that devisee shall devolve upon a particular person or class of persons, will not cut down the fee to a life estate. The fee, being vested by express and appropriate words, will not be diminished by subsequent words of vague and general character which are absolutely repugnant to the estate granted."

In *Booe v. Vinson*, 104 Ark. 445, 149 S. W. 524, we said:

"The purpose of construction of a will is to ascertain the intention of the testator from the language used as it appears from consideration of the entire instrument, and, when such intention is ascertained, it must prevail if not contrary to some rule of law; the court placing itself as near as may be in the position of the testator when making the will."

See, also, *Little v. McGuire*, 168 S. W. 1084.

Applying these well-established rules to the will under consideration, when the codicil and the third paragraph of the will, above quoted, are considered together, there is no doubt that it was the intention of the testator to devise to his son, John W. Pettus, only a life estate in the real estate in controversy, and to give to his heirs the remainder in fee simple; for the codicil expresses this intention of the testator in language too plain

to be misunderstood. The testator, by codicil, expressly declares what his intention was by the devise contained in his will. He construes the clauses of his will as if apprehensive that they might not be clearly understood, and expresses in unequivocal and unambiguous terms that at the death of his son, John W. Pettus, it was his intention that "all the real estate devised and given shall descend to the heirs of his body."

When the will is thus construed there is no necessary repugnancy between the codicil and the third paragraph. The third paragraph, with this interpretation of it by the testator himself, means no more than that the lands were devised to John W. Pettus and the heirs of his body forever. But if we are mistaken in this, and the third paragraph of the will should be construed to devise the fee simple title to John W. Pettus, then this paragraph would be manifestly inconsistent with and repugnant to the codicil, and in that case the language of the codicil would control.

In *Little v. McGuire*, supra, we held that, where the provisions of a will are in conflict, the last provision is controlling. See, also, *Cox v. Britt*, 22 Ark. 567; *McKenzie v. Roleason*, 28 Ark. 102; 40 Cyc. 1180.

[2] The effect of the devise, considering the entire will, under our statute abolishing fee tails, is to convey to John W. Pettus a life estate only, which, at his death, passed in fee simple to his children, the appellees herein. *Kirby's Digest*, § 735; *Horsley v. Hilburn*, 44 Ark. 458; *Myar v. Snow*, 49 Ark. 125, 4 S. W. 381; *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. 490; *Wilmans v. Robinson*, 67 Ark. 517, 55 S. W. 950; *Black v. Webb*, 72 Ark. 336, 80 S. W. 367.

It follows that the court did not err in its construction of the will and in its instruction declaring that construction to the jury as the law for their guidance.

The judgment is therefore correct, and it is affirmed.

**PENROSE et al. v. BAKER. (No. 12.)**

(Supreme Court of Arkansas. Nov. 30, 1914.)

**1. PARENT AND CHILD (§ 5\*)—EARNINGS OF CHILD—EVIDENCE.**

In a suit by an adult daughter to recover from her father the amount of her earnings, which she had deposited in a bank in the name of her father, evidence held to sustain a finding that the amount was deposited in pursuance of a family partnership agreement, which she thought existed, but which the father denied, so that the father was liable to the daughter for the amount deposited.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70-73, 75, 76; Dec. Dig. § 5.\*]

**2. CONTRACTS (§ 28\*)—EVIDENCE—DECLARATIONS.**

Declarations by the members of a family that the property of the family was accumulated by them and held in common, share and share alike, did not tend to prove a written contract claimed by plaintiff, by the terms of which the father and sons each were to receive 2 parts and the mother and daughters  $1\frac{1}{2}$  parts of the property.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785 $\frac{1}{2}$ , 1820, 1821; Dec. Dig. § 28.\*]

Appeal from Woodruff Chancery Court; Edward D. Robertson, Chancellor.

Suit by Anna E. Baker against William Penrose and others. Judgment for plaintiff for part of the relief asked, and defendants appeal, while plaintiff files a cross-appeal. Affirmed upon both appeals.

Appellee sued appellants in the Woodruff chancery court for a certain portion of real estate held by Wm. Penrose, her father, which she alleged was held in trust for herself and other members of the Penrose family. She alleged that the real estate sued for was accumulated by the Penrose family under a partnership, in which it was agreed that all of the members of the family should be equal partners and work to accumulate a common fund, which was to be placed in the hands of Wm. Penrose, the father, as trustee for his wife and children; that working under this agreement the family accumulated property worth the sum of \$50,000; that this was a verbal agreement, which afterwards, in the year 1907, was changed, and a new contract entered into, which was reduced to writing and signed by Wm. Penrose; that under the latter contract the father and boys should have shares equal to 2 parts and the wife and daughters should have shares equal to  $1\frac{1}{2}$  parts; that in the event of the marriage of the daughter she should have the privilege of taking her part of the property, or let it remain and be divided at the time of the death of the father and mother, according to the terms of the agreement; that appellee married, and asked for her portion of the property, according to the agreement, which was refused. Appellee also alleged that she was elected assistant cashier of the Hunter State Bank at a salary of \$500 for the year 1908; that she did all or

most of the work pertaining to the bank, keeping the books and acting as cashier; that at the expiration of the year 1908, according to the terms of the agreement existing between the parties, the appellee (plaintiff) placed to the account of Wm. Penrose the entire amount of her salary, to wit, the sum of \$500; that for the year 1909, beginning January 1st, her salary in the bank was raised to \$60 per month, and she worked continuously in the bank as assistant cashier, but attending to all of the business of the bank, until October 25, 1909. She alleges that her wages from January 1, to October 25, 1909, amounted to \$590, making \$1,090 the total amount of her earnings for the two years she worked for the bank prior to her marriage; that this sum went into the general fund held by Wm. Penrose under the partnership agreement. Appellee, among other things, prayed for three twenty-fifths of the property, and that Wm. Penrose and H. C. Penrose, who held the same, be declared trustees for all the parties to the cause, and that she be given judgment for \$1,090 in money, or for the value of her services, which she alleged were worth \$5,340 from the time she became of age until the date of her marriage. She asked that a master be appointed to divide the real property held in the name of Wm. Penrose. The appellants answered, denying the allegations of the complaint.

The testimony was taken by depositions, and the chancellor found, in part, as follows:

"That there was no agreement of partnership, or agreement upon the part of Wm. Penrose to hold the property accumulated by the plaintiff and the defendants for the joint benefit of said parties, but further finds that the defendant Wm. Penrose is indebted to the plaintiff in the sum of \$500 for services rendered at the Hunter State Bank for the year 1908, with interest thereon from January 1, 1909, amounting to \$143.76; and is further indebted to the plaintiff in the sum of \$586 for services rendered to the Hunter State Bank for the year 1909, with interest thereon from the 23d day of October, 1909, making a total of \$1,370.40"

—for which judgment was entered in favor of the appellee against Wm. Penrose, and from that judgment this appeal was duly prosecuted by Wm. Penrose. The appellee prayed and was granted a cross-appeal. Other facts will be stated in the opinion.

Roy D. Campbell, of Cotton Plant, for appellants. S. H. Mann, of Forrest City, and C. F. Greenlee, of Brinkley, for appellee.

WOOD, J. (after stating the facts as above). [1] I. The question on the appeal is whether or not the court erred in finding that Wm. Penrose was indebted to the appellee, Anna E. Baker, in the sum of \$1,370.40, and in rendering judgment in her favor for that sum. The testimony shows that when the Hunter State Bank wound up its business and surrendered its charter Wm. Penrose "took over its assets and assumed

its liabilities." Appellee testified that she commenced work in the Hunter State Bank in January, 1908, and worked continuously until October 23, 1909. The salary for the year 1908 was \$500. She placed this to the account of Wm. Penrose. She was elected assistant cashier of the bank by the board of directors for both the years 1908 and 1909. For the year 1909 she was to receive a salary of \$60 per month. She ceased working in the bank as assistant cashier October 23, 1909. Appellee was married October 25, 1909, and she applied to her father for her part of the estate, which she conceived to be due her under the alleged family partnership agreement, which her father refused to recognize, and therefore refused her request. She then wrote to the Hunter State Bank February 16, 1910, demanding pay for her services at \$60 per month from January 1 to October 23, 1909, in the sum of \$590. The bank answered her letter as follows:

"The cashier's salary for the year 1909 was credited to Wm. Penrose, being treated the same as for the year of 1908. You are familiar with the manner in which this was treated, as the entry was made in your own handwriting. [Signed] Hunter State Bank, per B. S. Carleton, Vice President."

Appellee then wrote to her father, advising him that her demand upon the bank for her salary for the year 1909 had been ignored, and that unless she heard from him within a week she would proceed to collect what was due her in a legal way.

Witness Carleton testified that he was vice president of the Hunter State Bank; that appellee was elected as its assistant cashier; that she was to receive as salary for her work during the year 1908 the sum of \$500. This money was credited to the account of Wm. Penrose. For the year 1909 appellee's salary was raised from \$500 a year to \$60 per month. The raise in her salary was made by the board of directors of the bank. The salary due her for the year 1909 was also credited to Wm. Penrose. When the Hunter State Bank received a letter from appellee, demanding the salary which she had earned for the year 1909, the letter was referred to witness to answer, which he did, writing the letter above mentioned. On cross-examination, he stated that he could not find any record of appellee's election to the position of assistant cashier upon the records of the bank.

H. O. Penrose testified that some of the records of the bank were never made up. He and Wm. Penrose both testified that appellee worked in the bank a little over a year and a half, doing most of the clerical work. The uncontroverted testimony shows that her name appeared on the stationery of the bank as assistant cashier, and that during the year 1908 and the year 1909, until she ceased working for the bank, she did the clerical work as assistant cashier in the bank, doing the work in the bank of cashier. True, Wm. Penrose and H. O. Penrose both

testified that there was never any arrangement made to pay the appellee a salary as assistant cashier, and H. O. Penrose testified that she was never elected assistant cashier. But the testimony on behalf of the appellee was amply sufficient to warrant the finding of the court that appellee was employed by the Hunter State Bank as assistant cashier at a salary of \$500 for the year 1908, and at a salary of \$60 per month for the year 1909; that she rendered the services to the bank under such contract until the 23d day of October, 1909, making the total amount due her at the time of the rendition of the judgment, with interest, \$1,370.40.

In view of the above testimony, no presumption can be indulged that appellee performed the duties of assistant cashier for the Hunter State Bank from a sense of filial obligation to her father, William Penrose, for a clear preponderance of the evidence shows that she was employed by the bank as assistant cashier at a stipulated salary. While she credited this salary to the account of her father, her testimony tends to prove that she did this because she believed that a family partnership arrangement existed, whereby she was to contribute to and to share in this partnership. But Wm. Penrose denied that any such partnership existed and repudiated any agreement of that kind. He received the salary due her from the bank. It was one of the debts of the bank which he assumed. It is clear that appellee did not intend that her services should be gratuitous to the bank, nor that her salary should be a gift to her father. The finding of the court to this effect was certainly not against the clear preponderance of the evidence. True, appellee testified that from the year 1890 until the year 1908 she was not working for wages, and that her services were reasonably worth \$250 per year above expenses. It is obvious that this testimony had reference to the value that appellee placed upon her services rendered under what she conceived to be a partnership agreement. It had no reference whatever to the value of her services rendered as assistant cashier of the bank during the years 1908 and 1909.

The judgment of the chancery court in favor of the appellee as against the appellant is correct.

[2] II. The appellee, in her complaint, set up that there was first a verbal agreement, which was afterwards changed to a written contract, by which Wm. Penrose agreed to take all the members of his family into partnership with him; that under this contract the father and boys should each have a share equal to 2 parts of the common accumulations of the family and the wife and daughters should each have a share equal to  $1\frac{1}{2}$  parts; that this contract was signed by her father. The appellee testified substantially in support of the allegations of her complaint. The appellants denied that any such

contract was entered into, and each of them testified that no such contract was executed.

The court found that there was no agreement of partnership, or agreement upon the part of Wm. Penrose to hold the property accumulated by the plaintiff and the defendants for the joint benefit of said parties. The testimony upon this branch of the case was voluminous, but, when narrowed to the competent evidence, the finding of the chancellor is sustained by a clear preponderance, and it could serve no useful purpose to set out and discuss the facts in detail. The written agreement of partnership, on which the appellee relies, she has failed to prove. The testimony of witnesses as to declarations of the appellants on various occasions to the effect that the property in the Penrose family was accumulated by them and held in common, each to share and share alike, did not tend to prove the written contract of partnership as set up by the appellee in her complaint. The finding of the chancellor on this branch of the case was also correct.

Finding no reversible error, the decree is in all things affirmed.

**KANSAS CITY SOUTHERN RY. CO. v.  
WILSON et al. (No. 230.)**

(Supreme Court of Arkansas. Nov. 9, 1914.)

**1. RAILROADS (§ 453\*)—BURNING OFF RIGHT OF WAY—LIABILITY.**

A railroad company may burn off its right of way, and its liability for property burned outside of the right of way depends on whether the loss resulted from the company's act, and from the negligence of the company or its servants in burning off its right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.\*]

**2. RAILROADS (§ 453\*)—BURNING OFF RIGHT OF WAY—NEGLIGENCE.**

What constitutes negligence, sufficient to render a railroad company liable for destruction by fire which spreads from its right of way, depends upon the circumstances as they existed at the time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.\*]

**3. RAILROADS (§ 482\*)—BURNING OFF RIGHT OF WAY—EVIDENCE.**

Evidence in an action for damages from fire spreading from a right of way held sufficient to justify an inference by the jury that the sectionmen burning grass on the day previous to the day on which the property was destroyed were employed by defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.\*]

**4. RAILROADS (§ 482\*)—BURNING OFF RIGHT OF WAY—EVIDENCE.**

Evidence in an action for damages from fire spreading from a right of way held sufficient to justify the inference that the section crew engaged in burning off the right of way the day before the property was destroyed were

burning off the right of way on the day of the fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.\*]

**5. RAILROADS (§ 457\*)—BURNING OFF RIGHT OF WAY—DUTY OF FOREMAN.**

It is the duty of the foreman of a crew burning off a right of way to prevent the fire from escaping from the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1661; Dec. Dig. § 457.\*]

**6. RAILROADS (§ 482\*)—BURNING OFF RIGHT OF WAY—EVIDENCE.**

Evidence in an action for damages from fire spreading from a right of way held to justify an inference that the section foreman negligently left fire burning on the right of way, and that it escaped from the right of way and burned plaintiff's property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.\*]

**7. APPEAL AND ERROR (§ 1068\*)—DAMAGES.**

A judgment for plaintiff in an action for damages from fire spreading from a right of way should not be reversed for error in instructing as to the measure of damages, where the verdict is based on the undisputed evidence of plaintiff as to damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**8. DAMAGES (§ 39\*)—DAMAGES FROM FIRE—INSTRUCTION.**

In an action by an owner and his tenant for damages to a pasture from fire spreading from a right of way, an instruction that the jury might take into consideration the rental value of the pasture for the remainder of the season is not erroneous, where the lease had four years to run at the time of the fire.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 260-284; Dec. Dig. § 39.\*]

Appeal from Circuit Court, Little River County; Jeff. T. Cowling, Judge.

Action by H. B. Wilson and others against the Kansas City Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. B. Wilson instituted this action against the Kansas City Southern Railway Company to recover damages for the negligence of the defendant's servants in permitting fire to escape from its right of way, whereby his pasture was burned and destroyed. The plaintiff had leased the land on which the pasture was burned. Subsequently the owners of the land were also made parties to the action. The facts are as follows:

On the 21st day of October, 1911, H. B. Wilson leased a tract of land in Little River county, Ark., for a term of five years. In 1912 about 100 acres of it were inclosed as a pasture. In the pasture were red top, oats, peas, kaffir corn, and bermuda and other natural grasses. On Saturday evening, the 23d day of November, 1912, the pasture was burned over, and the grass and other products on it entirely destroyed. A little more than 1,000 fence posts and about a half mile of fence around the field were also destroyed

by the fire, and about a quarter of a mile of plank and board fence around his barn was also burned. A part of the fence destroyed by the fire was adjoining the right of way of the Kansas City Southern Railway Company. On Friday before the fire occurred the plaintiff saw H. Hicks, a section foreman, and some sectionmen, burning off the right of way adjoining the farm. It was their custom to burn off the right of way every fall.

Two of the tenants on the farm, as they went to the town on Saturday afternoon, saw the sectionmen burning off the grass on the right of way of the railway company. The fire had not then got off of the right of way. Later in the afternoon the fire escaped from the right of way and burned the fence and pasture of the plaintiff as above stated. Wilson testified that the rental value of the pasture was \$150, and that a reasonable value of the posts destroyed was 12 to 15 cents each; that it would cost about \$35 to replace the fence around the pasture, and about \$26 to replace the plank and board fence around the barn. Another witness testified that he had bought some posts from the plaintiff Wilson on the farm, that they were good post, oak posts, and were reasonably worth 15 cents each. Other facts will be referred to in the opinion. The jury returned a verdict in favor of the plaintiffs in the sum of \$160, and the defendant has appealed.

Read & McDonough, of Ft. Smith, for appellant. A. D. Dulaney, of Ashdown, and Steel, Lake & Head, of Texarkana, for appellees.

HART, J. (after stating the facts as above). [1, 2] It is contended by counsel for the defendant that there is not sufficient evidence to support the verdict. The testimony on the part of the plaintiff shows that some sectionmen were engaged in burning off the right of way of the railroad on the Friday before the fire occurred. This the railroad company was legally entitled to do. The liability of the defendant to the plaintiff for the destruction by fire of its pasture and fence depends, first, upon the proof whether it resulted from its act; and, second, whether the fire resulted from the negligence of the defendant or its servants in burning off its right of way. What would constitute such negligence or want of care and prudence as would render the railroad company liable for the destruction by fire from its act in burning off its right of way depends upon the circumstances as they existed at the time. See *Bizzell v. Booker*, 16 Ark. 314.

[3] The testimony of the plaintiff, as extracted by the defendant, shows that a part of the fence which was burned was on the right of way of the Kansas City Southern Railway Company, and that some sectionmen were engaged in burning off the right of way on Friday before the fire occurred on Saturday afternoon. His testimony also shows

that it was a custom of the section foreman and his crew to burn off the right of way every fall. It is now contended by counsel for the railway company that the proof does not show that the sectionmen were employees of the defendant company, nor that they were engaged in burning off the right of way on the Saturday afternoon that the fire occurred. As we have already seen, the testimony shows that a part of the fence burned was next to the right of way of the defendant railway company, and the plaintiff knew the section foreman who was engaged in burning off the grass on Friday. From these facts the jury might have inferred that the section crew was in the employ of the defendant railway company.

[4] The evidence of two of the tenants shows that the section crew was also engaged in burning off the right of way on Saturday afternoon just before the fire occurred, and that when they saw them burning off the right of way the fire had not escaped from the right of way, and that there was no other fire burning in the neighborhood. From these facts the jury might have inferred that the same section crew was still engaged in burning off the right of way of the defendant company on Saturday.

[5, 6] It was the duty of the foreman to prevent the fire from escaping from the right of way of the railway company. There was no other fire in the neighborhood, and the jury might have inferred that the section foreman, after burning off the right of way, went off and negligently left fire burning there, that the wind, which was blowing at the time, fanned it into flame, and that the fire escaped from the right of way of the railway company, and burned the fence and pasture of plaintiffs.

[7] As to the measure of damages the court instructed the jury as follows:

"If you find for the plaintiffs, the measure of your damages for the posts that were stacked on the land would be the reasonable market value of the posts at the time, as shown by the evidence. The measure of damages for the destruction of the fence, if you believe that the fence was destroyed, would be the reasonable cost of replacing the fence as it was at that time. The measure of damages for the burning of the pasture grass, pea vines, or other stuff used for pasture, if any was burned, would be the reasonable rental or usable value of that pasture for the remainder of that season. If you find for the plaintiffs, then you will take these various elements and add them together, and 6 per cent. interest upon the amount you find from that date until the present time. If you find for the defendant, of course, your verdict would be: 'We, the jury, find for the defendant.'"

It is insisted by counsel for the defendant that the court erred in permitting the plaintiff Wilson to testify as to the reasonable expense of replacing the fences, and also in instructing the jury that a part of the measure of damages for the destruction of the fence would be the reasonable cost of replacing the fence as it was at that time.

Counsel for the defendant insists that the measure of damages where permanent improvements are destroyed is the difference in value between the farm without the improvements and the farm with the improvements, and we are of the opinion that counsel is correct in this. But it does not follow that the judgment should be reversed for that reason. The only issue of fact in the case was whether or not the defendant's servants were negligent in allowing fire to escape from its right of way to the premises of the plaintiffs and destroy their fences and pasture. The jury returned a verdict for the plaintiffs for \$160. The case was tried on the 7th day of June, 1914. The fire occurred on the 23d day of November, 1912. The plaintiff Wilson testified that the reasonable value of the pasture for the remainder of that season was \$150. Other evidence shows that the pasture contained peas, kaffir corn, and bermuda and other grasses. There is no attempt made to contradict the testimony of the plaintiff Wilson as to the reasonable value of the pasture for the remainder of the season, and we think his testimony in this respect might have been accepted by the jury as undisputed. The court told the jury that the plaintiff should be allowed 6 per cent. interest on the damage allowed from the time of the fire until the date of the trial. Six per cent. interest on \$150 for the period of time from the date of the fire until the date of the trial would amount to about \$10. Therefore it may be said that the undisputed evidence shows that the plaintiff was entitled to the amount of damages allowed him by the jury.

In addition to this, another witness testified that he purchased some fence posts, which were lying on the place, and that they were worth 15 cents each. The plaintiff testified that more than 1,000 fence posts were destroyed by the fire, and about a quarter of a mile of plank and board fence. The jury had a right to take into the jury box with them their common sense and experience in the everyday affairs of life, and when they took into consideration the reasonable value of the premises for the remainder of the season, and the fact that a half mile of fence around the pasture and a quarter of a mile of board and plank fence around the barn was destroyed by the fire, we think the undisputed evidence shows that the plaintiff was entitled to the amount of damages allowed him.

[8] It is also claimed by counsel for the defendant that the court erred in instructing the jury that they might take into consideration the rental value of the pasture for the remainder of the season. We do not think the court erred in this respect. In the first place, the owners of the land and the tenant, Wilson, were all joined as plaintiffs in the suit; and, in the second place, the

plaintiff Wilson had a five-year lease on the place, only one year of which had expired at the time the fire occurred. Therefore the court properly told the jury to take into consideration the reasonable value of the pasture for the remainder of the season.

We find no error in the record, and the judgment will be affirmed.

### SHALLER v. GARRETT et al.

(Supreme Court of Tennessee. Dec. 21, 1914.)

#### 1. CERTIORARI (§ 68\*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A concurrent finding of facts by the probate court and of the Court of Civil Appeals cannot be considered in the Supreme Court on certiorari to the Court of Civil Appeals.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 180-182; Dec. Dig. § 68.\*]

#### 2. CERTIORARI (§ 68\*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Where the probate court merely dismissed a petition to contest a will, but, before so doing, it must have found that an agreement between the parties was not procured by fraud, and was supported by a sufficient consideration, and the Court of Civil Appeals on appeal affirmed the decree and specifically found that the agreement was not procured by fraud and was supported by a sufficient consideration, there was a concurrent finding of facts which could not be considered by the Supreme Court on certiorari to the Court of Civil Appeals.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 180-182; Dec. Dig. § 68.\*]

#### 3. WILLS (§ 431\*)—PETITION FOR CONTEST—ESTOPPEL.

A defense, to a petition to contest a will, that a petitioner was estopped because of a prior judgment of the probate court dismissing a prior petition pursuant to an agreement between the petitioner and the defendants does not go to the merits of the issue of *devisavit vel non*, but raises an issue proper to be settled finally before the issue of *devisavit vel non* is tried.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 920-922; Dec. Dig. § 431.\*]

#### 4. JUDGMENT (§ 951\*)—CONCLUSIVENESS—EVIDENCE OUTSIDE THE RECORD.

The court, in ascertaining the extent and effect of an adjudication in a prior suit, is not confined to the record in the prior suit, but may hear evidence outside of the record to determine what, in fact, was adjudicated therein.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

*Certiorari to Court of Civil Appeals.*

Petition by Mary L. Shaller against F. Bruce Garrett and others, to contest the validity of a will. From a judgment of the Court of Civil Appeals, affirming a decree of the probate court dismissing the petition at the cost of the petitioner, the petitioner brings certiorari. Affirmed.

See, also, 127 Tenn. 665, 156 S. W. 1084.

Paul W. Evans, of Memphis, for Shaller. Bell, Terry & Bell, T. K. Riddick, J. H. Malone, and Caruthers Ewing, all of Memphis, for Garrett and others.

FAW, J. The controversy presented on this record originated in the probate court of Shelby county, and was carried by appeal from that court to the Court of Civil Appeals, and has been brought to this court by writ of certiorari to the Court of Civil Appeals.

A petition was filed in the probate court on December 3, 1912, by Mary L. Shaller, claiming to be one of the heirs at law and next of kin of Mrs. Caroline Cloth, deceased, and seeking to have an instrument bearing date of July 19, 1908, and which had been theretofore probated in common form in said court, as the last will and testament of Mrs. Caroline Cloth, deceased, certified to the circuit court of Shelby county, to the end that petitioner might contest its validity on an issue of *devisavit vel non*.

The petition charged that Mrs. Caroline Cloth never executed said instrument, and that it was a forgery and a fraud, and not the will of said Caroline Cloth, deceased.

Miles S. Buckingham, who was named as executor in said will, and who was also a legatee and devisee thereunder, and F. Bruce Garrett, named as a legatee and devisee under said will, were made defendants to said petition.

Defendants filed answers to the petition, and denied the right of petitioner to contest said will. They set up in their answers a written agreement, theretofore entered into and signed by the petitioner, by the terms of which it was agreed that said will "is the last and valid will and testament of the said Mrs. Caroline Cloth," and that petitioner would "hereafter stand by the agreement."

It was further averred in said answers that petitioner was also estopped to contest said will because of a judgment of the probate court of Shelby county dismissing a petition previously filed, seeking to contest said will, and which was dismissed pursuant to said agreement between petitioner and defendants and others, as heirs at law and next of kin of said Mrs. Caroline Cloth, deceased. The issues thus made up were tried on the pleadings and oral evidence before the judge of the probate court, and that court decreed that said petition be dismissed at the cost of petitioner, whereupon petitioner prayed, and was granted, an appeal to the Court of Civil Appeals.

The Court of Civil Appeals affirmed the decree of the probate court, and the cause has been brought to this court by a writ of certiorari to the Court of Civil Appeals, heretofore granted by this court upon the petition of Mary L. Shaller.

The disposition of the cause of Mrs. Mary Murrell et al. v. Mrs. H. Rich et al., by the opinion of this court this day handed down through Mr. Justice Buchanan, affirming the judgment of the circuit court of Shelby county, which declared a will known as the "missing page will" and of later date than

the will involved in the present cause to be the last will and testament of the said Mrs. Caroline Cloth, deceased, would seem to leave no real controversy between the parties to this cause upon the issues presented on this record, save the matter of costs, so that we shall undertake to state but little more than our conclusions herein.

The assignments of error are that the Court of Civil Appeals erred:

(1) In finding that the alleged agreement, upon which the estoppel against petitioner is claimed, was not obtained by fraud.

(2) In finding that said alleged agreement was supported by a sufficient consideration to make it binding on the petitioner and estop her to contest said alleged will.

(3) In holding that the defense of estoppel interposed by defendants raised a preliminary question to be determined finally before a trial of the issue of *devisavit vel non* could be had; and in not holding that, if a defense at all, it constituted a defense to the merits of the contest, and could be interposed only on the trial of the issue of *devisavit vel non*.

(4) In holding that the order of the probate court permitting the heirs at law to withdraw the petition to contest, of date August 13, 1912, rendered the question of petitioner's right to contest said alleged will res adjudicata, so that she is precluded from questioning the validity of said alleged will; and in not holding that such order of the probate court was nothing more than a withdrawal of a contemplated suit at its very inception, and hence constituted no bar to the right of any party then contesting to renew such suit on proper grounds.

(5) In not holding that said order of the probate court, permitting the withdrawal of said first petition, was procured by fraud, in that it was based upon, and merely in furtherance of and carrying out, the alleged agreement which had been procured by fraud, and that therefore said probate court order, permitting said withdrawal of said first petition to contest, did not constitute an adjudication against the right of any proper party to contest said alleged will of Mrs. Cloth.

[1] It will be observed that the first, second, and fifth assignments of error are leveled against findings of fact by the Court of Civil Appeals. We are precluded from a consideration of these assignments of error, because there is, in respect of the matters involved in these assignments, a concurrent finding of facts by the probate court and the Court of Civil Appeals.

It was held in the case of *State ex rel. v. Lee*, 124 Tenn. 385, 136 S. W. 997, and is the established rule of this court, that where there is a concurrent finding, upon an issue of fact, by the chancellor and the Court of Civil Appeals, this court will accept, and will not go behind, that finding, if there is any evidence to support it.

We think, notwithstanding the able argu-

ment of the learned counsel for petitioner to the contrary, that the proceedings and practice in the probate court of Shelby county are analogous to those in our chancery courts (*Miller v. Miller*, 5 Heisk. 723); and it has been held in the case now under consideration that an appeal lies from the probate court of Shelby county to the Court of Civil Appeals. *Shaller v. Garrett*, 127 Tenn. 665, 156 S. W. 1084.

We are unable to perceive any sound reason why the rule applicable to a concurrent finding of fact by the chancellor and the Court of Civil Appeals should not be applied to a concurrent finding of fact by the probate court and the Court of Civil Appeals.

[2] It is said, however, for petitioner, that there is no concurrent findings of fact in the present case because the decree of the probate court does not contain a statement of any facts found by that court, but merely decrees that the petition to contest the will in question be dismissed. It is true that the decree of the probate court does not contain in express terms a finding of fact, but the decree necessarily imports a finding of certain facts, because, under the issues made by the pleadings, the decree which was rendered could result only from a finding (1) that the agreement in question was not procured by fraud, and (2) that said agreement was supported by a sufficient consideration.

We must conclude, therefore, that the agreement which it is claimed estopped the petitioner to contest said will was not procured by fraud, and that said agreement was supported by a sufficient consideration to render it valid and binding upon petitioner.

Coming now to the third assignment of error:

[3] We are unable to agree to the conten-

tion of petitioner that the matter of estoppel, relied upon by the defendants, was a defense going to the merits of the issue of *devisavit vel non*. The defense interposed by the answers of defendants raised an issue which constituted "the corpus of a legal contestation, proper to be settled, finally, before the issue of *devisavit vel non* be tried." *Shaller v. Garrett*, 127 Tenn. 665, 156 S. W. 1084, and cases there cited.

[4] Under the fourth assignment of error, it is insisted that the Court of Civil Appeals erred in holding that the order of the probate court dismissing the petition filed by petitioner and others in August, 1912, and prior to the petition in the present case, seeking to contest said will, rendered the question of petitioner's right to contest said will res judicata.

In the ascertainment of the extent and effect of the adjudication in the first suit, the court below was not confined to the record in that case, but it was competent to hear and consider evidence dehors the record, in order to determine what, in fact, was adjudicated therein. *Harris v. Mason*, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. (N. S.) 1011.

As already held, said first petition was dismissed under a valid agreement between the parties to that cause, and we think that agreement could mean nothing more nor less than that the parties intended the judgment of dismissal to amount to a final adjustment of the merits of the controversy involved in that suit, and the judgment, therefore, constituted, in effect, a final adjudication that petitioner had no right to contest said will.

This disposes of all the assignments of error. It results that the judgment of the Court of Civil Appeals must be affirmed, at the cost of the petitioner.

**GRAYSON v. GRAND TEMPLE AND TABERNACLE IN STATE OF TEXAS OF KNIGHTS AND DAUGHTERS OF TABOR OF THE INTERNATIONAL ORDER OF TWELVE. (No. 5359.)**

(Court of Civil Appeals of Texas. San Antonio. Dec. 5, 1914.)

**1. INSURANCE (§ 750\*)—MUTUAL BENEFIT INSURANCE—STATUTES.**

Under Rev. St. 1911, art. 4834, providing that every certificate issued by a fraternal benefit association shall constitute the contract between the association and the member, no recovery of a death benefit can be had where the member was in default in payment of his endowment dues, and the benefit certificate recited that unless he was in good standing, and all payments and assessments had been made, the beneficiary should not be entitled to the benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1896, 1898, 1903; Dec. Dig. § 750.\*]

**2. INSURANCE (§ 697\*)—FRATERNAL BENEFIT INSURANCE—WAIVER OF PROVISIONS.**

Under Rev. St. 1911, art. 4847, declaring that a local branch of a fraternal association cannot waive any provisions of the laws and constitution of the association, the association cannot be estopped by the conduct of a local body.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1838; Dec. Dig. § 697.\*]

**3. BENEFICIAL ASSOCIATIONS (§ 18\*)—INSURANCE—BENEFITS.**

Where the member of a fraternal association had paid burial taxes, although he was in arrears to the local society for two months' dues, and also in arrears to the general society for endowment dues, his beneficiary is entitled to the funeral benefit; the member not having been notified of his lapse and being in good standing with the local lodge, regardless of his standing with the general society.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 41-50; Dec. Dig. § 18.\*]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by L. E. Grayson against the Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

T. H. Ridgeway, of San Antonio, for appellant. Carlos Bee and C. C. Todd, both of San Antonio, for appellee.

FLY, C. J. This suit was instituted by appellant for \$300, insurance on the life of her husband, William Grayson, deceased, and \$75, a funeral benefit. The cause was submitted to a jury on special issues, and upon their answers judgment was rendered for appellee.

[1] Appellee is a fraternal benefit society, and William Grayson was a member thereof when he was killed in the boiler explosion in the roundhouse of the Galveston, Harrisburg & San Antonio Railway Company at San Antonio on March 18, 1912. He had a life certificate in said society for \$300, but, by

reason of a failure to pay certain sums required by the constitution and by-laws, he was not in good standing or, as the members put the matter, he was "unfinancial," and his surviving wife was not entitled to receive the \$300 benefit. The endowment tax had not been paid by Grayson for January, February, and March, 1912. By the terms of the benefit certificate, the beneficiary was not entitled to the \$300 at his death, unless he was "in good standing in his \* \* \* temple, \* \* \* as provided for in the constitution, with the monthly dues and assessments paid in at the time of his \* \* \* death, as the record of the Grand Temple and Tabernacle will sustain the fact." William Grayson had not paid the monthly dues and assessments, but died leaving them unpaid, as found by the jury. Under the laws of the society, "when the endowment tax of a Sir Knight or Daughter of Tabor fails to reach the Secretary of the Endowment Board by the twentieth day in the first month in each quarter, said Knight or Daughter of Tabor stands unfinancial with the Endowment Board of Grand Curators until the same is paid and reaches the Endowment Secretary's office."

It did not require the report of the secretary of the local society as to the delinquency of Grayson, but the mere fact that the endowment tax did not reach the secretary of the endowment board was sufficient to put him on the delinquent list. His membership in the local society may not have been affected by his delinquency, but his interest in the endowment fund was affected. It is provided by law that every certificate issued by a fraternal benefit association "shall constitute the contract between the association and the member." Rev. Stats. art. 4834. That contract not only provided that Grayson must be in good standing, but the monthly dues and assessments must be paid in at the time of his death.

[2] There could be no waiver of any of the provisions of the laws and constitution of the association by the local body, because it is expressly provided in the statutes that no such waiver can be made. Rev. Stats. art. 4847. There could therefore be no question of estoppel, even if it had been alleged and proved, which it was not.

[3] The burial tax had been paid by William Grayson and, if he was in arrears for two months' dues, he had not received the 30 days' notice required. He was in good standing, as far as the local society was concerned, although behind on the endowment fund. The uncontroverted testimony showed that Grayson was not suspended or expelled, but was in good standing, so far as the local society was concerned. The jury had no testimony upon which to find that he was not in good standing, if such was their intention. The question embodied two matters, that of

good standing and that of payment of all dues and assessments, and the answer was in the negative without specifying the subject as to which the answer was given. He had failed to pay some dues and one endowment assessment, but had not been suspended, and consequently was in good standing in his local temple. His widow is entitled, under the laws of the society and the evidence, to the \$75 burial expenses.

The judgment will be reversed, and judgment here rendered that appellant recover of appellee the sum of \$75, less the dues to the local society for February and March, 1912, and all costs of this and the lower court.

**GRAND TEMPLE AND TABERNACLE IN THE STATE OF TEXAS OF THE KNIGHTS AND DAUGHTERS OF TABOR OF THE INTERNATIONAL ORDER OF TWELVE v. JOHNSON. (No. 5343.)†**

(Court of Civil Appeals of Texas. San Antonio. Nov. 18, 1914. Rehearing Denied Dec. 16, 1914.)

**BENEFICIAL ASSOCIATIONS (§ 14\*)—TORTS OF MEMBERS—LIABILITY.**

The officers of a local lodge of a fraternal beneficial insurance association are, when in the discharge of their duties in pursuance of the ritual, constitution, and by-laws of the order, agents of the order, and where, in discharging the duties in initiating a member into a local lodge, officers negligently injure the member while using an appliance required by the ritual, the order is liable.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 27-31; Dec. Dig. § 14.\*]

Appeal from District Court, Bexar County; Hon. R. B. Minor, Judge.

Action by Smith Johnson against the Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 131 S. W. 1195, 156 S. W. 532.

Carlos Bee and C. C. Todd, both of San Antonio, for appellant. T. H. Ridgeway and John Sehorn, both of San Antonio, for appellee.

CARL, J. Appellee originally sued the appellant, the Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor, and the International Order of Twelve Knights and Daughters of Tabor, with which the first named defendant was alleged to be affiliated. In the fourth amended original petition the International Order of Twelve, etc., was dismissed from the suit, and the cause proceeded to judgment against the Grand Temple in Texas, etc., in the sum of \$12,000 in favor of Johnson, the appellee. From that judgment this appeal is prosecuted.

This cause has been before this court twice before, and it will not be necessary here to do more than refer to Grand Temple, etc., v. Smith Johnson, 135 S. W. 173, for a full and complete statement of the case. Anything which may not be covered by that statement will appear in the course of this opinion. The various assignments of error briefed by appellant may be summarized as raising three propositions, viz.: (a) Was the guide or guard who negligently permitted his sword to get between the legs of appellee and trip him the agent of appellant? And (b) was the guide or guard acting within the scope of his authority and in the furtherance of appellant's business at the time appellee was injured? (c) Lastly, is the judgment excessive?

This order is a branch of the "International Order of Twelve Knights and Daughters of Tabor," which parent order is chartered under the laws of Missouri. It was shown in evidence that this parent order issues and promulgates what is known as "general laws" and the ritual. The ritualistic work is uniform in all branches of the parent order, and it prescribes the regalia and uniforms. This parent order requires the Grand Temples of the various states to incorporate under the laws of the state where located, as appellant did in this case, and also issues the quarterly pass. Under the head of "Powers and Authority," article II, sections 1, 2, 3, and 5, page 91, of the General Laws of the parent order, which controls appellant, the Grand Temples in the states are given full power and authority in the state of all temples, tabernacles, palatiums, and tents. The Grand Temple and Tabernacle in the state has authority to enact laws and rules (not in conflict with the parent order), and to grant charters to subordinate lodges, and suspend the same. Generally, the Grand Temple is supreme in the state, and all subordinate temples, such as the Lone Star Temple, No. 143, at San Antonio, where appellee was injured, derive their rights, powers, and privileges from the state Grand Temple. It grants the local charters, and its control and supervision are retained and jealously guarded in the laws. The head officer of the Grand Temple, Chief Grand Mentor (who happened to be C. E. W. Day in this case), has power to suspend a temple whenever he may think it necessary. He can suspend a Chief Mentor, such as Banks was, who was at the head of Lone Star Temple, No. 143; and the charter granted appellant by the state of Texas gives the Grand Temple authority to "organize and establish subordinate temples, etc., in the state of Texas." Its constitution provides that:

"The Grand Temple and Tabernacle of Texas shall have jurisdiction and control of the work and business in accordance with the Taborian laws of all temples of the Knights of Tabor \* \* \* within the boundaries of Texas, ex-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Writ of error pending in Supreme Court. Digitized by Google

clusively, subject only to the general laws of the Taborian order."

It is made the duty of the Chief Grand Mentor to build up the order, and for that purpose he may appoint any number of deputies. This Chief Mentor, such as Banks was, who was at the head of the San Antonio (or Lone Star) Temple, under section 7, page 52, of the constitution and laws, is made responsible to the Grand Temple and Tabernacle "for the manner in which he administers the laws of the temple. \* \* \* His decision shall be final, until reversed by the Chief Grand Mentor or the Grand Temple and Tabernacle." It is conclusively shown that Lone Star Temple, No. 143, was granted a charter by the Grand Temple and Tabernacle on August 10, 1908, and W. G. Banks was a duly appointed Deputy Grand Mentor of the order. Day appointed him. The names of the charter members were written on the charter when it was granted, and appellee was injured while being initiated, about October 13, 1908, after the local temple was organized in August.

It is the duty of the Chief Guards or Guides to assist the Chief Mentor in giving the degrees and in preserving order, etc., during business hours. As to whose duty it is to bring in candidates and escort them around, the Chief Mentor names whomsoever he chooses, and it thereupon becomes the duty of such favored member to perform that duty, the doing of which is regulated by the ritual. Banks, as Chief Mentor of Lone Star Temple, No. 143, appointed nine guides or guards to go out and bring in the candidates for initiation. The candidates were blindfolded, and were in that condition marched around the hall, to be halted on mysterious squares, called "333," "444," "777," etc. Johnson had made application for membership, his money paid, and he was accepted for membership. He was being initiated, when one of the guides, a part of whose regulation regalia was a sword, negligently permitted same to get between Johnson's legs. He was thereby tripped, and fell, causing his injuries.

The court submitted a full and fair charge to the jury, which is to be commended for its clearness, as well as fairness, and in that charge the jury was told that, if the act which caused the injury was not done while performing a duty of the lodge, but was done intentionally or wantonly, in mischief, for the purpose of having some fun, to find for the defendant.

The law of agency in this case is not different from agency in any other business or employment. And the proposition that, when the local lodge was organized, the parent order was no longer liable, because it had no voice in the selection of the officers or agents, is wholly untenable. The officers of a local lodge of a fraternal beneficiary insurance association, when in the discharge of their

duties, in pursuance of the rituals, constitution, and by-laws of the order, are just as much the agents of the parent organization as is a conductor of a railway train the agent of the corporation when he gives orders to start or stop the train on its journey. *Bankers' Union of the World v. Nabors*, 36 Tex. Civ. App. 38, 81 S. W. 91; *Knights of Pythias v. Bridges*, 15 Tex. Civ. App. 196, 89 S. W. 333; *Trotter v. Grand Lodge*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533, and notes; *Supreme Lodge v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; *Jones v. Supreme Lodge*, 236 Ill. 113, 86 N. E. 191, 127 Am. St. Rep. 277; *Mitchell v. Leech*, 69 S. O. 413, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811; *Thompson v. Supreme Tent*, 189 N. Y. 294, 82 N. E. 141, 13 L. R. A. (N. S.) 314, 121 Am. St. Rep. 874, 12 Ann. Cas. 552. Agency does not depend upon a name; it is measured by the relations of the parties and their relative duties one to the other. It is a matter of substance; not a form. Call it by whatever name you will, but if the facts show that the relation of master and servant exists, if the one commands and gives authority, and the other acts upon and obeys that authority, then the relation of principal and agent exists.

The Grand Temple and Tabernacle of the State of Texas could only carry out the purposes of its charter by the establishment of local lodges, wherein it is provided that certain officers should govern. The parent organization in the state is fed from these local branches, and it can only draw this support and assistance by means of its local agents. This matter has been so well settled that we deem a further discussion useless. This same principle of law was well stated by Justice Fly when this same case was before this court on another occasion, 135 S. W. 175. He says:

"The law of agency in this case is the same as the law of agency in other cases, which is that the principal is liable for the tortious acts of his agent, done in the prosecution or furtherance of the business of the principal. It will not admit of discussion that the principal is liable for all acts of the agent expressly authorized, or which are the result of acts which he has expressly authorized or directed, as well as for tortious acts knowingly ratified by the principal. Where a tort is committed by the agent in the course of his employment for the principal's benefit, he will be liable, although he has not authorized or ratified such act, or even though he had forbidden it. \* \* \* and the agent had disobeyed his orders or instructions."

It is only when the agent is doing some act not in the discharge of his duty that the principal is not liable. For instance, in *Railway Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, the agent, Nichols, was not performing a duty required of him when he turned the compressed air upon Currie and injured him in such a way that he died. He was intending to have some fun at Currie's expense, and that was no part of

his duty to the master. No matter how short a time he may so turn aside from his duties, that which he does while so turning aside from his duties is not an act for which the master is responsible.

But in this case there was no turning aside from the duty to be performed by the guides. In discharging those duties, while initiating Johnson, the negligent use of the sword, with which the rituals authorized the guide to be provided as a part of his regalia and equipment, caused the injury, and such act is attributable to the master. No insurance could have been obtained unless the candidate had been initiated, after the lodge had been organized as it was, and in performing the ceremony of initiation the officers of Lone Star Temple, No. 143, were acting in the furtherance and propagation of the Grand Temple and Tabernacle's insurance business in Texas.

This court is not willing to subscribe to the doctrine that a secret order may provide forms and ceremonies that are, or may by the manner of executing the same become, dangerous, and then escape liability when injury results from the negligence of its agents in carrying out those ceremonies. Neither do we concede that a candidate loses his right of action by reason of the fact that in his application and obligation he may agree to be bound by the constitution and laws of the order and to conform to the forms and ceremonies of initiation; for in the very nature of things he cannot know what those things are until they are made known to him during his initiation and afterwards. There was ample testimony in this case to warrant the jury in finding, as it did, that the sabers were a part of the initiation regalia of the lodge, and that the injuries of Johnson were caused, not by some one desiring to have fun and in a mischievous spirit, but by the negligent handling of the swords by the guides in the performance of a duty to the master.

The evidence of the injury is sufficient to sustain the amount of the verdict found by the jury, and, in the light of the testimony as to the condition appellee is now in, we do not feel like disturbing the judgment.

The assignments, without naming them seriatim, are overruled, and the judgment is in all things affirmed.

#### BARCUS v. O'BRIEN et al. (No. 711.)

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 14, 1914. Rehearing Denied  
Dec. 5, 1914.)

#### 1. GARNISHMENT (§ 133\*)—CLAIMS BY THIRD PERSONS—INTERPLEADER.

A garnishee, in order to protect himself from having to pay the debt twice, may interplead all claimants of the fund in his hands.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 262; Dec. Dig. § 133.\*]

#### 2. EXECUTION (§ 171\*)—EQUITABLE RELIEF—INJUNCTION — GARNISHMENT IN ANOTHER COURT.

Where a debtor against whom final judgment had been rendered in the district court was garnished in an action in the county court against his judgment creditor and filed his answer in the county court setting up the fact that another was claiming an interest in the district court judgment as assignee, he might have the collection of the judgment by the assignee enjoined by the district court until the right to the fund had been settled in the county court, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, authorizing injunctions in cases where the applicant shows himself entitled to such relief under the general principles of equity.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.\*]

#### 3. GARNISHMENT (§ 44\*)—PERSONS SUBJECT—JUDGMENT DEBTORS.

A defendant against whom a judgment which is final has been rendered is subject to garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 90; Dec. Dig. § 44.\*]

#### 4. JUDGMENT (§ 449\*)—EQUITABLE RELIEF—GARNISHMENT IN ANOTHER COURT—TENDER.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4647, providing that no injunction shall be granted to stay a judgment except so much thereof as the complainant shall show himself equitably entitled to be relieved against, a judgment debtor who had been garnished in an action against his creditor could not ask to have the enforcement of the judgment against him by an assignee restrained pending the outcome of the other action, unless he tendered into court the difference between the amount of the judgment and the amount of the claim in the garnishment proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 852, 853, 871; Dec. Dig. § 449.\*]

#### 5. GARNISHMENT (§ 44\*)—EQUITABLE RELIEF—FINAL JUDGMENT.

Where a judgment debtor gave notice of appeal, but did not file an appeal bond, and thereafter abandoned the appeal, and the creditor had secured the issuance of an execution thereon, the judgment was final so as to authorize garnishment against defendant therein.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 90; Dec. Dig. § 44.\*]

Appeal from District Court, Deaf Smith County; D. B. Hill, Judge.

Suit for injunction by W. O. O'Brien against G. W. Barcus and others. Judgment for plaintiff, and defendant Barcus appeals. Reversed and remanded.

G. W. Barcus, of Waco, and Knight & Slaton, of Hereford, for appellant. W. H. Russell, of Hereford, for appellee.

HALL, J. This is an injunction proceeding by appellee O'Brien against appellant, Henry Hicks, and the sheriff of Deaf Smith county, to restrain the collection of a judgment obtained by Hicks against O'Brien, in the sum of \$362.22, in the district court of Deaf Smith county, November 10, 1913. After answer filed by Barcus, alleging that he was the owner of the judgment, the injunction was granted. The application for in-

junction states, in substance, that the judgment had been transferred to appellant Barcus; that Barcus and Hicks had obtained an execution and were threatening to levy upon the property of O'Brien; that O'Brien had been garnished by the First National Bank of Hereford, said garnishment based upon a judgment obtained by said bank in the county court of Deaf Smith county against Henry Hicks; and that a balance remained unpaid thereon of \$129.90, with costs and interest. The prayer was for an injunction preventing the collection of said judgment until it could be ascertained in the county court of Deaf Smith county to whom said judgment belonged.

[1] The holding in *Dobbin v. Wybrants*, 3 Tex. 457, is to the effect that the plaintiffs in a garnishment proceeding, who had recovered a judgment against defendant, should have been made parties to the suit upon the note and the judgment in garnishment enjoined until it is ascertained to whom the debt is due. We find the same holding in *Iglehart v. Moore*, 21 Tex. 501, and *Iglehart v. Mills*, 21 Tex. 545. The doctrine is too well established in this state to require further citation of authorities that a garnishee, in order to protect himself from having to pay the debt twice, is entitled to interplead all claimants of the funds in his hands.

[2] The first proposition submitted by appellant is that the district court has no right or authority to enjoin the collection of a judgment in the district court pending a settlement of an entirely different suit in the county court, and we are cited to the case of *Foy v. East Dallas Bank et al.*, 28 S. W. 137, to sustain the proposition. In that case *Lightfoot*, Chief Justice, said:

"The sixth assignment complains that the court considered the proceedings in the case of *E. A. Allen & Bro.* against *M. A. and E. F. Archibald and J. E. Lett*, garnishee, pending in the county court, and suspended the judgment obtained by appellant until said cause was finally determined. It was shown that said *E. A. Allen & Bro.* had brought suit in the county court against the *Dallas Grocery Company* and had garnished the appellee bank, and that it had filed an answer in said cause. The bank could have interpleaded *E. A. Allen & Bro.* as it did the other litigants, and required them to come in and settle the question of their rights, but did not do so, and they are in no sense parties to this suit. The court erred in suspending the judgment obtained by appellant until the county court case could be disposed of, and in this respect the judgment below should be reformed. The remedy of the bank for its protection is clearly pointed out in the authorities cited under the first assignment above."

[3] The authorities cited under the first assignment and referred to by Judge *Lightfoot* hold that a stockholder may require claimants to the fund to interplead. As we construe it, the holding of Judge *Lightfoot* is that, if the bank had interpleaded *Allen & Bro.* in the county court suit, it would have been entitled to the relief asked. In the instant case *O'Brien* has answered in the gar-

nishment proceedings in the county court setting up the fact that appellant Barcus is claiming some sort of an interest in the judgment by reason of a transfer from Hicks and praying that Barcus be required to interplead. It is settled law in this state that a defendant in a judgment which is in every sense final is subject to garnishment. *Burke v. Hance*, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28; *Kreisle v. Campbell*, 89 Tex. 104, 33 S. W. 852; *Waples Platter Grocer Co. v. Railway Co.*, 95 Tex. 486, 68 S. W. 265, 59 L. R. A. 353.

We agree with appellant that the county court could not have enjoined the issuance and levy of the execution based upon the district court judgment; but we think the garnishee, in order to save himself from a double judgment, had the right to ask the district court to stay the collection of its judgment until the question of the right to the fund had been settled in the county court. *Henderson v. Garrett*, 35 Miss. 554; *Preston v. Harris*, 24 Miss. (2 Cush.) 247; *Morgan v. Peet*, 8 Mart. (N. S. La.) 396; *Weems v. Jennings*, 2 Brev. (S. C.) 92; *Paxson v. Sander-son*, 8 Leg. Int. (Pa.) 54; *Skipper v. Foster*, 29 Ala. 330, 65 Am. Dec. 405; *Montgomery Gaslight Co. v. Merrick & Sons*, 61 Ala. 537; *Rieden v. Kothman* (Civ. App.) 73 S. W. 425.

We think under the liberal provisions of article 4643, *Vernon's Sayles' Civil Statutes*, the case generally as presented is one entitling the applicant to equitable relief; but we agree with appellant that the application is in some respects deficient.

[4] Article 4647 provides that no injunction shall be granted to stay any judgment or proceedings at law except so much of the recovery or cause of action as the complainant shall in his petition show himself equitably entitled to be relieved against and so much as will cover the costs. We think this article applicable to this case. The application for injunction shows that the district court judgment sought to be enjoined is in the sum of \$362.22, and that the balance of the judgment in the county court against Hicks is only \$129.90, with 10 per cent. interest from June 12, 1912, and costs in the sum of \$27.40. There is no tender of the amount over and above the total sum due as principal, interest, and costs of the county court. This should be done. *Smith v. Smith*, 75 Tex. 410, 12 S. W. 678; *Twichell v. Askew*, 141 S. W. 1072; *Shannon v. Hay*, 153 S. W. 360.

[5] Appellant contends that, because 12 months has not expired since the date of the district court judgment against *O'Brien*, it is not such a final judgment as will permit a garnishment against the defendant therein. The application shows that, although notice of appeal was given, no appeal bond was ever filed, and it is alleged that the applicant, *O'Brien*, had no intention of prosecuting this appeal, but had abandoned it. Appellant has

himself furnished us the best evidence of its finality by the issuance of an execution thereon. The other propositions presented are overruled.

Because of the insufficiency of the petition, the judgment is reversed, and the cause remanded, with instructions to the judge of the district court of Deaf Smith county to dissolve the injunction and make such orders as the nature of the case and the rights of the parties demand.

Reversed and remanded.

**W. A. LEYHE PIANO CO. v. AMERICAN MULTIGRAPH SALES CO. (No. 7229.)**

(Court of Civil Appeals of Texas. Dallas. Dec. 5, 1914.)

**1. APPEAL AND ERROR (§ 770\*)—QUESTIONS PRESENTED—SUGGESTION OF DELAY.**

Even though the appellant files no brief, a suggestion by the appellee that the appeal was taken for delay only opens the entire record, and requires the court to reverse the judgment for any material error there may be therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3106, 3107; Dec. Dig. § 770.\*]

**2. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT.**

Where there was evidence to support the findings of the jury on the controlling issues in the case, the verdict cannot be disturbed, although the evidence was not conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**3. COSTS (§ 260\*)—FRIVOLOUS APPEAL—DAMAGES.**

Damages for the taking of an appeal for purposes of delay will not be awarded, unless it appears from the record that there was absolutely no just cause for the appeal, and that it was taken for delay only.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. § 260.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by the American Multigraph Sales Company against the W. A. Leyhe Piano Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas, Milam & Touchstone, of Dallas, for appellee.

**TALBOT, J.** This case has not been briefed by appellant, and was submitted on the brief of appellee, suggesting that the appeal was taken for delay and asking 10 per cent. damages. From appellee's brief we take the following statement of the nature and result of the suit:

"On April 10, 1913, the American Multigraph Sales Company, an Ohio corporation, with a lawful permit to do business in Texas, brought this suit in the county court of Dallas county at law against the W. A. Leyhe Piano Company, a Texas corporation, upon a signed order for various items, including one multigraph machine and attachments, in the aggregate sum of \$366; the same being signed 'Leyhe Piano Company, by Sidney F. M. Carrogher,' and approved by F. C. Hill, division sales manager

of the American Multigraph Sales Company. The defendant's first amended original answer was filed on February 4, 1914, claiming, among other things, that the multigraph machine and the attachments were not bought by the defendant, but were placed at its place of business on trial, and claiming, also, that Sidney F. M. Carrogher, the party who signed the Leyhe Piano Company's name to the order, was not authorized to do so. The case was tried in the county court at law, February 4, 1914, before the court and a jury, and verdict and judgment rendered in favor of the appellee for the sum of \$365, with interest thereon at the rate of 6 per cent. per annum from January 1, 1913, and foreclosure of mortgage lien."

[1] Notwithstanding appellant's failure to brief the case and assign error, the suggestion of delay by appellee opens up the entire record, and requires this court to reverse for material error, if such be found.

[2] An examination of the record discloses that there were in the court below, and are in this court, as contended by appellee, but two questions in the case. First, was there a purchase of the machine in question by the appellant from appellee? and, second, did the advertising manager of appellant have authority to purchase said machine from appellee for appellant? These were issues of fact for the determination of the jury. The evidence offered in support of them was not conclusive, but it is sufficient to support the findings of the jury, and they should not be disturbed. It certainly cannot be said as a matter of law, arising upon the evidence, that the controlling issues in the case, and to which we have referred, were not established. This being true, the verdict and judgment must be allowed to stand.

[3] The prayer for 10 per cent. damages, however, will be denied. We are not prepared to say, upon consideration of the entire record and the character of the evidence introduced to sustain appellee's case, that there was absolutely no just cause for this appeal, and that it was taken for delay only. The judgment of the court below will therefore be affirmed, without damages.

Affirmed.

**ZACHRY & GEARHART v. PETERSON & AVANT. (No. 5355.)**

(Court of Civil Appeals of Texas. San Antonio. Nov. 25, 1914.)

**1. PRINCIPAL AND SURETY (§ 200\*)—RIGHT OF ACTION BETWEEN SURETIES.**

One of two sureties for a debt, having a cause of action against the other only when he has been compelled to pay more than his share of it, and then only for contribution, cannot, when nothing has been done as to payment, maintain an action against the other to compel payment of his share to the principal debtor, for payment to the creditor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 641-650; Dec. Dig. § 200.\*]

**2. CORPORATIONS (§ 218\*) — STOCKHOLDERS' LIABILITY—RELATION OF SURETYSHIP.**

For improvement of the property of a corporation, though made by one under contract

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with one of the two stockholders, authorized to do so by the other, who had agreed to pay his part of the expenses, the corporation is primarily liable, and the two stockholders are sureties as to each other, as regards right of action by one against the other to compel payment of his share of the debt, though they be principals as to the holder of the debt.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 218.\*]

Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Action by Zachry & Gearhart against Peterson & Avant. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. D. Love, of Uvalde, for appellants. G. B. Fenley and I. H. Burney, both of Uvalde, for appellees.

CARL, J. Appellants, Zachry & Gearhart, a firm composed of J. H. Zachry and J. H. Gearhart, sued Peterson & Avant, appellees, another firm composed of Charles Peterson and A. M. Avant, and alleged, substantially: That about January 7, 1912, Peterson & Avant, being the owners of most of the capital stock of the Uvalde & Leona Valley Interurban Company, agreed with appellants that they should have 250 shares of the capital stock of said Interurban Company, and appellees were to have all of the remaining stock, except about 6 shares, that were held by outside parties. The capital stock was \$50,000, divided into 500 shares. Appellants agreed to assume one-half of a \$21,000 debt against the Interurban Company, held by one Joe C. Kerby, secured by mortgage on the property, and all parties were to sign new notes, with the Interurban Company as principal and the parties signing individually as sureties, and were to give a lien on the property to secure said new notes. (There are other features of this contract which it is not necessary here to state.) That appellants received their 250 shares of stock, and also assumed their one-half of the \$21,000 in debts, and joined appellees in executing new notes and security therefor, as provided in the contract, both appellants and appellees signing individually as sureties; but that by the terms of said contract appellants were only to assume one-half of the debt against the property, appellees having obligated themselves to pay the other one-half. That at the time of making said contract it was in contemplation of all the parties that certain improvements were to be made on the Interurban property, such as a freight track, down one street in Uvalde, etc., which would entail an outlay of something like \$10,000, which expense was to be borne equally by the parties. That, pursuant to said agreement, appellants made a contract for and did construct said improvements, and that the construction of the same, including depot, etc., cost \$20,122.41. That Kerby's debt was represented by 10 notes, each for \$2,100, payable

January 1, 1913, and each succeeding year thereafter, with 7 per cent. interest on the whole series, payable annually as it accrues; and that on January 1, 1913, the parties all paid their parts of the first note and the annual interest, and costs incurred in building said track, depot, etc., that accrued first, amounting to \$13,991.32, which amount included \$3,600 received as bonuses and \$2,391.32 earnings, which left the sum of \$4,000 paid on said cost of construction by the respective parties to this suit. That when the \$2,100 note held by Kerby matured January 1, 1914, and the interest on the whole series, appellees failed and refused to pay their one-half; but appellants procured and had ready their part of the note and interest, and requested the appellees to pay their share, which they refused to do. That by reason of appellees' failure to pay their part, said note and interest have matured, and by the terms of said notes all are subject to be matured, and suit is liable to be brought on the whole series. Appellants are anxious to meet and pay off their share. That of the cost of construction of the improvements there remains unpaid \$6,131.09, of which each side owes \$3,065.55, and appellants alleged they were ready to pay their part, but appellees would not do so, although liable therefor under the above-mentioned contract. That by reason of the fact that appellants own one-half of the capital stock of the Interurban Company, and are personally liable on the notes—

“and by reason of the fact that the properties and credits of the Uvalde & Leona Valley Interurban corporation are being impaired and damaged by reason of defendants' failure and refusal to comply with the terms and conditions of the contract herein described and copied, plaintiffs are personally and peculiarly interested in defendants paying their said obligations, and pray judgment against them that they be required to pay same according to the terms of said contract. Wherefore plaintiffs pray, as they have heretofore prayed, that on final hearing hereof that plaintiffs have judgment against said defendants, as a partnership and individually, jointly and severally, for the sum of \$1,617 to be paid into the treasury of the Uvalde & Leona Valley Interurban Company, and applied in payment of the above-described claim of Joe C. Kerby, and \$3,065.55 to be applied in payment of balance due on said construction work; also for damages, personally to these plaintiffs, in the sum of \$10,000, for costs expended in this behalf, for execution, and for such other and further relief as in law or in equity they may show themselves entitled to receive.”

The court sustained the general demurrer of appellees to the petition and the following special exceptions:

“(1) The defendants specially except to all that portion of plaintiffs' first amended original petition, wherein they seek to recover of defendants the sum of \$1,617, alleged in said petition to be one-half of one certain note in the principal sum of \$2,100, plus one-half the interest accrued upon the whole series of notes signed by them, and held by Joe C. Kerby, and say that the plaintiffs cannot recover of them for the said amount for the following reasons: (a) It is not shown that the plaintiffs have in

any way paid or satisfied the said indebtedness due the said Joe C. Kerby. (b) It is not shown by the said petition that the plaintiffs have any right or authority to sue for the said amount in behalf of, or for the benefit of, the said Joe C. Kerby, the alleged owner of the said notes.

"(3) The defendants except to all those allegations in plaintiffs' petition, wherein they seek to recover of defendants \$3,065.55, claimed as balance due on construction work and improvements made for the Uvalde & Leona Valley Interurban Railway Company, because: (a) It is not shown to whom said amount of indebtedness is due, or to whom it is to be paid. (b) It is not shown that plaintiffs have in any manner paid or satisfied said indebtedness, and that the same is now due them by the defendants. (c) It is not shown that the plaintiffs have any right or authority to sue for the benefit of the unknown creditor.

"(4) These defendants except to all that portion of the plaintiffs' prayer for relief wherein they pray for judgment against the defendants for the sum of \$1,617 to be paid into the treasury of the Uvalde & Leona Valley Interurban Company and applied in payment of the claim of Joe C. Kerby, and \$3,065.55 to be applied in payment of balance due on construction work alleged in said petition, because: (a) The said Uvalde & Leona Valley Interurban Company is not a party to this suit and could not be controlled in any manner by a judgment of this court. (b) It is nowhere shown that the said Uvalde & Leona Valley Interurban Company is solvent, or would be responsible for the said amounts, if the same should be collected from these defendants and turned over to them. (c) The said Joe C. Kerby and the creditors for the said \$3,065.55 are not parties to this suit, and it is not shown that the said Uvalde & Leona Valley Interurban Company is authorized in any manner to receive their moneys; therefore this court would have no jurisdiction or authority in law to adjudge that the said moneys should be turned over to the said Uvalde & Leona Valley Interurban Company for any purpose in this suit under the allegations in plaintiffs' petition. (d) It is not shown by the allegations in said petition that the said Uvalde & Leona Valley Interurban Company is in any way indebted to the said creditors for the sums of money prayed for in the plaintiffs' petition, or that it is liable for the payment thereof."

Appellants declined to amend, and the court thereupon dismissed their suit, and from that order this appeal is taken.

[1] It will be noted that appellants have not paid any part of appellees' debt; but, on the contrary, the petition shows that of the payments made, so far, appellees have paid their part. The debt for which recovery is sought is primarily the obligation of the Uvalde & Leona Valley Interurban Company, and the parties to this suit, plaintiffs and defendants, are sureties of and, individually and as firms, liable for that debt. The recovery is sought for a debt appellants have not themselves paid, and for which appellees could only become liable to them for contribution in case they should be compelled to pay more of said debt than appellees might pay. The Interurban Company might pay its obligation, and in that event neither set of sureties would have anything to pay, and, of course, there would be no cause for contribution. Stranger still, however, is the

contention and prayer that appellees be required to pay their share of the debts to the Uvalde & Leona Valley Interurban Company.

[2] For the improvements on the Interurban Company the corporation is primarily liable, and the parties to this suit are co-obligors or sureties as to each other, while principals as to the holders of the debts. It is not alleged that plaintiffs have paid one dollar for which they are entitled to contribution from defendants below. The first assignment is overruled. *Twichell v. Askew*, 141 S. W. 1072; *Wilks et al. v. Vaughan et al.*, 73 Ark. 174, 83 S. W. 913; *Yore et al. v. Yore*, 240 Mo. 451, 144 S. W. 847; *Hall v. Hall*, 34 Ind. 314, 43 L. R. A. 162 (see note on this page); 9 Cyc. 798.

The petition presents the strange anomaly of asking that appellees be required to pay over to the principal in the obligation their share, while plaintiffs below would be left to pay their pro rata at pleasure. It was certainly no more the duty of appellees to pay their part to the Interurban Company than it was the duty of appellants to do the same. And stranger still is the proposition of law that sureties can be required to pay their pro rata of an obligation to an insolvent principal, to apply to a debt for them on which they are not primarily liable as among themselves. We say insolvent principal, because, if not unable to pay its debts, there would be no occasion for the sureties to pay anything at all. But none of the parties have paid any part of the debt for improvements, nor of the remaining Kerby notes, for which contribution is here sought. As between sureties there is no doubt that one paying more of the obligation of the principal than his just proportion can have contribution from the other sureties. But that is not the case presented to us, because it is not contended that appellants have paid any more than have appellees. A citizen has the right to handle and dispose of his own funds, and, if he owes a debt, the law provides a remedy for requiring him to meet it. That remedy, however, does not deny him the right to pay his money to the one legally entitled to receive it, instead of the party whose default placed upon him the duty of paying the debt. The Interurban Company was not a party to the suit.

The trial court did not err in sustaining either the general demurrer or the special exceptions. *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751; *Twichell v. Askew*, 141 S. W. 1072; *Jackson v. Murray*, 77 Tex. 646, 14 S. W. 235; *Tarleton v. Orr*, 40 Tex. Civ. App. 410, 90 S. W. 534; *Glasscock v. Hamilton*, 62 Tex. 169; *Hamilton v. Glasscock et al.* (Sup.) 9 S. W. 207; *National Bank v. McAnulty*, 89 Tex. 124, 33 S. W. 963, 32 S. W. 376; *Yore et al. v. Yore*, 240 Mo. 451, 144 S. W. 847; 9 Cyc. 798, 801.

The judgment is in all things affirmed.

**WOOD v. TEXAS ICE & COLD STORAGE CO. (No. 7218.)**

(Court of Civil Appeals of Texas. Dallas.  
Nov. 28, 1914.)

**1. MONOPOLIES (§ 17\*)—"CONSPIRACY IN RESTRAINT OF TRADE"—SALE OF GOODS.**

A contract whereby a retail ice dealer agreed to purchase all of his ice from a certain manufacturer and wholesaler so long as the latter could supply his demands, and the wholesaler agreed to sell a certain quantity and as much more as possible to the retailer at a fixed price, unless the market price should go below that, when the market price should prevail, is contrary to Rev. St. 1911, art. 7798, subd. 1, which declares that it shall constitute a conspiracy in restraint of trade when any persons engaged in buying or selling any commodity agree to refuse to buy such commodity from, or sell it to, any other person; it not being necessary that the agreement be to refuse both to buy and sell.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Conspiracy*.]

**2. MONOPOLIES (§ 17\*)—CONTRACTS IN RESTRAINT OF TRADE—PURPOSE.**

The fact that the retailer was to receive the benefit of the market price, whatever it might be, does not render the contract lawful, since the intent of the parties and the actual effect of the contract cannot save it if it is illegal under the terms of the act.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.\*]

**3. MONOPOLIES (§ 17\*)—CONTRACTS IN RESTRAINT OF TRADE—SALE OF GOODS—PARTIES TO CONTRACT.**

The fact that one of the parties was a wholesaler and the other a retailer takes the contract out of the statute.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.\*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by H. C. Wood against the Texas Ice & Cold Storage Company. Judgment for defendant, and plaintiff appeals. Affirmed.

George Sergeant and Callaway & Mathis, all of Dallas, for appellant. Etheridge, McCormick & Bromberg, of Dallas, for appellee.

**RASBURY, J.** Counsel's statement of the nature and result of the suit contained in appellant's brief is not only clear and concise, but is accepted by counsel for appellee as correct, and we accordingly adopt same. It follows:

"Appellant, a retail dealer in ice in the city of Dallas, sued appellee, a manufacturer of and wholesale dealer in said commodity, on a \* \* \* contract entered into by the parties, whereby appellee agreed to sell appellant, at \$3 per ton, 'as much as six tons, or what his trade may demand, of ice per day,' and as much more as appellee might be able to supply without conflicting with other arrangements; and appellant agreed 'to make all his purchases from appellee' during the term of the contract, provided appellee should be able to furnish the quantity of ice needed. The contract also contains a provision that appellee shall meet the market price in case same should fall below \$3 per ton. The petition charges a breach of the contract

upon the part of appellee, in that it refused to sell appellant any more ice at the contract price, and that appellant was consequently compelled to go elsewhere in the market and purchase ice for his trade at an increased price. He prays damages in a sum equal to the difference between the contract price and the price actually paid by him for ice, laying the amount of damages at \$1,163.25. A copy of the contract sued on was attached to and made a part of the petition, which, omitting unimportant and formal portions, is as follows:

"Dallas, Texas, Oct. 30, 1912.

"This contract and agreement, this day entered into by D. M. Jones, acting for the Texas Ice & Cold Storage Co., hereinafter called first party, and H. C. Wood, hereinafter called second party, all of Dallas, Texas, witnesseth: That the first party agrees to sell the second party as much as six tons, or what his trade may demand, of ice per day, and as much more as the first party is able to supply, without conflicting with other arrangements, and the second party agrees to make all his purchases from the first party during the term of this contract, provided the first party is able to furnish same as above indicated. The price to be paid for all purchases during the term of this contract, which is one year beginning October 30, 1912, is three dollars (\$3.00) per ton on platform, located at 2225 Cedar Springs St., of first party, unless the general market price of ice in the city of Dallas goes below said price, then in that event, during such time, the first party agrees to meet such price so long as first party operates their plant. [Here follow numerous provisions relating to what shall be done in case of closing appellee's factory, the quality of ice to be furnished by appellee, and certain other mutual and reciprocal duties of both parties unnecessary to detail.] Witness our hands in duplicate.

"H. C. Woods,

"Texas Ice & Cold Storage Co."

[1] The only question involved in the appeal is whether the contract quoted constitutes a conspiracy in restraint of trade under subdivision 1 of article 7798, R. S. 1911. Stripped of verblage as applied to the instant case, said subdivision 1 of said article, in substance, declares that it shall constitute a conspiracy in restraint of trade when two persons (firms, corporations, or associations) engaged in buying or selling any commodity agree to refuse to buy such commodity from or sell it to any other person, firm, etc. Such being the literal language of the statute, the contract in question, in our opinion, comes precisely within the statutory definition of the acts denounced thereby, since the declared purpose of the contract is to prevent appellant from buying ice from any other person, firm, corporation, or association. By the statute it is unlawful for two persons to agree that one of them will buy from the other exclusively of a given commodity as it is in like manner unlawful for one of them to agree to sell exclusively to the other a given commodity. It is unlawful to do either or both, and it is not necessary to do both in order to constitute the offense, and the reason therefor is the statute itself. A recent case identical in principle and quite similar in fact is *Star Mill & Elevator Co. v. Ft. Worth Grain & Elevator Co.*, 146 S.

W. 604. There appellant undertook to supply appellee a stipulated number of bushels of grain on condition that appellee bought exclusively of "legitimate dealers," such as appellant, and not from farmers, brokers, or grain elevators. The difference in the facts of the two cases is that by the contract in the case cited the appellee could buy from dealers of like nature with appellant, but not from others, while by the contract in the instant case, appellant agreed to buy wholly from appellee.

[2] But it is argued by counsel in the instant case that the statute does not apply because such contract has no tendency to destroy competition between the parties. In short, that it permits appellant to buy ice at all times at the prevailing market price. Such might be literally true and yet the prevailing market price under such agreement, if general, might create, or tend to create, restrictions in trade or commerce, or destroy competition, which is the declared purpose of other portions of the act to prevent. Article 7796, R. S. 1911.

The letter of the act, as we have said, being so plain and the difficulty of determining just how such agreements may affect trade or commerce being so manifest, a fair rule of interpretation is that announced in *Star Mill & Elevator Co. v. Ft. Worth Grain & Elevator Co.*, supra, where it is said:

"The purpose, we think, as indicated by the scope of the statute and the language used was to denounce as illegal, without reference to the intent of the parties and without reference to its actual effect, every agreement or understanding between parties engaged in buying any commodity, whereby they, or either of them, was to refrain from buying such commodity from any one having same for sale."

[3] Counsel for appellant, however, further argues that subdivision 1, under which this proceeding was defended, is limited to those persons, firms, etc., who are engaged in the same character of business. In short, that before the statutory rule may be applied to the case at bar, it would have to be alleged and shown that appellant and appellee were both in the wholesale ice business, or the retail ice business. We believe the language of the subdivision is susceptible of no such narrow and restricted construction, and we have been unable to find any reported case that goes to that extent, though counsel for appellee cites *Nickels v. Prewitt Auto Co.*, 149 S. W. 1094, in support of the construction sought to be placed upon the statute. We conclude, however, there is nothing in the opinion to warrant that deduction. After reciting the fact that the case made out in the court below failed to show a monopoly, which was the defense urged, as defined by other provisions of the "anti-trust act," and after reciting that the pleadings and the evidence were insufficient to show a conspiracy in restraint of trade as defined by subdivision 1 under discussion, the opinion states that:

"If it had been alleged and proved that the Prewitt Auto Company and appellant Nickels were each and both engaged in the business of buying and selling automobiles, a different question would be presented, and we might hold that the contract was in violation of the first subdivision of article 7798; but no such allegation or proof was made."

The opinion, at another place, also holds that the pleading and proof were insufficient, "because it was not alleged or proved that both or either of the parties to the contract were engaged in buying or selling automobiles." The questions above, and relied upon by appellant, in our opinion sustain and support the conclusions reached by us in the instant case, and that they form no substantial basis for the claim that that court intended to hold that both Nickels and Prewitt Auto Company should be engaged exclusively in either the wholesale business or the retail automobile business, in order to come within the provision of said subdivision 1. According to such construction, wholesalers would be permitted at will to contract with retailers against the use of any commodity other than that of the particular wholesaler, and by which the very thing the act sought to prevent would be rendered judicially easy of accomplishment, notwithstanding the plain and unambiguous language of the act.

Much could be said concerning the reason for and the policy of the law, as disclosed by repeated and able constructions thereof, but to do so would be profitless, and for that reason we content ourselves with directing attention to *Mansur v. Price*, 22 Tex. Civ. App. 616, 55 S. W. 764, a case similar in many respects to the case at bar.

Finding no reversible error in the record, the judgment is affirmed.

BARTHOLOMEW et al. v. CULVER.

(No. 363.)

(Court of Civil Appeals of Texas. El Paso. Nov. 25, 1914.)

APPEAL AND ERROR (§ 773\*)—REVIEW—QUESTIONS PRESENTED—BRIEFS.

Where the judgment disposed of all the parties and was in conformity with the issues made by the pleadings, it will be affirmed, in the absence of briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action between Ed. Bartholomew and others and Claud Culver. From a judgment for the latter, the former appeal. Affirmed.

Sam, Bradley & Fogle, of Houston, for appellants. Barkley & Green, of Houston, for appellee.

WALTHALL, J. In this case no briefs for appellants or appellee have reached this court. The judgment rendered by the trial

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

court disposes of all the parties, and otherwise conforms to the issues made by the pleadings, and is affirmed.

Judgment affirmed.

### BISHOP v. JAPHET. (No. 346.)

(Court of Civil Appeals of Texas. El Paso.  
Oct. 15, 1914. On Rehearing,  
Dec. 17, 1914.)

#### 1. CONTRACTS (§ 139\*) — ILLEGALITY — ENFORCEMENT.

Plaintiff, desiring to eliminate H. from a retail liquor business they owned together, procured defendant to ostensibly purchase the entire business from H., defendant agreeing to hold the same in trust as plaintiff's agent, and employe, and to conduct the business for plaintiff's use and benefit. Plaintiff furnished the funds, agreeing to pay defendant a salary of \$150 a month as manager. Title was taken in defendant's name, and he was the ostensible owner of the business and the license, but, having repudiated the contract and claimed the business as his own, and that the advancement made to purchase the same was a loan, plaintiff sued to recover title, and sued out a writ of sequestration which was levied on the property, after which it was replevied by defendant, who filed a cross-action, claiming title. *Held*, that the contract alleged by plaintiff constituted an illegal attempt on his part to engage in the retail liquor business in the name of another, and since he could not recover without relying on the illegal transaction, the court properly refused to render judgment for him, but erred in failing to sustain defendant's title, which could be done without reference to the illegal contract, and also in failing to render judgment in defendant's favor against plaintiff and the sureties on the sequestration bond, since to deny such relief would permit plaintiff to use an extraordinary remedy to indirectly enforce his illegal contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 684-700; Dec. Dig. § 139.\*]

#### 2. CONTRACTS (§ 138\*)—ILLEGAL CONTRACT—ENFORCEMENT—PLEADING.

The court will not enforce an illegal contract where the illegality appears in the proof, though not pleaded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

#### 3. CONTRACTS (§ 138\*)—ILLEGAL CONTRACT—MALUM IN SE—MALUM PROHIBITUM.

The court will not enforce an illegal contract, whether the illegality is malum in se or merely malum prohibitum.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

On Rehearing.

#### 4. SEQUESTRATION (§ 20\*)—ACTION ON BOND—VERDICT—VALUE OF PROPERTY.

A verdict and judgment against persons who have replevied sequestered property must find the value of the several items of property replevied as of the date of the trial, since the obligors on the sequestration bond are authorized by Rev. St. 1911, art. 7107, to return the entire property, or any portion thereof, in satisfaction of the judgment in whole or in part.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. § 24; Dec. Dig. § 20.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Suit by Dan A. Japhet against Fred M.

Bishop. From a judgment dismissing both plaintiff's original suit and defendant's cross-action, plaintiff appeals. Affirmed in part and reversed in part.

J. V. Meek and Jas. Slyfield, both of Houston, for appellant. Baker, Botts, Parker & Garwood, of Houston, for appellee.

HIGGINS, J. Japhet filed suit against Bishop, alleging that on September 20, 1911, he purchased and became the owner of a retail liquor business in the city of Houston known as the Houston Liquor Company, and became the owner of a lease upon the building in which the business was located, and Bishop was to manage and control the business at a monthly salary of \$150; that on April 15, 1912, Bishop repudiated his contract of employment and appropriated to his own use and benefit the stock of goods and fixtures. Judgment was prayed for the title and possession of the property and premises. A writ of sequestration was issued at plaintiff's instance and levied upon the property in controversy, and the same was thereafter replevied by Japhet. By amended petition, upon which the cause was tried, it was alleged that on September 20, 1911, Japhet became the owner of a retail liquor business in city of Houston, known as the Houston Liquor Company, and employed Bishop to manage and control the same; that on April 1, 1912, Bishop unlawfully took possession thereof and converted the same to his own use and benefit; that same was of the value of \$5,921.78. Judgment was prayed for the title and possession to said property and for damages in the sum of \$5,000.

There is no substantial difference between the original and trial petition, except the latter omits the allegations with reference to the employment of Bishop by plaintiff to manage and control the business; the latter being in the ordinary form of an action to recover the title and possession of chattels wrongfully withheld from the rightful owner, and for damages. Bishop answered by general denial and cross-action, alleging that he was the owner of said business and stock of goods, having bought the same with funds loaned him for that purpose by Japhet; that the property had been seized under writ of sequestration, the issuance of which had been unlawfully and maliciously procured by Japhet, and he prayed judgment over against Japhet for his damages, actual and exemplary, occasioned thereby.

The testimony of Japhet discloses that on September 20, 1911, he and J. N. Hirsch owned a retail liquor business known as the Houston Liquor Company, title thereto being in the name of Hirsch, but Japhet owning a half interest therein. Hirsch was manager of the business, and Japhet was a

secret partner. Being desirous of eliminating Hirsch and acquiring his half interest, Japhet had Bishop to ostensibly purchase the entire business, Hirsch selling and conveying same to Bishop, who was to hold same in trust as agent and employé of Japhet and to conduct the business for his use and benefit. Japhet furnished the funds and was to pay Bishop a salary of \$150 per month as manager. Title to the business and the stock and fixtures was taken and stood in Bishop's name, and he was the ostensible owner of the business; the liquor dealer's license, bond, etc., all being in Bishop's name. Upon the whole, it is an admitted fact from Japhet's standpoint that the whole transaction was colorable, and designed to enable him to engage in the retail liquor business in the name of another, in violation of law.

The testimony of Bishop was to the effect that the funds furnished by Japhet were loaned him to enable him to buy the business, and that he was the bona fide owner of the business and stock of goods. The case was submitted to a jury upon special issues, the first being:

"Were the goods bought for the benefit of Japhet and were the same to be his property, or did he loan the money to Bishop with the understanding that the goods were to be the property of Bishop, and the business was to be owned by Bishop?"

—to which the jury answered:

"We, the jury, find the goods were bought with the understanding that they would be Japhet's property."

The jury further found that:

"When Japhet gave Bishop the money to buy the business and goods of the Houston Liquor Company, the agreement contract between Japhet and Bishop was that Bishop should take charge of the business and take out the license in his own name and run the business, and buy and sell liquors in his own name for the use and benefit of Dan A. Japhet."

The judgment of the trial court recites that the jury's findings establish an illegal contract and agreement between the parties, and that the court would grant no affirmative relief to either. It was therefore decreed that Japhet take nothing by his suit against Bishop, and that Bishop take nothing by his cross-action, and the sequestration bond be canceled and held for naught.

[1] The legal principles governing a proper disposition of this case are stated in *Beers v. Landman*, 88 Tex. 450, 31 S. W. 805. Landman gave Beers a promissory note in settlement of a balance due upon a gambling transaction arising out of speculation in cotton futures and as collateral security also indorsed and delivered certain negotiable notes. In a suit to enjoin Beers from collecting the principal or collateral notes and for decree canceling the principal note and ordering surrender of the collateral notes, it was said by Judge Denman:

"In order to properly understand the point to be determined, it will be well to state that

it does not involve the question as to whether, or under what circumstances, equity will lend its aid to cancel an executory contract founded upon an illegal consideration, as in case of the principal note above referred to; but it involves the sole question as to whether equity will interfere or lend its aid to cancel an executed contract, on the ground that the consideration thereof was illegal. For there can be no doubt that the indorsement and delivery of the negotiable notes to appellants, as security, vested in them the legal title thereto, and a qualified interest therein. Thus Landman, a party to the unlawful transaction, equally guilty with H. and B. Beers, having vested in the latter the legal title and qualified interest in said collateral notes, seeks to have the court of equity divest such title and interest out of the latter and reinvest him therewith, on the ground of the unlawfulness of the transaction. He does not seek the aid of a court of equity in making a defense to an executory contract, but seeks its aid in attempting to disturb property rights conferred by him upon his accomplice. Where two persons guilty of participation in an unlawful transaction are in pari delicto, as in this case, neither a court of law nor a court of equity will aid either to recover or reinvest himself with any title \* \* \* vested in the other, but will leave them in the same condition as to vested interests as they, by their own acts, have placed themselves.

"In *Frost v. Plumb* (1873) 40 Conn. 112 [16 Am. Rep. 18] discussing the principle under consideration, and following in the line of the English and Massachusetts cases above cited, the court say: 'We understand the rule to be this: The plaintiff cannot recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover.'

"If appellee were to sue in a court of law for the possession of the notes, and appellants were to answer that the legal title and special interest therein had been vested in them by the indorsement to secure an indebtedness, such answer would be a complete defense to appellee's suit, without setting up any facts implicating appellants in the unlawful transaction. Therefore, appellants' defense would not be based upon the illegality. In order to avoid such defense, appellee would be compelled to urge and rely upon his own participation in the unlawful transaction, thus bringing himself directly within the rule laid down in the case of *Taylor v. Chester*, and other authorities above cited, which prohibit his recovery."

The legal title to the property in controversy here was vested in Bishop. Japhet sued in a court of law for title thereto and possession. In order to avoid the consequences arising from Bishop's legal title, Japhet undertakes to show that he is the equitable owner thereof, and in order to do so, he is obliged to prove his participation in a transaction prohibited by the civil and penal laws of our state. Bishop can sustain his title without in any manner relying upon the illegal transaction, as he acquired same by virtue of the conveyance from Hirsch, but with Japhet it is quite different, and he can in no wise connect himself with the title

without disclosing and relying upon his own participation in the unlawful transaction. It being impossible for him to recover, except through the medium and by the aid of an illegal transaction to which he was himself a party, the maxim, "When both parties are equally in fault, the condition of the defendant and possessor is better," clearly applies, and is decisive of the case.

The court properly refused to enter judgment in Japhet's favor. *Beers v. Landman*, supra; *Eckles v. Nowlin*, 158 S. W. 794; *Read v. Smith*, 60 Tex. 379; *Crutchfield v. Rambo*, 38 Tex. Civ. App. 579, 86 S. W. 950; *Ry. Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837; *Fugua v. Pabst*, 90 Tex. 298, 38 S. W. 29, 35 L. R. A. 241; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593.

[2] The authorities cited by appellee are distinguishable. It is urged by appellee that it was necessary for Bishop to plead the illegality of the transaction. The unlawful nature of the transaction is the basis of the plaintiff's right, and goes to the foundation of the action. The function of the court is to enforce the law and not permit that which is forbidden; it will not disregard this rule, though not pleaded. *Ry. Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232, 54 S. W. 804; *Willis v. Weatherford*, 66 S. W. 473; *Simpkins on Contracts & Sales* (3d Ed.) 384, 385.

[3] And it is of no consequence whether the matter was *malum in se* or merely *malum prohibitionis*. *Labbe v. Corbett*, 69 Tex. 505, 6 S. W. 808.

The court erred in failing and refusing to enter judgment in Bishop's favor against Japhet and the sureties upon his bond for the value of the property sequestered and delivered to Japhet under a replevin bond. Article 7111, R. S. 1911. *Blum v. Gaines*, 57 Tex. 135; *Rea v. Schow*, 42 Tex. Civ. App. 600, 93 S. W. 706. A failure so to do permits Japhet to use an extraordinary remedy of the court to accomplish his purpose and thus indirectly do what the court will not directly do, i. e., restore to him the title and possession of the property. The original status quo of the parties to this unlawful transaction should not have been in any way disturbed by the court, and since it appears that its process has been wrongfully used for such purpose, the court, so far as it is possible to do, will restore the original status quo and leave the participants in this illegal transaction in the very position in which they voluntarily placed themselves and in which they were at the inception of the litigation. This does not constitute affirmative relief to the defendant, but simply enforces the policy of the courts to leave as it finds them participants in unlawful trans-

actions. To do otherwise would practically destroy the wholesome effect of this doctrine and open wide the door to an easy method of avoiding its consequences.

The cause is therefore reversed and remanded, and upon retrial, if the evidence be the same as here presented, the trial court is instructed to enter judgment refusing Japhet the relief for which he prays; that he be directed and ordered to restore to Bishop's possession the sequestered and replevined chattels, and that Bishop have judgment upon the replevin bond, in accordance with the provisions of articles 7107, 7108, 7109, 7111, Revised Statutes, for the value of such of the chattels as Japhet should fail or refuse to return; that all other relief be refused Bishop.

Reversed and remanded, with instructions.

#### On Rehearing.

In this cause, the motions for rehearing filed by appellant and appellee are both overruled.

[4] Appellant insists that there is no necessity to reverse and remand this cause, but that judgment should be here rendered in conformity with the views expressed in the original opinion. In reply to this suggestion, it is sufficient to say that a verdict and judgment against persons who have replevined sequestered property must find the value of the several items of property replevied, as the obligors have the right, under article 7107, R. S., to return the entire property or any portion thereof in satisfaction of the judgment in whole or in part, and the value of the several items of property must be found as of the date of the trial. The verdict in this case is defective in that respect. The cause was submitted upon special issues, and there is no finding by the trial court of the value of the various items of replevied property, as is authorized by article 1985, as to issues not submitted and not requested to be submitted, and the evidence in the record is not of that character as would authorize this court to undertake to find such valuation. It is therefore necessary that the cause be reversed and remanded, with instructions as contained in the original opinion filed herein.

The opinion upon rehearing heretofore filed on November 12, 1914, is ordered withdrawn, and this opinion is filed in lieu thereof.

FRANKLIN v. SMITH et al. (No. 6834.)

(Court of Civil Appeals of Texas. Galveston.  
Nov. 19, 1914. Rehearing Denied  
Dec. 17, 1914.)

HOMESTEAD (§ 57½\*)—USE OF PROPERTY—AGRICULTURE.

Plaintiff in 1876 purchased certain city lots in controversy, fenced and used them for garden purposes for several years, and 15 years prior

to the suit had built a house on the lots, which was occupied by his son, rent free. The lots were also used to grow plums and to graze plaintiff's animals when not at work, but the amount of produce obtained was not shown, and plaintiff himself, during that time, resided on other property. *Held* insufficient, as a matter of law, to sustain a claim that the property was homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 401; Dec. Dig. § 57½.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Special Judge.

Suit by Henry Franklin against W. E. Smith and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Stevens & Stevens, of Liberty, for appellant. E. T. Chew, of Houston, for appellees.

**PLEASANTS, C. J.** This is a suit for injunction, brought by appellant against the appellees, to restrain the sale, under a deed of trust executed by appellant, of four lots in the city of Houston, owned by appellant. The two grounds upon which the injunction was sought were that the property was at the time the deed of trust was executed, and is now, a part of appellant's homestead, and that plaintiff has paid a portion of the indebtedness to secure which the deed of trust was executed, but that defendants have not credited plaintiff with the payments made by him and are attempting to sell said property for the whole of said indebtedness.

On July 6, 1914, Hon. Norman G. Kittrell, special judge for the Sixty-First judicial district, upon presentation of the petition to him, indorsed thereon the following order:

"The injunction prayed for will issue on plaintiff giving bond in the sum of \$100, conditioned as required by law; the injunction to be treated as a temporary stay application for injunction, with leave to defendants to move at any time to modify or dissolve."

On July 8, 1914, the defendants filed the following answer and motion:

"Now come the defendants W. E. Smith and A. W. H. Lee, in the above numbered and entitled cause, and move the court to set aside its order heretofore made in this cause enjoining the defendant A. W. H. Lee from making sale under the deed of trust described in plaintiff's petition, and that said defendant be permitted to make said sale, because:

"(1) Defendant W. E. Smith has and will allow plaintiff all the credits on said notes to which he is entitled and, under the terms of said deed of trust, any excess over and above what is due the defendant W. E. Smith, and the expenses of said sale are to be returned to plaintiff, for all of which plaintiff has a remedy, and therefore said ground set out in plaintiff's petition does not support the injunction herein issued.

"(2) Defendants further alleged that the allegations in plaintiff's petition, to the effect that the property described in said deed of trust, which is the same as that set out in plaintiff's petition, is his homestead, is false, and is made for the sole purpose of delaying the sale by said trustee under said deed of trust. Defendants allege: That plaintiff has resided on the corner

of Jackson and Leland streets for more than 35 years, and during all of said time has owned said property and made same his home. That plaintiff never resided on the property described in plaintiff's petition and in said deed of trust, and has never claimed same to be his homestead prior to the allegations in his petition herein filed. Plaintiff has borrowed money on the property described in said deed of trust on many occasions in the last few years, and there is now a prior first lien mortgage on said property held by Mr. Ed. S. Phelps, amounting to the sum of \$1,700. That the deed of trust given by plaintiff to secure the notes given the defendant W. E. Smith is a second lien, and it is highly necessary, to preserve his rights, that said property be sold by said trustee, A. W. H. Lee, for, if said sale is not allowed to take place immediately, Mr. Phelps will foreclose his mortgage, which is now due, and the additional attorney's fees and costs in so doing will limit the chances of the defendant W. E. Smith to get his money out of said property.

"(3) Wherefore defendants pray that they have an immediate hearing, and that said injunction be dissolved and held for naught, and for such other and further relief, both in law and equity, as defendants may show themselves entitled upon the trial hereof."

Upon a hearing on July 28, 1914, the judge made the following order:

"On this 28th day of July, A. D. 1914, in chambers, before me came on to be heard the plaintiff's petition for a temporary injunction, as prayed for in said petition, and the court having heard the same, together with the evidence adduced, is of the opinion that said application for said injunction be denied. It is therefore ordered, adjudged, and decreed that the petition of Henry Franklin for a temporary injunction, as prayed for, to restrain W. E. Smith and A. W. H. Lee from selling the property at trustee's sale, be denied and refused, to which order of the court the plaintiff, Henry Franklin, excepted and gave notice of appeal to the Court of Civil Appeals. It is ordered, however, that the defendants be restrained from selling the property at trustee's sale, described in plaintiff's petition, during the pendency of this appeal, upon the plaintiff executing an appeal bond in the manner, within the time, and as provided by law, in the sum of \$1,200, payable to the defendants."

The hearing was upon the sworn pleadings of the parties and the oral testimony of the plaintiff. The testimony of the plaintiff as to use of the lots in question for homestead purposes was, in substance, that he had lived for about 40 years on two lots on Leland street in the city of Houston, some ten blocks distant from the lots in question. He bought the lots on which he lived in 1876 for \$290, and had lived there ever since with his family, consisting of wife and a number of children. He bought the four lots in controversy about 23 years ago, and paid therefor from \$100 to \$125 per lot. His statements as to the use of the property were as follows:

"When I bought the lots I put a fence around them, at the time I bought them, and after I fenced the ground I made a garden there. I grew corn and potatoes in that garden, and after I raised them I ate them. \* \* \* I built a house on these four lots. That has been about 15 years ago, I think. That house is there yet. My son is living in it. My son does not pay any rent for said house. He has been living there about seven years. I planted some plum trees

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on said four lots. The plum trees have been there about 15 years or more. They grow plums, and we eat them and use them for the family. I use the corn and potatoes and watermelons that I grow for my family. I have not grown anything this year because there was too much rain, and it knocked us out. We had corn there last year, and year before last we had corn and watermelons, besides the potatoes. We ate the watermelons and potatoes; used them for my family. I have got one horse and four mules. I graze them out on the four lots on Sunday, and they are working during the week. They are hired out during the week. On Sundays we graze them there where there is no crop growing. They have been grazing there this year on Sundays."

He further testified that he had never claimed these lots as his home, and that he had mortgaged them to Mr. Phelps prior to the execution of the deed of trust to secure the defendant Smith.

We do not think this evidence required a finding by the trial court that the lots in question were a part of the plaintiff's homestead. The use of the property for household purposes is not shown to have been continuous but only occasional, and such use as is shown seems to have been trivial and unimportant. Giving the testimony its strongest intendment in favor of the homestead claim, it only shows that, at some time after the purchase of the lots 23 years ago, plaintiff fenced them and made a garden on them in which he raised some corn and potatoes, which he ate. Neither the extent of the garden nor the amount of the corn and potatoes raised is indicated. About 15 years ago he planted some plum trees on the lots, and the plums grown thereon are used by plaintiff's family. Whether there are two or dozens of plum trees, or whether the plum crop amounts to a quart or to many bushels, is not shown. It is equally uncertain what amount of corn was grown last year or what quantity of watermelons and potatoes were grown the year before last. We are of opinion a more definite showing of a substantial beneficial use of the property for household purposes made to sustain plaintiff's claim that the lots in question were a part of his homestead. We think the evidence justifies the conclusion that for the past seven years at least the principal use of the property has been that of a home for plaintiff's son, who has lived on the property during said time. The fact that a dwelling house was built on the property 15 years ago would indicate that it was not intended to be used by plaintiff in connection with and as a part of his homestead, situated 10 blocks away. *Blum v. Rogers*, 78 Tex. 530, 15 S. W. 115.

The testimony as to the credit claimed by plaintiff on the indebtedness for which the lots were advertised for sale is also indefinite and uncertain, and, upon the facts disclosed by the record, the sale should not be enjoined upon the second ground alleged in the petition. These conclusions require that

the judgment of the court below be affirmed; and it has been so ordered.

Affirmed.

## SCATES v. RAPID TRANSIT RY. CO. (No. 7198.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 21, 1914. Rehearing Denied  
Dec. 19, 1914.)

### 1. STREET RAILROADS (§ 103\*)—INJURIES TO PERSONS ON TRACKS—DISCOVERED PERIL.

To apply the doctrine of discovered peril, the party injured must be actually discovered in a position of danger by those operating the train or cars, and the fact that the operatives did not keep the required lookout furnishes no basis for an application of the doctrine.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.\*]

### 2. STREET RAILROADS (§ 100\*)—INJURIES TO PERSONS ON TRACKS—DEFENSES.

Where one run down by a street car received his injuries because of his intoxication, he is as a matter of law guilty of contributory negligence, defeating recovery.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 217; Dec. Dig. § 100.\*]

### 3. STREET RAILROADS (§ 98\*)—INJURIES TO PERSONS ON TRACKS—CONTRIBUTORY NEGLIGENCE.

Where an intoxicated man negligently stepped in front of an approaching street car, his would-be rescuer stands in the same position as the intoxicated man, and the negligence of the latter is attributed to the rescuer, so that no recovery can be had against the street car company, though its servants were also guilty of negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.\*]

### 4. STREET RAILROADS (§ 85\*)—INJURIES TO PERSONS ON TRACKS—RIGHTS IN STREETS.

Street car lines, having franchises to operate their cars in the streets, have rights which pedestrians must recognize, and pedestrians cannot lie down in the street in such a manner as to interfere with the regular running of cars.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 150, 173, 183-185, 187; Dec. Dig. § 85.\*]

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Action by J. W. Scates against the Rapid Transit Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

M. M. Parks, J. C. Patton, and Lee Richardson, all of Dallas, for appellant. Thompson, Knight, Baker & Harris, J. Hart Willis, and Geo. S. Wright, all of Dallas, for appellee.

RAINEY, C. J. Appellant sued the appellee to recover damages for personal injuries caused to him by being struck with one of appellee's cars operated along Commerce street, in the city of Dallas, Texas. He alleged that he discovered an intoxicated and helpless man, by the name of Wells, down upon the defendant's railway track in said

street near the plaintiff, and so seeing said Wells, and believing him to be in danger of being killed or seriously injured by the movement of the defendant's street car or cars at or near said point, and appellant believing he could rescue said Wells from being struck by the defendant's said cars, and from death or serious bodily harm, appellant, being in the street, rushed to his assistance, and while in the act of attempting to rescue the said Wells from his said position of peril one of defendant's street cars ran into and against both the appellant and Wells, seriously and permanently injuring both of them; that defendant saw or could have seen him by keeping a vigilant watch and lookout ahead in approaching the place of accident in time to have prevented the accident, but failed to do so; that the car was run at a speed exceeding the limit fixed by an ordinance of the city of Dallas; and that appellant discovered his peril on the track in time to have prevented the accident by the use of the means at his command. The appellee answered by general and special exceptions, general denial, and specially contributory negligence. The appellant filed a supplemental petition, denying all the allegations in defendant's answer, except it admits appellant went upon the track in front of an approaching car.

The trial court instructed a verdict for appellee, and judgment was rendered accordingly. Appellant complains of the giving of said charge, and contends that:

"A pedestrian upon a street railway track in a public street of a city is not in any sense a trespasser, and he has the same right there as have the street cars of the company, and the company owes him the duty of ordinary care not to injure him, and there being no city ordinance or state statute making it negligence per se, or negligence at all, for such pedestrian to be there, and appellant having alleged in his petition both negligence per se and vel non of the defendant, proximately resulting in appellant's injuries, and having introduced testimony tending to establish said facts, the court erred in not submitting the question of the defendant's negligent and unlawful acts, as well as the question of contributory negligence on the part of the plaintiff, to the jury for their determination."

The evidence shows that one Wells, an acquaintance of appellant, was intoxicated and lying on the street car track. Appellant, seeing Wells' condition, and knowing a street car was coming, went to him and tried to pull him off the track. Wells' position was about 200 or 300 feet from the point of accident when the car was first noticed. It was night, but the track was straight and light, and by a lookout being kept he could have been seen 75 or 100 feet from the front of the car. Several witnesses testified the car was running about 15 miles per hour. The prescribed speed by ordinance is 12 miles per hour. The motorman did not see Wells or Scates on the track; but, as stated by one witness, he "was standing in a half turned position as if talking to some

one." The appellant testified on direct examination, among other things, as follows:

"When I first saw Mr. Wells on the track, the car was south of the Trunk railroad—about 100 yards, or a little over that, south. The car never checked its speed that I know of before it struck us. My object in going to Mr. Wells was that I saw that he was down across the track, and I knew that he had to be moved off the track. I knew the car was coming. I could see the car coming down the track, and I knew it would come on, and I knew he had to be taken off of it some way. I saw his life was in danger, and I went to his rescue. I tried to get him away from there to keep him from being injured."

On cross-examination he further testified:

"I said I saw this car on the night of the accident in July when it was 300 feet away. I don't remember any lights, excepting one in the barber shop; but it is a small light. I might have seen more, but I don't remember any more. We were walking down together, and I was just a little bit ahead of him, and we were going to catch the car together, and go home together, and he fell down just behind me across the track. I got him on his feet and turned him loose, and he fell down; his clothes slipped some way. I had my arm around him this way, and his clothes slipped, and I lost my hold on him. He fell down right in the middle of the track, right between the two rails. The car struck him first in the back part somewhere, and it struck me on the side of this leg, and forced me down. I was right down in front of the car in the track. I pulled him away from the track over towards me."

[1] The evidence clearly shows, we think, that the motorman did not actually see either Wells or the appellant before striking them; hence there can be no liability of the appellee on the theory of discovered peril. That the motorman failed to keep a lookout, as it was his duty, and by so doing he could have seen their perilous situation, does not change the rule. It is well settled by the decisions of our Supreme Court that, to apply the doctrine of discovered peril to a railway company, the party injured must be actually discovered in a position of danger by those operating the train. *Railway Co. v. Breaudow*, 90 Tex. 28, 38 S. W. 410; *Railway Co. v. Staggs*, 90 Tex. 458, 39 S. W. 295. These decisions have, since their rendition, been uniformly adhered to and followed by the Courts of Civil Appeals in many cases.

[2, 3] The evidence showing that the question of discovered peril does not arise in this case, and the evidence showing conclusively that Wells was guilty of contributory negligence in being intoxicated and lying on the track, the question arises: Is appellant chargeable with the negligence of Wells, and his right of recovery defeated thereby? When intoxication is shown to exist in the party injured, which is the cause of the injury, it as a matter of law is contributory negligence, and defeats a recovery, though the agency by which he is injured is guilty of negligence. *Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64. Wells' dangerous position being brought about by his own negligence, and the negligence of appellee being in no sense responsible therefor, it

follows that appellant's right of recovery is defeated.

As we understand it, the rule is that, when a party seeks to rescue another from a perilous position, who has negligently placed himself in such position through no fault of the railroad, and the party attempting the rescue is injured, no liability on the part of the railway company exists, and he cannot recover. *Linz v. McDonald*, 133 S. W. 535; *Railway Co. v. Scarborough*, 104 S. W. 408; *Donahoe v. Railway Co.*, 83 Mo. 560, 53 Am. Rep. 594. In *Linz v. McDonald*, supra, in which a writ of error was refused, this court said, through Mr. Justice Bookhout:

"The law is that, in an action by a servant to recover on account of injuries sustained in an effort to save the life of a fellow servant, the person whose rescue is attempted must be in a position of peril from the negligence of the defendant. In the case of *Donahoe v. Railway Co.*, 83 Mo. 560, 53 Am. Rep. 594, the law is stated thus: 'If the railroad company is not chargeable with negligence with respect to the person in danger, the case of the person who attempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct toward him and his in making the attempt. In other words, the negligence of the company as to the person in danger is imputed to the company with respect to him who attempts the rescue, and if not guilty of negligence as to such person then it is only liable for negligence occurring with regard to the rescuer, after his efforts to rescue the person in danger commenced.' See, also, *Railway Co. v. Hiatt*, 17 Ind. 102; *Railway Co. v. Ridley*, 114 Tenn. 727, 86 S. W. 606; *Railway Co. v. Lynch*, 69 Ohio St. 123, 68 N. E. 703, 63 L. R. A. 504, 100 Am. St. Rep. 658. In the case last cited it was held by the Supreme Court of Ohio that the conditions upon which there may be a recovery on account of injuries sustained in an effort to save human life are that the person whose rescue is attempted must be in a position of peril from the negligence of the defendant. If Holmes was in a position of peril at the time appellee attempted to push him from the idler pipe, it cannot be said his peril was the result of the negligence of appellant. Under the facts we are of the opinion the court erred in refusing the charge requested by appellant instructing a verdict for defendant. The judgment is reversed, and judgment here rendered for appellant."

In *Railway Co. v. Scarborough*, 104 S. W. 409, by the San Antonio Court of Civil Appeals, it is said:

"One who imperils his own life for the sake of rescuing another from imminent danger is not chargeable as a matter of law with contributory negligence; and if the life of the rescued person was endangered by the defendant's negligence, the rescuer may recover for the injuries which he suffered from the defendant in consequence of his intervention. \* \* \* This rule rests upon the law having such a high regard for human life it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of a prudent person. \* \* \* It is apparent from the principles enunciated that the sine qua non of recovery in such a case is that the imminent peril from which one is sought to be rescued was caused by the negligence of the defendant. However commendable and praiseworthy may be the voluntary act of benevolence of one who imperils his life to save the life of his fellow man, its costs

cannot be charged to and collected from another, unless his negligence was the occasion of such commendatory act. But wherever the party sought to be rescued from imminent danger could have himself recovered, had he been injured by the negligence of the defendant, he who undertook to rescue him from his peril can maintain his action for any injuries he may have incurred in his undertaking, if he were not so reckless in it as to defeat a recovery."

Contributory negligence being shown, the failure of appellee's servants to keep a lookout and the running at a greater rate of speed than permitted by the ordinance does not authorize a recovery in this case. In *Railway v. Staggs*, supra, Mr. Justice Brown says:

"If deceased was guilty of contributory negligence, his widow and children could not recover for failure to see him upon the track, or to discover his danger, because in such case their right of action would rest upon the negligence of the defendant, to which contributory negligence of the deceased would constitute a good defense."

In the case of *Donahoe v. Railway Co.*, supra, in addition to the quotation made in the *Linz* Case, it says:

"It is to be observed that it is only when the railroad company, by its own negligence, created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person and recover for an injury he may sustain in that attempt. For instance, if a man is lying on the track of a railroad intoxicated or asleep, but in such a position that he could not be seen by the men managing an approaching train and they had no warning of his situation, and another, seeing his danger, should go upon the track to save his life, and he be injured by the train, he could not recover, unless the trainmen were guilty of negligence, with respect to the rescuer, occurring after the beginning of his attempt."

The evidence shows that after appellant made the attempt to rescue Wells he was not seen by the railway employes before that time, nor until after he was struck by the car.

[4] It is argued that Wells and appellant, being on the street, were trespassers, but had the same right there as the street cars, and the railway company owed them the duty not to injure them. This is true in a limited sense. While persons have a right to be on the streets, that right must conform to the rights of others using the streets. Street car lines are granted franchises to operate cars along tracks laid in the streets, and it is contemplated that pedestrians will not monopolize the streets; and, as cars have to be operated over the tracks, it is expected that pedestrians will recognize that condition, and not use the street occupied by the tracks for *bunking* purposes, or so as to interfere with the regular running of cars. Sidewalks are usually made and regular crossings prepared for the use of pedestrians. So the duty to each other is mutual, and the rights of both should be observed.

As we understand the evidence, the parties were on the track at a place other than a street crossing and putting the street to a

use never intended, and they were guilty of such negligence as prevents a recovery.

The judgment is affirmed.

**CHILDS et al. v. McGREW.** (No. 359.)  
(Court of Civil Appeals of Texas. El Paso.  
Nov. 19, 1914. Rehearing Denied  
Dec. 17, 1914.)

**1. APPEAL AND ERROR (§ 837\*) — FINDINGS AS CONCLUSIVE—REVIEW.**

In the absence of any findings of fact or conclusions of law by the trial court, the Court of Civil Appeals must look to the record to see if, under the pleadings, there is evidence to sustain the judgment entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

**2. GUARDIAN AND WARD (§ 182\*) — GUARDIAN'S BOND—LIABILITY OF SURETIES—BURDEN OF PROOF.**

The burden is upon the sureties on a guardian's bond to clearly establish their defense which would relieve them of liability.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 423, 623-636, 638-652, 654-663; Dec. Dig. § 182.\*]

**3. GUARDIAN AND WARD (§ 182\*) — ACTION AGAINST SURETIES—SUFFICIENCY OF EVIDENCE—MINORITY.**

In an action on a guardian's bond for misappropriation of the ward's money, held that, resolving the facts in favor of the judgment, the evidence sustained a finding that, when the ward gave certain money to the guardian, he was a minor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 423, 623-636, 638-652, 654-663; Dec. Dig. § 182.\*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by Willie McGrew against R. S. Childs, Guardian, and others, as sureties upon the guardian's bond. Judgment for plaintiff, and the sureties appeal. Affirmed.

M. H. Broyles, of Houston, for appellants.  
L. E. Blankenbecker, of Houston, for appellee.

**HARPER, C. J.** This is an appeal from a judgment for \$1,577.95 in favor of Willie McGrew and against R. S. Childs, guardian, and L. W. Woods, Edward Lee, and E. B. Ramsey, as sureties upon the guardian's bond.

Findings of fact: On March 10, 1910, R. S. Childs, upon his application, alleging that Willie McGrew was a minor, was appointed guardian of his person and estate. He duly qualified with the other defendants above named as sureties on his bond. A short time before the appointment, a judgment had been rendered in the United States court for \$1,560 in favor of the ward, and the money retained by order in the registry of the court. Thereafter, on the 14th day of March, the United States court made its finding that Willie McGrew was of age, and directed the clerk to deliver the money to him in person, which was accordingly done. On the same

day, last named, Willie McGrew delivered the money received to defendant Childs, and it was deposited in bank in his name as guardian, and reported its receipt to the probate court, and the guardian had not been discharged when he received the money.

Upon the trial said Childs admitted that he had appropriated the money to his own use. Only the bondsmen appeal from the judgment entered.

[1] Although appellants present three assignments of error, there is only one issue suggested, and that is one of fact, and, there being no findings of fact nor conclusions of law from the trial court, this court must simply look to the record to see if, under the pleadings, there is evidence to sustain the judgment entered by the trial court.

[2] The burden is upon the sureties on the bond to clearly establish their defense which would relieve them of liability (Bopp v. Hansford, 18 Tex. Civ. App. 340, 45 S. W. 744), and this they have not done in this case.

The proposition asserted by appellants is: That the ward had reached his majority—21 years of age—when the money was given by him to defendant Childs. That, having reached the age of 21 years, the guardianship had ceased, as a matter of law. Therefore the delivery and receipt of the money was a simple transaction between man and man, for which they, as bondsmen, are not liable.

[3] The question in this case is: Was Willie McGrew 21 years of age at the time he delivered the money to defendant Childs? For, if the ward was not 21, then there can be no question that the bondsmen are liable. The county court judicially determined that on March 10, 1910, Willie McGrew was a minor. There is no evidence as to the date of his birth, but he and his sister testified upon the trial, about February 11, 1913, that he was then 23 years old. If he was not yet 24 years of age in February, 1913, he might not have been 21 years of age at the time the money was given to defendant Childs, and the trial court may have so found.

It being our duty to resolve the facts where there is any evidence upon the issue in favor of the judgment, we must hold that the judgment be sustained and cause affirmed.

**DE GRAZIER v. LONGINOTTI.** (No. 1346.)  
(Court of Civil Appeals of Texas. Texarkana.  
Nov. 5, 1914.)

**1. LANDLORD AND TENANT (§ 130\*)—SUIT FOR NONPAYMENT OF TAXES—DEFENSE—BREACH OF COVENANT.**

Conceding that a landlord consented to subletting, his collection of additional rent from the subtenant, who was not disturbed before the end of the term, was not a breach of the landlord's covenant for quiet enjoyment, constitut-

ing a defense to his suit against his tenant for nonpayment of taxes.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470-481; Dec. Dig. § 130.\*]

**2. LANDLORD AND TENANT (§ 132\*)—POSSESSION—DISTURBANCE.**

A tenant is not damaged by his landlord's collection of additional rent from a subtenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 460-464, 467-469, 1198; Dec. Dig. § 132.\*]

Appeal from District Court, Bowie County; W. T. Armistead, Judge.

Action by Joseph Longinotti against Tony De Grazier. From a judgment for plaintiff, defendant appeals. Affirmed.

Rollin W. Rodgers and R. P. Dorough, both of Texarkana, for appellant. Mahaffey & Thomas, of Texarkana, for appellee.

HODGES, J. Longinotti sued De Grazier to recover \$301.93 as taxes which he alleged De Grazier should have paid on certain property, and for the conversion of some furniture and bar fixtures which had been left in the custody of De Grazier. De Grazier answered, denying any liability for the sum sued for, and sought a recovery on a counterclaim against Longinotti. At the conclusion of the evidence, the court instructed a verdict for the plaintiff, Longinotti, for the sum of \$301.93, the amount of the taxes claimed, and against the defendant, De Grazier, on his counterclaim.

There appears to be no dispute about the facts in this case. Longinotti was the owner of a building situated in the city of Texarkana, Tex., and on August 1, 1906, leased it, together with some saloon furniture and bar fixtures, to De Grazier for a term of five years; the consideration being \$100 per month and the payment of all taxes levied against the property during the term of the lease. The lease contained this provision:

"It is made a condition of this lease that second party (De Grazier) perform each and every covenant and obligation imposed upon him herein, among others to pay said rent promptly on first of each month in the manner stated, to keep said property in good repair, to pay all taxes and assessments against said property, and observe the conditions as to subletting of said premises and all other conditions of this lease. And upon a failure to perform any one of the above conditions to be performed by second party, this lease will, at the option of the first party (Longinotti), be at once terminated, and first party is hereby given the right in such event, without notice or demand, to enter into and upon said premises or any part thereof and expel the lessee or those claiming under him and remove his effects without being taken or deemed guilty of trespass or without prejudice to any remedies which might otherwise be used for arrears of rent."

The building was used by De Grazier and others for a saloon till some time in 1910, when the adoption of local prohibition made that business unlawful. It appears, however, that during the year 1909 De Grazier

had sublet to one Holcombe, and that, after prohibition became effective, the latter subleased the property to G. W. Schiffin. In June, 1910, C. V. Brown purchased the sublease held by Schiffin and took possession of the building. He made some alterations and began using it for the exhibition of moving pictures. By agreement with Holcombe and De Grazier, Brown paid \$100 per month as rent to De Grazier and \$20.72 per month to Holcombe as a monthly apportionment of taxes to be paid at the end of the year. Longinotti resided in Hot Springs, Ark., and there is no evidence that he knew anything about these transactions, except what may be gathered from the correspondence that passed between him and De Grazier. On May 9, 1910, De Grazier wrote to Longinotti, telling him that the house had been closed since the 15th of the preceding month, and offered to surrender the lease. He also suggested that a party in Texarkana desired to rent the house for a picture show, and asked Longinotti what should be done with the property. Longinotti replied to this communication a few days afterwards, acknowledging the receipt of the check for the rent, and reminding De Grazier that he (Longinotti) still held him responsible for the rent, and also mentioned the fact that De Grazier had not explained what kind of a show the people he referred to wanted to operate and what alterations they desired to make in the building, or who the parties were. De Grazier replied, stating that the party who wanted the building was a gentleman and in every way responsible; that he would spend \$400 or \$500 "fixing up" the building. He stated that the building would be kept in good condition and properly cared for, and would be turned over to the owner in good shape at the expiration of the lease. He expressed a wish that he receive an early answer to his communication. There appears to have been no reply to this letter. Shortly thereafter Brown entered into possession of the building and began using it for the exhibition of moving pictures. Some time in August of the same year, Brown, without the knowledge of De Grazier, made a visit to Hot Springs and had a personal interview with Longinotti in regard to the property. It appears from Brown's testimony that Longinotti was very much displeased with the conduct of De Grazier in permitting him (Brown) to occupy the building for a picture show, and threatened to sue De Grazier for damages. It was finally agreed, however, between Brown and Longinotti that, if Brown would pay \$50 a month in addition to what Longinotti was already receiving from De Grazier, Brown might continue his occupancy of the premises and would probably have the privilege of leasing the building after the expiration of De Grazier's lease, which then had about

one year more to run. Brown says that he went to see Longinotti for the purpose of securing this new lease upon the building, to begin after the expiration of that held by De Grazier; that Longinotti did not tell him explicitly that he might have the building after that time, but allowed him to believe that he would, and promised to give him an answer within a few days, but failed to do so. Brown, however, continued to pay to Longinotti the \$50 per month and to De Grazier \$100 per month, and the taxes to Holcombe, until some time about the 1st of February, 1911. De Grazier then learned for the first time of Brown's making the payments to Longinotti, and wrote to the latter repudiating his lease and disclaiming any further responsibility under the original contract. He also refused to pay the taxes which had accrued on the property for the year 1910, and which it is admitted amounted to \$301.93 and were due. These taxes were subsequently paid by Longinotti. Brown continued in possession of the building, and thereafter paid monthly the \$100 rent which had formerly been paid by De Grazier, the \$50 which he was to pay Longinotti, and \$20 additional, making \$170 per month.

[1] The only defense which De Grazier urges in this suit is the conduct of Longinotti in demanding and receiving the \$50 per month from Brown. He contends that this conduct was a breach of the covenant for quiet enjoyment. The proposition is based upon the assumption that Longinotti had consented in the first instance to the subletting of the property to Brown. Conceding that this assumption is justified by the evidence, there is nothing to show that either Brown or De Grazier was disturbed in the possession of the property, or in their rights under the lease. According to his testimony, which is not disputed, Brown desired a continuation of the lease after the expiration of that held by De Grazier, and sought an interview with Longinotti for the purpose of securing it, as well as to prevent any disturbance of his possession under De Grazier. It is true, as Brown states, Longinotti declined to keep his promise, and finally gave him notice to quit at the expiration of the De Grazier lease, which occurred about the 1st of August, 1911. This, however, was a matter between Brown and Longinotti exclusively, and did not in the least disturb the relations of De Grazier and Brown. De Grazier ascertained by accident that Brown was paying \$50 per month to Longinotti. His repudiation which followed seems to have been prompted more by a feeling of resentment at this exaction on the part of Longinotti than by any actual disturbance of his possessory rights as a tenant. The evidence makes it clear that he sustained no damage, and that he was nei-

ther actually nor constructively evicted. In the absence of such consequences, the conduct of Longinotti in thus dealing with Brown is no defense to this action to recover the taxes then due. See 24 Cyc. pp. 1059 and 1129, where the authorities are referred to in the notes.

[2] The suit of De Grazier for damages is without merit. He had no right to collect from Brown more than Brown had agreed to pay him. If by some species of oppression to which Brown did not object, Longinotti procured from Brown an additional \$50 a month, that sum did not belong to De Grazier. The facts do not show that De Grazier sustained any damages.

The judgment is therefore affirmed.

### BRYSON v. ABNEY, (No. 1273.)

(Court of Civil Appeals of Texas. Texarkana.  
July 1, 1914. Rehearing Denied  
Dec. 3, 1914.)

#### 1. DEDICATION (§ 20\*)—PUBLIC ROAD—EVIDENCE.

Where uninclosed land of a parcel not platted into lots or streets was used generally by farmers and the public for the purpose of hitching horses, and leaving wagons thereon, and driving across and in a promiscuous way to reach roads on its margin, and there was no act of the owner or his predecessor indicating a purpose to dedicate the land to the public use, there was no dedication of a right of way.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 17-30; Dec. Dig. § 20.\*]

#### 2. EASEMENTS (§ 8\*)—RIGHT OF WAY—PRESCRIPTION.

Where a use by the public of uninclosed land of a tract, not platted into lots or streets, was permissive only, an easement of a public way by prescription could not be acquired.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. § 8.\*]

Appeal from District Court, Harrison County; H. T. Lytteton, Judge.

Action by G. M. Abney against J. M. Bryson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

F. H. Prendergast and J. H. T. Bibb, both of Marshall, for appellant. Young & Abney and S. P. Jones, all of Marshall, for appellee.

LEVY, J. The appellees sought to enjoin the appellant from erecting a store building on the premises in suit, which lies directly in front of the appellee's residence, claiming that it would depreciate the value of his residence lot. The grounds pleaded for the relief asked are: (1) That there had been a dedication by the owners of the premises to public use; (2) that the premises was a public highway by prescription; (3) that J. W. Furrh, a prior owner, and the vendor of both the parties to this suit, made an agreement with appellee in the purchase and sale of the 30-foot strip off the premises in suit that no buildings should be erected on the part of the premises in suit, and that the right for

the premises to thereafter continue as a public highway passed by implication with Furrh's deed to appellee; and (4) estoppel of J. W. Furrh to deny an easement to the public in the premises.

The court submitted the case to the jury on special issues. The two pertinent questions submitted were: (1) Did John W. Furrh, or those from whom he acquired the property, dedicate the premises in question to the public uses as alleged in the plaintiff's petition, and (2) did J. M. Bryson either know, or have notice of such facts and circumstances as would lead an ordinarily prudent person to discover, that the premises had been dedicated to public use at the time he purchased a part of the premises in suit? The jury answered the questions in the affirmative. Upon the verdict a decree was entered perpetuating the temporary injunction previously granted.

The seventh assignment is to the effect that there is failure of proof to support the verdict of the jury that there had been dedication of the premises to public use by John W. Furrh or his predecessors in title. It is believed that the conclusion is inevitable that the finding, as made by the jury, is not supported, as a matter of law, by the testimony in the record. And as the decree was founded on only one alleged ground, there is necessitated a reversal of such decree.

[1, 2] It appears that appellee bought a tract of  $3\frac{1}{2}$  acres from J. W. Furrh about 22 years ago, and on the eastern part of this lot was located his dwelling, which fronts south. Waskom is a village or community of few inhabitants, and the appellee's land is in Waskom. It does not appear that Waskom was ever platted into a town site, or land sold with reference to its being laid off into lots and streets. A public road from the north runs on the east of appellee's property and intersects on the south a road running from the west. Adjoining appellee's land on the south, and between it and the roads, there is located an open and vacant plat of land about 123 feet deep by 186 feet long. Between 10 and 12 years ago J. W. Furrh conveyed to appellee a strip off of the north of the above tract of about 30 feet by its length. Recently J. W. Furrh conveyed appellant a lot off of the west part of the strip of approximately 37 by 45 feet, and appellant undertook to erect a storehouse thereon. It is not deemed necessary to set out all the evidence. At the time appellee bought his residence lot the entire strip on the south was open, vacant land, and was so when he bought the 30-foot strip off of it. There is no evidence that any land was by the owners ever platted into lots or streets, or even laid off on the ground. There is no act of J. W. Furrh or his predecessors in title even tending to indicate a purpose to make a dedication of the strip to public use.

There is ample evidence showing that the uninclosed plat was, and had been for years, used generally by the farmers and public of the adjacent territory for purposes of hitching horses, and to drive and leave wagons and other vehicles on, and to drive vehicles across in a promiscuous way to reach the roads on its margin. There appears no specific claim of right in the public to so use it. All that the evidence shows, we conclude, is a mere permissive use by the public of the vacant plat, and no purpose or intention on the part of J. W. Furrh, or his predecessors in title, that it should be dedicated to the public. The evidence is not sufficient to constitute either a dedication by the owners or an easement by prescription. *De George v. Goosby*, 33 Tex. Civ. App. 187, 76 S. W. 66; *Heilbron v. Ry. Co.*, 52 Tex. Civ. App. 575, 113 S. W. 610, 979; *City of Atlanta v. Ry. Co.*, 58 Tex. Civ. App. 226, 120 S. W. 923.

The judgment is reversed and the cause remanded.

#### BALL-CARDEN CO. v. RIDGELL. (No. 7157.)

(Court of Civil Appeals of Texas. Dallas.  
July 4, 1914. Rehearing Denied  
Dec. 19, 1914.)

#### 1. CONTRACTS (§ 284\*)—CONSTRUCTION.

Where a contract for the sale of gravel provided that the buyers should pay only for material usable under the terms of their contract with the federal government for locks and dams as interpreted by the United States engineer in charge, the determination of the engineer is conclusive.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. § 284.\*]

#### 2. CONTRACTS (§ 290\*)—REJECTION—ESTOPPEL — EQUITABLE ESTOPPEL — WHAT CONSTITUTES.

The buyers are not estopped from denying that gravel tendered by the seller was not usable under the contract, because the engineer, after rejecting it, allowed them to use that part which was delivered, upon putting more concrete in the mixture, it appearing that the buyers did nothing to cause the seller to change his position and that the use of additional concrete would vastly increase the expense of the work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1317; Dec. Dig. § 290.\*]

#### 3. CONTRACTS (§ 290\*)—CONSTRUCTION.

The engineer who rejected the gravel delivered and tendered was not authorized, under the government contract providing that he might vary the percentage of concrete in case stone dust or sand be found in the gravel, to permit the use of gravel not up to specifications and containing no stone dust and to require additional cement, so as to compel the buyers to accept gravel not up to specifications.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1317; Dec. Dig. § 290.\*]

#### 4. APPEAL AND ERROR (§ 1175\*)—DETERMINATION.

Where the case was fully developed below, it is the duty of the appellate court, if possible,

to render such judgment as should have been rendered by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

Appeal from District Court, Dallas County; Kenneth Forree, Judge.

Action by R. R. Ridgell against George A. Carden and P. D. C. Ball, copartners doing business as the Ball-Carden Company. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

B. B. Hemphill, Tarlton, Morrow & Cockrell, and Gray & McBride, all of Dallas, for appellants. T. B. Ridgell, of Rockwall, and J. C. Muse, of Dallas, for appellee.

TALBOT, J. Appellee Ridgell brought this suit against appellants, Ball-Carden Company, a partnership firm composed of George A. Carden and P. D. C. Ball, alleging that appellants had contracted to buy from appellee 26,000 yards of gravel and sand to be used in the construction of locks and dams numbered 2 and 4 on the Trinity river for the United States government, the total consideration for said gravel and sand being \$2,600. It is charged that the appellants, after having taken and used \$249.59 worth of gravel, had failed to take the balance of the gravel, as contracted for, and judgment was sought and rendered for the unpaid portion of the contract price for the gravel, the judgment being for \$2,350.31, with interest. The contract sued on is in writing, is dated February 26, 1909, and the portions thereof material to this controversy are as follows:

"Know all men by these presents, that I, R. R. Ridgell, for and in consideration of the sum of twenty-six hundred (\$2600.00) dollars, to be paid to me as hereinafter set forth, do hereby sell, assign and convey unto Ball-Carden Company, a firm composed of P. D. C. Ball and George A. Carden, twenty-six thousand (26,000) yards of gravel, or gravel and sand, or rock and sand, hereinafter called material, in such proportions as may be desired by Ball-Carden Company; said material being embraced within and on or under the ground selected by Ball-Carden Company, a part of the premises of the above named seller, situated about two miles in a southerly direction from the town of Kleburg in Dallas county, Texas. The conditions of this sale are as follows: Said Ball-Carden Company shall not be bound to pay for any material, which is not usable under the terms of their contracts with the United States government on locks and dams Nos. 2 and 4, as the same is or may be interpreted by the United States engineer in charge, nor for any material which, not having been used in such locks and dams, has been washed away or made unavailable for said use by floods or overflows, or otherwise, but the said Ball-Carden Company shall be bound to pay unto said seller, only for said material used in the construction of the said locks and dams, the sum of eleven (11) cents per cubic yard, measured in place as concrete in said locks and dams, and the same shall be paid for according to the estimate of the government, monthly, on the 15th day of each month succeeding the month for which such measurement and estimate is made: For so much of said material as is not used in said

locks and dams Nos. 2 and 4, and used elsewhere or sold by Ball-Carden Company for such use, but the same is to be used, if material offered comes up to specifications of government, but same must be offered so as not to delay the use thereof, the said Ball-Carden Company are to pay unto the said seller the sum of ten (10) cents per cubic yard, measured on cars, until said payments, together with the payments made for said material, measured as concrete in place in said locks and dams, as aforesaid, shall equal the sum of twenty-six hundred (\$2600.00) dollars, when this contract shall be considered by the parties hereto to have been completely fulfilled. \* \* \* It is understood, as aforesaid, the basis of measurement of the material used in said locks and dams shall be the concrete in place in said locks and dams, but if any party hereto shall be dissatisfied with the measurement of same by the engineer of the United States government in charge, then they shall co-operate together for the purpose of securing an absolutely correct measurement."

The defendant P. D. C. Ball, not having been served with citation, did not appear and answer, but the defendants Ball-Carden Company and George A. Carden answered by general and special demurrers, a general denial of the material allegations of plaintiff's petition, and specially, among other things, that the effect and meaning of the contract which was entered into was that the defendants were not required to accept the sand and gravel offered by plaintiff unless the same should come up to the specifications promulgated by the United States government, whereunder said locks and dams were to be constructed, and were not to be used or paid for unless said sand and gravel were usable by the defendants under the terms of their contracts with the United States government for the construction of said locks and dams Nos. 2 and 4, as said contracts should be interpreted by the United States engineer in charge, that defendants tendered the sand and gravel of the plaintiff to the said engineer in charge of the construction of said locks and dams, and that said engineer decided that said sand and gravel was not usable under the terms of said contracts with the government, and refused to allow defendants to use same in the construction of said locks and dams, and therefore defendants, under the terms of their contract with plaintiff, were not obligated to and did not use said sand and gravel. These defendants also pleaded the statutes of limitation of two and four years in bar of plaintiff's action. A trial by the court without a jury resulted in a verdict and judgment in favor of the plaintiff against the firm of Ball-Carden Company and George A. Carden individually, and they appealed.

[1] The leading question arising on the appeal, and one that controls the decision of the case, is whether or not the gravel claimed to have been purchased by appellants from appellee came up to or complied with the specifications of appellants' contract with the United States government and "usable."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as contemplated by the terms of appellants' contract with the appellee, in the construction of the locks and dams in question. Appellants contracted to take 26,000 yards of gravel and sand from appellee's land and to pay him therefor 11 cents per cubic yard, or \$2,600 for the whole. They took only about 2,269 yards, paying therefor the sum of \$249.59, and appellee's suit is bottomed upon appellants' failure to take all the gravel and sand which they agreed to take under the contract of purchase. Appellee testified:

"Mr. Carden paid me for all that he got. My complaint is that they did not take the gravel that they contracted to take."

The contract for the purchase of appellee's gravel and sand was made after appellants had contracted with the United States government to construct locks and dams Nos. 2 and 4, and for the purpose of enabling them to carry out that contract. Their contract with the United States government specifically regulated the proportions of the sand, gravel, and cement which were to be used in the construction of the work thereby undertaken, and particularly stated that the gravel should be clean and of a satisfactory quality, and that not less than 50 per cent. of it should be composed of pebbles not less than one inch in diameter. As has been seen, appellants purchased appellee's gravel and sand upon condition that they were not bound to pay for any of it which was—

"not usable under the terms of their contract with the United States government on locks and dams Nos. 2 and 4, as the same is or may be interpreted by the United States engineer in charge, nor for any material which, not having been used in such locks and dams, has been washed away or made unavailable for said use by floods or overflows or otherwise."

The concrete to be used in the construction of the locks and dams as specified in said contract with the government was to be composed of one barrel of Portland cement, 12 cubic feet of sand, and 24 cubic feet of broken stone or gravel, all measured by loose bulk or an approved method, and in the event stone dust or sand was found in the broken stone or gravel, these proportions might be varied by the engineer to suit the existing conditions. Now, it is placed beyond controversy by the evidence that the gravel contracted for by appellants did not measure up to or comply with the specifications contained in appellants' contract with the United States government. A. E. Waldron, who was the engineer of the United States government, in charge of and superintending the work of constructing the locks and dams, and whose duty it was to see that the gravel and sand used in the construction complied with the specifications in appellants' contract with the government, unequivocally testified that the gravel bought by appellants from appellee did not comply with said specifications, and that he refused to allow it to be used by appellants in the construction of the locks and dams. Among other things, he said:

"The proportion of large-size pebbles in the gravel was nowhere near that required by the specifications. I refused to allow the use of gravel containing too large a proportion of small-size pebbles. No question arose as to the sand, but the gravel did not comply with the specifications. The contract required that the work be performed in accordance with the specifications mentioned. The proportion of pebbles exceeding said size was not as large as required by the specifications. In fact, as I now recall it, there were practically no pebbles of the size which the specifications required should constitute some 30 or 40 per cent. of the gravel."

By the terms of appellants' contract with appellee the question of whether or not the gravel purchased complied with the specifications of appellants' contract with the United States for the construction of the locks and dams was left to the judgment of the government's engineer, and the determination of A. E. Waldron that it did not is conclusive of the matter, regardless of any view other witnesses may have expressed in relation thereto, and settles the issue in favor of the appellants.

[2] But notwithstanding the engineer decided that the gravel agreed by appellants to be taken from appellee's land did not comply with the specifications of appellants' contract with the United States government, yet the evidence clearly shows that afterwards the engineer agreed that the gravel might be used in the construction of the locks and dams, provided appellants would use in the concrete mixture an additional sack of cement to each cubic yard thereof, and that appellants, under this requirement, used the amount of gravel paid for by them, and appellee contends that in view of these facts appellants are estopped from denying that the gravel was usable under their contract with the government. Should this view of appellee be sustained? We think not. The theory of estoppel advanced is not, in our opinion, correct. There is no evidence in the record that appellee was induced by the conduct of appellants to change his attitude with respect to the written contract made with appellants or the subject-matter of said contract; nor is there any testimony that said contract was ever in any manner altered or modified. Plaintiff's petition and alleged cause of action is based solely upon said written contract, and appellee testified that Ball-Carden Company never asked him to make any change in said contract. Besides, in appellee's brief it is declared that he "relies for a recovery upon the contract between appellant and appellee which appears in the statement of facts." The undisputed evidence is that the engineer of the United States government condemned the gravel agreed to be taken from appellee, on the ground that it did not come up to the specifications in appellants' contract with the government, and only permitted the use of it at all upon the condition that one sack of cement, in addition to the number required by

the specifications, be used; that the amount of gravel used by appellants, after this demand of the United States government, was used by appellants in an honest effort to perform their contract with the government, and that this effort demonstrated that the use of the extra sack of cement would entail upon them an additional expense, in constructing the locks and dams of about 50 cents per yard of concrete to be used therefor, and would be practically prohibitive of the use of appellee's gravel in doing that work. It is because of this effort that appellee contends that appellants have forfeited their right to insist upon the recognition by the courts of that provision of their contract with appellee which renders them liable to him, for only such gravel as was usable, under the terms of their contract with the United States government, and our conclusion is that the contention is not sound.

[3, 4] The claim of appellee to the effect that, under the terms of appellants' contract with the United States government, the engineer was authorized to vary the proportions of the gravel, sand, and cement to be used in the concrete mixture, and that therefore the engineer, in requiring the use of the extra sack of cement, did no more than said contract provided for, is not borne out by the language of the contract. The only power given the engineer to vary the proportions of gravel, sand, and cement, as specified in the contract, was where "stone dust or sand was found in the broken stone or gravel." In this event only was the engineer authorized to vary the proportions to meet and satisfy the existing conditions. The contract will be searched in vain for authority conferred upon the engineer to vary the requirement as to the quality or size of the gravel to be used, and the contract expressly stipulates that the gravel "shall be clean and of a satisfactory quality, and not less than 50% of it shall be composed of pebbles and not less than one inch in diameter." It is not pretended that because of "stone dust" or "sand" found in the gravel acquired from appellee, the engineer was authorized to demand the use of the extra sack of cement. There is no evidence whatever that such dust or sand was found in the gravel, and hence no basis for any such contention.

Our conclusion is that the gravel appellants contracted to take from appellee's land was not "usable" under the terms of appellants' contract with the United States government according to the ruling of the government's engineer, and that therefore appellants, under the terms and conditions of their contract of purchase from appellee, were not bound to take and pay for said gravel, and that judgment should have been rendered in the court below in their favor. This conclusion renders it unnecessary to consider any other question presented in appellants' brief, and, as the case seems to have

been fully developed, it becomes our duty to render in this court such judgment as should have been rendered in the trial court.

It is therefore ordered that the judgment of the district court be reversed, and that judgment be rendered in this court for appellants.

# ST. LOUIS, S. F. & T. RY. CO. v. SMITH. (No. 7219.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 21, 1914. Rehearing Denied  
Dec. 19, 1914.)

## 1. LIMITATION OF ACTIONS (§ 127\*)—AMENDMENT OF PLEADING—NEW CAUSE OF ACTION.

Where a widow of a railroad employé killed while engaged in interstate commerce sued as widow, asserting that her cause arose under a state statute, it was not the beginning of a new action for her to file an amended petition as the personal representative of the deceased seeking recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), as the substitution of the personal representative relates back to the filing of the original petition; hence limitations did not apply to the filing of the amended petition.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

## 2. COSTS (§ 32\*)—AWARD.

Where the widow of an employé of a railroad company killed while engaged in interstate commerce ultimately recovered judgment under the federal Employers' Liability Act as his personal representative, it was not improper, though the railroad company procured the reversal of a judgment in favor of the widow where she sued as such, to assess all costs against the company, including those up to the time the widow was substituted as personal representative.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. § 32.\*]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by Maude Smith, administratrix, against the St. Louis, San Francisco & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrews, Streetman, Burns & Logue, of Houston, and Head, Dillard, Smith, Maxey & Head, of Sherman, for appellant. Wolfe & Wood, of Sherman, for appellee.

RAINEY, C. J. This suit was originally instituted by Maude Seale, F. H. Seale, and J. E. Seale, widow and father and mother, respectively, of M. T. Seale, deceased, to recover damages for the death of the said M. T. Seale, who was killed by being run over by a switch engine in the yards of the St. Louis, San Francisco & Texas Railway Company at Sherman, Tex., on January 16, 1909. A verdict and judgment was obtained by said parties, from which an appeal was perfected by the railway company to the Court of Civil Appeals for the Fifth supreme judicial district, and the judgment of the lower

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court was, by said Court of Civil Appeals, affirmed; the judgment of affirmance being reported in 148 S. W. 1099. A writ of error was denied by the Supreme Court of the state of Texas. The holding of the Court of Civil Appeals, in so far as the same affects the issue now before this court, was that the facts did not disclose a cause of action arising under the federal Employers' Liability Act; but, if they did, the contention of the railway company that the suit should have been brought by a personal representative of the deceased should have been taken advantage of by proper pleading in the trial court. A writ of error was granted by the Supreme Court of the United States. That court held that the facts disclosed a cause of action arising under the federal Employers' Liability Act, and that the suit could be prosecuted only by a personal representative of the deceased, and reversed and remanded the case without prejudice to such rights as a personal representative of the deceased may have. The opinion may be found in 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. Upon the return of the mandate from the United States Supreme Court a motion was made in the Court of Civil Appeals for the Fifth district to enter judgment in its behalf on the ground that more than two years had elapsed since the accrual of the right of action, and that the making of the personal representative a party would be the beginning of a new suit, and was therefore barred by limitation. This motion was refused. The opinion on said motion may be found in 160 S. W. 317. Since the filing of the original suit, Maude Seale, widow of M. T. Seale, deceased, intermarried with one Frank Smith, and having theretofore been appointed administratrix of the estate of the deceased for the purpose of prosecuting this suit, on the 11th, day of December, 1913, she filed a motion in the trial court asking permission to be substituted as the party plaintiff in lieu of the original parties plaintiff, which motion was duly granted by the court. After the granting of said motion, but on the same day, to wit, December 11, 1913, she filed her third amended original petition in which she prosecutes her suit as personal representative of the deceased. The cause was tried on January 19, 1914, and resulted in a verdict and judgment in favor of appellee for \$7,500. Appellant presented its motion for new trial, which was by the court overruled. Exceptions were reserved to the action of the court in that regard, as to other matters on the trial of said cause, and the cause is appealed to this court for review.

The first assignment of error complains of the action of the court in overruling defendant's third special exception to plaintiff's

third amended original petition on the ground that it asserts a new cause of action, and was filed more than two years after the accrual of the original cause of action.

[1] The proposition presented is that:

"Appellee's original petition and first and second amended original petitions asserted a cause of action under the Texas Death Statute. The third amended original petition asserts a cause of action under the provisions of the federal Employers' Liability Act, which is a new and distinct cause of action from that asserted in her original pleadings. The third amended original petition was filed more than two years after the cause of action arose, and, under the provisions of the federal Employers' Liability Act, the same is barred, and appellant's exception to said petition on that account should have been sustained."

The allegations in the last amendment and to which the exceptions were leveled are substantially, in fact almost literally, the same as those in the second amendment, except in the last the widow of the deceased, M. T. Seale, having married again, and having been appointed administratrix of his estate, by leave of the court, as such representative made herself a party plaintiff in lieu of the original plaintiff. The last amendment did not set up a new cause of action under the provisions of the federal Employers' Liability Act any more than did the second amendment. On the first appeal the case was affirmed, but on writ of error to the Supreme Court of the United States it was reversed, because plaintiff was not capable of recovering in her individual capacity, "but only through the deceased's personal representative." *Railway Co. v. Maude Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156.

The substitution of the personal representative of a deceased party is not the beginning of a new cause of action, but it relates back to the filing of the original petition.

We think the case of *Railway Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, is decisive of this proposition. The holding of our Supreme Court is to the same effect. *Price v. Wiley*, 19 Tex. 142, 70 Am. Dec. 323; *Martel v. Somers*, 26 Tex. 551, and others.

The amendment setting up no new cause of action, the statute of limitation did not apply (*Railway Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636), and there was no error in the overruling of the exception.

What we have heretofore said settles the third assignment of error against appellant, and it is overruled.

[2] The second assignment of error complains of the court for not taxing the costs that had accrued in said suit up to the time of making new parties, etc., against plaintiff. The court did not err in this respect, and said assignment is overruled.

The judgment is affirmed.

**BANKS v. BLAKE et al. (No. 6710.)**

(Court of Civil Appeals of Texas. Galveston.  
Nov. 13, 1914. Rehearing Denied  
Dec. 10, 1914.)

**1. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR—EFFECT.**

An assignment that the court erred in overruling plaintiff's motion to set aside the judgment for defendants and to retry the cause on its merits as between all the parties, because the judgment was not final, in that it did not dispose of the rights of all the parties, nor all the issues, such motion being merely one for a new trial, and filed too late, and not an equitable suit for a new trial, was insufficient to present for review the question whether the judgment was final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.\*]

**2. APPEAL AND ERROR (§ 20\*)—ORDERS APPEALABLE—JURISDICTION.**

Where a motion for a new trial to set aside a judgment rendered at a former term was filed too late, so that the district court had no jurisdiction to entertain it, no appeal would lie from an order overruling the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 81-87; Dec. Dig. § 20.\*]

**3. APPEAL AND ERROR (§ 719\*)—APPELLATE COURT—JURISDICTION.**

It is within the province of the Court of Civil Appeals to determine in any case whether it has jurisdiction to entertain an appeal, regardless of whether the matter is presented by an assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

**4. PARTITION (§ 95\*) — PROCEEDINGS — FINAL JUDGMENT.**

Plaintiff sued for partition, claiming an undivided interest in the land in controversy, and, his suit being resisted on the ground that he had no title, he appealed, and pleaded, in addition to the plea of not guilty, the defense of the statute of limitations of three, five and ten years. A verdict was rendered in favor of defendant B. alone, while the judgment recited that plaintiff take nothing and the defendants go hence, etc. *Held*, that the effect of the judgment was to declare that plaintiff had no title to any part of the land, and therefore was not entitled to partition as to one and all of the defendants, who, so far as plaintiff's claim was concerned, were entitled to go hence, etc., and was therefore final.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 300-316; Dec. Dig. § 95.\*]

Error from District Court, Jasper County; W. B. Powell, Judge.

Suit by W. Gerard Banks against Roi Blake and others for partition. From a judgment in favor of defendants, plaintiff brings error, and appeals from an order denying a motion to set aside the judgment and for a new trial. *Affirmed*.

See, also, 143 S. W. 1183.

H. C. Howell, of Jasper, for plaintiff in error. Blake & Williams, of Jasper, for defendants in error.

McMEANS, J. W. Gerard Banks brought this suit against Roi Blake, Henry Bendy, Marunda Bendy, Robert Bendy, Jim Bendy,

Alma Bendy, Alford Bendy, Mrs. Emma McKinney, John McKinney, Mrs. Willie Watson, Dave Watson, Mrs. Dora Wagner, F. M. Wagner, Kate Dawson, Wyatt Dawson, Jerry Bryant, and Alice Bryant for partition of 177 acres, the Jesse B. McNeely labor of land, in Jasper county; the plaintiff claiming an undivided interest of 157 acres therein, and conceding the ownership of 10 acres to the defendants Roi Blake, Jerry Bryant, and Alice Bryant, and 10 acres to the other defendants.

Defendants Kate and Wyatt Dawson answered, praying that the land be partitioned and that the portion thereof to which they were entitled be set apart to them. The defendants Dave and Willie Watson answered, pleading a general demurrer and general denial. The defendants Roi Blake, Jerry Bryant, and Alice Bryant answered, denying that they were tenants in common with plaintiff, but alleged that they were the owners in fee simple of the entire labor and in possession thereof, and pleaded not guilty, and also filed a cross-bill, in which they sought, by action of trespass to try title, to recover the whole tract. In their answer they sought no recovery as against their codefendants. The other defendants did not answer.

To the cross-bill above mentioned the plaintiff answered, pleading not guilty and the statute of limitation of three, five, and ten years.

The case was tried before a jury, and upon a verdict in favor of defendant Roi Blake alone a judgment was entered, which recited:

"That the plaintiff, W. Gerard Banks, take nothing by his suit, and that defendants go hence without day, and that plaintiffs pay all costs in this behalf expended," etc.

At the next succeeding term of the court the plaintiff, claiming that the judgment theretofore rendered was not a final judgment, filed a motion to set aside the judgment and to retry the case, which motion was by the court overruled, to which plaintiff excepted and gave notice of appeal. Afterwards the plaintiff, Banks, sued out a writ of error from the original judgment and from the judgment overruling his motion to set aside the judgment and retry the case, and the appeal is now before us.

Appellant's only assignment of error is as follows:

"The court erred in overruling the motion of plaintiff, W. Gerard Banks, to set aside the judgment rendered in said cause on the 11th day of December, A. D. 1912, and to retry said cause on its merits as between all the parties to said cause, and in refusing to set aside said judgment and retry said cause on its merits as between all the parties to said cause, because said judgment is not a final judgment, in that it does not dispose of all the parties nor all the issues between the parties in said cause."

[1, 2] We are of the opinion that this assignment of error is not sufficient to bring into review the question of whether the judgment was or was not a final judgment. The

only complaint presented by it is as to the action of the court in overruling a motion to set aside the judgment made at a subsequent term of the court. This motion cannot be regarded as an equitable suit for a new trial because of the absence of necessary allegations to make it such. Being merely a motion to set aside a judgment which had been rendered at a former term, in other words, a motion for a new trial, the district court was without jurisdiction to entertain it, because it came too late. This being true, no appeal therefrom would lie, and therefore this court has no jurisdiction to pass upon the question presented by the assignment.

[3, 4] But it is within the province of this court to determine in any case whether it has jurisdiction to entertain an appeal, regardless of whether the matter is presented by an assignment of error, and in determining that question in this case we have carefully looked to the record to determine whether the judgment appealed from was or was not a final judgment, and after mature deliberation have concluded that it was final. It is true that the judgment does not follow the verdict, for the verdict is in favor of Roi Blake alone, while the judgment is that the plaintiff take nothing, and that the defendants go hence, etc. The plaintiff makes no complaint of this error, and, if he had, no question of our jurisdiction could have been predicated upon it. The suit as originally brought was for partition, the plaintiff claiming an undivided interest in the land. His suit was resisted on the ground that he had no title, and to meet this contention he pleaded, in addition to the plea of not guilty, the defense of the statute of limitations of three, five, and ten years. The effect of the judgment as rendered was to declare that he had no title to any part of the land, and therefore he was not entitled to a partition, and that, as to the defendants—all of them, that is, so far as plaintiff's claim of title and right of partition were concerned—they go hence without day. We think, therefore, that such judgment was final, and as the case is before us without any assignment of error that we can sustain, the judgment of the court below must be affirmed; and it has been so ordered.

**Affirmed.**

**PATTERSON et ux. v. SYLVAN BEACH CO. (No. 848.)**

(Court of Civil Appeals of Texas. El Paso. Nov. 19, 1914. Rehearing Denied Dec. 17, 1914.)

**1. APPEAL AND ERROR (§ 630\*)—TRANSCRIPT—SUFFICIENCY.**

The clerk's transcript and statement of facts sent by the clerk of the Court of Appeals to counsel for respondents was not returned, having been lost. As a substitute for the lost papers, they tendered a duplicate copy of the statement of facts which had been filed in the

court below, but which was not certified by the clerk of the lower court, although appellants' counsel agreed that it was a true and correct copy of the record. *Held* that, as appellee's counsel could easily have procured a substitute transcript regularly certified, but failed to, though the Court of Civil Appeals advised them that the duplicate copy would not be considered, the copy will be rejected, and the statement of the nature and result of the suit contained in appellants' brief and the statements supporting the assignments of error will be treated as correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2723; Dec. Dig. § 630.\*]

**2. JUDGMENT (§ 248\*)—CONFORMITY TO PLEADING.**

Where a corporation sought to set aside conveyances made by its officers to defendants on the ground that the officers were not authorized to make the conveyances, and that the consideration was wholly inadequate, and defendants asserted that the contracts were entered into fairly for the consideration paid, a money judgment affirming the deeds, but allowing the corporation to recover the claimed deficiency in the purchase price, must be reversed, being without support in the pleadings or evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. § 248.\*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by the Sylvan Beach Company against J. T. Patterson and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Cooper, Merrill & Lumpkin and John R. Burkett, all of Houston, and Brown & Terry, of El Paso, for appellants. A. B. Wilson and Cole & Cole, all of Houston, for appellee.

HIGGINS, J. [1] After the submission of this case, it was discovered that the clerk's transcript and statement of facts were missing from the files, having been sent some months previous by the clerk of this court to counsel for appellee, who had failed to return same. Their attention was called to the matter, and it developed that same had been lost or misplaced by them, and thereupon an opportunity was afforded of substituting the same. As a substitute for the lost papers, they tendered a duplicate copy of statement of facts which had been filed in the trial court as by law required, together with what purported to be a copy of the original clerk's transcript. This tendered clerk's transcript was without any certificate by the clerk of the lower court, but it was agreed by appellants' counsel that it was a true and correct copy of the record as originally prepared by the clerk of the lower court.

In view of the fact that a clerk's transcript regularly certified could have been readily procured from the clerk of the lower court and tendered as a substitute for the lost one, and being of the opinion that it was advisable the substituted transcript should be so authenticated, and a mere agreement of counsel that the same was correct should not be accepted in lieu of a certificate, the clerk

was instructed to advise appellee's counsel that the substitute tendered for the clerk's transcript was not regarded as sufficient, and to instruct them that such transcript must be regularly certified to by the clerk of the lower court as in case of an original transcript. Counsel were so advised, but they have seen fit to disregard this holding of the court, and have again tendered the copy which we had theretofore indicated was not acceptable, and moved the court to allow the same and the duplicate copy of the statement of facts to be filed as a substitute for the original record. Believing, for the reason above indicated, that the proposed substitute clerk's transcript is insufficient, the motion to substitute will be overruled, and it becomes necessary for us to dispose of the appeal as best we may without the record. We will therefore accept as correct the statement of the nature and result of the suit contained in appellants' brief, together with the statements supporting the various assignments of error as being correct, and will dispose of the assignments upon such assumption.

Suit was instituted by Sylvan Beach Company against J. T. Patterson and Nelle W. Patterson, his wife; the cause of action being stated as follows:

First. Suit in ordinary form of trespass to try title to lots 19 and 20, block 13, Sylvan Beach, First subdivision Johnson Hunter survey, Harris county, Tex., alleging ejectment, of date December 1, 1912.

Second. Seeking cancellation of two deeds to property above described, on ground of want of authority in officers of plaintiff's company to execute same, and alleging that first of said deeds was executed on December 21, 1911, by W. C. Porterfield, vice president of plaintiff's company, attested by H. M. Porterfield, as secretary of the company, conveying said lot 13 to appellant Nelle W. Patterson, for a recited consideration of \$500, and that the second of said deeds was executed on May 18, 1912, by A. H. S. Talbot, vice president of plaintiff company, and attested by J. T. Patterson, appellant, as secretary thereof, which deed also conveyed lot 19, above described, for a recited consideration of \$500 cash; that the reasonable market value of said lots at time of execution of said deed was from \$500 to \$700 each, which fact was well known to appellant J. T. Patterson at the time; that neither of appellants paid any consideration for either of said deeds, or, in the alternative, they paid only the sum of \$150 each for said lots; and that such consideration was so grossly inadequate as to render the deeds void on the ground that the officers of plaintiff's company were without authority to execute said deeds for a less consideration than the reasonable market value of the property, which fact is alleged to have been known to appellant J. T. Patterson at time deeds were executed.

Third. For alternative pleading, the petition alleged: "Plaintiff further represents to the court that said property hereinabove described has not been paid for by the defendants or either of them, and if the court should find that plaintiff is not entitled to recover said lots, then plaintiff is advised and believes that it has a right to have its equitable lien against said property established and enforced for the unpaid purchase money, which defendants should have paid plaintiff for said lots and which are due and owing plaintiff in the event the court should hold said deeds to be valid and binding upon the plaintiff."

The trial court's judgment was based upon this last-mentioned portion of the petition. Appellants answered by exceptions, plea of not guilty, and special plea that the lots were purchased from the plaintiff for an agreed consideration of \$150 each, which was paid to and accepted by it by giving proper credit on an indebtedness from the company to J. T. Patterson, and the deeds in question were executed by proper officers of the company, with full knowledge of all the facts.

The cause was submitted to the court without intervention of a jury, and judgment rendered on June 11, 1913, in favor of appellee, establishing an indebtedness against appellants jointly in the sum of \$708.75, with interest at 6 per cent., on account of unpaid purchase money for said lots, establishing an implied vendor's lien against the property above described, and ordering foreclosure in the usual form. From this judgment the defendants appeal, assigning as error:

First: "The court erred in rendering judgment in favor of plaintiff establishing and foreclosing an equitable lien on the lots in controversy, for the reason that such judgment is without pleading to support it, in this: That said pleading wholly fails to allege the existence of any agreement on the part of the defendants, or either of them, to pay to plaintiff as consideration for the lots in controversy, or either of them, any sum whatever in excess of the amount found by the court to have been paid by the defendant J. T. Patterson at the time the deeds were executed."

Second: "The court erred in overruling, and not sustaining, the special exception contained in the third paragraph of their amended answer, which points out the insufficiency of that part of plaintiff's first amended original petition which seeks the establishment and foreclosure of an equitable lien in favor of the plaintiff on the ground that said pleading fails to allege the existence of any agreement on the part of the defendants, or either of them, to pay to the plaintiff any consideration for the lots in controversy other than the cash consideration paid at the time the deeds were executed."

Third: That the judgment rendered by the court is wholly unsupported by the evidence, in that there is no evidence whatever of an agreement on the part of defendants to pay the company for the lots in controversy any consideration whatever other than the amount found by the court to have been paid at the time the deeds covering the lots were executed.

[2] The judgment of the court established the validity of the deeds under which appellants claim title to the lots in controversy, and found, as a fact, that appellant J. T. Patterson paid the company the sum of \$150 for each lot at the time the deeds were executed, and that there was an unpaid balance of \$350 due on each of the lots. The vice president of the company had full authority to execute deeds in behalf of the company, and it was the custom of Porterfield, as vice president, and later of Talbot, in the same capacity, to do so.

J. T. Patterson testified that he was sales manager of appellee company from March 20, 1911, until after execution of two deeds in question; that he purchased lot 20 from W. C. Porterfield, vice president, and A. H. S.

Talbot, general manager, of appellee company, for cash consideration of \$150, which was charged to his account on the books of the company; that lot 19 was bought from Mr. Talbot, who was vice president and general manager of the company at that time, for a cash consideration of \$150, which was likewise charged to his account; that Talbot had full charge of the office and business of the company, and that the company owed witness at the time from \$700 to \$800; and that the consideration for these lots was actually credited on his indebtedness. There was no evidence whatever of any agreement upon appellant's part to pay more than \$150 for each lot.

The foregoing assignments are each sustained. There is no express agreement alleged upon which the court could base a finding and judgment that there was a balance of \$350 due on the purchase price of each of the lots, nor are any facts alleged from which such an agreement might be implied. The mere fact that the officers of the company had conveyed the property for a consideration less than that at which they were authorized to sell for certainly would not imply an agreement upon the part of the vendee to pay the difference between the reasonable value of the lots and that actually paid. It seems this was the theory upon which the court entered judgment. The pleadings themselves are wholly insufficient to support the judgment, and the evidence likewise, as there is no evidence of an express or an implied agreement upon Patterson's part to pay more than the amount which he did pay.

Reversed and remanded.

# MISSOURI, K. & T. RY. CO. OF TEXAS v. CHURCHILL. (No. 67021.)

(Court of Civil Appeals of Texas. Galveston. Oct. 20, 1914. Rehearing Denied Nov. 25, 1914.)

## 1. APPEAL AND ERROR (§ 547\*)—INSTRUCTIONS—REVIEW—BILL OF EXCEPTIONS—NECESSITY.

Error cannot be successfully assigned on the court's refusal to submit certain special issues to the jury, where no bill of exceptions was taken to the court's charge or to its refusal to give defendant's requests.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2428-2432; Dec. Dig. § 547.\*]

## 2. CARRIERS (§§ 818, 346\*)—TRANSPORTATION OF PASSENGERS—PERSON ACCOMPANYING PASSENGER TO TRAIN—INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff while endeavoring to alight from a vestibuled passenger train as it was leaving a station to which plaintiff had gone to assist his mother and her other children aboard the train, by his being struck by a shed support as he swung out from the wrong side of the train in an endeavor to alight after the train had started, and in the presence of the conductor, evidence held to sustain a finding of negligence on the part of the

conductor and of absence of contributory negligence on plaintiff's part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314, 1401; Dec. Dig. §§ 318, 346.\*]

## 3. CARRIERS (§ 304\*)—TRANSPORTATION OF PASSENGERS—PREMATURE STARTING OF TRAIN.

Where plaintiff, to the knowledge of defendant's conductor in charge of a vestibuled train, boarded the train to assist his mother and her other children to a seat therein, it was the conductor's duty to hold the train a reasonable time to allow plaintiff to perform such duty and to disembark from the train, and, on discovering that the train had started before plaintiff had time to alight, the conductor was bound to stop the train and permit plaintiff to disembark.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1104, 1110-1114, 1124, 1242; Dec. Dig. § 304.\*]

## 4. CARRIERS (§ 333\*)—INJURY TO LICENSEES—ASSUMED RISK.

Where plaintiff boarded a vestibuled passenger train to assist his mother and her other children to a seat to the knowledge of the conductor, and he, having negligently started the train before plaintiff could perform such service and alight, refused on request to open the vestibule and permit plaintiff to get off on the right side of the train, whereupon plaintiff rushed to the opposite side, opened the vestibule, swung out, and was struck by a steel depot roof support, he did not assume the risk in attempting to alight from the train at the time, place, and manner he did.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

## 5. APPEAL AND ERROR (§ 1050\*)—RECEPTION OF EVIDENCE—PREJUDICE.

Where plaintiff, having gone on a vestibuled train to assist his mother and her other children to a seat, attempted to alight after the train had started from the wrong side of the train, in the presence of the conductor, and there was evidence that plaintiff did not know of the proximity to the car of posts supporting the station roof or of their existence at the place, and that the conductor saw plaintiff while opening the vestibule door and attempting to alight, the issue of discovered peril not having been submitted to the jury, defendant was not prejudiced by the court's allowing the conductor to answer in the affirmative a question whether he knew, when he saw plaintiff attempting to open the door, that it would be dangerous for him to alight from that side of the train.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from District Court, Galveston County; Edward F. Harris, Special Judge.

Action by S. A. Churchill against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and Jno. T. Garrison, all of Houston, and John L. Darrouzet, of Galveston, for appellant. S. L. Staples, of Smithville, and Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for appellee.

McMEANS, J. Plaintiff, S. A. Churchill, brought this suit against the defendant, Missouri, Kansas & Texas Railway Company of

Texas, to recover damages sustained by him on account of the negligence of the defendant. He alleged, in substance, that he accompanied his mother and her two children to the Union Depot in the city of Galveston, where they intended to take passage on defendant's passenger train to their home in Smithville, and that he entered the train with his mother and her two children to assist them with their luggage and in finding seats, first apprising the conductor of this fact and the fact that he did not intend to become a passenger, and that, while he was so engaged, the conductor, without warning or notice to him, started said train in motion, and before he could get to the door of the car to alight from the train the conductor shut the vestibule door through which he had entered, and that, although the conductor was shutting the vestibule door when plaintiff first asked him to let him off, he continued to shut, and did thereafter finish shutting, the door, and that, although he requested the conductor to open the door and let him out, he (the conductor) failed and refused to do so and failed and refused to stop the train and let him off, but stood on the trapdoor of the vestibule, thus barring plaintiff himself from opening the door; that the momentum of the train was growing greater all the time; that in order to disembark, and not be carried away, he went on the platform of the car next to the one he had entered, opened the trapdoor and vestibule door on the opposite side of the train from which he entered, and, getting down on the car steps, he grasped the handholds on each side, and leaned back to see if he could get off in safety; and that just as he leaned back to look his head came in contact with an iron support of the shed under which the train had been standing, knocking him from the steps, and inflicting the injuries for which he sued. The grounds of negligence alleged were in permitting the train to start while plaintiff was inside the car without affording him a reasonable time to assist said passengers and alight therefrom, and without giving him notice that the train was going to start, in either of which events he could have alighted with safety; in closing the vestibule door while plaintiff was demanding the conductor to permit him to pass through it; and in using a track located in such close proximity to the iron support of the shed as to make the support dangerous to a person who might leave the train on the side upon which it was situated.

Upon the request of appellant the case was submitted to a jury upon special issues in the form of interrogatories, the issues submitted being as follows:

"(1) Did the plaintiff, before the train started, inform the conductor of the fact that plaintiff was not going on the train to Smithville?

"(2) Was the train held before the starting a reasonable length of time to allow plaintiff to get off the train?

"(3) Did plaintiff wait a reasonable length of time, to allow the train to be stopped, after

plaintiff called out to the conductor that plaintiff wanted to be let off the train?

"(4) Was the defendant guilty of negligence toward plaintiff in using the track as close to the pillar or post as it was used?

"(5) Was plaintiff guilty of contributory negligence in his conduct after the train started?"

The sixth interrogatory propounded was as to what sum of money would reasonably and fairly compensate plaintiff for the injuries sustained by him, laying down in that connection definite rules to guide the jury in arriving at the measure of his damages.

The jury answered the first, third, and fourth questions in the affirmative, and the second and fifth in the negative, and in answer to the sixth found that a fair and reasonable compensation to plaintiff for the injuries suffered by him was \$7,000. Upon the return of the verdict the court required a remittitur by plaintiff of \$2,000, which was filed and entered, and thereupon the court rendered judgment in his favor for \$5,000, from which the defendant, after its motion for a new trial had been overruled, has appealed.

Appellant's first assignment of error assails the action of the court in submitting interrogatory No. 4 for the determination of the jury, to wit:

"Was the defendant guilty of negligence toward plaintiff in using the track as close to the pillar or post as it was used?"

[1] The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth assignments are predicated upon the refusal of the court to submit to the jury special issues requested by defendant. No bill of exceptions was taken to the charge of the court or to the court's refusal to give defendant's special charges, and for this reason appellee objects to the consideration of these assignments.

In *St. Louis, Southwestern Ry. v. Wadsack*, 166 S. W. 42, the Texarkana Court of Civil Appeals had under consideration the question whether assignments of error based upon objections to the court's charge or predicated upon the refusal of the court to give special charges requested by the appellant, to which action bills of exception were not taken in the trial court and allowed and signed by the judge, could be considered by the appellate court. In a comprehensive opinion written by Associate Justice Hodges the following conclusion is reached:

"Heretofore the rulings of the court in giving and refusing charges was regarded as excepted to in every instance, without any express reservations by bill or otherwise. The effect of the amendment to article 2061 is to place the rulings of the court in giving or refusing charges in the same category with other rulings not appearing of record as to the formalities required for their consideration on appeal. Appellate courts can now no more review the action of the trial court in giving or refusing charges than they can the rulings admitting or excluding testimony, without proper bills of exception. It also follows that bills of exception relating to the giving or refusing of charges must conform to the requirements provided by statute for bills of exception generally."

See, also, *Novelty Import Co. v. Griffin*, 168 S. W. 85.

The court in the cases cited properly, we think, refused to consider the assignments. We will not pause to set out here the reasons for thus deciding, and content ourselves by referring therefore to the cases referred to. The assignments cannot be considered.

Appellant's second, third, and fourth assignments challenge in different ways the sufficiency of the evidence to justify the verdict and judgment. This requires a review of the facts.

[2] Appellee formerly lived at Smithville, a town on appellant's railway line, but at the time of his injury, and for some time prior thereto, lived in the city of Galveston, and was engaged as switchman on another railroad entering that city. His mother and her other children resided in Smithville. Prior to April 8, 1913, plaintiff's mother and two of her children visited plaintiff in Galveston, and on that date started to return to their home. Plaintiff accompanied them to the Union Station in Galveston, from which all trains, including defendant's, took their departure, to assist them with their grips, bundles, and packages, of which there were several, and a short time before the time for departure of the train he, accompanying them, carrying a large grip and a box in which there was a small dog, entered the gate and proceeded to the car door through which they intended to enter the train. Here plaintiff spoke to the conductor, one Tabor, with whom he was well acquainted, having been his neighbor when both lived in Smithville; plaintiff's mother having known him for 17 years. Tabor asked plaintiff if he was going home, meaning Smithville, to which the latter replied that he was not; that he was then living in Galveston; and that he was there only for the purpose of assisting his mother and the children on the train. Plaintiff, prior to the time of this conversation, had set the grip he was carrying on the ground, and had gone down to the engine and procured the fireman to carry the dog to Smithville, and upon his return proceeded to assist his mother and the children on the train, he himself carrying the large grip, and after they were in the coach began arranging their seats and baggage, but before he had accomplished this the conductor gave the signal for starting the train, and the train began to move out. Hastily kissing his mother good-bye, the plaintiff walked rapidly toward the end of the coach from which he had entered, and just as he reached the door the conductor was closing the vestibule door through which plaintiff expected to make his exit. He at once called to the conductor to stop and to open the door and let him off, but the conductor, although he heard him, did not reply, nor did he heed plaintiff's requests, but took his stand on the trapdoor, which had to be raised before the vestibule door could be opened. At

this juncture a man with whom the conductor had been talking, and who was standing in the gangway when plaintiff approached, stepped on the platform of the car just in advance, and onto the trapdoor on the left. Plaintiff, seeing that the conductor was making no effort to stop the train or to open the door and let him off, passed to the platform of the car next in front, and as both doors on the left were blocked, one by the conductor and the other by the man, he lifted the trapdoor and opened the vestibule door on the right, and, going down on the steps, he caught the handholds on each side, preparatory to swinging off, and leaned backward to see if he could safely get off at that place, and just as he did this his head came in contact with an iron support of the shed under which the train had been standing and was then moving, and which was 13 inches from the side of the coach, knocking him from the steps and to the ground, and inflicting damage upon him to the amount of the judgment. The train was what is known as a vestibule train, and all the vestibule doors on the right-hand side had been kept closed, while those on the left had been opened to allow the entrance of passengers from that side. It was usual and customary to leave the doors on the left side open until the train reached the registry station, some distance down in the yards, where the trains usually stopped, but plaintiff, seeing the conductor closing the doors, supposed the train would not stop there, and would not stop at all until it reached Forty-Second street, or the station of Oyster, down the Island; hence his anxiety to get off at the time and place he attempted it. While he knew the shed was held up by supports, he did not know of the position of the support that hit him, nor that any of them were close enough to the car to strike him while making his descent from the train, but the defendant did. The conductor observed plaintiff opening the vestibule door on the right, but said nothing, and did nothing to stop him.

There was some conflict in the evidence, but we have stated only the facts which most strongly support the plaintiff's case; for, if these warranted the verdict and judgment in his favor, the case must stand, even though there may have been evidence upon which the jury might have found against him.

[3, 4] Our conclusion, based upon the foregoing facts, is that the evidence was sufficient to support the finding of the jury that the appellant was guilty of negligence toward plaintiff which proximately caused his injuries, in failing to hold the train a reasonable time to allow him to seat his mother and her children and to disembark therefrom, and in failing to stop the train and let him off when the conductor discovered that he had not gotten off, and that in the circumstances detailed plaintiff was not guilty of contributory negligence, nor did he assume the risk

of injury in attempting to alight from the train at the time, place, and manner he did. The assignments must therefore be overruled.

[5] While the conductor, Tabor, was testifying for the defendant, he was asked the following question by plaintiff's counsel: "You knew when you saw the plaintiff attempting to open the trapdoor to the right that it would be dangerous for him to alight on that side, didn't you?" To which the witness answered, "Yes."

The question and answer were objected to by defendant upon the grounds that plaintiff had not sought to recover on the ground of discovered peril; that plaintiff knew the condition of the posts and shed; and that the conductor did not see plaintiff when he was opening the trapdoor or attempting to alight. The assignment cannot be sustained. There was proof that the plaintiff did not know the proximity of the posts to the car or of its existence at this place, and that the conductor did see plaintiff while he was opening the door and attempting to alight. The issue of discovered peril was not submitted as one of the special issues in the case, and the jury could not have based the findings they made upon the testimony objected to. If the admission of the testimony was error, it could have had no possible influence upon the jury in determining the issues submitted to them by the court's charge.

The remaining assignments complain of the verdict as being excessive. It is unnecessary to state in detail the extent of the injuries which the evidence shows plaintiff suffered. We have carefully considered the evidence upon this issue, and are of the opinion that the verdict, as reduced by the remittitur required by the lower court, is not excessive.

We find no reversible error in the record, and the judgment of the court below is therefore affirmed.

Affirmed.

### CONN et al. v. HOUSTON OIL CO. OF TEXAS. (No. 6680.)

(Court of Civil Appeals of Texas. Galveston. Nov. 3, 1914. Rehearing Denied Dec. 10, 1914.)

#### 1. APPEAL AND ERROR (§ 548\*)—OBJECTIONS TO CHARGE—REVIEW—BILL OF EXCEPTIONS—NECESSITY.

An objection to a charge or any part thereof will not be reviewed by the appellate court, unless the objection is preserved by a proper bill of exceptions incorporated in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.\*]

#### 2. VENDOR AND PURCHASER (§ 232\*)—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE—PRIOR UNRECORDED DEED—POSSESSION.

Where, when a tram company purchased certain land in controversy from the heirs of D., one L. was living on and had possession of

86 acres, holding under an unrecorded deed in which the 86 acres was described by metes and bounds, but it was not shown that the tram company had knowledge of possession of any part of the tract other than that occupied by L., his possession was not constructive notice to the tram company of a prior unrecorded deed to the balance of the tract, nor did the fact that the deed under which L. was holding was unrecorded enlarge the effect of his possession as notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.\*]

#### 3. VENDOR AND PURCHASER (§ 238\*)—BONA FIDE PURCHASER—KNOWLEDGE OF SUBSEQUENT GRANTEE.

Where plaintiff claimed title under a tram company, which was an innocent purchaser for value without notice of any superior outstanding title, plaintiff acquired the tram company's rights, and it was immaterial that at the time it purchased it had knowledge of facts which, if possessed by the tram company, would have charged it with knowledge of a prior conveyance by one of its prior grantors.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 580-582; Dec. Dig. § 238.\*]

#### 4. APPEAL AND ERROR (§ 564\*)—RECORD—FILING—STATEMENT OF FACTS—TIME.

Vernon's Sayles' Ann. Civ. St. 1914, art. 2073, allows 30 days after adjournment in which to file a statement of facts and bills of exception, and provides that on good cause shown the time may be extended, but not so as to delay the filing of the statement, together with the transcript of the record, in the appellate court within the time prescribed by law, subject to a proviso that any statement of facts filed before the time for filing the transcript in the appellate court expires shall be considered as filed in time. Held that, under such proviso, a statement of facts filed before the transcript is required by law to be filed in the appellate court is filed in time, though not filed within the time specified by the trial court for filing the same as extended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

#### 5. EXCEPTIONS, BILL OF (§ 42\*) — FILING — TIME—"FORMALITIES."

The time for filing bills of exception relates to formalities in bringing a case to the appellate court for revision within Court of Civil Appeals rule 8 (142 S. W. xi), providing that all motions relating to informalities in the manner of bringing a case into court shall be filed and entered by the clerk on the motion docket within 30 days after the filing of the transcript in the Court of Civil Appeals, or the objection is waived, if it can be waived by the party; and hence failure to file bills of exception in time was waived, where no motion to strike the same was filed within the time prescribed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72; Dec. Dig. § 42.\*]

#### 6. VENDOR AND PURCHASER (§ 243\*)—OUTSTANDING TITLE—NOTICE—EVIDENCE.

On an issue as to whether a tram company under which plaintiff claimed was an innocent purchaser without notice of an outstanding title in having acquired title from certain heirs in December, 1892, February, 1893, and February, 1895, evidence that, in 1893, 1894, or 1895, the tram company's manager expressed a fear of litigation with reference to the land and ordered a removal of the timber therefrom as quickly as possible, and that there was general talk among its employees indicating that the

company did not have a good title to the land, was inadmissible.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.\*]

**7. APPEAL AND ERROR (§ 301\*)—ERRORS NOT PRESENTED IN MOTION FOR NEW TRIAL—ERRORS APPARENT OF RECORD—"APPARENT."**

The term "apparent," as used in the clause "errors of law apparent on the face of the record," means clear or manifest to the understanding; plain; obvious; appearing to the eye or mind—not including errors which can be ascertained by looking into the record and considering the evidence; and hence assignments in an action to recover land that the judgment was contrary to law and without evidence to support it, in that it awarded to defendants three forty-seconds only of the land in controversy, when it should have awarded eleven fifty-sixths, there being no evidence that a tram company under which plaintiff claimed paid value in good faith and without notice of the adverse claim of those under whom defendants claimed, etc., and that the court erred in granting a peremptory instruction on the issue of purchase in good faith by the tram company, on the ground that there was no evidence that it was an innocent purchaser for value, did not present errors of law apparent on the face of the record, and could not be reviewed, where they were not presented as grounds for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

For other definitions, see Words and Phrases, First and Second Series, Apparent.]

Appeal from District Court, Newton County; A. E. Davis, Judge.

Suit by the Houston Oil Company of Texas against R. C. Conn and others. Judgment for complainant, and defendants appeal. Affirmed.

John B. Warren, of Houston, for appellants. Hightower, Orgain & Butler, of Beaumont, H. O. Head, of Sherman, and Parker & Kennerly, of Houston, for appellee.

McMEANS, J. The Houston Oil Company of Texas brought this suit against R. C. Conn and John B. Warren to recover 1,051 acres of land in Newton county, part of the Lewis Donaho one-half league and labor survey. The defendants answered by plea of not guilty, and by cross-bill sought to recover the land from the plaintiff. In answer to the cross-bill the plaintiff pleaded not guilty. The case was submitted to a jury upon special issues, and upon return of the verdict a judgment was rendered and entered in favor of plaintiff, from which the defendants, after their motion for a new trial had been overruled, have appealed.

Plaintiff deraigned title as follows: (1) Patent from the state of Texas to Lewis Donaho, for one-half league and labor, dated December 12, 1845; (2) deeds from the heirs of Lewis Donaho, some of them acting through their duly authorized agents and attorneys in fact, to the Cow Creek Tram Company, dated respectively December 23, 1892, February 20, 1893, and February 18, 1895; (3) deed from the Cow Creek Tram

Company to George Adams; (4) deed from George Adams to the plaintiff, Houston Oil Company of Texas.

The defendants deraigned title through a deed from Lewis Donaho to Wm. McFarland, conveying the entire survey. This deed was not produced on the trial, nor was it shown that it had ever been recorded, but its execution was proven by circumstances only, and was shown to have been executed at a date long anterior to the date of the deed from the heirs of Lewis Donaho to the Cow Creek Tram Company. Defendants further proved a regular, consecutive chain of transfers from Wm. McFarland down to themselves.

From the foregoing statement it will be observed that the defendants owned the senior title, which was superior to the junior title owned by the plaintiff, provided that, at the time the Cow Creek Tram Company purchased the land in controversy from the heirs of Lewis Donaho, it had notice of the execution of the deed by Lewis Donaho to Wm. McFarland, or had knowledge of facts that would have put a person of ordinary prudence upon inquiry, which, if diligently pursued, would have led to the discovery of its execution. It is apparent from the foregoing that one of the main issues upon the trial was whether the Cow Creek Tram Company was a purchaser for value without notice of the execution of the deed by Lewis Donaho to Wm. McFarland. If it was not, the judgment should have been for defendants; if it was, then the judgment for plaintiff was properly rendered, regardless of whether the Cow Creek Tram Company or plaintiff, in purchasing from Adams, had knowledge of the execution of the senior deed, or were in possession of facts that would put a person of ordinary prudence on inquiry. The undisputed facts show that Adams was acting for the Cow Creek Tram Company in purchasing the land from the heirs of Lewis Donaho, and any notice he had at that time of the execution of the senior deed, or other facts to put a person of ordinary prudence on inquiry, was chargeable to the tram company.

The seventh special issue submitted by the court to the jury is as follows:

"Question No. 7: Was George Adams or the Cow Creek Tram Company an innocent purchaser for value in good faith of the land purchased from the heirs of Lewis Donaho of 1,051 acres? You will answer this question, 'Yes.'"

The jury, in obedience to the court's command answered this question in the affirmative.

The peremptory charge on this issue is assailed by defendants' first assignment of error; their contention being that the question was one for the jury to determine, since there was evidence introduced tending to show that George Adams, the representative of the tram company, had notice of the de-

fendants' claim of title and of the claim of title of those under whom they hold.

[1] We are met in limine by the objection of appellee to the consideration of this assignment, on the ground that this charge was not excepted to before it was submitted to the jury, and there was no exception to the action of the court in giving it preserved by a bill of exceptions. It is now too well settled to require further discussion that an objection to a charge, or any part thereof, will not be reviewed by the appellate court, unless the objection is preserved by a proper bill of exceptions incorporated in the record. *Railway v. Wadsack*, 166 S. W. 42; *Railway v. Brown*, 168 S. W. 867; *Railway v. Mallard*, 168 S. W. 994; *Ford Motor Co. v. Freeman*, 168 S. W. 82; *Saunders v. Thut*, 165 S. W. 554; *Railway v. Galloway*, 165 S. W. 546; *Johnson v. Hoover*, 165 S. W. 900; *Roberts v. Laney*, 165 S. W. 116; *Life Association v. Rhoderick*, 164 S. W. 1068; *Street Railway v. Barnes*, 168 S. W. 992; *Railway v. Churchill*, 171 S. W. 517, decided by this court October 15, 1914. But does this rule apply to a peremptory instruction which takes from the jury the right to pass upon the facts? We are inclined to the opinion that it does not, but applies only to those charges which submit to the jury controverted fact issues raised by the evidence.

[2] However that may be, we are of the opinion that the undisputed evidence introduced upon the trial was sufficient to show want of notice to the Cow Creek Tram Company, at the time of its purchase, of the execution of the deed by Lewis Donaho to Wm. McFarland conveying the entire Lewis Donaho survey, which deed, as before stated, was proved by circumstances only. We will not set out in detail the evidence which appellants contend tended to prove notice, but will content ourselves with the statement that we have carefully examined the evidence relied upon by appellants in that regard, and find the same is insufficient to raise the issue. The only fact tending even remotely to show notice was the proof that, at the time of the purchase of the 1,051 acres in controversy by the tram company from the heirs of Lewis Donaho, one W. K. Landrum was living upon, and had possession of, 86 acres of it, holding under a deed which was not then recorded, and in which the 86 acres was described by metes and bounds, and certain other parties had other portions of the Donaho survey in their possession, but, with the exception of Landrum, the possession of said other persons of different parts of the survey did not extend to or upon the 1,051 acres in suit. The evidence is uncontradicted that the Cow Creek Tram Company paid full value for the land. It was not shown that George Adams, who represented the tram company in making the purchase, and who died several years before the trial, had knowledge of possession of any part of the Donaho, other than that of W. K.

Landrum of 86 acres of the tract involved in this suit, and this fact is shown only by the circumstances of Landrum's possession. The 86 acres is not involved in this appeal; it not having been awarded to either party. The possession of land not included in the deed to the tram company, it not having been shown that the tram company knew of such possession at the time it purchased, could not be constructive notice affecting the title to any land beyond that possession. *Hayward Lumber Co. v. Bonner*, 56 Tex. Civ. App. 208, 120 S. W. 578. Landrum's possession, whether the tram company had either actual or constructive notice of it, was not notice of claim to any part of the tract in controversy which he did not claim; and from the fact that the deed under which he was holding was not recorded such want of record could not enlarge the effect of his possession as notice. *Wright v. Lassiter*, 71 Tex. 640, 10 S. W. 296.

[3] In consideration of the foregoing, we are of the opinion that the Cow Creek Tram Company was shown by the undisputed proof to be a purchaser for value without notice of any superior outstanding title to the land in controversy, and that the court did not err in giving the peremptory instruction complained of. As the Cow Creek Tram Company was an innocent purchaser for value, it is immaterial whether at the time the appellee, Houston Oil Company, purchased the land it had knowledge of facts which, if possessed by the tram company at the time it purchased, would have charged it with knowledge of the execution of the deed from Lewis Donaho to Wm. McFarland. *Illies v. Frerichs*, 11 Tex. Civ. App. 575, 32 S. W. 917.

If we are correct in the views above stated, then the judgment of the court below must be affirmed, unless some error prejudicial to appellants was made by the court in the rejection of the testimony offered by them, which is complained of in the eighth and ninth assignments. The testimony in question was that of the witness Myers, who was an employé of the tram company as locomotive engineer, and who, had he been permitted, would have testified that about the year 1893 or 1894 or 1895, when the tram company was cutting timber on the land in controversy, which was shown to be after its purchase, he was given orders by George Adams, the manager of said company, to hurry up and get the timber off the tract, as they might have litigation over it, and, if he saw anybody trying to stop him while running the train on the tram, to not stop, but to pull the train and timber off of that tract as quickly as possible; also the testimony of the witness Cully, an employé of the tram company, to the effect that it was general talk among the employés of the Cow Creek Tram Company, when the timber was being removed from the land, that the company was in a rush to get the timber off for

fear of litigation. To the rejection of this testimony appellants duly preserved bills of exception.

[4] Appellee objects to the consideration of the assignments upon the ground that neither the statement of facts nor bills of exception in this case was filed in the trial court within the time fixed by law, nor within the time allowed by the order of the court, which extended the time of filing 30 days after the expiration of the time the law prescribed. It appears that the trial court made an order allowing appellants 30 days after the expiration of the time given by law for the filing of statements of fact and bills of exception in which to file a statement of facts and bills of exception, but that neither the statement of facts nor bills of exception was filed until more than 30 days after the time so extended by the court's order had expired.

Article 2073, Vernon's Sayles' Ann. Civ. St. 1914, prescribes that the parties to a suit shall have 30 days after the day of adjournment of court in which to prepare and file a statement of facts and bills of exception, and provides that:

"Upon good cause shown, the judge trying the cause may extend the time in which to file a statement of facts and bills of exception: Provided, that the court trying such cause shall have the power in term time or vacation, upon the application of either party, for good cause to extend the several times as hereinbefore provided for the preparation and filing of the statement of facts and bills of exception, but the same shall not be so extended so as to delay the filing of the statement of facts, together with the transcript of record, in the appellate court within the time prescribed by law."

The article concludes with the following proviso:

"Provided that any statement of facts filed before the time for filing the transcript in the appellate court expires, shall be considered as having been filed within time allowed by law for filing same."

This last proviso is explicit, and must be given the construction which its clear language demands, and that is that a statement of facts is filed in time if filed at a date before the transcript is required by law to be filed in the appellate court. This is not a new question in this state. *Criswell v. Robbins*, 152 S. W. 210; *Witherspoon v. Crawford*, 153 S. W. 633.

We cannot sustain appellee's contention that the statement of facts was not filed within the time required by law.

[5] But what of the bills of exception? In *Criswell v. Robbins*, supra, the court, after referring to the last proviso of article 2073, above copied, says:

"But that provision would not lend any aid to the bills of exception, \* \* \* because they are not mentioned in the sweeping provision as to statements of facts. The bills of exceptions are still under the law as to extensions of time, as is apparent from the language of the law of 1911. \* \* \* It follows that, although under the law of 1911 we are compelled to consider the statement of facts, the bills of

exceptions cannot be considered because filed out of time."

We think the conclusion thus stated is sound in the abstract, but that it has no application to the bills of exception now under discussion, for the following reasons: The time of filing of bills of exception relates to formalities in bringing a case to the appellate court for revision. Rule 8 (142 S. W. xi), prescribed for the government of Courts of Civil Appeals, provides:

"All motions relating to informalities in the manner of bringing a case into court shall be filed and entered by the clerk on the motion docket within thirty days after the filing of the transcript in the Court of Civil Appeals, otherwise the objection shall be considered as waived, if it can be waived by the party."

Under this rule an objection to the bills of exception on account of the informalities complained of, to be available to appellee, must have been presented by a motion to this court filed and docketed within 30 days after the transcript was filed, and as this was not done, and as the informality was one that could be waived, this court is not at liberty to disregard them.

[6] Adverting now to the assignments, appellants contend that the testimony referred to was admissible as tending to prove that the Cow Creek Tram Company was not an innocent purchaser. We do not think the contention sound. The time mentioned by the witnesses at which the fear of litigation was expressed by Adams, and at the time of the general talk among the employees mentioned by the witness Cully, was in 1893, 1894, or 1895, and not more definitely stated. All this was subsequent to the date of the tram company's purchase. The source of the threatened litigation was not shown, nor any other fact that would indicate that the statement of Adams or the general talk was induced by any notice to Adams or the company of an outstanding superior title at the time the company bought the land. At most, the testimony could have only raised a surmise or suspicion. The assignments are overruled.

The only other assignments of error that we feel called upon to notice are the eleventh and twelfth. The eleventh is as follows:

"The judgment is contrary to law and without evidence to support it, in this: The judgment awards to defendants three forty-seconds only of the land in controversy, and it should have been eleven fifty-sixths; there being no evidence that the Cow Creek Tram Company paid value, in good faith, and without notice of the adverse claim of title of those under whom the defendants claimed, as to the undivided interest in said land purchased by the tram company from [naming certain heirs of Lewis Donahoe] which parties, if they had any claim, conveyed by their deeds a one-eighth interest in the land to said tram company."

The twelfth assignment complains of the peremptory instruction on the issue of the purchase in good faith by the tram company, on the ground that there was no evidence that the tram company was an innocent

purchaser for value from certain other heirs of Lewis Donaho.

The matters complained of in these assignments were not presented by defendants in their motion for new trial in the court below, but to cure the effect of this omission, are presented as pointing out fundamental error apparent upon the face of the record.

[7] To determine whether these assignments point out error would require an investigation of all the evidence bearing upon the matter to which they relate. We do not understand that the assignments are such as point out "error in law \* \* \* apparent on the face of the record," as this language is used in article 1607, Revised Statutes 1911. This language was construed by our Supreme Court in *Houston Oil Co. v. Kimball*, 103 Tex. 104, 122 S. W. 533, 124 S. W. 85, and it is there said:

"Webster defines the word 'apparent' thus: 'Clear, or manifest to the understanding; plain; \* \* \* obvious; appearing to the eye or mind.' This does not mean that an error which can be ascertained by looking into the record and considering the evidence may be considered without any assignment, for that would include every error which can be considered at all. Nothing can be considered as an error which cannot be made apparent by an examination of the record; therefore the language of the statute must be given that construction which will make it consistent with its requirements in other respects."

Tested by the rule thus stated, we are of the opinion that the assignments do not point out error apparent on the face of the record, and therefore, because the alleged error was not called to the attention of the trial court in the motion for a new trial, the assignments cannot be considered.

We are of the opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

#### O'NEIL ENGINEERING CO. et al. v. CITY OF SAN AUGUSTINE et al. (No. 6647.)

(Court of Civil Appeals of Texas. Galveston. Nov. 10, 1914. Rehearing Denied Dec. 17, 1914.)

#### 1. APPEAL AND ERROR (§ 548\*)—INSTRUCTIONS—BILL OF EXCEPTIONS—NECESSITY.

Error cannot be assigned on the charge of the court or on the refusal of requested charges, unless a proper bill of exceptions has been taken in the trial court to the portion of the charge complained of or to the court's action in refusing requested charges.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.\*]

#### 2. CONTRACTS (§ 280\*)—ENGINEERING SERVICE—PERFORMANCE—NEGLIGENCE.

Where a contract employing engineers to construct a waterworks plant provided not only that the company should furnish plans and specifications for the work and a competent superintendent, but gave it entire control and management of the work in constructing the system and the employment and control of the necessary labor, it was bound to exercise reasonable care in employing a competent superin-

tendent and labor, and was liable to the city for any damage occasioned by a failure to do so.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1249-1280; Dec. Dig. § 280.\*]

#### 3. PRINCIPAL AND SURETY (§ 82\*)—BOND—PERFORMANCE OF WORK.

Where a contract employing engineers for the construction of a waterworks system not only required them to prepare proper plans and specifications, but gave them complete charge of the work of construction, the surety on a bond conditioned that the engineering company should faithfully comply with and fulfill all the terms and conditions of the contract was liable for loss to the city incident to the engineering company's negligence in failing to provide a proper superintendent and labor in the construction of the work.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 127; Dec. Dig. § 82.\*]

Appeal from District Court, San Augustine County; A. E. Davis, Judge.

Action by the City of San Augustine and others against the O'Neil Engineering Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Harry P. Lawther, of Dallas, for appellants. Foster & Davis, of San Augustine, for appellees.

PLEASANTS, C. J. In December, 1908, appellee, as party of the first part, entered into a contract with appellant engineering company, the material parts of which are as follows:

"That the said party of the first part has this day employed the party of the second part as supervising and constructing engineers to prepare plans and specifications for the construction of a system of waterworks, to be erected and constructed in the city of San Augustine, San Augustine county, Tex., upon the following terms and conditions:

"First. The said party of the second part shall prepare and finish complete plans and specifications for the construction and equipment of the proposed waterworks system, together with an estimate of same, which said estimate shall be guaranteed by a surety bond, and shall submit same to the party of the first part for their approval, and shall make such changes in plans as shall be desired by the party of the first part.

"Second. When such plans and specifications shall be approved and accepted by the party of the first part, said party of the second part shall cause advertisements for bids of all of the material, machinery, and apparatus needed in the construction of said work to be inserted in the *Manufacturers' Record of Baltimore* and the *Engineering News of New York*, to be at the expense of the party of the first part and to run not less than two weeks, said bids called for in said advertisements shall be addressed to the party of the first part, and shall not be opened until the day named in said advertisements, at which time, or if deferred by the party of the first part to a later date, said party of the second part by its officers, shall be present to assist the party of the first part in awarding contracts for the purchase of machinery, material, and apparatus needed in the construction of said waterworks system.

"Third. The party of the second part shall employ all labor that may be necessary in collecting material and constructing said plant, and in doing so shall use local labor so far as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

possible, said labor to be paid for by the party of the first part, and shall also furnish a competent superintendent of same and of the work to be done in the construction of said waterworks system, which shall include a competent superintendent, and such other superintendence as may be necessary at the expense of the party of the second part, and shall also at its expense furnish all tools necessary for the construction of said work, such as picks, shovels, plows, scrapers, lanterns, hammers, and such like articles."

As compensation for its services under said contract, the appellant engineering company was to receive "10 per cent. of the entire cost of the material, labor, machinery, apparatus, and all other things going into the cost of the construction of said work," payable in installments; the times and amounts of such payments being specified in the contract. It was further provided in said contract that no liability should be incurred thereunder until the city could dispose of bonds to be issued for the purpose of constructing said system.

Acting under this contract, the engineering company, in February, 1909, prepared plans and specifications and an estimate of the costs of the system, and submitted same to appellee. These specifications called for one artesian well 500 feet in depth, estimated to cost \$1,500. Owing to the delay in the issuance and sale of the bonds of the city, nothing further was done under this contract until 1911, when, after certain changes in the specifications, bids were advertised for all of the material and machinery, as provided in the contract. As finally adopted, the estimated cost of the system, exclusive of the commission to be paid the engineering company, was \$20,434.37. The final specifications and estimate call for a well 500 feet in depth, to cost \$1,500. The advertisement for bids made by the engineering company did not include a bid for the well; but a contract was made by the city, without consulting appellant, with a well borer by which he agreed to sink a 6-inch well for \$2 per foot, the city to furnish the casing and the derrick to be used in the work, and also to pay the freight on the shipment of the well-boring machinery from Homer, La., to San Augustine. After the contract for the material and machinery and for the well had been let, the engineering company executed and delivered to the appellee the following bond upon which the appellee Fidelity & Deposit Company of Maryland is surety:

"State of Texas, County of San Augustine.

"Know all men by these presents that we, O'Neil Engineering Company, as principal, and Fidelity & Deposit Company of Maryland, a corporation of the state of Maryland, of Baltimore, Md., as surety, are held and firmly bound unto the city of San Augustine, San Augustine county, Tex., in the sum of five thousand (\$5,000.00) dollars, lawful money of the United States of America, well and truly to be paid to the said city of San Augustine, Tex., for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, and assigns, firmly by these presents.

"Signed and dated this 11th day of August, A. D. 1911.

"The condition of this obligation is such that, whereas the said O'Neil Engineering Company has entered into a certain written contract with the said city of San Augustine, Tex., bearing date the 17th day of December, A. D. 1908, covering the designing, supervising, and construction of a water system for the city of San Augustine, Tex., as per contract hereto attached and made to form a part hereof: Now, therefore, if the said O'Neil Engineering Company shall do and perform all things required of them by said contract, and shall in all things faithfully and honestly comply with and fulfill all the terms and conditions of said contract, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

"It is specifically understood and agreed that the surety, Fidelity & Deposit Company of Maryland, does not guarantee the maintenance of any portion of the work after the completion of same, nor does this bond cover any provisions of the contract respecting guarantee of efficiency or wearing qualities or for maintenance or repairs.

"In testimony whereof, witness our hands the day and year first above written."

On April 26, 1912, after the completion of the waterworks system, the appellee brought this suit against appellants to recover damages for the alleged breach by the engineering company of its contract. The petition alleges the breach of the contract in the following particulars and sought to recover the items of damages specified:

(1) That the cost of the work exceeded the estimate in the sum of \$1,117.07. (2) That under the terms of the contract the O'Neil Engineering Company was to furnish at its expense a competent superintendent of labor and work, and such other superintendence as might be necessary; that in the course of the work the said O'Neil Engineering Company had employed as foreman and representatives three several men, who had been paid in the aggregate the sum of \$378.40 by the city, instead of by the O'Neil Engineering Company, as provided for in the contract. (3) That the superintendent furnished by the engineering company was incompetent, and performed his duties in a negligent manner, and that by reason of the carelessness and negligence of said superintendent, who had authority from said defendant to employ and discharge the laborers necessary to perform the work of constructing said system, a large number of unnecessary laborers were employed to perform the work of ditching and laying the water pipes for said system; that said laborers were not required to do a full day's work, and that said superintendent who had charge of said work did not give his attention to the same, but devoted a large portion of his time to his private business affairs and permitted the men employed to do said work, and whose wages were paid by appellee, to waste their time; that said work was conducted by said superintendent with reckless extravagance and utter disregard of the rights of appellee; and that, as a direct result of the manner in which the work was

conducted in the digging of the ditches and laying the pipe, the cost of such work to appellee was \$1,062.50 more than it would have been had said work been properly conducted. (4) That by reason of the incompetence and negligence of said superintendent in supervising the sinking of the well for said system the appellee was compelled to expend for said well \$2,118.54 more than it would have cost him but for the incompetence and negligence of said superintendent.

The petition admitted that appellee owed the engineering company a balance of \$545.70 as commission under its said contract, and prayed for judgment for the damages above stated, aggregating \$4,676.45, less the said sum admitted to be due defendant.

In addition to a general demurrer, special exceptions, and general denial, the defendants further answered, specially denying that the cost of the plant had exceeded the estimate, that the plans and specifications of the O'Neil Engineering Company had only called for a well 500 feet deep 6 inches in diameter, estimated to cost \$1,500, and that they could not be held responsible, and especially the surety company could not be held responsible, for any costs the city had been put to concerning said well after it passed a depth of 500 feet, that the three several men who had been paid by the city in the aggregate sum of \$378.40 were not superintendents, but were simply straw bosses, and, under the terms of the contract, should have been paid by the city, as they were paid; specially denying that the said Greene performed his work in a negligent manner; and setting up that the amount paid out for the ditch pipe laying and reservoir work was much as was ordinary and customary under the circumstances; and setting up various items in the total cost of the work which they claimed were extras not called for in the original plans and specifications, and due to changes therein made by the direction of the city of San Augustine; and setting up that the city was still due the O'Neil Engineering Company a balance of \$571.70 commissions provided for in the contract, for all of which they prayed judgment against the city.

The cause was submitted to a jury in the court below upon special issues. The charge of the court, in so far as it relates to the questions presented by appellant's assignments of error, was as follows:

"In this case the court submits to you for your finding certain questions, which you will answer in accordance with your findings. The burden of proof rests on the plaintiff the city of San Augustine to show by a preponderance of the evidence the allegations in its petition, and, if it has failed to do this, the city cannot recover. 'Negligence' is the want of that care and diligence which an ordinarily prudent person would use under the same or similar circumstances. 'Incompetency' is the want or lack of ability to do or perform a certain thing.

"In this case you are charged that, under the contract introduced in evidence between the

plaintiff and O'Neil Engineering Company, dated December 17, 1908, it was the duty of the engineering company to furnish a competent superintendent for the construction of the waterworks system and to furnish such other superintendence as the work required, and it was the duty of the engineering company to exercise in the supervision of the work the care and skill of an ordinarily prudent supervising engineer under the same or similar circumstances, and, if the said company has failed to exercise such care and skill in the particulars alleged in plaintiff's petition, and the plaintiff has been damaged thereby, the engineering company would be liable therefor.

"Question No. 1: Was S. G. Greene negligent or incompetent in supervising the digging of the ditch and reservoirs and laying the pipe for the waterworks system? Answer this question 'Yes' or 'No.'

"If you answer question No. 1 'Yes,' then answer question No. 2; but if you answer question No. 1 'No,' then you need not answer question No. 2.

"Question No. 2: Was the city of San Augustine damaged because of the negligence or incompetency of S. G. Greene in supervising the digging of ditches and reservoirs and laying the pipe for the waterworks system for the city of San Augustine? Answer this question 'Yes' or 'No.'

"Question No. 3: Did S. G. Greene cause the well to be drilled below 500 feet? Answer this question 'Yes' or 'No.'

"If you answer question No. 3 'Yes,' then answer question No. 4; but if you answer question No. 3 'No,' then you need not answer question No. 4.

"Question No. 4: Was it negligence for Greene to cause the well to be drilled below 500 feet, under the circumstances? Answer this question 'Yes' or 'No.'

"If you answer questions Nos. 3 and 4 'Yes,' then you will answer question No. 5; but if you answer either questions No. 3 or No. 4 'No,' then you will not answer question No. 5.

"Question No. 5: Was the city of San Augustine damaged because of the negligence of S. G. Greene in causing the well to be drilled below 500 feet? Answer this question 'Yes' or 'No.'

"If you answer questions Nos. 3, 4, and 5 'Yes,' then you will answer question No. 6; but if you answer any of the questions Nos. 3, 4, and 5 'No,' then you need not answer question No. 6.

"Question No. 6: What was the amount of damages to the city of San Augustine because of the negligence or incompetency of S. G. Greene in causing the well to be drilled below 500 feet? Answer this question by giving the amount in figures.

"If you answer questions Nos. 1 and 2 'Yes,' then answer question No. 7, but if you answer either questions 1 or 2 'No,' you will not answer question No. 7.

"Question No. 7: What was the amount of the damages because of the negligence or incompetency of S. G. Greene in supervising the digging of the ditches and reservoir and laying the pipe for the waterworks system of the city of San Augustine? Answer this question by giving the amount in figures."

The jury by their verdict answered the first five questions in the affirmative, and, in answer to the sixth and seventh questions, fixed the amounts of appellee's damage at \$994 and \$800, respectively. In answer to the eleventh question propounded to them, they found that the total estimated cost of the waterworks system under the plans and specifications furnished by the engineering company was \$20,500, exclusive of the commissions to the engineering company; and

in answer to the twelfth question found that the actual cost of the system to the city was \$22,146.16. Upon the return of this verdict both parties asked for judgment thereon. The motion of defendants for judgment in their favor was refused and plaintiff's motion granted. The judgment rendered was in favor of plaintiff for the sum of \$1,794, the aggregate amount of damages found by the jury in answer to questions 6 and 7, and the further sum of \$378.40, the amount shown by the evidence to have been paid by plaintiff to the three foremen whose wages plaintiff claimed should have been paid by the engineering company. From these aggregate amounts, \$2,172, the sum of \$571.70, the amount found by the jury to be due the engineering company as commissions, together with \$52.70 interest thereon, was deducted, leaving a judgment in favor of the plaintiff against both defendants for the sum of \$1,543.97.

The sufficiency of the evidence to sustain the findings of the jury upon the issues submitted to them is not questioned by any of the assignments of error presented by appellants.

The first, second, third, and fifth assignments of error presented in appellants' brief are as follows:

"First assignment of error: The court erred in submitting to the jury the question of Greene's negligence, and in rendering judgment against appellants on account of same, especially as to the fidelity and deposit company. Neither the contract between the city of San Augustine and the O'Neil Engineering Company nor the bond of the fidelity and deposit company guaranteed the city against the negligence of the superintendent furnished by the engineering company.

"Second assignment of error: The court erred in submitting to the jury, especially as against the surety company, the question of the negligence of Greene in causing the well to be drilled below 500 feet, and in rendering judgment against appellants on account of same; the plans and specifications which were approved and accepted by the city only calling for a 6-inch well 500 feet in depth, at an estimated cost of \$1,500.

"Third assignment of error: The court erred in refusing to give to the jury special issue No. 9, requested by the defendants as follows: 'Was Greene incompetent in the superintendence of the digging of the well down to a depth of 500 feet.'"

"Fifth assignment of error: The court erred in refusing to submit to the jury special issues Nos. 2 and 10, as follows:

"Special issue No. 2, requested by the defendants: 'At the request of the defendants, I submit to you for your finding the following question, in addition to the questions hereinbefore propounded to you, which you will answer in accordance with your finding: "Question No. 16: Did the city of San Augustine expect to obtain a flowing well at the depth and size which the defendant engineering company's estimate of the well named in the plans and specifications upon which the total cost was based?"'

"Special issue No. 10, requested by the defendants:

"In considering your answer to question No. 3, you will take into consideration all of the circumstances of the case, the fact, if you find from the evidence that such was the fact, that

all of the parties expected to obtain a flowing well at a depth of 500 feet, the quantity of water which you find from the evidence was found at depth of 500 feet, and whether or not what is known as a flowing well was, in fact, found at a depth of 500 feet; and if, from all the circumstances surrounding the situation, and looking at it from Greene's viewpoint, you find from the evidence that a man of ordinary prudence and competence would have acted as Greene did, under the same or similar circumstances, you will answer this question, "No;" also, before determining your answer to this question, you will find from the evidence whether the water which was found which rose to the top of the pipe and trickled over was found at a depth of 500 feet or at a depth between 640 and 710 feet."

[1] It does not appear from the record that any bill of exceptions was taken by the defendants in the court below to the charge given by the court, nor to the refusal of the court to give the special charges requested by the defendants. It has been held in a number of cases decided by the Courts of Civil Appeals for the Third, Fifth, Sixth, and Seventh Districts that under our present statute no complaint of error in the charge of the court or in the refusal of requested charges will be heard on appeal, unless a proper bill of exceptions is taken in the court below to the portion of the charge complained of, or to the action of the court in refusing requested charges when such action is assigned as error. *Saunders v. Thut*, 165 S. W. 554; *Railway Co. v. Wadsack*, 166 S. W. 42; *Railway Co. v. Brown*, 168 S. W. 887; *Motor Co. v. Freeman*, 168 S. W. 82; *Railway Co. v. Barnes*, 168 S. W. 992; *Railway Co. v. Mallard*, 168 S. W. 994. We think this is a fair and reasonable construction of the statute, and that such construction tends to further the evident purpose and object of the Legislature in its enactment.

In the recent cases of *Railway Co. v. Churchill*, 171 S. W. 517, and *Conn v. Houston Oil Co.*, 171 S. W. 520, this court approved and followed the rule announced in the cases above cited.

[2] If, however, we could consider the assignments, we do not think they should be sustained. Under the contract before set out, the obligation of the engineering company was not limited to furnishing plans and specifications for the work and a competent superintendent thereof, but they had entire control and management of the work of constructing the system and the employment and control of the labor necessary for such construction. This responsibility having been assumed by it, and being a material part of the consideration for the execution of the contract by the city, the company was required to use ordinary care and diligence in the discharge of its contract obligations, and would be liable to the city for any damage caused by its failure to use ordinary care in the performance of any of its contract undertakings.

[3] The bond executed by the appellant

surety company was conditioned upon the faithful performance by the engineering company of all of the requirements, terms, and conditions of its contract with the city, and under this bond the surety company is liable for any damages sustained by the city by reason of the failure of the engineering company to faithfully comply with any of the requirements of the contract. We think the charge given by the trial court correctly applied the law to the facts disclosed by the evidence, and that the requested instructions were properly refused.

The fourth assignment complains of the refusal of the court to render judgment in favor of the defendants upon the findings of the jury that the total cost of the plant did not exceed the estimate furnished the city by the engineering company. This assignment is predicated upon the theory that the engineering company was not required under its contract to use any care in the employment of labor or in incurring expenses for the city further than to bring the total cost of the work within the amount of the estimate furnished by it. We do not think this is a proper construction of the contract. As we have before said, we think the company was bound under the contract to use ordinary care and diligence in the performance of its contract undertakings, and the fact that the city required it to guarantee that the work would not cost more than a stated amount did not authorize it to negligently spend an unnecessary amount in carrying out the contract, and thus increase the amount of its commissions.

This disposes of all of the assignments presented in appellants' brief, and from the conclusions above expressed it follows that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

### MAGILL v. RUGELEY, Sheriff, et al. (No. 6716.)

(Court of Civil Appeals of Texas. Galveston.  
Nov. 20, 1914. Rehearing Denied  
Dec. 10, 1914.)

#### 1. ATTORNEY AND CLIENT (§ 99\*)—ATTORNEY'S AUTHORITY—SETTLEMENT OF JUDGMENT.

An attorney at law has no authority to accept anything but money in payment of a judgment recovered by him on a claim left with him for collection, without his client's express consent.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 196-203; Dec. Dig. § 99.\*]

#### 2. ATTORNEY AND CLIENT (§ 103\*)—ATTORNEY'S AUTHORITY—ACTS BEYOND AUTHORITY—ACQUIESCENCE.

Where an attorney at law, without authority, accepted certain trust certificates in settlement of a judgment he had obtained for his client, who, when he first learned of the settlement, refused to accept the certificates, and in days placed the collection of the judgment

in the hands of other attorneys, there was no ratification of the settlement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 154; Dec. Dig. § 103.\*]

#### 3. ATTORNEY AND CLIENT (§ 77\*)—AUTHORITY OF ATTORNEY—APPARENT AUTHORITY.

Where one was employed only as an attorney at law to collect a debt for his client, the debtor could not assume that the attorney had authority to accept anything but money in satisfaction, so that the rule requiring a principal to give notice of any limitation on the authority of a general agent, or one having apparent authority to make the contract in question, does not apply.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 88-90, 132, 136, 148, 149; Dec. Dig. § 77.\*]

#### 4. ATTORNEY AND CLIENT (§ 99\*)—AUTHORITY OF ATTORNEY—COLLECTION OF JUDGMENT—JOINT OWNER.

Where a note, placed in the hands of an attorney for collection, provided for a 10 per cent. attorney's fee, and the client agreed to pay the attorney such percentage and \$60 additional, such agreement did not make the attorney a joint owner of a judgment in favor of the client for the amount of the note, principal, interest, and attorney's fee, so as to entitle the attorney to make a settlement with the debtor by receiving trust certificates instead of money, under the rule that an accord and satisfaction with one of several joint creditors is a satisfaction of the debt.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 196-203; Dec. Dig. § 99.\*]

#### 5. PRINCIPAL AND SURETY (§ 164\*)—SURETY'S LIABILITY—JUDGMENT.

Where a judgment against a principal and surety directed that execution should issue on the property of the surety, only in the event that property of the principal sufficient to satisfy the judgment could not be found, the return of several executions issued against the principal nulla bona was prima facie sufficient to authorize a levy on the property of the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 456-465; Dec. Dig. § 164.\*]

Appeal from District Court, Matagorda County; Sam'l J. Styles, Judge.

Suit by G. M. Magill against Frank Rugeley, sheriff, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Gaines & Corbett, of Bay City, for appellant. Krause & Wilson, of Bay City, for appellees.

PLEASANTS, C. J. This suit was brought by appellant to enjoin the execution of a judgment rendered by the district court of Matagorda county against appellant and others and in favor of S. G. Anderson, defendant in this suit. The judgment sought to be enjoined was rendered on January 22, 1912, in a suit brought by S. G. Anderson against the Burton D. Hurd Land Company, as principal, and appellant G. M. Magill and others, as sureties, and was for the sum of \$1,744.28. This judgment directs that execution issue upon the property of the sureties, only in event property of the principal sufficient to satisfy the judgment could not be

found. In that suit E. E. Bateman was attorney of record for S. G. Anderson. Original execution was issued on this judgment October 25, 1912, and an alias execution on March 17, 1913, which was returned not executed, "no property of the Burton D. Hurd Land Company being found." Several subsequent executions were issued and returned not executed, "no property being found."

The execution sought to be enjoined in this suit was issued on October 3, 1913, and was by defendant Rugeley, sheriff of Matagorda county, levied upon lots in the city of Bay City owned by appellant Magill. Plaintiff asked that the execution of the judgment be enjoined, and said judgment canceled and discharged of record on the ground that E. E. Bateman, the attorney of record for defendant Anderson in the suit in which said judgment was rendered, had on February 25, 1913, made a settlement of said judgment with the land company, and executed a written release of the judgment, reciting that it had been paid and satisfied in full. The defendant Anderson by proper plea denied the authority of Bateman to make said settlement and execute said release. By supplemental petition, the plaintiff alleged that Bateman was the attorney of record of the defendant Anderson, and had full and complete authority to make the settlement with the land company and release said judgment, and further that Bateman was also a joint owner with Anderson of said judgment.

The trial in the court below without a jury resulted in a judgment in favor of the defendants.

The evidence shows that E. E. Bateman, who was attorney of record for defendant in the suit in which the judgment sought to be enjoined was obtained, on February 25, 1913, accepted from the land company, in satisfaction of said judgment, trustees' certificates of the nominal value of the amount due upon the judgment, and executed and delivered to the land company a full release of the judgment, signed by him as attorney of record for the defendant Anderson. Anderson testified that he never authorized Bateman to accept anything but money in satisfaction of the judgment, and that the trustees' certificates were never delivered to him, and he had never seen them. When he heard that Bateman had made a settlement of the judgment he went to see him in regard to the matter, and Bateman told him that he had taken the certificates, but they were not worth anything, and that he, Anderson, did not want them. Four or five days after this he employed other attorneys to represent him in collecting the judgment.

Bateman testified:

"I cannot say that Mr. Anderson ever authorized me specifically to accept the trustees' certificates, but Mr. Anderson had left the matter entirely in my hands for collection, like any other client turns over a matter or note to me for collection."

[1] This evidence amply sustains, if it does not compel, the conclusion that Bateman had no express authority from appellee Anderson to accept anything but money in satisfaction of the judgment. It is well settled that an attorney at law has no right to receive anything but money in the payment of a debt intrusted to him for collection, without express authority from his client. *Wright v. Dally*, 26 Tex. 730; *Portis v. Ennis*, 27 Tex. 575; *Anderson v. Boyd*, 64 Tex. 108; *Cook v. Greenberg*, 34 S. W. 687.

[2] There is no evidence showing acquiescence on the part of appellee Anderson in the settlement made by Bateman, and the testimony before set out, which is uncontradicted, shows that when he first learned of the settlement he refused to accept the certificates, and in a few days thereafter placed the collection of his judgment in the hands of other attorneys.

[3] The question of apparent authority in Bateman to make the settlement is not raised by the evidence. His employment being only that of an attorney at law to collect a debt for his client, the debtor could not assume that he had authority to accept anything but money in satisfaction of the debt, and the rule which requires a principal to give notice of any limitation upon the authority of a general agent, or any agent who has apparent authority to make the contract in question, has no application.

[4] The judgment in favor of appellee Anderson was for the amount of the principal, interest, and attorney's fees due upon several notes which he had turned over to Bateman for collection. When he placed the notes in the hands of Bateman for collection he agreed to pay him, when collection was made, the 10 per cent. attorney's fees provided in the notes and an additional sum of \$60. This agreement did not make Bateman a joint owner with appellee of the notes nor of the judgment obtained thereon, and the undisputed evidence shows that no transfer or assignment of any interest in judgment was made to Bateman. Such being the facts, the principle invoked by appellant, that accord and satisfaction with one of several joint creditors is a complete extinction of the debt without any showing that the joint creditors who made the settlement had authority to act for the other joint owners, cannot be applied.

[5] The return upon previous citations stating that no property of the land company could be found out of which the judgment could be made was prima facie sufficient to authorize the levy upon the property of the surety, and, in the absence of any evidence showing that the judgment could be collected from the principal, the levy upon and sale of the property of the surety to satisfy the judgment could not be enjoined.

We have not set out nor discussed in detail the several assignments presented in ap-

pellant's brief, but in what has been said we have disposed of all of the questions presented by the assignments.

We have considered all of the assignments, and none of them in our opinion should be sustained. It follows that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

#### POLLARD v. ALLEN. (No. 656.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 31, 1914. Rehearing Denied Dec. 5, 1914.)

#### 1. LIMITATION OF ACTIONS (§ 102\*)—CAUSES OF ACTION BARRED BY LIMITATION — TRUSTS.

Plaintiff claimed that he turned over money to his uncle by having it placed to his uncle's credit in the bank, in which it was deposited at his uncle's request and on his uncle's promise that he would put it on interest for plaintiff, and that plaintiff could have it back any time he wanted it or needed it. Held that, assuming that the transaction took place as claimed and that a trust was thereby created, such trust, though a direct or express trust, since it arose from an express agreement of the parties, was not a technical, continuing, and subsisting trust against which limitations would not run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494-505; Dec. Dig. § 102.\*]

#### 2. LIMITATION OF ACTIONS (§ 87\*)—SUSPENSION — ABSENCE FROM STATE — NONRESIDENTS.

The departure from the state of a nonresident, who had been temporarily present in the state, did not suspend the running of limitations against a cause of action against him.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 456-462; Dec. Dig. § 87.\*]

#### 3. LIMITATION OF ACTIONS (§ 46\*)—ACCRUAL OF CAUSE OF ACTION—OBLIGATIONS PAYABLE ON DEMAND.

Where plaintiff turned over money to his uncle on his uncle's promise to put it in a bank on interest for plaintiff's benefit, and to return it when plaintiff wanted it or needed it, there was an obligation payable on demand, against which limitations ran from the date of the receipt of the money by the uncle, or at least from the expiration of a reasonable time in which to make the agreed deposit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.\*]

Appeal from District Court, Sherman County; D. B. Hill, Judge.

Action by Frank M. Allen against James T. Pollard, executor. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

John H. H. Stahl, of Stratford, and Goldstein & Miller and Turney & Burges, all of El Paso, for appellant. Tatum & Tatum, of Dalhart, for appellee.

HALL, J. Appellee instituted this suit in the district court of Sherman county against appellant September 28, 1912, to recover the

sum of \$4,165.50, with interest from September 11, 1907, at 6 per cent. per annum. Plaintiff alleged in substance the death of W. C. Thomas on the 30th day of March, 1912; the qualification of appellant as executor of Thomas' estate; that during the winter of 1905 W. C. Thomas and plaintiff purchased a herd of cattle, paying therefor the aggregate sum of \$900; that thereafter plaintiff purchased an additional interest to the extent of \$400 from the said Thomas, and that thereafter during the winter of 1905 and 1906 the said W. C. Thomas gave to plaintiff all the interest which was then owned by the said Thomas in the said herd of cattle and delivered possession of the same to him; that during the fall of 1906 the said Thomas purchased 100 calves, which he also gave to plaintiff; that on the 1st day of September, 1907, plaintiff was still the owner and in possession of both herds of cattle, and on or about the 10th day of September he sold the entire lot of cattle for \$4,265.50 in cash, which he deposited in the First National Bank of Stratford, Tex., save and except \$100 retained for his personal use; "that on or about the 11th day of September, 1907, the said W. C. Thomas, now deceased, stated that if the plaintiff would turn over to him the said sum of \$4,165.50 then deposited in the bank aforesaid, he, the said Thomas, could and would put said money out at interest for the use and benefit of this plaintiff, and that this plaintiff could have any or all of said money at any time he requested or demanded the same from the said W. C. Thomas, and at any time he needed or desired the same, but that if he would turn it over to said W. C. Thomas at the time he could and would place it so that it could be drawing interest at all times and would be safe, but that the plaintiff should receive any or all of it back when he needed the same, or when he desired to have the same; that the said W. C. Thomas, now deceased, was an uncle of this plaintiff, and acting upon the said request, and in response to the said statements of the said Thomas, this plaintiff turned over and delivered to the said Thomas the aforesaid sum of \$4,165.50, by having the First National Bank of Stratford, Tex., place the said sum of money to the credit of the said W. C. Thomas, in the presence of the said W. C. Thomas, for the uses hereinafter set forth." Appellee further alleged that none of said money had ever been repaid to him; that after the said Thomas died in the state of Missouri, on or about the 30th day of March, 1912, plaintiff on or about the 23d day of September, 1912, presented his claim against the estate of the said Thomas, duly verified, to defendant Pollard, as executor of said estate, and that the same had neither been rejected nor allowed.

On January 12, 1914, the appellant filed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his second original answer, in which he demurred generally and specially to plaintiff's amended petition, on the ground that it was barred by the 2 and 4 year statutes of limitations. He denied every issuable fact pleaded by appellee, and averred that the cattle belonged to Thomas at the time they were sold; that the money derived from the sale belonged to Thomas, but that Allen had collected the same, and in transferring it from his account in the bank to Thomas' account he did so in recognition of Thomas' ownership thereof. He also specially pleaded the statutes of limitations of 2 and 4 years in bar of plaintiff's right to recover.

In reply to the second amended original answer, appellee filed his first supplemental petition, in which he pleaded the absence of Thomas from the state of Texas from the time of the alleged payment of the money to him until his death, except for a period of about 2 weeks, and that by reason of the absence of the said Thomas from the state of Texas the statutes of limitations did not run, except for about 2 weeks, during which time Thomas was in the state. In response to this supplemental petition, appellant filed his first supplemental answer, in which he denied that Thomas was ever a resident of the state of Texas, temporarily or otherwise, but that for 60 or 70 years before his death he resided continuously in the state of Missouri, and not elsewhere.

The case was submitted upon the following special issues in substance:

First. "Was the \$4,165.50 the property of Allen on or about September 11, 1907?" To which the jury answered, "Yes."

Second. "Was it the agreement and understanding between Allen and Thomas that Thomas would keep this sum for Allen, and return same to him when called upon or requested to do so by Allen?" To which the jury answered, "Yes."

Third. "Has Thomas, or any one for him, ever returned the \$4,165.50 or any part thereof, to Allen? If so, what amount?" To which the jury answered, "Yes; \$1,000."

After the jury had retired, they returned and propounded to the court the following question:

"If we answer special issue No. 1 'Yes,' have we the privilege to deduct from the \$4,165.50 the \$1,000 that Allen received?"

In reply to this question the court instructed them as follows:

"You will simply answer special issue No. 1, referred to, 'Yes' or 'No,' as from the evidence before you you find the facts to be, and for further instructions you are referred to the instructions heretofore given you."

Upon motion of appellee the court entered judgment in his favor for the sum of \$3,165.50, and all costs.

[1] The undisputed evidence shows that Thomas was never a resident of the state of Texas, at least since 1906; that he was never in the state but once since the alleged delivery of the money by Allen to him, and at that time he merely passed through on his way to Mexico. From the record it is clear that appellee's cause of action was barred

unless the relation of trustee and cestui que trust existed between Thomas and Allen, under an agreement creating a technical continuing trust. The testimony bearing upon this issue is solely from the witness Allen, and is as follows:

"I had no understanding or agreement with him [Thomas] about this money until after they [the cattle] were sold. I put the money in the bank here, and he asked me to take it to Missouri. He said, 'Frank, I will take this money to Missouri and put it in the bank on interest for you.' I said, 'All right,' and let him have it. He said I could have it any time I wanted it, or needed it. I did not need it. I have not gotten any of that money back. \* \* \* The last time I saw Mr. Thomas was in the fall of 1908, in California, Mo., at which time we talked about the money I let him have at his home. He said he had that money out on interest up there for me, and that I could have it if I wanted it, then or any other time, just like he had always stated."

On cross-examination:

"I have not a scratch of a pen to show that Mr. Thomas owes me any money only the bank books. I have never asked him to repay that money from the time I let him have it until he died. I didn't think it was necessary. I asked him about the interest once. In 1908 I talked to him about it. I never asked about paying interest—never asked about repaying any part of the money. The only time I had any talk with him with reference to it was in 1908, at his home, from the time I let him have it. I do not know whether it was in September or October, 1908, that I was at his home. He lived four years from September, 1908, and during all that time I never as much as chirped about this money to him; I did not need it; I didn't say a word to him about it one way or other. I didn't know how much interest it was bearing; if it was bearing any, I never asked him. I claim to have \$4,000 that was to be kept on interest, and never inquired whether it was bearing interest. I never asked who it was loaned to. I did not know where it was loaned. I didn't think it was necessary, for the five years I claim to have had this money loaned, to know how much interest it was bearing, or whether it was loaned out, or to whom. For five years I claim this money was loaned out. I didn't know how much interest it was bearing, or whether it was loaned out, or to whom. It is true that not until after this old man died did I begin to agitate this question. \* \* \* Nobody was present when I talked to Mr. Thomas about this money. I talked to him in the yard; nobody was present. \* \* \* I have alleged, it is true, that Mr. Thomas requested me to turn over the \$4,165.50 to him, and that he would put said money out at interest for my use and benefit, and that I could have all or any of the money at any time. I testified in my direct examination that Mr. Thomas told me that he would put it in the bank for me on interest. His agreement was that he was to take it back to Missouri and deposit it on interest in the bank for me. Nothing was said about it being subject to my check. He said I could draw on him any time I wanted money. Nothing was said about checking on the account. The agreement was that he was to take it back and deposit it on interest for me in the bank. He may have done that for all I know. I asked Mr. Pollard for a settlement; for all I know, that money is deposited in the bank on interest for me to-day. When he stated he was going to take the money back, to Missouri and deposit it in a bank on interest for me, nothing was said about what bank. I naturally thought it would be a bank in Cali-

fornia, Mo. He said he was going to take it home, and California, Mo., was his home. Our agreement was that he was to deposit it on interest in the bank at California, Mo. I do not know that it is not still there on interest for me; for all I know, it may be on interest for me to-day; for all I know, Mr. Thomas may have done the very thing that I claim he agreed to do. Nothing was said about the money being subject to my check when it was deposited in the bank in Missouri. He said to draw on him if I needed it. He said he would deposit the money, and I could draw on him when I needed it. I may have answered the sixth interrogatory in my deposition (if it reads that way), that he was going to Missouri and suggested to me that he would take this money to Missouri with him and place it on deposit there for me. I didn't loan him the money, but simply placed it to his credit in the bank, in order that he might take it to Missouri, where he said he would place it to my credit on interest, so that I could draw on it any time that I wanted to. My answer to the sixth interrogatory means practically the same thing as what I now say. Under my conception of the truth, both statements are true. I say I didn't loan the money to him. In answer to the fourth interrogatory of my deposition, my answer is: 'I was in Texas at the time I loaned it to him in cash.' That was not correct. I swore two or three times that it was not a loan, and he knows it. I didn't say in one place that it was a loan; he took it down that way. I told him I would not swear it was a loan. My signature is to the deposition. I signed the papers. I told him it was not a loan; told him five or six times during the deposition, and he said it was all right."

We think the rights of the parties to this litigation must necessarily turn upon the construction of the contract detailed by Allen. In *Eborn v. Zimpelman*, 47 Tex. 503, 28 Am. Rep. 315, our Supreme Court construed two instruments in writing of substantially the same tenor as the agreement between Allen and Thomas, as shown by the above-quoted testimony. The instruments upon which the Eborn Case was founded are as follows:

"Borrowed and received from William Eborn \$900.00, which I promise to return when called for, with interest. Feb. 3, 1846. [Signed] Thomas Eborn."

"Received of William Eborn \$6,500.00, which I promise to invest in lands, or return the same when called for, with interest. May 14, 1846. [Signed] Thomas Eborn."

Zimpelman, as administrator, pleaded the defense of limitation, and Associate Justice Gould, delivering the opinion of the court, said:

"The claim as presented was a money demand, barred upon its face. The \$900 borrowed, to be returned 'when called for,' created a cause of action from its date, and against it the statute runs from that time." *Cook v. Cook*, 19 Tex. 436. The receipt, or second instrument, is like the receipt which was before the court in *Mitchell v. McLemore*, 9 Tex. 151. In that case the receipt was for money to be invested in paying government fees for Texas scrip, placed in the party's hands for location, and it was held that if, after the lapse of a reasonable time, the agent had failed to apply the money as required, he was in default, and the statute commenced to run without demand. It was held, further, that even if a demand was necessary 'the plaintiff should have made it within time to have brought his suit before the statute had interposed a bar from the time

the default occurred.' After the lapse of a reasonable time to invest in lands, the money became due without demand; and even if demand were necessary, four years, the ordinary period of limitation to suits on written instruments, was long enough to allow for its being made. Regarding *Mitchell v. McLemore* as a case in point, and following that case and *Wingate v. Wingate*, 11 Tex. 430, we hold that the claim as presented, and as sued on, was not an express trust, but was an ordinary moneyed demand, barred by limitation, unless there was a sufficient acknowledgment to support the action."

Conceding that the testimony of appellee, Allen, shows an express or direct trust, still we think it must be classed with those trusts to which our courts have held a plea of limitation applies. Granting that the jury's finding upon the second special issue evinces an express trust rather than a loan, yet it is not such a trust as falls "within the proper, peculiar, and exclusive jurisdiction of courts of equity," but is cognizable at law. The case of *Wingate v. Wingate*, supra, is in point. R. P. Wingate sued his brother for the possession of a slave. The defendant set up limitations, and to avoid this plea the plaintiff offered in evidence a writing as follows:

"I acknowledge to have received of my father, Walter Wingate, Sr., his negro boy Boston, for whose labor I agree to pay him at the rate of \$6.00 per month, until called for. Columbia, La., April 8, 1841. [Signed] E. T. Wingate."

Wingate, Sr., died in 1844, and the suit was filed in 1849. The trial court sustained the plea of limitation, holding that the written receipt created an express trust, which continued until demand. Lipscomb, Justice, reversed the judgment, saying:

"That the agreement of the son (A. T. Wingate) constituted him a trustee for his father, to some extent, is admitted, because every bailee is, in some sense, a trustee; but it does not follow that every kind of trust forms an exception to the operation of the statute of limitations. If so, half the business transactions of men would be removed from its influence; and the doctrine has been settled, by a train of decisions from the case of *Lockey v. Lockey*, Prec. in Ch. 518, decided by Lord Macclesfield, down to the present time, that to remove a trust from the operation of the statute, it must be such a trust, technically, as is created by the mutual confidence of the parties, such as equity alone can take cognizance of and afford redress. If it is a trust that common-law courts could give relief, the statute will run, although the party may have sought his remedy by a suit in chancery. In such cases, the fact of the suit being brought in the court of chancery, will not defeat the statute. It can be avoided only by a technical trust, of which the courts of common law could afford no relief. When it is laid down that, so long as a trust is continuing and subsisting, the statute does not commence to run between the cestui que trust or his assigns and their trustee, the doctrine applies to such cases only as are strictly and technically trusts created and sustained by the principles of equitable jurisprudence, exclusive of and in contradistinction to trusts of common-law cognizance; and even in such cases the statute would commence to run from the time the trustee disavowed the trust, or did any act conclusively showing that he did not hold as trustee. If

the legal title is in one in trust for another, the trust could not be enforced but by a resort to equitable jurisdiction. This would be a case where the trust would be a continued equitable trust. The statute would not run in favor of the cestui que trust or his assigns, until the trustee had clearly avowed that he did not hold as trustee, but in adverse right to the trust claim. If one man receives into his possession the money or chattels of another, it would create a trust; but suppose he goes further, and writes to the other that he had so received his money. Here would be a declaration of a direct trust, but not such a trust as would be unaffected by the statute of limitations, because suit could be brought in a court governed by the rules of the common law. It is important in all cases of trust, in inquiring whether the statute can be pleaded, to bear this distinction in the mind: If there is a remedy at law, that is, on the principles of the common law, in contradistinction to equity jurisprudence, the fact of there being such remedy brings the trust within the statute. In *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417, a case which the late Chancellor Kent has, by the display of his talents and great research on the subject of the statute of limitations as a bar to trusts, coupled with the immortality of his own great name, the Chancellor says: "I cannot assent to the proposition that all cases of direct and express trust, arising between trustee and cestui que trust, are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. The word 'trust' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued, either at law for money had and received, or in equity as trustee, for a breach of trust. *Willes, C. J., in Scott v. Swoman, Willes, 404, 405.* The reciprocal rights and duties founded upon the various species of bailments and growing out of those relations, as between hirer and letter to hire, borrower and lender, depositary and the person depositing, a commissioner and an employer, a receiver and giver in pledge, are all cases of express and direct trust; and these contracts, as Sir William Jones observes (*Jones on Bailments*, 2), are among the principal springs and wheels of civil society. Are all such cases to be taken out of the statute of limitations, under the motion of a trust, when one of the parties solicits his remedy in this court? A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish upon the solid foundation of authority and policy this rule: That trusts, intended by courts of equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

Judge Lipscomb then applies the principles announced to the facts and holds that the written acknowledgment relied upon is not evidence of such a trust as takes it out of the statute of limitation and continues, using the following language:

"There is no pretense but that there was ample remedy on the principles of the common law, to the father whilst he lived, and to his assigns after his death, and that, if a trust it was not such a trust, as gave 'peculiar and exclusive jurisdiction to the court of equity.' There was no legal title in the defendant that made it necessary for the chancery jurisdiction to look behind. The title was acknowledged

to be in the elder Wingate, and the defendant, the son, had only the possession, and the statute would have commenced the moment that a right to sue the defendant, according to stipulations of the contract, had accrued."

In a note appended to this case Judge Lipscomb refers to the case of *Tinnen v. Mebane*, 10 Tex. 246, 60 Am. Dec. 205, saying it had been decided while he was absent, and that if he had seen it before writing the opinion in the *Wingate Case* he would not have considered it at all necessary to again discuss the question of continued trusts. In the *Tinnen Case*, supra, Chief Justice Hemp-hill says:

"The rule that trusts are not affected by statutes of limitation was in the earlier cases very loosely expressed, and gave rise to erroneous decisions. Chancellor Kent, having been misled by them in the case of *Coster v. Murray*, 5 Johns. Ch. [N. Y.] 522, examined the subject very elaborately in the case of *Kane v. Bloodgood*, 7 Johns. Ch. [N. Y.] 90, 11 Am. Dec. 417, and in a review of the cases, laid down the rule that trusts, not affected by statutes of limitation are those technical and continuing trusts not at all cognizable at law, but which fall within the peculiar and exclusive jurisdiction of courts of equity. \* \* \* All trusts which are cognizable at law are not withdrawn from the operation of the statute. Persons who receive money to be paid to another, or who misapply money placed in their hands for a particular purpose, or the reciprocal rights and duties founded upon the various species of bailments, as between hirer and letter to hire, \* \* \* depositary and persons depositing, etc., are cases of express and direct trusts, but being cognizable at law, or within the reach of the statute. The subject has been so much discussed that, he states, where there is a separate chancery jurisdiction and statutes of limitation are restricted to actions at law, the rule is of easy application. All implied and constructive trusts, all which are cognizable at law, are subject to the bar of limitation; and equity applies the same limitation to equitable demands that is applied in analogous cases at law. It is only where the trust is the mere creature of equity, exclusively cognizable within that jurisdiction, and is a subsisting, continued, and acknowledged trust, that the statute has no operation. It is more difficult, in our system of procedure, to apply the rule. The chancery and common-law jurisdiction are here blended. The doctrine that the trust must be exclusively within the jurisdiction of equity to save it from the statute has very little application in a system of jurisprudence where there is no exclusive equity jurisdiction, and where the statute applies to all subjects within its provisions, irrespective of whether they involve legal or equitable rights, and whether elsewhere they be cognizable at law or in equity. No doubt, with us, the statute extends to all cases in which it is admitted to be applicable in other common law states. How much more it may embrace has not been determined. That portion of the rule which requires the trust, not barrable by time, to be subsisting, continued, and acknowledged, is of more universal application; and, in all cases which come properly within the definition, and are not repugnant to either the express provisions or policy of the statute, there is no doubt that lapse of time would not be permitted to operate as a bar."

The facts in the case of *Phillips v. Holman*, 26 Tex. 277, show that Phillips transferred to Holman certain shares of stock which Holman agreed to use "as in his judgment would

make it most profitable or productive." The profits were to be divided equally between them. The suit was against Holman, who, it was alleged, had disposed of the stock at a profit of \$2,150. The statute of limitations of four years was pleaded as a defense. Bell, Justice, said:

"The only questions which we deem it necessary to discuss in this case, arise upon the plea of the statute of limitations. We do not think that the contract between the parties created in Holman that kind of 'technical and continuing trust' which cannot be affected by the statute of limitations. It is true the contract did not contemplate any particular period of time within which it was to be performed; but it nevertheless implied that it should be performed within a reasonable time, and devolved upon Holman the obligation after the lapse of a reasonable time to account to Phillips upon the contract. The time when the statute of limitations would begin to run upon this contract would perhaps be when Phillips would be entitled to call upon Holman for an account, and to enforce an account. This right would arise in Phillips, either because a reasonable time had elapsed for Holman to have performed the contract by disposing of the certificates of stock which were placed in his hands, or because he had in fact made some disposition of the stock, of which Phillips became informed."

Without quoting from the authorities further, this rule is further elucidated in *Bridgens v. West*, 35 Tex. Civ. App. 277, 80 S. W. 419; *Hightower v. Hester*, 15 S. W. 415; *Kennedy v. Baker*, 59 Tex. 154; *Cone v. Dunham*, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 650, and note; *Phillips v. State ex rel. Harter*, 5 Ohio St. 122, 64 Am. Dec. 636; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 391.

[2, 3] The temporary presence of Thomas, who is clearly shown by the evidence of Allen to have been a nonresident, did not suspend the statute on his subsequent departure from the state. *Wilson v. Daggett*, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 768. Thomas having undertaken to repay the money to Allen when he wanted it makes it an obligation payable on demand. *Pitschki v. Anderson*, 49 Tex. 1; *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310; *Swift v. Trotti*, 52 Tex. 503. These cases hold in effect that limitation runs from the date of the receipt of the money by Thomas. However, if it be contended that limitation did not begin to run until after the money had been deposited in a bank for Allen, under the rule, Thomas would be granted a reasonable time in which to make a deposit, and limitation would begin to run at the expiration of that time. The uncontradicted evidence shows that one day was a reasonable time in which to make the deposit.

Perry on Trusts, § 23, announces the rule that private trusts which concern individuals are limited in their duration. All kinds of bailments and deposits come within the jurisdiction of the law. These are in effect personal trusts, with which equity does not deal. *Simkins on Equity*, 146.

If the transaction in question created a trust, it, of course, was a direct or express trust, since it arose from express agreement of the parties; but the authorities quoted warrant us in holding that it was not such a technical, continuing, and subsisting trust as would exempt it from the bar of the statute.

Appellant urges that the court should have directed a verdict, based upon the answer of the jury to the second special issue, and we are inclined to the opinion that this contention is sound. However, we have thought it best to detail the evidence and quote at length from the authorities applicable to the facts.

We conclude that the judgment must be reversed, and here rendered for the appellant.  
Reversed and rendered.

### KEASLER v. WRAY et al. (No. 1255.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 5, 1914.)

#### 1. MARSHALING ASSETS AND SECURITIES (§ 1\*) —NATURE AND SCOPE OF REMEDY.

The doctrine of marshaling assets will not be applied in favor of a party whose equities are inferior to that of others claiming the same securities.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

#### 2. CHATTEL MORTGAGES (§ 225\*) — SALE OF PROPERTY — CONSENT OF MORTGAGOR — RIGHTS OF JUNIOR MORTGAGEE.

By a sale of a part of mortgaged chattels with the mortgagee's consent, but without waiving lien, neither the mortgagee nor mortgagor injured or displaced any right of a junior mortgagee in respect to the security acquired under a mortgage made thereafter on the property not sold.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

#### 3. CHATTEL MORTGAGES (§ 225\*) — SALE OF PROPERTY — CONSENT OF MORTGAGOR — TITLE AND RIGHT OF BUYERS.

Where a mortgagee of chattels consents to a sale of a part thereof, but without waiving lien, the buyers may require the mortgagee to first exhaust the lien on the remaining property before having recourse to the property sold, and, if that is sufficient to satisfy the debt, they become the absolute owners free from the lien.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

#### 4. MARSHALING ASSETS AND SECURITIES (§ 2\*) —CLAIM FOUNDED ON CONTRACT.

Taking a junior mortgage on the remainder after a sale of a part of mortgaged chattels with the senior mortgagee's consent would not so far overcome the prior equities of the buyers, as to compel marshaling in favor of the junior mortgagee against them, for marshaling is not founded on contract, nor is it a vested right or lien, but rests on equitable principles.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 1; Dec. Dig. § 2.\*]

#### 5. MARSHALING ASSETS AND SECURITIES (§ 4\*) —CLAIMS IN HANDS OF ONE PERSON.

A junior mortgagee, who took a mortgage on the remainder after a sale of a part of mort-

gaged chattels, with the senior mortgagee's consent, but without waiving lien, and who later took an assignment of the senior mortgage, being the holder of both claims, could not invoke the doctrine of marshaling securities as against the equities of the buyers.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 6. PAYMENT (§ 39\*) — APPLICATION OF PAYMENTS.

The application of a payment as intended and agreed cannot be diverted without the debtor's consent.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

#### 7. CHATTEL MORTGAGES (§ 210\*)—PAYMENT OF DEBT—APPLICATION BETWEEN MORTGAGES.

Where mortgaged property is turned over to the mortgagee to apply the proceeds on the mortgage debt, a junior mortgagee, who acquires the property with notice thereof, on taking an assignment of the debt and senior mortgage, must apply the proceeds accordingly to discharge the debt secured by the senior mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 210.\*]

Appeal from District Court, Cass County; H. F. O'Neal, Judge.

Suit by T. B. Keasler against C. P. Wray and others to recover on notes, and for other relief. From a judgment for defendants, plaintiff appeals. Affirmed.

On November 2, 1911, C. P. Wray, as principal, and T. E. Wray, as surety, executed to the First National Bank of Hughes Springs ten promissory notes. As a further security in the payment of the notes, C. P. Wray on November 4, 1911, executed a mortgage to the bank on seven mules, two wagons and harness, and a shingle mill and its machinery and usual attachments. On April 29, 1912, C. P. Wray, as principal, and T. J. Wilson, as surety, executed to the bank a note for \$132.50 due 30 days after date, and this note was by agreement secured by the mortgage of November 4, 1911. In June, 1912, C. P. Wray by permission of the cashier of the bank made sale of the shingle mill and its machinery and usual attachments to A. B. Bennett and A. H. Wiley. At the time of the sale of the shingle mill and outfit to Bennett and Wiley, the first six of the series of ten promissory notes had been paid to the bank, and there were four of the series unpaid, but only one of the four was yet due besides the note for \$132.50. The cashier at the time of granting permission to sell the shingle mill stated that the bank "would not waive its mortgage, but there was sufficient property to pay them without the shingle mill." On June 15, 1912, after the sale of the shingle mill to Wiley and Bennett, C. P. Wray executed to T. B. Keasler a note for \$640.12 and secured the same by a second mortgage on the seven mules, two wagons, and harness described in the first mortgage. On August 6, 1912, about two months after C. P. Wray had sold the shingle mill and outfit to Wiley

and Bennett, the appellee C. P. Wray turned over to the bank the seven mules, two wagons, and harness covered by the mortgage, together with two notes for \$100 each, for the purpose of having sale made of the property, the notes collected, and the proceeds arising therefrom to be applied to the payment of the five notes mentioned above. At the same time, Wray turned over to the bank as a payment a credit in his favor at the bank of \$38. Four of the five notes were due and payable at the time the property was turned over to the bank for sale; the note for \$132.50 having a credit payment thereon of \$86.70. After the property was turned over to the bank to pay the indebtedness, and about August 14, 1912, T. B. Keasler, without the knowledge of C. P. Wray or his sureties, or Wiley and Bennett, bought of the bank the five notes held and owned by it, and had said notes and mortgage assigned to him by the bank. After T. B. Keasler came into the possession of the property through delivery by the bank to him, he sold some of the property, and bartered some, and realized out of all the property the net sum of \$901. Out of the sum realized from the sale of the property the appellant applied the same first to his own debt and then on the notes purchased from the bank, leaving a balance due on the bank notes. Appellant brought the suit to recover on the notes purchased from the bank against the makers and the sureties and to foreclose the first mortgage, and against A. B. Bennett and A. H. Wiley for the value of the shingle mill and outfit alleged to have been converted by them. The defendants answered that the property sold by the plaintiff had been turned over by C. P. Wray to the bank to be sold and collected and the proceeds to be applied to the payment of the bank debt, and that the proceeds should have been applied by the plaintiff first to the bank debt. The defendants Bennett and Wiley answered that the shingle mill and outfit were sold to them by permission of the bank, which held the mortgage; that the second mortgage did not embrace the property; and that they had the right to have the mortgage as originally executed to the bank exhausted on all of the property and first applied to payment of the bank debt. C. P. Wray further claimed that the property was more than sufficient to pay both the debt of the bank and of the plaintiff, and prayed for judgment over and against plaintiff for \$501. The case was tried to the court without a jury, and he made findings of fact and conclusions of law, and entered judgment for the defendants. The findings of fact are not challenged, and are substantially given above.

Henderson & Bolin, of Daingerfield, and Mahaffey, Thomas & Hughes, of Texarkana, for appellant. O'Neal & Allday, of Atlanta, for appellees.

LEVY, J. (after stating the facts as above). The court pronounced the legal effect of the facts found by him to exist to be in denial of the right of the plaintiff to have a judgment against the defendants in the suit. The appellant insists by his two assignments of error that the court did not give the proper legal effect to the facts found to exist. Appellant insists that, holding as he did the debt of the bank as well as that of his own with the several securities given for the payment of each, he has the right to have the securities for the payment of either debt marshaled in such manner as to most fully protect him. Concluding as we do that the court's decision should be sustained, we overrule the two assignments.

[1] It is believed that under the facts the appellant could not claim the benefit nor invoke the rule of marshaling securities. The equities of the defendants in point of fact are found by the court to be superior to that of appellant, and this would be sufficient to deny the application of the doctrine in favor of appellant.

[2] It appears from the facts that the property covered by the mortgage to the bank covered mules, wagons, and a shingle mill and its attachments. The mortgage subsequently given to the appellee covered the same mules and wagons, but did not cover the shingle mill and attachments. The first mortgage was executed November 4, 1911. About June 6, 1912, and when about one-half of the indebtedness that the mortgage was given to secure was paid, the mortgagor sold by permission of the bank the shingle mill and attachments covered by the mortgage to Wiley and Bennett. It would be required to presume, in support of the court's judgment, that about June 6, 1912, the shingle mill sale was effected, for the court finds that "about two months after the shingle mill had been sold the defendants A. P. Bennett and A. H. Wiley and O. P. Wray turned over to the First National Bank of Hughes Springs, Tex.," the property mortgaged, and the evidence is without dispute that the date the property was turned over to the bank was August 6, 1912. The appellant's mortgage was executed June 15, 1912. Therefore at the time of the sale of the shingle mill neither the bank nor the mortgagor injured or displaced any right of the appellant in respect to the security. The appellant at the time of the sale stood towards the transaction as any other stranger would do having no rights therein.

[3] But rights arose in favor of Wiley and Bennett in regard to the security covered by the mortgage, which must be taken into account and considered, as the court did, as a right next to the lien of the bank. Acquiring the property by permission of the bank, and at a time that no junior mortgage existed against any of the property and when sufficient of the original indebtedness

had been reduced by payment to leave the value of the mules and wagons more than sufficient, as a fact, to pay off the balance due, Wiley and Bennett would be in an equitable position to require of the bank, had it undertaken to satisfy its existing debt under the mortgage, that it first exhaust its lien upon the personalty covered by the mortgage before having recourse to the shingle mill. This would be so for the reason that the permitted sale of the property operated as an equitable limitation upon the remedy of the bank to disturb the rights of Wiley and Bennett further and to a greater extent than to apply the shingle mill to the satisfaction of the indebtedness existing, failing the sufficiency of the remaining personalty to satisfy same. If the other property was sufficient to pay the existing original indebtedness, as was the proof here, then, as against both the mortgagor and the bank, Wiley and Bennett would have become the absolute owners of the shingle mill free from the mortgage lien of the bank.

[4] In order to displace and defeat this equitable situation of Wiley and Bennett against the bank in respect to the shingle mill, the appellant has to rely alone upon the fact that he was a junior lienor upon the mules, and that subsequently on August 14, 1912, he became the purchaser of the bank of the existing indebtedness and the mortgage. The fact of taking a junior mortgage, being after the sale to Wiley and Bennett, would not so far overcome the prior equities of Wiley and Bennett as to compel marshaling in favor of appellant against Wiley and Bennett, for marshaling is not founded on contracts, nor is it a vested right or lien, but rests on equitable principles alone. 26 Cyc. 928; 6 Pomeroy's Equity Jur. 867.

[5] By subsequently purchasing the bank's debt and security, appellant was not in a better position to invoke, as against the equities of Bennett and Hill, the benefit of the doctrine sought to have applied. He in fact was in the position then of one person having two claims against another person. Being in that position, appellant could not invoke the doctrine of marshaling securities, for the rule is not applicable when the two claims are in the hands of the same person. In order to obtain the relief, "the parties must be creditors of the same debtor, and both funds must belong to one debtor." 3 Pomeroy's Eq. Jur. 868.

[6, 7] And neither was there error in concluding, as involved in the court's conclusion, that appellant by his subsequent purchase of the bank's debt and lien was not entitled, under the facts, to be protected by substitution or subrogation under the mortgage. The court finds:

"That about two months after the shingle mill had been sold by defendant O. P. Wray to defendants Wiley and Bennett, C. P. Wray turned over to the First National Bank of Hughes Springs, Tex., the seven mules, two

wagons, seven sets of harness, also two notes for \$100, and a credit at the bank of \$38 for the purpose of said personal property being sold by the said bank and the said notes being collected and the proceeds thereof to be applied to the payment of the five notes executed by said C. P. Wray and others to said bank, which notes are described in the bank mortgage, and being the five notes sued on herein." And "I find that, after said property had been turned over to the said First National Bank of Hughes Springs to pay said indebtedness, the plaintiff, without knowledge of the defendants herein, bought from the bank the five notes held by it, being the five notes described in the plaintiff's petition and the five notes sued on herein, and had said notes and said mortgage to said bank assigned to him by the First National Bank of Hughes Springs."

After the appellee came into the possession of the property, he, as found by the court, "sold some of the property and bartered the balance, and realized out of all the property the net sum of \$901." Finding, as the court did, that C. P. Wray, the debtor, directed the manner in which his payment was to be applied, and that the bank accepted and undertook to make appropriation as directed and intended by the debtor, Wray, the bank would have to apply it accordingly. The application of the payment as intended and agreed cannot be diverted without the consent of the debtor. Taking the property and acquiring the debt with notice, as the court was authorized to find, of the intention and agreement to make application of the proceeds of the property to the bank's debt, the appellant could take no position inconsistent with the application of the payments in the particular way. The court therefore may, at the instance of the debtor, enforce, as he did, the appropriation of the funds under the agreement of the bank to the discharge of the specified debt, and in so doing the debt would appear, according to the evidence, fully discharged. As the debt of the bank was fully discharged by applying the payment as directed and agreed, the mortgage would be released, and as a consequence the maker of the note, the sureties, and Wiley and Bennett would be discharged. The effect of the court's conclusion was this result, and should be sustained.

The judgment is affirmed.

**LOUISIANA & TEXAS LUMBER CO. v.  
SOUTHERN PINE LUMBER CO.**  
et al. (No. 6699.)

(Court of Civil Appeals of Texas. Galveston.  
Oct. 29, 1914. Rehearing Denied  
Nov. 25, 1914.)

**1. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS.**

A question, asking whether witness' husband, prior to his death, purchased or acquired by deed the interests of his brothers and sisters in the land in controversy, and, if yea, whether witness saw any such deeds, it being claimed that the deed or deeds were lost, which the witness answered in the affirmative, was not objectionable as leading, since a question will

not be condemned as leading though it admits of an answer "yes" or "no," if only one material fact is elicited and the form of the question does not suggest the answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.\*]

**2. EVIDENCE (§ 471\*)—OPINION EVIDENCE—OPINION OR CONCLUSION.**

The question was not further objectionable as calling for the conclusion or opinion of the witness; her answers thereto so far as responsive being statements of fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**3. ACKNOWLEDGMENT (§ 36\*)—CERTIFICATE—SUBSCRIBING WITNESS—SIGNATURE OF WITNESS—REQUEST OF GRANTOR.**

Where an officer's certificate to a deed recited that the witness who proved the deed stated that he "was present and saw the grantor sign and deliver the instrument for all the purposes and considerations contained and expressed as witness at the request of the grantor," it was not objectionable for failure to sufficiently show that the witness signed the instrument as a witness at the grantor's request.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 181, 182, 184-198, 221-223; Dec. Dig. § 36.\*]

**4. APPEAL AND ERROR (§ 1050\*)—RULINGS ON EVIDENCE—PREJUDICE.**

In trespass to try title, defendant could not successfully object on appeal to the introduction of a deed in evidence, where there was nothing in the statement under the assignment of error to show that plaintiff's title to any part of the land in controversy depended on the deed or was in any way affected thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**5. TENANCY IN COMMON (§ 55\*)—RIGHTS OF COTENANT—RECOVERY OF LAND.**

A cotenant may recover the whole property as against one showing no title.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 140-156; Dec. Dig. § 55.\*]

**6. VENDOR AND PURCHASER (§ 224\*) — INNOCENT PURCHASER — ADMINISTRATOR'S DEED.**

An administrator's deed purporting to convey only whatever interest the estate might have in the land in controversy was prima facie only a quickclaim and insufficient to support a plea of innocent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 469-473; Dec. Dig. § 224.\*]

**7. EXECUTORS AND ADMINISTRATORS (§ 388\*)—SALE OF LAND—INNOCENT PURCHASER.**

A purchaser of land at an administrator's sale, notwithstanding the form of the deed, may be an innocent purchaser if the probate proceedings and the facts attending the sale show it to have been the purpose of the administrator to sell and of the purchaser to buy the land described in the deed, and not a mere chance of title and the purchaser had no notice of any adverse claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.\*]

**8. EXECUTORS AND ADMINISTRATORS (§ 148\*)—SALE OF LAND—TITLE ACQUIRED.**

Where intestate long prior to his death had conveyed the land in controversy by a deed of record, and a purchaser at a subsequent sale of the land by the intestate's administrator knew at the time of the purchase that intestate

did not own the land, no title was acquired by the sale or the administrator's deed conveying the estate's interest therein.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 595-601; Dec. Dig. § 148.\*]

**9. EXECUTORS AND ADMINISTRATORS (§ 388\*)—INNOCENT PURCHASER.**

Where an administrator's deed only purported to convey the title of the estate, and the grantee knew when he purchased that the intestate had conveyed the land long prior to his death, the deed was sufficient to put a subsequent purchaser on notice, so that he could not acquire title as an innocent purchaser or acquire a better position than his grantor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.\*]

**10. TRESPASS TO TRY TITLE (§ 41\*)—FINDINGS—EVIDENCE.**

In trespass to try title, evidence held to sustain a finding that the heirs of a prior owner, other than H., conveyed their interests in the land to him.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

Appeal from District Court, Houston County; John S. Prince, Judge.

Trespass to try title by the Southern Pine Lumber Company against the Louisiana & Texas Lumber Company and others. Judgment for plaintiff, and defendant Lumber Company appeals. Affirmed.

See, also, 147 S. W. 604.

Nunn & Nunn, of Crockett, for appellant. Adams & Young, of Crockett, for appellees.

**PLEASANTS, C. J.** This is an action of trespass to try title, brought by the appellee Southern Pine Lumber Company against appellant, Louisiana & Texas Lumber Company, and appellee Paul Durham, for the recovery of the W. T. English survey of 707 acres of land in Houston county. The appellant answered in the court below by general demurrer, disclaimed title as to all of the land sued for except two tracts, one of 546.9 acres and the other containing 50 acres. As to these tracts appellant pleaded not guilty, and also that it was an innocent purchaser in good faith for a valuable consideration and without notice of appellee's claim. The appellee Durham answered by general demurrer, general denial, and plea of not guilty. Upon the trial of the cause it was agreed that the title to only 160 acres, a part of the 546.9 described in appellant's answer, was involved. The trial in the court below without a jury resulted in judgment in favor of plaintiff for the 160 acres of land in controversy.

The evidence sustains the following conclusions of fact: The W. T. English 707-acre survey of land, of which the 160 acres in controversy is a part, was patented to Jesse Duren, assignee of said English, on September 23, 1871. By deed of date March 8, 1860, Duren conveyed the 160 acres of said

survey in controversy in this suit to Joseph Luce, Sr. This deed was duly recorded in Houston county in May, 1862. The deed records of said county were destroyed by fire in 1885. The deed was recorded in 1874, and the record thereof again destroyed by fire in 1882. It was again recorded in 1900. After the death of Joseph Luce, Sr., and his wife, the 160 acres was conveyed to his son, Hiram Luce, by all of the other children of the deceased Joseph Luce and wife. This conveyance has been lost or destroyed and is not of record in Houston county. On May 15, 1901, after the death of Hiram Luce, his widow and heirs conveyed the 160 acres to Dolly Shelton. By deed of date June 21, 1902, Dolly Shelton conveyed said tract of land to A. Harris & Co., and A. Harris & Co. conveyed it to plaintiff by deed of date June 14, 1905, for a consideration of \$13 per acre, which was paid by plaintiff. Jesse Duren died prior to 1877, and his estate was administered in the probate court of Houston county by W. H. Cundiff. Acting under an order of said court which directed him to sell the lands of said estate for the purpose of paying its debts, the administrator, after due notice, sold said lands on the first Tuesday in April, and J. C. Wooters became the purchaser. The report of this sale was duly made and the sale was confirmed by the court. Among the other lands purchased by Wooters and conveyed to him by the administrator's sale was the following:

"All the interest the estate may have in and to the Wm. T. English grant, containing 707 acres of land lying and being situated in Houston county, Texas."

The words "containing 707 acres" in the above description were interlined in the original deed. As this deed appears upon the record the interlineation is as follows: "Containing 177 acres." The trial court finds, and the finding is not challenged by appellant, that the figures 177 are altered in the original deed after its record to 707. The trial court further finds that when Wooters purchased the lands of the Duren estate and took the deed from the administrator he had actual and constructive notice that Duren had parted with his title to the 160 acres of land in controversy. This finding is not questioned by appellant. On December 28, 1899, the appellant by its agent, R. H. Keith, purchased from Wooters a tract of 546.9 acres of the Wm. T. English survey, paying therefor the sum of \$1,367.25. The 160-acre tract in controversy was included in the 546.9 acres described in and conveyed by the deed to appellant by Wooters. At the time he made this purchase Keith had no active notice of the claim of those under whom appellee holds title.

[1] The first six assignments presented in appellant's brief complain of the ruling of the trial court in admitting in evidence over

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant's objections certain questions and answers contained in the depositions of Sarah Huling, who was formerly Sarah Luce, wife of Hiram Luce. The first assignment complains of the ruling of the court in not sustaining appellant's objection to the fourteenth interrogatory and the answer of the witness thereto. This interrogatory and the answers of the witness are as follows:

"State whether or not your husband, Hiram Luce, prior to his death and subsequent to the death of his father or mother, purchased or acquired by deeds in writing, or through the partition of his father's and mother's estate, the interest of his brothers and sisters in and to the Joseph Luce, Sr., 160-acre survey of land made out of the W. T. English survey in this suit, and being the land conveyed by you and your children to Dolly Shelton, by deed dated May 15, 1901. If yea, then please state as to whether or not you ever saw any deed or deeds from the other children and heirs of Joseph Luce, Sr., to Sarah Luce conveying their interest in and to said 160 acres of land?

"Yes, my husband, Hiram Luce, purchased the interest of the other heirs of Joseph Luce, Sr., in and to 160 acres of the W. T. English survey, the same land that myself and the other heirs of Hiram Luce afterwards conveyed to Dolly Shelton. He paid the other heirs fifty (\$50.00) dollars apiece for their interest in the land. I remember that he gave Katy Allen a horse valued at fifty (\$50.00) dollars for her interest in this land. He got a deed from most of the heirs to this land and I think from all of them, but I can't state for sure about the deed from all of them. I know he bought each heirs' interest in the land and paid fifty (\$50.00) dollars each. I know most of them made a deed conveying their interest in this land for I have seen such deed, but can't remember whether all of them had signed it or not."

The interrogatory was objected to on the ground that it was leading and assumed that Hiram Luce had acquired the land inquired about in one of the ways mentioned "and further assumed that it was the same land conveyed by witness and her husband to Dolly Shelton by deed of date May 15, 1901, all of which calls for the conclusions and opinion of the witness and does not call for the facts about which the witness would be competent to testify." The answers of the witness were objected to on the ground that they were not responsive to the interrogatory and that the proper predicate had not been laid for the introduction of such testimony.

The court did not err in overruling these objections. We do not think the first question contained in the interrogatory properly admits of the answer "yes" or "no"; but, if it does, only the one material fact whether or not Hiram Luce acquired by deed or partition the interest of the other heirs of his father and mother in the land mentioned in the interrogatory was elicited by the question, and the form of the question was not such as to suggest the answer desired.

The weight of authority supports the rule that a question is leading which embodies a material fact and admits of a simple affirmative or negative answer. But this rule has been modified by the decisions of our Supreme Court to the extent that a question

will not be held leading because it admits of the answer "yes" or "no" if only one material fact is elicited by the question and the form of the question does not suggest the answer. *Cunningham v. Neal*, 49 Tex. Civ. App. 613, 109 S. W. 455; *Lott v. King*, 79 Tex. 292, 15 S. W. 231; *Railway Co. v. Dalwigh*, 92 Tex. 655, 51 S. W. 500; *Railway Co. v. Lowe*, 97 S. W. 1087; *Railway Co. v. Collins*, 33 Tex. Civ. App. 58, 75 S. W. 816; *Bryan Press Co. v. Railway Co.*, 110 S. W. 99.

[2] The land inquired about was the land conveyed by the witness and the heirs of Hiram Luce to Dolly Shelton, and the interrogatory properly so described it. The question did not call for the conclusion or opinion of the witness, and her answers thereto, which were responsive to the question, were statements of fact and not expressions of opinion or conclusions. The loss of the deed and diligent and unavailing search therefor was shown by testimony of this witness, and this entitled plaintiff to prove the contents by parol evidence.

The questions presented by the second, third, fourth, fifth, and sixth assignments need not be discussed in detail. None of the testimony, the admission of which is complained of, was objectionable upon any of the grounds set out in the assignments, and each of said assignments is overruled.

[3] The seventh assignment complains of the ruling of the court in admitting in evidence the deed from Jesse Duren to Joseph Luce over appellant's objection that it was not properly proven for record. The deed was proven for record by a subscribing witness. The certificate of the officer recites that the witness stated:

"That he was present and saw the grantor sign and deliver said instrument for all the purposes and considerations contained and expressed as witness at the request of the grantor."

As we understand the assignment, the objection made to the certificate is that it does not show that the witness signed the instrument as a witness at the request of the grantor. The objection was properly overruled. The statement of the witness above set out shows that he was present as a witness at the request of the grantor and saw him sign and deliver the instrument, and the name of the witness appears upon the instrument as a subscribing witness. We think the certificate of proof is in substantial compliance with the statute. The assignment is overruled.

[4, 5] The eighth assignment of error cannot be sustained. If it be conceded that the deed mentioned in the assignment was not admissible over the objection made by appellant, there is nothing in the statement under the assignment to show that the title of appellee to any part of the land in controversy depended upon this deed or was in any way affected thereby. It is probable that a search through the record, which we do not

feel called upon to make, would disclose that the grantors in this deed were two of the heirs of Hiram Luce and as such held an interest in the land. If this is true, and their interest did not pass by the deed, they are tenants in common with appellee, and, appellant having shown no title to the land, appellee as against appellant was entitled to recover the interest of its cotenants.

[6, 7] We cannot agree with appellant's contention, made under its ninth assignment of error, that the undisputed evidence sustains its plea of innocent purchaser in good faith. The deed from the administrator of Duren's estate to Wooters, under which appellant claims, only purports to convey whatever interest the estate might have in the English survey, and is prima facie only a quitclaim deed which would not support the plea of innocent purchaser. But notwithstanding the form of the deed, a purchaser at an administrator's sale might be an innocent purchaser if the proceedings in the probate court and the facts of the entire transaction showed that it was the purpose of the vendor to sell and the intention of the purchaser to buy the land described in the deed, and not a mere chance of title, and such purchaser had no notice of any adverse claim to the land.

[8, 9] The proceedings in the probate court in regard to the sale in question do not appear in the record; but, as before stated, the trial court finds that Wooters knew at the time he purchased that the estate did not own the 160 acres in question, and the undisputed evidence shows that Duren had conveyed the 160 acres to Luce long prior to his death, and this deed was of record in Houston county at the time of the administrator's sale to Wooters. The estate having no title to the 160 acres of land in controversy at the time of the sale of its interest in the survey to Wooters, and the deed only conveying the interest in the survey owned by the estate, Wooters, regardless of the question of notice, acquired no title to the 160 acres by the deed from the administrator. The character of the deed was such that any purchaser from Wooters was put upon notice that he only acquired title to whatever interest in the property the estate owned at the time of the sale, and such purchaser could not under this deed acquire title as an innocent purchaser in good faith to land in said survey not owned by the estate at the time of the sale to Wooters. A purchaser from one holding under a deed of this kind is in no better position than the vendee in such deed. *Harrison v. Boring*, 44 Tex. 255; *White & Newman v. Frank*, 91 Tex. 66, 40 S. W. 962; *Hitchler v. Scanlan*, 15 Tex. Civ. App. 40, 39 S. W. 633.

[10] The remaining assignments complain of the judgment on the ground that the evidence is insufficient to sustain the finding of the court that the heirs of Joseph Luce, Sr.,

other than Hiram Luce, conveyed their interest in the land to said Hiram. Mrs. Huling, the surviving wife of Hiram Luce, testified positively that Hiram Luce purchased the interest of the other heirs in the land and received a deed from them therefor; that she saw the deed and had it in her possession; and that she had lost it or it had been unintentionally destroyed with other papers of her deceased husband. Her testimony as to the loss of the deed and her search therefor was amply sufficient to admit parol proof of its existence and its contents. Her statement that such a deed was in fact executed and delivered is uncontradicted and fully justified the finding of the court upon this issue. If any of the heirs of Joseph Luce failed to execute the deed, they are tenants in common with appellee, and the latter was entitled, as against appellant, to recover all of the land.

We are of the opinion that the judgment of the court below should be affirmed, and it has been so ordered

Affirmed.

PARIS & G. N. R. CO. v. LACKEY.  
(No. 1341.)

(Court of Civil Appeals of Texas. Texarkana.  
Oct. 29, 1914.)

1. MASTER AND SERVANT (§ 112\*)—INJURY TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

Where a railroad employé, struck by an engine moving on a track in railroad yards, was not injured because of any necessity, in the discharge of his duty, to assume the position he did with reference to an adjacent track, the fact of the nearness of the two tracks could not be relied on as negligence, for the negligence, if any, in constructing the tracks close together was not a proximate cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218-223; Dec. Dig. § 112.\*]

2. EVIDENCE (§ 244\*)—DECLARATION OF EMPLOYÉ—ADMISSIBILITY.

Declarations made by an engineer the day following his striking plaintiff with an engine that he might have done more than he did to avoid the accident were inadmissible as against their common employer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

3. MASTER AND SERVANT (§ 248\*)—INJURY TO SERVANT—DISCOVERED PERIL.

To support a charge of actionable negligence of a railroad company on the doctrine of discovered peril, the employé injured by being struck by an engine must show facts authorizing a finding that the men in charge of the engine realized that the employé was in danger and neglected to use available means to avoid injuring him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. § 248.\*]

4. EVIDENCE (§ 586\*)—NEGATIVE EVIDENCE—WEIGHT.

Testimony of witnesses that they did not hear the bell on an engine has probative force, provided they were so situated that in the ordi-

nary course of events they would have heard the bell had it been rung.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 536.\*]

5. TRIAL (§ 139\*)—EVIDENCE—QUESTION FOR JURY.

Where there was positive and negative testimony on the issue whether an engine bell was rung, the question is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

Error from District Court, Lamar County; A. P. Dehoney, Judge.

Action by J. T. Lackey against the Paris & Great Northern Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Tracks 1 and 2 in plaintiff in error's (hereinafter referred to as defendant) yards at Paris ran north and south. The distance between the west rail of track 1 and the east rail of track 2 was 7 feet and 7 inches. Cars set opposite, or passing, each other on the tracks would be 29 or 30 inches apart. In July, 1911, defendant in error (hereinafter referred to as plaintiff) was employed by defendant, and had been during the preceding seven months, as a general "roustabout." He helped in defendant's blacksmith shop, and repaired and helped to ice and sweep out passenger cars used by defendant in its business as an interstate carrier. On the morning of July 23, 1911, plaintiff had assisted in cleaning and icing coaches set on track 1, about ready to be sent out in one of defendant's trains, and had walked north between the two tracks, by the side of the cars standing on track 1, and, while in the act of picking up certain tools lying between the tracks, was struck by an engine moving north on track 1 at a speed of 3 or 4 miles an hour. He claimed he was injured as a result of the accident, and that defendant was liable to him for damages he thereby suffered, because of negligence on its part, first, in constructing tracks 1 and 2 so close together; second, in failing, through its employes in charge of the engine, to use due care to avoid injury to him after said employes discovered him to be in a place of danger from the engine; and, third, in failing to warn him of the approach of the engine to the point where he was engaged in picking up the tools. In the charge of the court each of these grounds of negligence was submitted to the jury, and they were authorized to find against defendant on each or all of them. A general verdict in plaintiff's favor having been returned, and judgment entered accordingly, defendant prosecuted this appeal.

Andrews, Ball & Streetman, of Ft. Worth, and Wright & Patrick, of Paris, for plaintiff in error. Love & Hutchison, of Paris, for defendant in error.

WILLSON, C. J. (after stating the facts as above). In the view we take of the case as made by the testimony in the record, it is believed the appeal can be sufficiently disposed of by briefly stating the conclusions reached, without specific reference to the assignments of error.

[1] 1. The trial court erred in submitting to the jury an issue as to whether or not defendant was guilty of negligence in constructing tracks 1 and 2 so close together. In reaching this conclusion, we have not thought it necessary to first determine whether, on the facts shown by the testimony, negligence of which plaintiff had a right to complain could have been predicated on the nearness of tracks 1 and 2 to each other or not, for it is clear, if defendant was guilty of negligence in constructing the tracks so close together, its negligence in that respect was not a proximate cause of the injury to plaintiff. If he was struck by the engine, it was because of the position he occupied with reference to track 2, and it did not appear that it was necessary, in the discharge of his duty, for him to assume that position because of the proximity of track 1, or that the nearness of that track to track 2 had anything to do with his assuming that position. In the position he occupied he would have been struck as he was had tracks 1 and 2 been 50 instead of 7 and a fraction feet apart.

[2, 3] 2. The trial court further erred in submitting to the jury an issue as to "discovered peril." Unless the testimony of the witness Williams as to declarations made to him by the engineer the next day, or later, after the accident, tending to show that he might have done more than he did to avoid it, should be considered, there was nothing in the evidence heard to support a finding that plaintiff was in danger from the engine until he stooped to pick up the tools, or, if he was, that the employes in charge of the engine realized it, nor to support a finding that the perilous position occupied by plaintiff at the time he stooped to pick up the tools was discovered by said employes in time to have avoided the accident. It is clear that defendant was not bound by the declarations in question, if made by the engineer, as testified to by Williams, and therefore that same should not be considered in passing on the sufficiency of the evidence to support the finding in question. *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 537. To support a charge of negligence on the part of defendant on the doctrine of "discovered peril," it was indispensable that there should be testimony authorizing a finding that the employes in charge of the engine realized that plaintiff was in danger therefrom, and neglected to resort to means they should have resorted to, in the exercise of due care, to avoid striking him. *Railway Co. v. Bread-*

ow, 90 Tex. 26, 36 S. W. 410; Railway Co. v. O'Donnell, 99 Tex. 636, 92 S. W. 409; Railway Co. v. Hope, 149 S. W. 1077.

[4, 6] 3. It is not believed that defendant's contention that the testimony was not sufficient to support a finding that it was guilty of negligence in failing to warn plaintiff of the approach of the engine should be sustained. The contention is based on the fact that its witnesses swore that the bell was ringing, while the testimony of plaintiff, as it construes it, and of his witness Windom was to the effect merely that they did not hear the bell ringing. The argument is that, in face of positive testimony that the bell was ringing, negative testimony to the contrary was without probative force. The contention seems to be supported by Railway Co. v. Kutac, 76 Tex. 473, 13 S. W. 327, which was the authority relied upon for a similar ruling made in Railway Co. v. Anderson, 126 S. W. 928, cited by defendant. We do not agree that those cases correctly interpret the law controlling the question, and therefore we are unwilling to follow them. That the testimony of witnesses that they did not hear the bell was admissible to prove it was not rung cannot be doubted. "Courts," said Professor Wigmore, "have often been asked to exclude testimony based on what may be called negative knowledge; i. e., testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." And he adds: "This sort of testimony, on the authorities stated, is constantly received—particularly in proof of the failure to give railroad signals," etc. 1 Wig. on Ev. § 664. And see Railway Co. v. Hansford, 125 Ala. 349, 28 South. 50, 82 Am. St. Rep. 241; Walsh v. Railway Co., 171 Mass. 52, 50 N. E. 453. Such testimony being admissible as proof, in a case like this one, that the bell was not rung, whether it was sufficient proof of the fact or not should be left to the determination of the jury. "When evidential facts are once admitted by the judge," said Professor Wigmore in another volume of the same work, "their individual and total weight or probative value is for the jury." 4 Wig. on Ev. § 2551. Had there been no testimony to the contrary, we are sure defendant would not question the sufficiency of the testimony of witnesses, showing they were in a position to hear and did not hear the bell ring, to prove the fact that it was not rung. If it would not question its sufficiency in that event, then logically it should

not because of the testimony to the contrary, for the jury had a right, if they chose to do so, to wholly disregard the testimony of the witnesses to the effect that the bell was rung.

It follows, from what has been said, we are of the opinion that, on the testimony in the record, negligence, if any, on the part of defendant could be predicated alone on its failure, as charged, to warn plaintiff of the approach of the engine. Therefore the issue as to liability on the part of defendant or not, made by that testimony, it seems to us was determinable by the answer the jury might make to the question as to whether it was guilty of negligence in the respect stated or not, and if answered in the affirmative, the answer they might make to the question as to whether plaintiff was guilty of contributory negligence or not.

The judgment is reversed, and the cause is remanded for a new trial.

## HOUSTON CHRONICLE PUB. CO. v. TIERNAN. (No. 6730.)

(Court of Civil Appeals of Texas. Galveston. Dec. 1, 1914.)

### 1. EVIDENCE (§ 106\*)—RELEVANCY—CHARACTER.

Plaintiff, in an action for libel, may prove good character, if the publication of which he complains is an attack on his character, or such an attack is made in defendant's pleading, or the nature of the action involves his character; and where defendant's published article charges plaintiff and his wife with malpractice, barratry, and extortion, and that they would be called to defend disbarment proceedings, and indirectly charged them with being criminals, and defendant, in his answer, alleged that the charges were true, testimony of plaintiff that he had held several offices in city named, and that up to the time of the publication he and his wife were of good character as lawyers and persons, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.\*]

### 2. WITNESSES (§ 350\*)—CHARACTER—ADMISSIBILITY OF EVIDENCE.

It is improper to attempt to impeach a witness by asking him on cross-examination if he had been arrested in a city named on a charge of misdemeanor theft.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.\*]

### 3. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in allowing witness to be improperly cross-examined as to his character held not harmless error, where, if the witness' testimony had been believed by the jury, plaintiff's cause of action would have been partially defeated, and the rendition of a large verdict indicates that the jury did not believe the witness' testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

### 4. LIBEL AND SLANDER (§ 42\*)—PRIVILEGED PUBLICATION.

Rev. St. 1911, art. 5597, §§ 3, 4, make the impartial account of public meetings, and the reasonable comment on the official acts of public officers, and the other matters of public concern

published for general information, privileged. Held, that an account of disbarment proceedings, in which defendant stated what the evidence which had not been made public would show, are not privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 42.\*]

Appeal from District Court, Liberty County; J. Llewellyn, Judge.

Action by R. H. Tiernan against the Houston Chronicle Publishing Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hunt, Myer & Teagle, of Houston, for appellant. Stevens & Stevens, of Houston, for appellee.

McMEANS, J. R. H. Tiernan brought this suit against the Houston Chronicle Publishing Company for damages, alleging that said company had published in its newspaper, known as the Houston Chronicle, which has a large circulation, certain libelous statements of and concerning plaintiff, R. H. Tiernan, and his wife, Alice S. Tiernan. The petition contained the usual averments of good character and reputation of the plaintiff and his wife, and alleged that they were engaged, at the time of the publication, in the practice of the law in the city of Houston. He further alleged that, on the dates hereinafter stated, the defendant published the following articles of and concerning plaintiff and his wife, which were alleged to be untrue, libelous, and defamatory, viz.:

That on October 5, 1912, it published the following:

"Tiernans, husband and wife, are to face the local bar. Charges of malpractice filed and general denial made. Mrs. Tiernan one of the first women lawyers in Texas. Charges of malpractice were pleaded Saturday before the Harris County Bar Association against R. H. and Alice Tiernan, members of the Houston bar. The complaint against Mr. and Mrs. Tiernan is signed by Clarence Kendall, assistant prosecuting attorney, and by attorney R. V. Solomon. It is as follows: 'October 5, 1912. Judge A. E. Amerman, President Harris County Bar Association: We, the undersigned, are in possession of sufficient evidence of malpractice on the part of R. H. and Alice S. Tiernan which we think would disbar them from the further practice of the high profession of which we are members, and ask that you, as president of the Harris county bar association, call a meeting of same at once to consider the evidence we have, and if sufficient, to institute disbarment proceedings.' The evidence has not been made public, but it is said to consist of affidavits and will charge that Mr. and Mrs. Tiernan have solicited practice at both the city and county jails and have extorted money from clients. It will also be charged that they have received pay for services which they have not performed."

The petition further alleged that on the 9th day of October, 1912, the defendant published the following:

"Tiernan case with committee. Whether or not R. H. and Alice S. Tiernan, lawyers of Houston, will be called upon to defend their right to practice law at Houston will be decided by a committee of attorneys. More than fifty

lawyers attended the meeting in the county court room to hear the evidence against the Tiernans. Mr. Kendall read the affidavits that have been collected from persons who have had professional dealings with the Tiernans. He urged that disbarment proceedings be instituted."

Plaintiff further alleged that on the 5th day of November, 1912, the defendant also printed and published in its said newspaper the following article:

"Bar association committee divided on barratry charge. Majority report against Mrs. Tiernan is adopted, while minority questions jurisdiction of association. Mrs. Alice S. Tiernan, one of the first women in the South to be admitted to the bar, must stand trial on the charge of barratry. Her husband, R. H. Tiernan, will not be placed on trial on the initiative of the bar association, according to the report, because the direct evidence against him was upon immaterial, irrelevant, and collateral facts. Mrs. Tiernan, however, must answer the charge of barratry preferred by the district attorney. The action was taken at a meeting of the Harris County Bar Association last night, at which meeting it was the unanimous sentiment that the local bar should be purged of all members found guilty of barratry or unethical conduct. 'A majority of your committee appointed to investigate certain charges on the part of R. H. and Alice S. Tiernan make the following report: Several affidavits and some oral statements were made to us, but none of them, with the exception hereafter stated, was direct evidence, but as a rule was hearsay upon any material fact, and if we had any direct evidence it was upon immaterial and irrelevant and collateral facts. Mrs. H. A. Clark, wife of H. A. Clark, and Percy Antill made statements from their own knowledge which, if true, shows a clear case of barratry against Alice S. Tiernan, but not against R. H. Tiernan.' The majority report was adopted by the association and the president, A. E. Amerman, was empowered to make a committee to file the affidavits embodying the charges against the Tiernans and to lend whatever assistance is needed by the district attorney; and likewise a committee to institute disbarment proceedings in the district court. 'Warning to lawyers. As you will see it is a criminal offense if an attorney at law shall seek to obtain employment in any suit or case at law or in equity to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such cases. And the charges which were investigated by your committee were that the attorneys at law named had solicited employment. We are calling attention to this statute so that the Harris County Bar Association will put people on notice that any lawyer who solicits employment or does any of the other acts prohibited by the above-quoted article of the Penal Code is a violator of the law himself, and is a criminal, and therefore any one who employs him, knowing that the lawyer is violating the law, must understand that when he employs a lawyer under such circumstances that he (the culprit) is employing a law breaker and criminal to represent him in his business.'"

Certain other allegations with respect to other alleged libelous publications were stricken out upon exceptions of defendant, and these allegations have not been set out in this statement.

The petition then alleged that all of the charges set forth in said publication were false, and that said false and opprobrious charges and insinuations had discredited the plaintiff and his wife before the public and in-

jured them in their profession, and had caused them to suffer great humiliation, injury to their law practice, good name, credit, and reputation, and prayed for \$25,000 as actual damages and a like sum as exemplary damages.

The defendant answered by general denial, and specially pleaded that the publications complained of were a fair, true, and impartial report of the proceedings of a judicial nature in a court of record, and were therefore privileged matters. It further pleaded that the matters and things which it published, as charged by the plaintiff, were a true, fair, and correct report of the proceedings instituted against plaintiff and his wife before the Harris County Bar Association; that the plaintiff and his wife, as attorneys, were officers of the various courts of Harris county, and that their demeanor, as attorneys at law, was subject to the supervision and regulations of said courts, and that all matters and things set out in said publications were true; that the plaintiff and his wife had solicited legal employment; and that they had obtained money from clients for which they had given no services, among others from one A. Rindkoff.

The case was tried before a jury and resulted in a verdict and judgment for plaintiff for \$15,000, from which the defendant has appealed.

[1] The plaintiff was permitted to testify, over the objection of defendant, that many years ago he had held several offices in Galveston, and that:

"Up to the time of the publication complained of, my wife and I were reputed of good name and character and reputation. We were of good reputation as lawyers and persons."

Appellant, by its first assignment of error, complains that the court committed prejudicial error against it by admitting this testimony. The contention advanced by the proposition under this assignment is that:

"In an action for libel, a plaintiff is not permitted to introduce evidence of his good character and general reputation, and the fact that he has been an office holder, unless his reputation has been first attacked by the defendant."

Subject to certain explanations, we can readily agree with this contention. We do not understand that the attack by the defendant upon the character or general reputation of the plaintiff, in order to admit such proof as here complained of, must be made through witnesses placed upon the stand at the trial. It is enough that the publication against which the defendant is called to answer is itself such an attack, or that such an attack is made by the defendant's pleadings, or that the nature of the action involves the general character of a party or goes directly to affect it. *Houston Electric Co. v. Faroux*, 125 S. W. 924, and authorities cited; *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658; *Timmony v. Burns*, 42 S. W. 134; *King v. Sassaman*, 64 S. W. 937.

The publications above set out in effect charged the plaintiff and his wife with malpractice, with barratry and extortion. They also charged plaintiff and his wife would be called upon to defend disbarment proceedings because of their unprofessional dealings with their clients. It was stated that Alice S. Tiernan was guilty of barratry, which offense was defined, and, under the caption of "warning to lawyers," the people were put upon notice that any lawyer who solicited employment or was guilty of other acts prohibited by the law denouncing barratry is a violator of the law and a criminal, and thus indirectly charged that plaintiff and his wife were criminals and no better than the violators of the law who employed them. Appellant, in its answer, alleged that all these charges were true. We think that not only the charges contained in the publications, but the allegations that they were true, involved the general character of the plaintiff and his wife and rendered the evidence complained of admissible.

One of the charges contained in the publications was that plaintiff and his wife received money from clients for services they never thereafter performed. The defendant in its answer averred the truth of this statement, and specifically alleged that plaintiff and his wife "had obtained money from clients for which they had received no services, among others, one A. Rindkoff." On this material issue the witness Rindkoff was placed on the stand and testified: That he employed plaintiff, R. H. Tiernan, to bring suit in his behalf to recover an indebtedness of \$10.40 due him, and paid \$5 at the time for his services in the matter. That said plaintiff told witness to call again the following week, and that he did so, and was then told by plaintiff he wanted \$4 more to deposit as security for costs, and that witness gave him this additional sum. That after three or four weeks had passed, and he had heard nothing from the plaintiff, he called at his office, and that the lady in the office (Mrs. Tiernan) showed him on the calendar that the case would be tried on the 10th of the following month. That he returned to plaintiff's office on that date, and the lady was not there, but that Mr. Tiernan was, and told him it was a mistake, and that the case would be tried the next week, on Monday, about 9 o'clock. That he returned on the day and at the hour indicated, and that the lady told him the defendant's lawyer was sick and to come on Monday of the next week, when he did, and was then told by plaintiff to come on Monday of the following week, and when he did so was told the judge was taking his vacation, and that plaintiff would let him know when the judge returned. That after two months had passed, and he had heard nothing further from plaintiff, he went again to see about it, and that plaintiff told him he had lost the papers. That he

went to the justice court, and upon inquiry learned that the suit never had been filed, and he then asked plaintiff which court the case was filed in, and that plaintiff told him he did not remember. That he then demanded of plaintiff the money he had paid him, and plaintiff said he did not have it "this week, and next week I will bring it down to your place," but that witness told plaintiff he would call for it, and plaintiff told him to call the following Tuesday, which he did, but was then told by plaintiff that he had so many bills to pay he could not pay witness then, but would pay him the following week, but that he never did pay him either the \$5 paid by him as a fee or the \$4 advanced for costs.

[2] After the witness had thus testified, he was asked on cross-examination by plaintiff's attorney if it was not a fact that he (the witness) had been arrested in the city of Houston on a charge of misdemeanor theft, to which the witness answered in the affirmative. The question was objected to on the ground that the testimony was inadmissible for the purpose of impeachment, and that it was not a proper method of impeaching the witness, which objection was overruled and the answer admitted, to which action defendant seasonably preserved a bill of exceptions and presents the question for our determination by its second assignment of error. We are of the opinion that the court erred in admitting the testimony over the objection urged. *Railway v. Creason*, 101 Tex. 335, 107 S. W. 527; *Railway v. Roberts*, 144 S. W. 691; *McDonald v. Humphries*, 146 S. W. 712.

[3] Whether the error is such as to require a reversal depends upon whether it was reasonably calculated to cause and probably did cause the rendition of an improper judgment either upon the question of liability or upon the amount of the verdict. Appellee contends that the error is harmless, for the reason that the plaintiff Tiernan admitted in his testimony that he did receive the sums from Rindkoff and that he failed to render the service for which he was employed. We find from the statement of facts that he did make such admission. He testified in substance: That when Rindkoff gave him the employment and paid him the sums of money testified to by Rindkoff, \$5 of which he received as a fee and \$4 to be deposited as security for costs, he made a memorandum relating to the case and put it in a drawer of his desk, intending to give it proper attention, but that he thereafter forgot all about it, and that, when Rindkoff called at his office several months later to inquire about the case, he did not remember anything about it, and had forgotten Rindkoff, and had to ask his name. That he repaid Rindkoff the \$5 fee, and later went to the latter's place of business and tendered him the other sum, but that Rindkoff told him he wanted \$25, and

that if he (plaintiff) did not pay him that sum he would have him disbarred. That he (plaintiff) declined to pay the amount demanded, and that Rindkoff refused to accept the \$4.

The charge made by the publications that plaintiff and his wife had received pay for services which they had not performed carried with it more than a charge of simple neglect to render a service for which compensation had been made, but that the act was opprobrious and involved turpitude. It was seemingly so understood by defendant, and the general charge was reiterated in its answer, and the transaction between plaintiff and Rindkoff was specially instanced as one of the opprobrious acts of this nature of which the plaintiff had been guilty. If Rindkoff's testimony was true, the charge was fully sustained, because no one reading his testimony could conclude therefrom that plaintiff's failure to discharge the service for which he was employed was the result of mere neglect or forgetfulness. The only admission by plaintiff was that he received the money but failed to perform the service, and he explains his conduct in this regard by saying that he forgot it. He contradicts Rindkoff as to the repayment of the \$5, and explains his failure to pay the other sum by saying that Rindkoff demanded \$25 and threatened to have him disbarred if he did not pay it. If Rindkoff's testimony was believed by the jury, then so much of plaintiff's cause of action as was based on the charge of his having received pay for services which he willfully failed to perform was defeated, and no recovery therefor could be sustained. If the jury did not believe Rindkoff, then they had the right to return a verdict against defendant for such sum as they reasonably believed, from the testimony, the plaintiff had been damaged by the publication of such a charge. In view of the large verdict which was rendered for plaintiff, we think it is reasonably probable that the jury discredited Rindkoff's testimony and allowed damages for the publication of this charge, which they could not have done, had his testimony been believed to be true. In these circumstances, we think the error in admitting the testimony objected to was calculated to cause and probably did cause the rendition of an improper judgment, and that for such error the judgment must be reversed.

[4] Under its fifth and sixth assignments of error, appellant advances the proposition that the publications complained of were privileged under sections 3 and 4 of article 5597 of the Revised Statutes of 1911, which defines libel, and by said assignments complains of the refusal of the court to give its special charges 4 and 5, which were intended to so instruct the jury. The sections referred to, defining what matters shall be privileged, are as follows:

"(3) A fair, true and impartial account of public meetings, organized and conducted for public purposes only.

"(4) A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information."

Without entering into an extended discussion of the questions presented by the assignments, it is our opinion that the publications do not fall within either of the exceptions defining what matters are to be deemed privileged. *Belo v. Wren*, 63 Tex. 724; *Knapp & Co. v. Campbell*, 14 Tex. Civ. App. 199, 36 S. W. 765. Aside from the report of the bar proceedings, the publications contained statements which by no reasonable construction can it be said were other than statements of its own, viz.:

"The evidence collected has not been made public, but is said to consist of affidavits and will charge that Mr. and Mrs. Tiernan have solicited practice at both the city and county jails and have extorted money from clients. Charges of extorting money from ignorant immigrants were filed several weeks ago with the authorities at Washington by M. Arthur Kuykendall, the local immigration inspector, against Mr. and Mrs. Tiernan."

The assignments are overruled.

The only other assignments presented by appellant complain of the size of the verdict and of the failure of the court to grant a new trial on account of newly discovered evidence. As the judgment must be reversed, it would serve no useful purpose to discuss either of these assignments.

For the error indicated the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

### KIRBY LUMBER CO. v. HAMILTON. (No. 6692.)

(Court of Civil Appeals of Texas. Galveston.  
Oct. 22, 1914. Rehearing Denied  
Dec. 10, 1914.)

#### 1. MASTER AND SERVANT (§ 116\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where defendant lumber company maintained an unrailed platform 16 or 18 feet high, on which its employes were required to move heavy timbers, and plaintiff was injured by being knocked off the platform while so engaged, defendant failed to provide plaintiff with a safe place to work in omitting to provide the platform with a guard rail.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 207; Dec. Dig. § 116.\*]

#### 2. MASTER AND SERVANT (§ 129\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—ABSENCE OF GUARD RAILS.

Where plaintiff, an employe of a lumber company, was knocked from a high platform and injured while assisting a fellow employe in moving heavy timbers on the platform, which was not equipped with a guard rail, defendant could have reasonably anticipated that the absence of a guard rail would result in injury to employes required to work under such circumstances, it only being necessary, to make defendant's negligence in failing to provide such rail the proximate cause of plaintiff's injury, that it could

be found that injury to some person put to work on the platform might reasonably be anticipated as the result of the absence of the rail, and not that the precise accident that happened or that injuries would occur in the precise manner in which they did should have been reasonably anticipated.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

#### 3. MASTER AND SERVANT (§ 201\*)—INJURIES TO SERVANT—NEGLIGENCE—SAFE PLACE—FELLOW SERVANT—CONCURRENT NEGLIGENCE.

Where an employer's negligence in failing to provide an employe with a safe place to work was the proximate cause of the employe's injury, the employer's liability was not affected by the fact that the injury was the result of the employer's negligence, combined with the concurrent negligence of a fellow employe.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

#### 4. MASTER AND SERVANT (§ 208\*)—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff, a minor employed at defendant's mill, was ordered to assist a negro in moving heavy pieces of lumber on a platform 16 feet from the ground, which was unguarded by a rail, without warning, the fact that plaintiff knew that the platform was a considerable distance from the ground was not sufficient to charge him with assuming the risk of working thereon without protection.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 551; Dec. Dig. § 208.\*]

#### 5. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an employe by being thrown from an unguarded elevated platform in the course of his employment, whether he was guilty of contributory negligence held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 6. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURY.

Plaintiff, 19 years of age and earning \$1.50 a day, while assisting a fellow employe in moving certain heavy timbers on an unguarded elevated platform, was thrown to the ground, breaking his right thigh. He was in bed about three months, and suffered and still continued to suffer great physical pain, and at the trial testified that his leg hurt him to such an extent in bad weather that he could not work at all. The bones united, but his right leg was 1½ inches shorter than his left, leaving him a permanent cripple. Held, that a verdict allowing him \$8,500 from which he remitted \$412, was not so excessive as to indicate passion and prejudice of the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by Reese Hamilton, by his next friend, against the Kirby Lumber Company. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

Andrews, Streetman, Burns & Logue, of Houston (John G. Logue and W. L. Cook, both of Houston, of counsel), for appellant. Blain & Howth, M. G. Adams and Ralph Durham, all of Beaumont, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant to recover damages for personal injuries, alleged to have been caused by the negligence of appellant. Several grounds of negligence were pleaded, but the only question of negligence submitted to the jury was whether defendant had used reasonable care to furnish plaintiff with a safe place in which to work. Defendant answered by denying the several allegations of negligence contained in the petition, and specially pleaded that the place referred to in plaintiff's petition was constructed and arranged in the usual and customary manner of places in which the work required of plaintiff was usually performed. It further pleaded that defendant was under no obligation to warn plaintiff of any danger that might attend the performance of his work in such place, but that plaintiff was warned of such danger. Assumed risk and contributory negligence on the part of plaintiff were also pleaded by the defendant. The evidence shows that at the time of the accident in which plaintiff received his injuries he was employed by the appellant and was engaged in moving heavy pieces of lumber, which were piled upon an elevated platform or scaffold at appellant's sawmill. This platform was 16 or 18 feet high, and at the place where plaintiff was put to work there was no railing around the edge of the platform. Plaintiff, who was a minor about 19 years old and weighed only 95 pounds, was directed by Mr. Miller, a vice principal of appellant, to go upon this platform and assist a negro employé of appellant in placing the lumber thereon on a skid by means of which it was slid onto trucks. In handling a piece of lumber 32 feet long, 16 inches wide, and 3 inches thick, plaintiff was knocked over the edge of the platform, and fell to the ground, and thereby received the injuries for which this suit was brought.

**Plaintiff testified:**

"At the time of the accident I had not noticed the height of the platform, though I did notice it afterwards. I never noticed it before. I noticed it after I got up from my injuries caused by the fall. The platform was between 16 and 18 feet from the ground. The work I was doing required me to be about 3 feet from the edge of the platform. There were no rails around the platform to guard or to keep people from falling off where we were working along there. Lumber was stacked all around the edge of the platform in the neighborhood of where we were working. They pulled this lumber out to the edge of the platform on trucks; they did not have any live rollers there. \* \* \* While we were doing that work I got knocked off the platform. At the time it happened the negro and I were handling the timber, and the negro gave it a quick jerk, and pulled it around, and knocked me off. He jerked one end of the timber, and the timber was suspended in the center on a skid, and he gave a quick jerk on his end, which swung my end around, and threw me off. Yes, it knocked me off, and I fell to the ground from the top of the timber deck, a distance of from 16 to 18 feet. I did not know that the place where I was at work was a dangerous place, and nobody explained the danger to me, and nobody showed me how to avoid the

dangers. I was not strong enough to do that work. The foreman told me to go ahead that day, and he would put me back to my old job to-morrow; that is what he said to me when I told him I was not able to do that work. What I said to him about my ability to work, that is, about having been sick, I told him I was not able to do the work, it was too heavy for me, and he told me to go ahead that day. I did tell him about being sick, and about having been sick, and I was sick most of the time up to that time. I did tell him the work was too heavy for me. Then he told me to go ahead, and it would be all right that day, that he would put me back to my old job the next day. He said I could do the work that day. \* \* \*

"Going back to the time of the accident, it happened this way: I was on one side of a piece of lumber, shoving it; I was not strong enough, and had to go back behind it and shove it. The negro at the other end gave it a quick jerk and threw me off. My back was to the edge of the dollyway where I fell off. \* \* \* I was fixing to push it when the accident occurred. The negro gave the piece a quick jerk and slipped me off. If I had been strong enough to pull that plank without getting behind it and shoving it, this would have aided me on that occasion, and prevented the accident. I did get behind it and attempt to shove it, and this man slipped me off. I do not know the name of the negro; he was a transient negro, just come in there. I did not know anything about him."

Eugene Hamilton, plaintiff's brother, testified as follows:

"I was present on the occasion when Mr. Miller told my brother to go over and help that negro load the timber. He did not give him any warning about the danger and how to avoid it. When Mr. Miller told my brother to go over there and help get this timber out, my brother told him he could not handle the timber, and Mr. Miller said it would be all right to work the balance of that evening, it was only a very short time to quitting time, and he told him it would not hurt him to do it just that evening. \* \* \* The way that negro did his work he just jerked things around in a violent and rough manner. My brother was very small. I had not noticed that negro at all up to that morning. I had not noticed him before that morning. \* \* \* I saw my brother knocked off of the platform. The platform did not have any guard rails or any other safety appliances or devices."

[1] We cannot agree with appellant in the contention that the evidence before set out is insufficient to sustain the finding of the jury that appellant was negligent in not providing plaintiff a safe place in which to work. It certainly cannot be held as a matter of law that a platform 16 or 18 feet high and without any guard rail around its edge is a safe place on which to handle pieces of lumber of such size as to require two persons to move them and it is necessary for the persons so engaged to work near the unguarded edge of the platform. There is nothing in this evidence tending to show that it was impractical to have a guard rail around the platform, and it is manifest that a rail in such place would afford protection to workmen who were required to work near the edge and would have rendered the place much safer for such work. We think upon the evidence the jury were authorized to find that the appellant was negligent in not providing plaintiff with a safe place in which to perform his work, and the first assignment

of error which complains of the verdict upon this issue, on the ground that it is not supported by sufficient evidence, cannot be sustained.

[2] The second assignment complains of the verdict on the ground that there is no evidence from which the jury were authorized to find that the alleged negligence of the appellant submitted to them by the charge of the court was the proximate cause of plaintiff's injury. The fourth assignment complains of the refusal of the court to instruct the jury to return a verdict for the appellant on the ground that the undisputed evidence shows that the negligence of plaintiff's fellow servant was the proximate cause of plaintiff's injury. Neither of these assignments can be sustained. We think it could have been reasonably anticipated by appellant that the absence of a guard rail around this platform would result in injury to its employees who were required to work near the edge of the platform by their falling or being accidentally knocked therefrom while moving lumber thereon. It is not necessary, in order to hold appellant liable for plaintiff's injuries, that it should have anticipated that the accident in which plaintiff received his injuries would occur in the precise manner in which it did, nor that such accident would result in the particular injuries received by plaintiff. All that was required to make appellant's negligence the proximate cause of the injury to plaintiff was a reasonable anticipation that injury to some person put to work by it on said platform might result from its negligence. *Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Ry. Co. v. McComus*, 36 Tex. Civ. App. 170, 81 S. W. 760.

[3] The negligence of appellant being a proximate cause of plaintiff's injury, appellant's liability is not affected by the fact that such negligence was combined with the concurrent negligence of a fellow servant. *Ry. Co. v. Sweeney*, 14 Tex. Civ. App. 216, 36 S. W. 800; *Ry. Co. v. Brown*, 46 S. W. 926.

[4] Plaintiff being a minor and appellant having failed to warn him of the danger attending his work on the platform due to the absence of a guard rail, the rule as to his assumption of the risk of such danger is not the same as the rule applicable to an adult, and it was for the jury to determine from all the evidence whether he had sufficient knowledge and appreciation of the danger and its extent to exempt appellant from liability for his injury. He testified that he had not noticed the height of the platform from the ground, and did not know the place was dangerous, nor the danger of the work in which he was engaged. There is no evidence that he was mentally deficient, or that his eyesight was not that of a normal person, and it is hard to believe that he could have worked near the edge of this platform for the length of time he did and fail to observe

its height, but a mere knowledge of the fact that the platform was a considerable distance from the ground is not sufficient to charge him with assuming the risk of performing his work thereon. He must, to be so charged, have realized the extent of the danger to which he was exposed from the height of the platform, the absence of a railing, and the character of the work he was called upon to perform thereon. The court did not err in refusing to instruct the jury to return a verdict in favor of appellant on the ground that upon the evidence plaintiff should, as a matter of law, be held to have assumed the risk of receiving the injuries sustained by him, and appellant's third assignment, which complains of the refusal of the court to so instruct the jury, is overruled. *Ry. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511.

[5] The fifth assignment complains of the refusal of the trial court to instruct the jury to return a verdict for the defendant on the ground that plaintiff was guilty of contributory negligence. We think the issue of contributory negligence was properly submitted to the jury, the evidence not being such as to compel the finding that plaintiff was guilty of such negligence. The assignment is overruled.

[6] The jury fixed the amount of plaintiff's damage at \$8,500, of which amount plaintiff remitted the sum of \$412. The sixth assignment complains of this verdict as excessive. The evidence shows that plaintiff's right thigh was broken by his fall from the platform, and while the bones have again united his right leg is about 1½ inches shorter than his left, and he is a permanent cripple. He was in bed about three months, and suffered and still suffers physical and mental pain as the result of his injuries. He testified that his leg hurt him to such an extent in bad weather that he could not work at all. At the time of his injury he was receiving \$1.50 per day for his work. While the verdict of the jury is liberal, it is not so unreasonably large as to justify the conclusion that, in fixing the amount of plaintiff's compensation, the jury was influenced by passion, prejudice, or any improper motive, and therefore we are not authorized to substitute our judgment for that of the jury as to the amount to which plaintiff is entitled.

By an agreement signed by counsel for both parties it is made to appear that an error occurred in the entry of the judgment in the court below, in that the judgment as entered was for a less amount than the verdict of the jury after deducting therefrom the remittitur of \$412, filed by the plaintiff, and appellant agrees that, in event the judgment is affirmed, it shall be reformed so as to award plaintiff the amount found by the jury, less the remittitur.

It follows from our conclusions upon the assignments above discussed that the judgment should be affirmed, and in accordance

with the agreement above stated should be reformed; and it is so ordered.

Reformed and affirmed.

### THARP v. BLAKE. (No. 369.)

(Court of Civil Appeals of Texas. El Paso.  
Dec. 3, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 59\*)—POWERS.

A municipal corporation may only exercise those powers that are granted in express words or are necessarily and fairly implied in or incident to the powers expressly granted and those essential in the sense of being indispensable as distinguished from merely convenient to the authorized objects and purposes; any fair reasonable doubt concerning the power being resolved by the courts against its exercise.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 149; Dec. Dig. § 59.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 58\*)—"ORGANIC ACT"—POWERS.

A statute by which a municipal corporation is organized and created is its "organic act" and the limit of its power, so that all acts beyond the scope of the powers there granted are void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. § 55.\*]

For other definitions, see Words and Phrases, First and Second Series, Organic Act.]

#### 3. MUNICIPAL CORPORATIONS (§ 214\*)—EXISTENCE—CONTEST—AUTHORITY OF TOWN—CONTRACTS—EMPLOYMENT OF ATTORNEY.

Since Rev. St. 1911, art. 1042 et seq., specifying the powers of an incorporated town or village, contained nothing conferring authority on it to become a party to a contest to determine the validity of an election on the question whether the corporation should be abolished, and article 3078 declared that in such a contest no costs should be adjudged against the town, such town had no authority to employ an attorney to contest such an election nor to bind the town for the payment of fees for such services.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 582-588; Dec. Dig. § 214.\*]

#### 4. MUNICIPAL CORPORATIONS (§§ 226, 858\*)—INCORPORATED TOWN—CONTRACTS.

An incorporated town, under the general laws of the state, can enter into valid contracts and incur debts only when the making of such contracts or debts is within the scope of its general corporate functions or of authority conferred by statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 645-650, 1813; Dec. Dig. §§ 226, 858.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 244\*)—CORPORATE ACTION—ORDINANCES—RESOLUTIONS.

A city or town council speaks through its ordinances or resolutions, passed and promulgated as permitted or required by the law creating it; and hence the employment of an attorney, if otherwise authorized, can only be properly accomplished by an ordinance or resolution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 678-681, 683; Dec. Dig. § 244.\*]

#### 6. MUNICIPAL CORPORATIONS (§ 220\*)—CONTRACTS—INVALIDITY—QUANTUM MERUIT.

Where an incorporated town had no authority to employ an attorney to perform certain legal services, he could not recover the reasonable value thereof on a quantum meruit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 599-608; Dec. Dig. § 220.\*]

Appeal from Harris County Court; Clark C. Wren, Judge.

Action by G. W. Tharp against Cabeen Blake, as receiver of the Town of Humble. Judgment for defendant, and plaintiff appeals. Affirmed.

C. B. Wood and G. W. Tharp, both of Houston, for appellant. R. H. Holland, of Houston, for appellee.

WALTHALL, J. In this case appellant, G. W. Tharp, sues Cabeen Blake, receiver of the town of Humble, appellee, to recover on a debt of \$150 agreed to be paid him by the town council of the town of Humble for services as an attorney in an election contest to determine whether the incorporation of said town of Humble should be abolished. The town of Humble was incorporated as a municipal corporation on December 10, 1910, under the general laws of the state of Texas pertaining to the incorporation of towns and villages of more than 500 and less than 10,000 inhabitants, and, under the present Revised Civil Statutes, constituting title 22, c. 14. The case was filed in the justice of the peace court, and appealed to the county court, where both appellant and appellee filed amended pleadings. Some questions of pleading and practice were raised by demurrers to plaintiff's pleadings in the county court by appellee, but, not being properly submitted under the rules, cannot be considered. The county court heard the pleadings and evidence and rendered judgment for appellee, and appellant assigns this as error: First, because the evidence shows that plaintiff performed legal services for the town of Humble at an agreed price of \$150 under a valid contract, made by the mayor and aldermen, in contesting an election held to determine whether or not the corporation of the town of Humble should be abolished; second, because the evidence shows that plaintiff performed the legal services, at the special instance and request of the town of Humble, acting through its mayor and aldermen in contesting an election, to determine whether or not the corporation of the town of Humble should be abolished, which legal services were reasonably worth \$150; and, third, because the evidence shows that the town of Humble received the benefit of the services of plaintiff in contesting the election held to abolish the corporation, the mayor and aldermen knowing, at the time that said services were being rendered, the town of Humble is estopped from denying liability for

same, hence the defendant (the receiver of the town) is liable for the reasonable value of the services so received, which was shown to be \$150. We make the following findings of fact:

We find that on December 10, 1910, at an election legally held, the town of Humble was duly incorporated under what is now title 22, c. 14, Revised Civil Statutes of Texas; that thereafter a mayor and board of aldermen were duly elected and qualified; that on or about the 10th day of October, 1911, a petition was duly signed and presented to the county judge, asking for an election to determine whether the incorporation of the town of Humble should be abolished or not; that said election was duly ordered; that pursuant to said order an election was held, and a majority of the votes cast were in favor of abolishing the corporation; that prior to the said election the town of Humble, by a resolution duly passed, had employed the plaintiff as an attorney to advise the mayor and aldermen in matters pertaining to their duties, and had paid plaintiff for said services out of the current funds of the town; that, after the election held to abolish the incorporation, the mayor and aldermen concluded to test, by a suit in the court, the legality of the election, and after consulting with plaintiff as to the charge he would make for his services to conduct such suit, at a meeting of the council, and without an ordinance or resolution being passed to test the validity of said election, or to engage the services of plaintiff as attorney, a motion was made and carried, but never reduced to writing, to employ plaintiff as attorney in a suit to contest said election and to pay him for his services in said suit the sum of \$150, and the mayor was authorized to employ the plaintiff as attorney in said suit for \$150; that the mayor thereafter did employ plaintiff as attorney to bring the suit contesting the election at the agreed amount to be paid him of \$150; that thereafter, without further action by the town council, by ordinance, resolution, or otherwise, either as to said fee, or authorizing a suit to be filed contesting the election, a suit was filed by plaintiff, contesting the said election, entitled *Warrener v. Lambrecht et al.*, 146 S. W. 633, and tried in the district court and Court of Civil Appeals and decided against the contestant; that an order was duly entered by the county judge declaring the corporation of the town of Humble abolished; that, in a suit filed in the district court of Harris county, appellee, Cabeen Blake, was appointed and qualified as receiver of the town of Humble; that plaintiff duly filed his claim for \$150 with the receiver, which was "allowed subject to the approval of the district court"; that a protest was filed against the allowance of the claim and bond given as provided by law; that appellant's services as attorney in said suit were reasonably worth the sum of \$150.

### Opinion.

[1-3] The rule of construction of powers granted to towns and cities for the exercise of municipal purposes is that corporations possess and can exercise the following powers and none other: First, those granted in express words; second, those necessarily and fairly implied in or incident to the powers expressly granted; third, those essential to the object and purposes not simply convenient, but indispensable. Any fair, reasonable doubt concerning the power is resolved by the courts against the exercise of such power. The statute by which a municipal corporation is organized and created is its organic act, and the corporation can do no act or make any contract not authorized thereby. All acts beyond the scope of the powers granted are void. *Williams v. Davidson*, 43 Tex. 1; *Dillon on Municipal Corporations*, § 55, et seq. All the powers granted to towns and villages incorporated under title 22, c. 14, of the Revised Civil Statutes, seem to be embraced in the following article:

"Art. 1042. When the entry mentioned in the preceding article has been made (the entry by the county judge of the election returns declaring the village incorporated and designating the boundaries with the plat of the town) the town shall be invested with all of the rights incident to such corporation under this chapter, and shall have power to sue and be sued, plead and be impleaded, and to hold and dispose of real and personal property"—situated within the limits of the corporations.

The statute provides for the election of officers, fixing the term of office; states what constitutes a quorum for the transaction of business; gives the quorum power to enact such by-laws and ordinances not inconsistent with the laws and Constitution of the state, as shall be deemed proper for the government of the corporation; gives the corporation power to remove nuisances, regulate markets, control over streets and alleys and other public places within the corporate limits; power to levy taxes, fill vacancies; requires the publication of all ordinances; and prescribes the manner of abolishing the corporation. The powers of a municipal corporation organized under the chapter pertaining to the incorporation of towns and villages are very limited. Judge Gaines, in *Waxahachie v. Brown et al.*, 67 Tex. 519, 4 S. W. 207, in discussing the question whether the town of Waxahachie had the power to create an indebtedness for the purchase of a schoolhouse, and, incidentally, the difference between the powers granted cities and towns and those granted to towns and villages, used the following language:

"The difference between the provisions of the title referred to in reference to cities and those relating to towns is remarkable. There are ten chapters devoted to the former, and but one to the latter, class of municipal corporations. The powers granted to towns in chapter 11 (now 14) of that title are hardly more than are absolutely essential to their existence as bodies

corporate. No authority to issue bonds or to create debts is given them, and hence there are no enactments regulating the amount or mode of their issue."

Since the Supreme Court rendered the opinion in that case, several articles have been added to the chapter relating to the incorporation of towns and villages, but none extending their general powers. There is no provision in the statute that can be construed to authorize the town council to contest the election held to abolish the corporation, and the right to contest the election is not incident to any powers granted. If it cannot contest the election directly, it cannot do so indirectly, as that would be to exercise a power not granted, and not within the scope of the purposes for which it was created. Article 3077, Revised Civil Statutes, referring to contested elections, provides:

"If the contest be for the validity of an election held for any other purpose than the election of an officer or officers in any county or part of a county or precinct of a county, or in any incorporated city, town or village, any resident of such county, precinct, city, town or village, or any number of such residents, may contest such election in the district court of such county in the same manner and under the same rules, as far as applicable, as are prescribed in this chapter for contesting the validity of an election for a county office."

Article 3078 provides:

"In any case provided for in the preceding article, the county attorney of the county, or where there is no county attorney the district attorney of the district, or the mayor of the city, town or village, or the officer who declared the official result of said election, or one of them, as the case may be, shall be made the contestee, and shall be served with notice and statement, and shall file his reply thereto as in a case for a contest for office; but in no case shall the costs of such contest be adjudged against such contestee, or against the county, city, town or village which they may represent, nor shall such contestee be required to give any bond upon an appeal."

It will be observed that the statute makes no provision for a county, precinct, city, town, or village to become a contestant in an election. The statute makes provision for a contest, and who may be made contestee, but provides that no costs shall be adjudged against the contestee or against the county,

city, town, or village which they may represent. The city council in this case undertook to become the contestant in the name of S. K. Warrenner, for which there is no authority or power given in the statute. It was an attempt to exercise an implied power not necessary or incident to any of the powers granted. The city council, by a motion made and carried, but not reduced to writing or in any manner made a part of the proceeding or action of the council, undertook to create a debt for the attorney's fees, a part of the expenses or costs of the contest. We think the inhibition in the last article of the statute quoted against taxing any of the costs of the contest against a contestee representing the village, by analogy, at least, might be applied to such debt or costs. There is no such power given the town council, and no implied power could be exercised that would not come within the objects and purposes for which the corporation was created, and not reasonably necessary and proper for the discharge of the functions committed to them. *City of Bryan v. Page & Sims*, 51 Tex. 532, 32 Am. Rep. 637; *Williams v. Davidson*, 43 Tex. 33.

[4-6] A town incorporated under the general laws of the state can enter into valid contracts and incur debts only when the making of such contracts or debts is within the scope of its general corporate functions, or of authority conferred by the statute. A city or town council speaks through its ordinances or resolutions passed and promulgated as permitted or required by the law creating it. If the town of Humble, acting through its town council, could have entered the courts either in its corporate name or in the name of S. K. Warrenner, to contest the election to abolish the corporation, and we hold that it could not, it seems to us that it could do so only by an ordinance or resolution so declaring. None was passed. The bare fact that a fee of \$150 was a reasonable charge for the services rendered would not be sufficient to constitute appellant's cause of action.

There was no error in rendering judgment for appellee.

Cause is affirmed.

**CONTINENTAL BANK & TRUST CO. v. DEALEY BROS. et al. (No. 1299.)**

(Court of Civil Appeals of Texas. Texarkana. Nov. 5, 1914.)

**1. SALES (§ 363\*)—QUESTIONS FOR JURY.**

Where conflicting testimony made an issue as to whether one of the defendants was the purchaser of certain shingles or not, it was error to peremptorily instruct the jury that plaintiff, suing as assignee of the indebtedness for the purchase price, was not entitled to recover as against such defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. § 363.\*]

**2. TROVER AND CONVERSION (§ 34\*)—ISSUES AND PROOF.**

Proof of several and distinct conversions by two persons will not support a recovery for a joint conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 207-214; Dec. Dig. § 34.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by the Continental Bank & Trust Company against Dealey Brothers and others. From a judgment for plaintiff against one of the defendants, and for the other defendants against the plaintiff, plaintiff appeals. Reversed and remanded.

About October 3, 1907, the C. A. Bonds Lumber Company shipped two cars of shingles from Shreveport, La., to the Craven Lumber Company in Dallas, Tex. It appeared from the face of the invoices made by the Bonds Company to cover the shipments that the Craven Company were the purchasers of the shingles. The Craven Company contended it had not purchased them, but had merely agreed with the Bonds Company to receive and sell them on the Bonds Company's account. To secure \$610 advanced to it on the shipment by appellant, the Bonds Company on October 5, 1907, delivered the invoices and bills of lading covering the shipments to appellant, after having printed with a rubber stamp on each of the two invoices the following:

"Transferred for value received to Continental Bank & Trust Co., Shreveport, La. Remit direct to them for account of C. A. Bonds Lbr. Co., by C. A. Bonds."

Appellant, believing that the Craven Company was the purchaser of the shingles as shown by the invoices, forwarded the invoices and the bills of lading to said Craven Company, without at the same time, by letter or otherwise, advising the Craven Company it had done so. The Craven Company, after receiving the invoices and bills of lading, advised the Bonds Company it did not care to handle the shingles, and afterwards, having been directed by the Bonds Company to do so, delivered the invoices and bills of lading to C. L. Dealey, then doing business in Dallas under the name of Dealey Bros., who had agreed with the Bonds Company to undertake to sell same on its account. October 26,

1907, Dealey sold the shingles to one Tims in Ft. Worth, to be paid for by the latter in 90 days from that date. Tims never paid for the shingles, and before the expiration of the 90 days credit given to him was adjudged a bankrupt. Appellant's suit was against the Bonds Company, C. A. Bonds, the Craven Company and Dealey. The Craven Company in its answer prayed that, if appellant recovered against it, it have judgment for the amount so recovered over against the other defendants. In accordance with a verdict returned by the jury in compliance with peremptory instructions given them by the court, judgment was rendered in appellant's favor against C. A. Bonds, "doing business," it was recited in the judgment, "under the trade-name of Bonds Lumber Company," for the sum of \$610 and interest, and, in favor of the Craven Company and Dealey against appellant for costs. From the judgment so rendered appellant prosecuted this appeal.

W. H. Clark and M. M. Plowman, both of Dallas, for appellant. Halloway & Halloway, W. M. Pierson, and L. P. Pierson, all of Dallas, for appellees.

**WILLSON, C. J.** (after stating the facts as above). [1] In its petition appellant alleged that the Craven Company purchased the shingles of the Bonds Company, and that the Bonds Company assigned to it the indebtedness for the purchase price thereby arising in that company's favor against the Craven Company. As the owner of this debt appellant sought judgment against the Craven Company for the amount thereof. By other counts in its petition appellant sought, in the event it should appear that the Craven Company had not purchased the shingles, judgment against that company and Dealey Bros. on the theory that they, acting together with the Bonds Company in pursuance of a scheme to defraud it, had converted the shingles by the sale thereof to Tims. The allegation that the Craven Company purchased the shingles and became indebted to the Bonds Company for the purchase price thereof was supported by the testimony of C. A. Bonds that the Craven Company "agreed to buy and did buy the shingles in controversy." This testimony, and testimony showing the Bonds Company to have assigned its claim against the Craven Company for the purchase price of the shingles to appellant, made an issue as to whether the latter company had purchased the shingles or not, which should have been submitted to the jury. The trial court had no right, because it was contradicted by other testimony in the case, to determine the question himself. It must be held, therefore, that that court erred when he peremptorily instructed the jury that appellant was not entitled to recover anything as against the Craven Company; for, clearly, appellant was

entitled to recover against that company if it was true, as the jury might have found it to be, that the Craven Company as purchasers of the shingles had become indebted to the Bonds Company. On another trial, if the testimony makes an issue, as it did on this one, as to whether the Craven Company was the purchaser of the shingles or not, the jury should be instructed to find for appellant as against that company if they believe it purchased the shingles, and, in that event, to find against appellant on its claim of liability to it on the part of Dealey Bros.; for if the Craven Company was the owner of the shingles, Dealey Bros., in selling same to Tims, were not guilty of a conversion thereof as against appellant.

[2] In reversing the judgment so far as it is in favor of the Craven Company and Dealey Bros., on the ground stated, we do not mean to be understood as holding that the peremptory instruction given either would or would not have been error if the testimony had not made an issue as to whether the Craven Company was the purchaser of the shingles or not. With reference to this phase of the case we will not say more than that we are inclined to believe the testimony was not sufficient to support a finding that the Craven Company and Dealey Bros., if the former was not the purchaser of the shingles, acted together in converting same. If they did not act together in the matter, but were liable, if at all, as for several and distinct conversions, it may be it was not error to so instruct with reference to this branch of the case, on the theory that appellant, having alleged a joint conversion, and proved several and distinct conversions, was not entitled to recover. *Strawbridge v. Stern*, 112 Mich. 16, 70 N. W. 331; *Cooper v. Blair*, 14 Or. 255, 12 Pac. 370; *Dahms v. Sears*, 13 Or. 47, 11 Pac. 891; *Larkins v. Eckwurzel*, 42 Ala. 322, 94 Am. Dec. 651; 15 Plead. & Prac. 562; 21 Plead. & Prac. 1033.

Bonds is not in the attitude of complaining of the judgment against him. Therefore it will be affirmed as to him, and will be reversed in other respects, and will be remanded for a new trial as between appellant, the Craven Company and Dealey Bros.

# BEARD v. INTERNATIONAL & G. N. RY. CO. (No. 1348.)

(Court of Civil Appeals of Texas. Texarkana. Dec. 4, 1914. Rehearing Denied Dec. 17, 1914.)

## 1. TRIAL (§ 252\*)—REQUESTED INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where an agent in charge of a car of bananas traveled on a nontransferable pass, issued to his principal, to a junction point, with the consent of the conductor of the branch train, and was there injured while the car was being coupled onto a train on the main line, a requested charge that if the agent presented the pass believing he had a right to ride thereon, and

it was accepted by the conductor knowing that he was the agent of the person named therein, the agent was a passenger, was not applicable to the evidence, since the conductor of the train on which he was injured had not consented to his riding.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

## 2. CARRIERS (§ 244\*)—CARRIAGE OF PASSENGERS—ACQUIESCENCE OF CONDUCTOR.

One who took charge of a car of bananas as the agent of another, and attempted to travel along with the car on a nontransferable pass issued to his principal, not believing that he had a right to ride thereon, but only that the train employes would permit him to do so, is not a passenger toward whom the law owes a high degree of care, but at most a licensee, since the railroad company cannot be bound by the acts of its conductors in accepting persons for passage when done in violation of law, or of the known rules of the company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 244.\*]

## 3. CARRIERS (§ 246\*)—CARRIAGE OF PASSENGERS—BURDEN OF PROOF—EXISTENCE OF RELATION.

One who attempts to ride on a nontransferable pass issued to another has the burden of showing that he was accepted by the carrier as a passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1275, 1284, 1296; Dec. Dig. § 246.\*]

## 4. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS—UNNECESSARY INSTRUCTIONS.

Where a person, injured while accompanying a car of fruit, was a licensee, not a passenger, because traveling on a nontransferable pass issued to another, an instruction that he was not a passenger because he had the car stopped at a place not authorized by the bill of lading, while unnecessary, was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

## 5. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for injuries received by a licensee while in a railroad car, an instruction that the plaintiff could not recover for any defect in the brake was proper, where there was evidence that the brake was defective, but no evidence that there was any attempt to use the brake, since the defect could not have been the proximate cause of the injury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

## 6. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—REPETITION.

The court should not give a special charge embodying the same instructions that were previously given in the main charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 7. APPEAL AND ERROR (§ 499\*)—PRESENTING QUESTIONS IN LOWER COURT—OBJECTIONS TO CHARGE.

A bill of exceptions to the giving of a special charge should show that the particular objection urged on appeal was called to the attention of the trial court as required by Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), although the language of that article mentions only the general charge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

Appeal from District Court, Rusk County; W. C. Buford, Judge.

Action by John A. Beard against the International & Great Northern Railway Company. Judgment for defendant and plaintiff appeals. Affirmed.

Beard & Davidson, of Marshall, and J. Y. Gray, of Henderson, for appellant. Wilson, Dabney & King, of Houston, and Morris & Sims, of Palestine, for appellee.

HODGES, J. This is an action by the appellant to recover damages for personal injuries.

On October 31, 1911, H. M. Turner shipped over the appellee's road from Galveston a car load of bananas consigned to himself at Longview, Tex. The bill of lading contained the following notation:

"Mr. H. M. Turner, as a messenger in charge of the following cars loaded with bananas: R. D. 9174; and is entitled to accompany any one or all of these cars, to waybilled or to substitute destination in case of reconsignment. He has been furnished with return transportation over the International & Great Northern, Missouri Pacific . . . . Railroads, and no additional return transportation should be furnished over those lines, but return transportation should be furnished over all other lines interested in the going movement. H. M. Turner holds I. & G. N. local ticket No. 218, Longview to Galveston."

Across the face of the bill of lading was stamped the words, "Copy—Not Negotiable." The waybill contained the same notation, and also showed that the privilege of stopping and partially unloading at Henderson, Tex., was allowed. After the arrival of the car at Henderson it was stopped about two days, during which time a portion of the fruit was unloaded. Turner, desirous of sending the car on to Longview, employed the appellant, Beard, to accompany it in his stead. In order to reach Longview the car had to be transported over a branch road to Overton, there to connect with the main line of the International & Great Northern Railway. A delay at Overton of several hours occurred by reason of the schedule of the railway company. When this car reached Overton it was placed upon what was called the "house track" to await the next freight going north. According to the testimony of the appellant, he then opened the doors, and proceeded to sell the fruit, and did sell a quantity of it before the arrival of the freight train that was to carry him on to Longview. When this train came, the engine was detached, coupled to the fruit car, and pulled it north a short distance beyond the depot. The car was then released from the engine and permitted to roll down toward a number of other cars, with which it collided. Appellant remained in the fruit car during this time, and the collision, he says, was so violent that it threw him against the end of the car, and inflicted the injuries of which he complains. Appellant testified that,

before he left Henderson, Turner delivered him the bill of lading containing the transportation issued to him, Turner, and directed appellant to use it. He exhibited this to the conductor on the branch road from Henderson to Overton, and it was accepted. He testified that this conductor knew both him and Turner; but it is undisputed that the conductor on the main line, where the injury occurred, did not know him.

The court, in effect, instructed the jury that the appellant was not a passenger, but a licensee, and that he was entitled to the exercise of ordinary care on the part of the railway employes for his protection, that if he was injured as alleged by the negligence of such employes, to return a verdict in his favor, unless the appellant was guilty of contributory negligence. The jury returned a verdict in favor of the railway company.

Among other instructions, the court gave the following:

"The written contract introduced in evidence between the railway company and H. M. Turner shows that the said H. M. Turner was permitted under the terms of his contract to have transportation along with said car of bananas from Galveston to Longview with stop-over privileges at Henderson, but that said transportation was not transferable, and as a matter of law the plaintiff, John A. Beard, could not legally and lawfully ride upon said transportation."

"In the waybill and other papers offered in evidence, it appears that Henderson was the only place at which a stop-over privilege was allowed under the contract. The contract, however, provides that other points may be substituted and other points agreed to by said Turner paying some additional amount and complying with certain other requirements under the contract; but this appears not to have been done; so as a matter of law the plaintiff had no legal right to be transported under this contract, nor had the plaintiff the legal right to have the car of bananas stopped at Overton and placed upon the side track and to make sales from said car. Therefore the relation of carrier and passenger did not and could not, under this contract, exist between the parties."

"However, if you find from the testimony that H. M. Turner had control and possession, under this contract which has been offered you in evidence, of the car of bananas with stop-over privileges at Henderson, and that the plaintiff, John A. Beard, was employed by the said Turner to aid and assist him in selling fruit from said car, and in managing the business and caring for the fruit, and that the railway company knew said fact and permitted the plaintiff, John A. Beard, with such knowledge and consent, to ride in said car and care for said fruit and to sell the same at Overton, and transported him from Overton to Longview without demand of further compensation, then you are instructed that the plaintiff, John A. Beard, would be what in law is called a licensee; that is, although he had no legal right to demand said privileges to sell said fruit from said car, still if the company, by its agents or servants, with knowledge of these facts, permitted him to ride in said car and sell fruit from the same, and be transported over the road, he would not be a trespasser, but would be what is called a licensee."

The objection to these charges is that they assumed as a matter of law that Beard was a mere licensee, and not a passenger, and therefore was not entitled to that high de-

gree of care which common carriers owe to their passengers.

[1] In a special charge requested and refused, the appellant urges the proposition that if Beard presented the transportation to the conductor believing that he was thereby entitled to ride upon the train of the defendant, and the conductor accepted the transportation and permitted Beard to ride upon the train, knowing that he was the agent of Turner, to care for the fruit, then Beard was a passenger and entitled to the high degree of care which the law accords to passengers. Such an instruction could only be applicable to the conditions under which appellant traveled from Henderson to Overton; for it is not contended that the conductor on the main line saw the pass, or knew the identity of the appellant, or that he was not Turner. In their brief, counsel for the appellant quote the following from the testimony of the conductor:

"I did not tell him to get out of the car. I knew he was there when we started the car \* \* \* to couple into it. \* \* \* I did not take up his ticket. I did not ask him anything more about any ticket, or anything, or any transportation. \* \* \* I asked him if he was in charge of that car of stuff; I saw a notation on the waybill that there was a man in charge; of course I did not know who it was; I did not recognize the name."

[2] The question is, Was appellant entitled to an instruction telling the jury that he was a passenger, or one submitting that issue to the jury, to be determined by his good faith in believing that he had a right to use the transportation issued to Turner? Assuming that a charge instructing the jury that negligence in this instance was the failure to exercise the highest degree of care for the appellant's safety, instead of making ordinary care the test, might have led to a different verdict, still we do not think there is here presented any error of which the appellant could complain. One who boards a car with the intention of using transportation which does not entitle him to passage cannot claim to be a passenger, in the legal sense, till after he has been accepted as such. *Way v. Ry. Co.*, 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; *Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Ry. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822. According to appellant's own testimony, he had ridden from Henderson on the pass issued to Turner, and expected to continue his journey on the same transportation. The injury occurred before the train left Overton, and even before the car in which he was riding had been incorporated into the train. The conductor, who did not know Beard, saw from the waybill that Turner was permitted to accompany the car as the caretaker. He asked Beard if he was the man in charge of the car, and naturally assumed that he was the man designated in the waybill. The only legitimate inference is that Beard was allowed to remain in the car be-

cause he had failed to make known his identity. But the appellant contends that he would be entitled to be treated as a passenger if he in good faith entered the car believing that he had a right to be carried on that transportation. That might be true if there was any ground for such a belief in the evidence. Appellant does not say in his testimony that he entertained any such belief; neither does he say that he intended. In the event the pass was not honored, to pay his fare. Upon its face the pass gave notice that it was good only in the hands of Turner, and there is nothing to indicate that the appellant did not fully understand that fact. He may have believed that the conductor would carry him notwithstanding he was not entitled to use the pass, or that he would accept him with the impression that it was Turner who was presenting the transportation. But such conduct would not give him the status of a passenger, because Beard knew the conductor would have no right to make such a substitution. Article 1533, Pen. Code 1911, excepts from the general prohibition against free transportation by railways "the necessary caretakers" accompanying shipments of "live stock, poultry, fruit, melons, or other perishable produce." The proper railway officers had in this instance designated the individual who should accompany this car of fruit, and the appellant must have known that a freight conductor had no authority to substitute another person for the one named, or to carry still another caretaker. The railway company cannot be bound by the unauthorized acts of its conductors in accepting persons for passage when done in violation of the law or known rules. *T. & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

[3] Under the circumstances attending this injury the burden was upon Beard to prove that he was entitled to be treated as a passenger. But he shows no facts which justify an inference that he was knowingly permitted to use transportation to which he was not entitled, or that he intended in any event to pay his fare to Longview.

In the case of *S. P. Co. v. Schuyler*, 227 U. S. 601, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901, it was held that the fact that an interstate passenger was being transported free in violation of the act of Congress did not exonerate the railway company from liability for negligence. An examination of the facts in that case shows that the free transportation being used by the deceased was such that both the railway company and the deceased might have believed in good faith that it came within the exceptions provided. But the question there was, Did the deceased occupy the status of a trespasser, by which he forfeited the right to even ordinary care? Justice Pitney, in rendering the opinion of the court, says, that the right to safe carriage "arose from the

fact that he was a human being of whose safety the plaintiff in error had undertaken the charge." The judgment affirmed that of the Supreme Court of Utah, where the case was discussed at considerable length. In concluding the opinion, Chief Justice Straup of that state used the following language:

"A mere intruder or trespasser, of course, cannot create the relation of carrier and passenger by his own act. Nor can one create such relation by fraudulently or deceitfully making an unauthorized use of a commission, pass, ticket, or the like, nor by likewise gaining his presence on the train by fraud or deceit, or through collusion or connivance with mere train crews." *Schuyler v. S. P. Co.*, 37 Utah, 581, 611, 100 Pac. 458, 470.

[4] In this case, the bill of lading provided for only one stop-over privilege. That had been exhausted by the stop at Henderson, and Beard had no legal right to open the car and sell fruit therefrom at Overton. We fail to see how the charge upon that feature of the case operated to the injury of the appellant, although not necessary to the proper determination of the real issues involved.

[5] At the instance of the appellee the court gave the following charge:

"You are instructed that the plaintiff in this case cannot recover on account of any defect in the brake or brake-rigging by which the car could have been controlled; and if you find from the evidence that on account of a defective brake or brake-rigging the car was caused to bump into another car, and that he was thus injured, then it will be your duty to return a verdict for the defendant."

According to Beard's testimony the car in which he was riding at the time of the injury was equipped with a defective hand brake. He admitted that he knew of that defective condition of the car before it left Henderson, and knew that it still existed when he remained in the car at Overton. There is no evidence that this defect caused the injury, further than Beard's testimony concerning the statement of a brakeman at Overton. Beard testified that after the collision which caused his injuries, he got out of the car and inquired what was the matter, and a brakeman told him that the brakes on the car would not hold anything. There is no testimony that any attempt was made to use those brakes for the purpose of holding the car on that occasion. Beard testified that the car was pulled north and turned loose from the engine, and that it then rolled down towards the others, with which it collided. Even if this charge stated an incorrect proposition of law, the error, if any, was harmless because of the insufficiency of the facts to justify a finding that the defective equipment of the car was the proximate cause of the collision.

[8] Appellant also complains of the charge of the court on the issue of contributory negligence. It is contended, in the first place, that the facts do not raise that issue;

and in the second, that the special charge was but a repetition of what the jury had already been told in the main charge, and that it placed undue emphasis upon the issue of contributory negligence. It is true the court should not have embodied the same instructions in a special charge which had previously been given in the main charge, but we do not think, under the facts of this case, that the error operated to the prejudice of the appellant.

[7] Moreover, the bill of exception reserved to the giving of this special charge does not comply with the provisions of article 1971, Rev. St. 1911, as amended by the acts of 1913. See Acts 1913, p. 113. The bill should show that the particular objection here urged was called to the attention of the court before the charge was read to the jury. The parties are restricted on appeal to the objections there made. It is true that the language of the article referred to mentions only the general charge as the one to be objected to under such conditions, but the spirit of the law would apply the same rule to special charges which are given at the instance of one of the parties. See *Ry. Co. v. Wadsack*, 166 S. W. 42.

The testimony as to the circumstances under which the injury occurred is conflicting. That offered by the appellant tended to show that the car was detached from the engine and permitted to violently collide with other cars. That offered by the appellee tended to show that there was no such collision, that the car moved slowly and gently down to the other cars, and the coupling made without any unusual jar. There was also testimony from which the jury might have found that the appellant was injured at Henderson before he reached Overton.

We find no error which justifies the reversal of the judgment, and it is accordingly affirmed.

#### HOUSTON OIL CO. OF TEXAS v. SUD-DUTH et al. (No. 6679.)

(Court of Civil Appeals of Texas. Galveston. Nov. 21, 1914. Rehearing Denied Dec. 17, 1914.)

#### 1. LOST INSTRUMENTS (§ 23\*)—ACTIONS—LOST DEED—EVIDENCE.

Where, in trespass to try title, plaintiffs claimed under an alleged deed from the patentee to F., which they were compelled to prove by circumstances, evidence of a chain of title to 800 acres of the same survey but not a part of the land in controversy, beginning with a deed from the same F., and evidence of another chain of title to other portions of the survey which failed to connect with the sovereignty of the soil, the deeds having been of record for many years and the parties having long since died, were admissible as circumstances to prove the execution of the alleged deed from the patentee to F.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. §§ 51-57; Dec. Dig. § 23.\*]

## 2. LOST INSTRUMENTS (§ 23\*)—ACTIONS—LOST DEED—EVIDENCE.

Where an alleged administrator's deed in plaintiff's chain of title was claimed to have been lost, a certificate by the administrator, reciting that in the year 1843 or 1844 he, as administrator of the decedent's estate, executed to S. a conveyance of the land in controversy, was not a mere *ex parte* statement, but was admissible as a circumstance to show that the patentee had previously conveyed the land to the intestate.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51-57; Dec. Dig. § 23.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 275\*)—REAL PROPERTY—SALE—EXCHANGE FOR CLAIMS.

Act Feb. 3, 1844 (Gammel's Laws, p. 990; Hartley's Dig. art. 1076), provided that an administrator with the consent of the court and creditors, or the court without the creditors' consent, may apportion the assets to the creditors in settlement of their claims. *Held* that, where an administrator executed a certificate dated August 21, 1850, declaring that "some time in 1843 or 1844 he conveyed certain land in controversy alleged to belong to the estate, to S. and his heirs, in consideration of all the claims of S. against the intestate's estate," the deed being lost, it would be presumed in support of the transfer that the conveyance post-dated the statute, and was therefore based on legal authority; it appearing that the probate record had been destroyed by fire.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1076-1091, 1093, 1094; Dec. Dig. § 275.\*]

## 4. TENANCY IN COMMON (§ 55\*)—POSSESSION AS AGAINST TRESPASSER—DEEDS—INSUFFICIENT CERTIFICATE.

Where defendant, as tenant in common, claimed under a deed sufficient in form, but defective only with respect to the certificate of acknowledgment, and the grantors and their heirs for more than 50 years recognized the deed as valid, and did not join in a suit by another cotenant to recover the land, or otherwise repudiate the conveyance, defendant was not a trespasser, within the rule that a tenant in common may recover the whole tract against a trespasser.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 140-156; Dec. Dig. § 55.\*]

Appeal from District Court, Newton County; A. E. Davis, Judge.

Trespass to try title by Katie V. Sudduth and others against the Houston Oil Company of Texas. Judgment for plaintiffs, and defendant appeals. Affirmed in part, and reversed and rendered in part.

Hightower, Orgain & Butler, of Beaumont, H. O. Head, of Sherman, and Parker & Kennerly, of Houston, for appellant. John B. Warren, of Houston, for appellees.

**McMEANS, J.** This is an action of trespass to try title, brought by the plaintiffs, Katie V. Sudduth and others, against the Houston Oil Company of Texas, to recover an undivided two-fifths interest in 250 acres of land, part of the Lewis Donaho one-half league and labor, in Newton county, and for the possession of the entire 250-acre tract. The case was tried before the court without a jury, and resulted in a judgment for the

plaintiffs for the title to the two-fifths interest sued for, and declaring defendant a trespasser, and awarding plaintiffs a writ of possession for the entire 250 acres, and decreeing that "all right, title, or interest of defendant to the whole of said land be divested out of defendant and vested in plaintiffs." From this judgment the defendant has appealed.

The appellant and appellees claim title to the land in controversy through a common source, to wit, H. W. Sudduth; the appellees claiming two-fifths interest. The appellant claimed three-fifths interest by virtue of a quitclaim deed from three of the five heirs of H. W. Sudduth and his wife, Sarah Sudduth; the said three heirs being married women, who were joined by their husbands in the execution of the deed. As the title claimed by the respective parties was from the common source, it would not be necessary to go behind the common source, except for the fact that the appellant also claims under a deed executed by the heirs of Lewis Donaho to it in 1893. The common chain of title of both parties is as follows: (1) Patent from the state of Texas to Lewis Donaho. (2) Deed from Lewis Donaho to William McFarland. This deed was proved by circumstances. (3) Deed from Thos. S. McFarland, administrator of the estate of William McFarland, to Seth Swift. (4) Deed from Seth Swift to H. W. Sudduth, the common source. This deed was also proved by circumstances.

The appellees proved that H. W. Sudduth died in 1853, and that his wife, Sarah Sudduth, died in 1855, and that they were heirs of said Sudduths through John G. Sudduth, a son, and through Elizabeth Saulberry, a daughter.

The appellant claims an undivided three-fifths interest in the land in controversy: (1) Under a quitclaim deed of three married daughters of H. W. Sudduth, viz., Nancy West, Emily Conn, and Mary Ann Lewis, joined by their respective husbands, to Jesse Dickerson. (2) Deed from Jesse Dickerson to D. R. Wingate. (3) Deeds from D. R. Wingate to Charles G. Saunders. (4) Deed from Charles G. Saunders to appellant, Houston Oil Company. Appellant also introduced the chain of title emanating from the heirs of Lewis Donaho, as follows: (1) Powers of attorney from the heirs of Lewis Donaho to Seale & Powell, authorizing them to make sale of the Lewis Donaho survey or any portion thereof. (2) Deed from the heirs of Lewis Donaho, through Seale & Powell, their attorneys in fact, to the appellant, Houston Oil Company, conveying the entire tract of land in controversy.

From the foregoing it will be seen that the appellees claimed title to an undivided two-fifths interest, and the appellant an undivided interest of three-fifths, by a chain of title

emanating from Lewis Donaho, the original grantee, and passing into H. W. Sudduth. It was proved that H. W. Sudduth and his wife, Sarah, died intestate, and that the appellees were their heirs, as were also the grantors in the deed to Jesse Dickerson, appellant's remote vendor, and that appellant also claimed under a chain of title originating with a deed from the heirs of Lewis Donaho to D. R. Wingate. But for the defective certificate of acknowledgment to the deed of Nancy West, Emily Conn, and Mary Ann Lewis, three of the five heirs of H. W. Sudduth and wife, Sarah Sudduth, and to which we shall hereinafter refer, we apprehend that no serious question would be made upon this appeal as to the title of appellant to a three-fifths interest to the land in suit.

Appellant by its first assignment of error complains that the court erred in rendering judgment for the plaintiffs for any of the land in controversy, for the reason that the evidence adduced by plaintiffs in the trial was insufficient to establish the execution of deeds from Lewis Donaho, the original grantee, to William McFarland, McFarland to Seth Swift, and Swift to H. W. Sudduth, plaintiffs' ancestor, the execution of all which was proved by circumstances. It asserts in its proposition that:

"The most perfect proof of long-continued claim, consistent with the existence of a supposedly lost deed from Lewis Donaho down, does not authorize an inference of the existence of such deed, in the absence of facts tending to show acquiescence in such claim by Lewis Donaho or his heirs."

Appellant seems to concede that there was such circumstantial evidence introduced by plaintiffs of claim under the original grantee by those in defendant's chain of title, claiming under plaintiffs' ancestor and adversely to plaintiffs, as would have warranted an inference that the deeds constituting links in their chain of title existed, provided there had been proof of acquiescence on the part of defendant and its grantors since they acquired the Donaho title in 1893, and of the Donaho heirs prior to that time, but contends that plaintiffs failed to make the requisite proof of acquiescence in the claim relied upon to warrant an inference of the execution of such deeds. We have carefully examined the evidence in record bearing on the issue of acquiescence, and are of the opinion that the testimony was amply sufficient to raise the issue. To set out the facts in detail would extend this opinion to an unreasonable length, and we therefore content ourselves with the statement that it is our finding that the evidence was sufficient in that regard.

[1] During the trial the appellees introduced in evidence, over appellant's objection, a chain of title to 800 acres of the Lewis Donaho survey, of which the land in controversy was not a part, beginning with a deed from William McFarland to Lewis J. Miles, dated

January 26, 1840, followed by a deed from Miles to Lydia G. Swift, dated June 1, 1840, and continuing down through the probate proceedings and partition of the estate of Lydia G. Swift and Elizabeth Swift, and deeds made by parties claiming under the Swifts. They also introduced, over appellant's objection, certain deeds in a chain of title to other portions of the Lewis Donaho survey, which failed to connect with the sovereignty of the soil, including deeds from Alfred West to Jordan Reese, from J. T. Mangum to Albert Bean, and from J. E. B. Bean and wife to J. T. Bean. All these deeds were introduced as circumstances, in connection with other circumstances, to prove the execution of a deed from Lewis Donaho to William McFarland. The deeds had been on record in Newton county for years, and the parties to all of them had long since died. In addition to the deeds above mentioned the appellees introduced in evidence, also as a circumstance to prove the execution of said deed, an instrument executed by Thomas S. McFarland, administrator of the estate of William McFarland, his father, to Seth Swift, dated August 21, 1850, which is as follows:

"The State of Texas, Newton County.

"Know all men by these presents, that whereas, some time in the year of 1843 or during the year eighteen hundred and forty-four, as administrator of the estate of William McFarland, dec'd, I made to Seth Swift a deed of conveyance; and whereas, the said Seth Swift has certified the same was burned in the destruction of his house, and made affidavit of the fact before J. S. Cochran, a justice of the peace of the county aforesaid: Therefore I make this certificate by way of substitution for the loss of said deed, which embraced and conveyed the following property, viz.: One certain tract or parcel of land situate on Cow creek in the county aforesaid, the headright of Lewis Donaho, being all of said Donaho's headright situate on Cow creek, after deducting that portion of said tract which was previously sold, which leaves for said Swift fourteen hundred and fourteen acres. For further particulars refer to the original field notes, and deed from said Donaho to said McFarland. Also, one certificate for two-thirds of a league and one labor of land, the headright of Enis Hardin, granted at Jasper, the 7th day of Dec'r, 1838, No. 502. Also a certificate for (369) three hundred and sixty-nine acres of land, the headright of Corbet Stevens, granted at San Augustine July 7, 1838, No. 957.

"The foregoing property, as specified, was sold and transferred to said Seth Swift and his heirs and assigns forever, for and in consideration of all and singular the claims of said Swift against the said estate of Wm. McFarland, dec'd. To acknowledge and certify which I hereto subscribe my signature and scrawl instead of a seal on this twenty-first of August, A. D. eighteen hundred and fifty."

We think that the deeds were admissible in evidence as circumstances, along with other circumstances, upon the issue of the execution of the deed from Lewis Donaho to William McFarland. *Carlisle v. Gibbs*, 44 Tex. Civ. App. 189, 98 S. W. 196; *J. M. Guffey Petroleum Co. v. Hooks*, 47 Tex. Civ. App. 560, 106 S. W. 695; *Brewer v. Cochran*, 45

Tex. Civ. App. 179, 90 S. W. 1035. Appellant's second and third assignments, which raise the point, are overruled.

[2] By its fourth assignment appellant complains of the action of the court in admitting in evidence, over its objection, the instrument executed by Thomas S. McFarland, administrator of the estate of William McFarland, which has hereinbefore substantially been set out in the discussion of appellant's second and third assignments. The first objection urged is that the instrument, being merely an ex parte statement, was not brought within any exception to the hearsay rule, there being no showing of actual age of as much as 30 years, and that the same was not admissible as a recorded instrument, because not such as is authorized by law to be recorded. The instrument was only one of many circumstances introduced in evidence to prove the truth of the facts therein recited—that is to say, that Lewis Donaho had previously deeded the land to William McFarland—and as such circumstance, in connection with the other circumstances proved, it was admissible in evidence.

A second objection is that plaintiffs' evidence indicated the existence of the original of such instrument, and that, therefore, no sufficient predicate for the admission of secondary evidence was laid. On this point we have examined the evidence carefully, and find that a thorough and complete search for the original was made at every place where it reasonably could be expected to be found, and that inquiry was made of every person that reasonably could be expected to know where it was, and that such search and inquiry, although prosecuted with diligence, failed to discover the original.

[3] A third objection is that the instrument shows an invalid administrator's sale, since it shows that the administrator transferred the property to Swift "in consideration of the claims of Swift against the estate," and that such transfer was not authorized under the law of its purported date, and no presumption could be indulged that it was confirmed. This objection cannot be sustained. The instrument, which is dated August 21, 1850, recites that "some time in the year 1843 or during eighteen hundred and forty-four" the administrator made the deed of conveyance to Seth Swift, and further recites that:

"The foregoing property, as specified, was sold and transferred to said Seth Swift and his heirs and assigns forever, for and in consideration of all and singular the claims of said Swift against the estate of Wm. McFarland, dec'd."

The act of February 3, 1844 (Gammel's Laws of Texas, page 990; Hartley's Dig. page 345), provides in section 1 thereof:

"That in all cases in which there may be debts due the estate of any deceased person, or property sold by the executor or administrator thereof, prior to the first day of May, eighteen hundred and forty-two, or upon contracts made by the deceased, in his lifetime, and prior to said first day of May, 1842, it shall be the duty

of the chief justice of the probate court, upon a representation of the facts, by petition, by the administrator or executor, to cause the creditors of the estate to be notified to appear at some specified term of the court, and have their claim settled. \* \* \*

Section 2 provides:

"That when the time for said settlement shall arrive, the court, after ascertaining the amount due to each, and what proportion of their respective claims the estate will be able to pay, shall cause the executor, or administrator (as the case may be), to transfer to each of the several creditors so much of the credits thereof, at their appraised value, as may appear to be their respective proportion: Provided, that the same shall be taken and held to be in full and perfect satisfaction of their claims, to the amount received."

The third section provides:

"That should any of the creditors be unwilling to receive said credits in satisfaction of their claims, the court shall set apart such proportion thereof as they may be entitled to, and the settlement shall take place as to the other creditors. \* \* \*

If we assume that the conveyance referred to in the instrument under discussion was executed in 1843, then it may be that no title passed to Seth Swift thereby, because of a want of authority in the probate court and the administrator to order and make an exchange of property of the estate for debts owing by it; but if it be assumed that the conveyance was made in 1844, and after the adoption of the act, above copied, on February 3, 1844, then the conveyance for such purpose was authorized by law and passed the title of the estate. The instrument in question says that the deed was made some time in the year 1843 or during the year 1844. We think it reasonable, after so great a lapse of time, and after the probate and other records had, as the record shows, been destroyed by fire, to indulge the presumption that the deed in question was made in 1844, and after the adoption of the act above copied, and that it was made under the authority of the act, and that all the necessary prerequisites thereof had been complied with in order to pass the title to the land out of the estate of William McFarland and vest it in Seth Swift.

The fifth, seventh, eighth, and ninth assignments assail in various ways the action of the court in rendering judgment in favor of appellees for the three-fifths undivided interest claimed by appellant, and ousting appellant from the possession thereof. It appears that when H. D. Sudduth died administration was had upon his estate, and that in course of time a partition thereof among his heirs was ordered. After this order was made Wm. McF. Lewis, administrator, filed his application requesting that the land in controversy be left out of said partition; and the administrator, joined by Nancy West, Elizabeth Saulsberry, Mary Ann Lewis, Emily Conn, and Solomon Wright, guardian of the minors, Henry and Sarah Ann Sudduth, said parties constituting all the heirs of H. W. Sudduth, deceased,

also filed a petition to leave said land out of the partition, reciting that said H. W. Sudduth, during his lifetime, had sold the land in controversy to Jesse Dickerson, and that said heirs were desirous of relinquishing to said Dickerson the title to said land, and that they had received payment therefor. Upon this request the land was left out of the partition of said Sudduth's estate. Afterwards, on March 18, 1859, three of the five heirs of H. W. Sudduth, viz., Nancy West, joined by her husband, Jefferson West, Emily Conn, joined by her husband, Joseph Conn, and Mary Ann Lewis, joined by her husband, Wm. McF. Lewis, executed to Jesse Dickerson, appellant's predecessor in title, a quitclaim deed to the land. These heirs owned three-fifths undivided interest in the land. The certificate to this deed was held by the court to be invalid, and the deed for that reason ineffectual to pass the title of the grantors. The certificate is as follows:

"The State of Texas, County of Newton.

"Before me, T. S. McFarland, chief justice of county aforesaid, personally appeared in my presence all of the signers of the within quitclaim deed, viz., Jefferson West and wife, Nancy West, Joseph Conn and wife, Emily Conn, and Wm. McF. Lewis and wife, Mary Ann Lewis, all of whom are well known to me, and they signed in my presence and then acknowledged the same to be their voluntary acts. All the said women aforesaid were examined separately and apart from their husbands, and they said they were acquainted with the circumstances and transaction and did not wish to retract what was done. To certify to the foregoing, I hereto place my signature and affix the seal of the county court this 18th day of March, 1859.

T. S. McFarland,

"Chief Justice Newton County."

Appellees are shown by the evidence to be owners of the title to the other two-fifths. After the execution of the above-mentioned deed in 1850, the grantors and their heirs never asserted any title to the land adversely to the title or claim of Jesse Dickerson, nor were they parties to this suit. The judgment awarding possession to appellees of the three-fifths interest was no doubt based upon the view that the appellees were tenants in common with the grantors in said deed, and that, as the deed was ineffectual to pass the title of the grantors, the appellant was without title, and, being without title, could be regarded as a trespasser against whom the appellees, as tenants in common with the owners of the title to the three-fifths interest, were entitled to possession.

[4] It is a general rule that a tenant in common of a tract of land may recover the possession of the entire tract as against a mere trespasser; but we do not think that the rule applies under the facts of this case. The deed to Dickerson was admitted in evidence and in form was sufficient, but was held to be ineffective only because of the insufficiency of the certificate of acknowledgment. The grantors and their heirs for more than 50 years have recognized the deed as

valid, and did not join in this suit to recover the land, or otherwise repudiate the conveyance. In these circumstances the appellant was not a mere trespasser, and the appellees are strangers to the title of appellant's vendors, and as such were not entitled to interpose as a defense to appellant's title that the defective certificate rendered the deed ineffectual. A very similar question was before our Supreme Court in *Spivy v. March*, 105 Tex. 473, 151 S. W. 1037, 45 L. R. A. (N. S.) 1109, and in an opinion by Chief Justice Brown it was said:

"It is not necessary for us to decide in this case whether a stranger to the title should ever be permitted to interpose this defense; but we are firmly convinced by authority and sound reasoning that, under such conditions, a court should construe the language as Mrs. Hensley (the grantor) and her heirs have construed it by their inaction for half a century. \* \* \* We have in this case by the decision of the Court of Civil Appeals a stranger setting up a defect which the vendor refuses to assert. The injustice and unreasonable character of the proposition forbids that this court should approve it, unless required to do so by precedents that we dare not disregard. We do not find the decisions of our courts to be of that character."

Nor are we prepared to hold that the court correctly held the certificate of acknowledgment to be fatally defective. It is true that the law in force at the time of the acknowledgment of the deed required the officer to certify that he explained the instrument to the married woman whose acknowledgment he took; but the statute also provides that any certificate showing that the requisites of the law have been complied with shall be as valid as the form there prescribed. *Hartley's Dig.* page 131. Here the officer, instead of certifying that he fully explained the instrument, certified that "they said they were acquainted with the circumstances and transaction." The certificate shows that the husbands and wives together signed the deed, after which the wives were removed from the presence of their husbands, so that they would be entirely free from their influence, and then the married women were examined separately and apart from their husbands. It was upon this examination that the wives stated to the officer that they were acquainted with the "circumstances and transaction" and that they did not wish to retract what was done. We probably could conclude, without entering too far into the realms of conjecture, that the "circumstances and transaction" referred to were the facts connected with the sale of the land by H. W. Sudduth to Jesse Dickerson under such circumstances as to not pass the legal title, the payment of the purchase money by Dickerson, which facts were set out in the petitions filed in the probate court, and the leaving of said land out of the partition of said Sudduth's estate, because it had theretofore been sold by Sudduth to Dickerson. The petition to the probate court, signed by the married women who executed the deed

in question, recites, and shows that they knew, that their father during his lifetime had sold the land to Jesse Dickerson, and stated that they were desirous of relinquishing to said Dickerson the title thereto and that they had received payment therefor. Although the deed was executed more than half a century ago, neither the married women who executed it, nor their heirs, have since then made any claim to it, but have recognized the deed as valid. Paraphrasing the language of our Supreme Court in *Spivy v. March*, supra, it is safe to construe the language of the certificate as if the court were performing the duties of the officer, and if Mrs. West, Mrs. Conn, and Mrs. Lewis, upon privy examination, should use the words of this certificate, would it not reasonably appear to such court that they understood the nature of the instrument and the legal effect of their acts, and that they were satisfied?

But we do not rest our decision upon the sufficiency of the acknowledgment, as it is not necessary, but rest it upon the view, above expressed, that the appellant is entitled, as against the appellees, to remain in undisturbed possession of a three-fifths undivided interest in the land in controversy. It follows that it is our opinion that appellant, in so far as the appellees are concerned, was, under the facts of this case, entitled to remain in the undisturbed possession of a three-fifths undivided interest in the land in controversy, and that the judgment of the trial court, in so far as it ousted appellant of such possession, and divested title out of it, and vested the title thereto in appellees, was erroneous.

We are of the opinion that the judgment in favor of appellees for two-fifths undivided interest in the land should be affirmed, and that the judgment ousting the appellant and divesting it of title to three-fifths undivided interest should be reversed, and judgment be here rendered in favor of appellant therefor; and it has been so ordered.

Affirmed in part. Reversed and rendered in part.

## HOUSTON LIGHTING & POWER CO., 1905, v. CONLEY. (No. 367.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 19, 1914. Rehearing Denied  
Dec. 17, 1914.)

### 1. MASTER AND SERVANT (§ 185\*)—DUTY OF MASTER—DELEGATION OF DUTY.

A master's duty to provide the servant with a safe place to work is nondelegable, and a servant who selects a location for a spool of wire which is to be unwound represented the master in the performance of a nondelegable duty, and the master is liable for negligence in the performance of such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

### 2. MASTER AND SERVANT (§ 279\*) — NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for injuries to a servant, held sufficient to support a finding that another servant was guilty of negligence in performing a nondelegable duty of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.\*]

### 3. MASTER AND SERVANT (§ 208\*)—PLACE TO WORK—ASSUMPTION OF RISK.

The risk of failure to provide a safe place to work is one not ordinarily assumed as incident to servant's employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.\*]

### 4. MASTER AND SERVANT (§ 203\*)—"ORDINARY RISK"—"EXTRAORDINARY RISK."

Ordinary risks arising in a service are assumed by the servant; negligence of either master or servant is not an element of such risks, but they arise out of the conditions of the employment, and are such that the servant could not reasonably anticipate that injury would occur from them in the usual course of the service, and are incapable of being foreseen or avoided by the exercise of ordinary care by either master or servant. Extraordinary risks are those that are abnormal and arise out of the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.\*]

For other definitions, see Words and Phrases, Second Series, Extraordinary Risk, also, First and Second Series, Ordinary Risk.]

### 5. MASTER AND SERVANT (§ 208\*)—ASSUMPTION OF RISK—PLACE TO WORK.

The selection of a safe place for the location of a spool of wire while it was being unreeling was not a risk assumed by the servant who assisted in the unreeling.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.\*]

### 6. MASTER AND SERVANT (§§ 101, 102\*)—SELECTION OF PLACE TO WORK—DEGREE OF CARE.

It is the master's duty to exercise ordinary care to furnish a servant a reasonably safe place to work, and his failure to do so is negligence which renders him liable for an injury proximately caused thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

### 7. MASTER AND SERVANT (§ 286\*)—SELECTION OF PLACE TO WORK—QUESTIONS FOR JURY.

Whether a master was negligent in selecting a place for a servant to work held a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by T. J. Conley against the Houston Lighting & Power Company, 1905. Judgment for plaintiff and defendant appeals. Affirmed.

Andrews, Streetman, Burns & Logue, Blain, Dupree, and W. L. Cook, all of Houston, for appellant. Geo. H. Currier and Kinard, Meade & York, all of Houston, for appellee.

**WALTHALL, J.** This is a suit by Conley to recover damages arising from personal injuries sustained while in appellant's employ.

Upon the occasion of the accident, defendant company was stringing wire upon its poles in the city of Houston, the wires being drawn over the crossarms along a series of poles, from and off of a reel. This reel or spool was situate upon the ground and fixed at point designated by one Browan, defendant's foreman, in charge of the work and gang of men. Conley was employed and working as a "groundman," and was placed in charge of the reel to hold it in place, and see that the wire reeled off properly as it was pulled from the other end. The reel was placed near a dead tree which was seen by Browan at the time the reel was placed there. The wire proceeded from the reel upon and over the first pole, and in so doing passed through the branches of this tree. At the time of the accident plaintiff was at his post of duty, and, in the discharge thereof, was using a two by four timber as a brake in retarding the revolutions of the reel. As a pull was made in the wire at its further end, and as it drew taut, it broke a limb which fell and struck him, inflicting injuries of which he complains in this suit.

The only grounds of recovery submitted in the court's charge were as follows:

"You are instructed as a matter of law that it was the duty of the defendant company to use reasonable care and diligence to furnish the plaintiff a reasonably safe place in which to work, and that this duty upon its part was non-assignable.

"If, therefore, you believe from the evidence that the spool of wire was placed, under the direction of plaintiff's foreman Browan, at a point where the wire or spool to the first pole upon which it was being strung necessarily passed in close proximity to a dead tree; and if you further believe from the evidence that the vibration of said wire during a pull of the same by defendant's employes caused same to forcibly come in contact with the limbs, or some of the limbs, of said dead tree, and that one of said limbs by reason thereof broke off, striking plaintiff in the back; and if you further believe from the evidence that in so placing the spool of wire, at which plaintiff was required to work, plaintiff's superiors in defendant's service, charged with that duty, failed to exercise that degree of care and prudence to see that plaintiff had a reasonably safe place in which to work, ordinarily exercised by reasonably prudent and careful persons under the same or similar circumstances, and that, as a proximate result of such failure, plaintiff was injured in one or more of the particulars alleged; and further believe from the evidence that defendant's employes charged with the duty of directing the location of the spool of wire in question, in the exercise of ordinary care and prudence, should have reasonably foreseen that plaintiff might have been injured in some like manner, by reason of pulling the wire in close proximity to said dead tree—then in such event, you will let your verdict be for the plaintiff, and assess his damages as hereinafter instructed, unless you find for defendant under other portions of this charge, or special charges, given you by the court."

[1, 2] No complaint is made of the manner in which this issue is submitted, but the

point is made that the jury's finding thereon in plaintiff's favor is unsupported by the evidence. The duty of the master to provide a safe place to work is nondelegable, and it is immaterial whether Browan be regarded as a vice principal. In the selection of the spot where the reel was to be placed, and plaintiff was to work, he represented the master in the performance of a nondelegable duty, and the master is liable for any negligence upon his part in the performance thereof. It could not be regarded as a mere detail of the work, and the evidence amply supports the finding that Browan was guilty of negligence in placing the reel in such proximity to the tree.

[3] The risk incident to the master's failure to provide a safe place to work is not a risk ordinarily incident to the servant's employment, and as such assumed; hence, the second assignment must be overruled.

What has been said necessarily adversely disposes of all assignments except the third, under which it is contended the evidence discloses plaintiff's danger to have been obvious and patent, and the risk assumed.

The reel was placed upon an axle and about 35 feet distant from the nearest pole. The wire extended upward therefrom through the branches of the tree, which intervened, and over the crossarm on the pole. The tree was a dead one, with long extending branches. Plaintiff, at the time the limb fell and struck him, was between the pole and reel with his back to the pole and tree. He was stooping over, using the two by four as a brake to retard the movement of the reel of wire. He had been in the employ of defendant as a groundman for about four years, and was thoroughly experienced in such work, and the work he was doing was incident to his employment, and he was thoroughly familiar therewith. He had been engaged in the same service all the day before at about the same place, and all of the morning of the day upon which he was injured until 11 o'clock, at which time the accident happened.

Appellant's statement under this assignment refers to and adopts the testimony set out under previous assignments as embodying practically all of the evidence from any source throwing any light on the subject. We therefore copy from the assignments such evidence as we deem necessary to a full comprehension of the issue involved. Appellee Conley said:

"I had nothing whatever to do with the choosing of the position of the reel. The foreman directed the work that particular morning, and directed that the reel should be placed in that particular place. I was working under the direction of that foreman. After the reel was placed, I was left there to see that the wire did not run off the reel when the team stopped work, that is, to take up the slack in the wire, keep up the slack in the wire. \* \* \* While the wire was pulling off, the wire was jumping, bounding up and down, and struck a limb on this tree and knocked it down on me; when

the limb fell on me I was between the reel and the pole with my back toward the pole and tree. That was a necessary position for the work I was doing with the tools I had to use. I was using a small piece of two by four some six or seven feet long. \* \* \* I used that for a brake. \* \* \* It was not my duty to do anything except to take care of the spool and reel. \* \* \* Neither the foreman nor any one in charge who had charge of the placing of the reel informed me of any danger. I did not know of any danger then existing. I did not know whether the limbs on that dead tree would break off and fall on me. \* \* \* I saw the tree. The tree was something like 30 feet from where the spool was placed when I was at work. The wire that went over the poles came in contact with the limbs of the tree; the wire went over some limbs and underneath others. The foreman directed the placing of those wires over these poles that went through the limbs of that tree. The foreman gave the linemen their orders. \* \* \* I did not know the tree was rotten. I knew it was dead. I did not have anything to do with making an inspection of it. The foreman said nothing to me about the tree. The foreman said: 'Place the reel there, boys, at this particular place'—and pointed that place out. \* \* \* The day I got hurt was not the only day I had worked at it right there where the spool and reel were then. \* \* \* I had worked about that same spot before with the spool and reel. \* \* \* I noticed from time to time when those pulls were being made there was small stuff fell. Some of those pieces that fell were about as big as my finger and 10 or 12 inches long, something like that. \* \* \* There was not anything about there from my point of view, and with the opportunity I had for general observation in and about the work, to indicate to me that there was any danger of that wire slipping a limb on my shoulder."

**D. E. Bostick testified:**

"I am general foreman of the defendant. \* \* \* B. D. Browan had charge of the gang that was doing that work. \* \* \* Where wires go through the limbs of a tree it is our custom to saw off limbs that may endanger the wires or the men, that is, where wires go through between limbs. It is the duty of any lineman that the foreman should appoint to saw off those limbs, to go up there and saw off the limb. When the accident happened, I was out on one of the other jobs. I had been on this job where the accident happened that day, possibly an hour earlier than the accident. \* \* \* I saw where the plaintiff was at work. I knew the work was going on there. I saw the wire running up from the reel and over the first pole. I did not see any unusual condition of danger there. No condition of danger existed there, any more than that of a man getting tangled up in the wire. I did not see any occasion to saw off any limbs."

**Ben Browan testified:**

"When we went to work there in the morning I told them where to set the reel. \* \* \* I did not have the tree inspected by any one."

The court, by proper instructions, submitted to the jury the issues of assumed risk and negligence on the part of defendant to furnish plaintiff a safe place to work. The jury found against appellant on both issues. The appellant, in this assignment, says that the verdict of the jury and the judgment of the court were contrary to the uncontradicted evidence, in that, under the evidence, the

dangers from which plaintiff's injuries proximately resulted were patent, obvious, and the result of the operation of natural laws, of which plaintiff had notice, and was required to take notice.

It would not be necessary to do more than to read the evidence of appellant's foreman to see that the danger from falling limbs was not patent and obvious. The foreman was at the place of the accident about an hour before the accident happened, and he testified that he saw where the appellee was at work, knew the work was going on there, saw the wire running up from the reel over the first pole, and did not see any unusual condition of danger, said that no unusual condition of danger existed there any more than that of a man getting tangled up in a wire. Did not even see any occasion to saw off the limbs, and his underforeman, Browan, did not deem it necessary to even have an inspection made to determine the necessity of sawing off the limbs.

[4] The law makes a distinction between ordinary risks arising in the service, and extraordinary risks. The former the employé assumes. Ordinary risks do not involve negligence of either master or servant, and arise out of such conditions of employment that the servant could reasonably anticipate that injury would occur in the usual course of the service, incapable of being foreseen and avoided by the exercise of ordinary care of either master or servant. It is elementary that all risks not arising from some default of the master are necessarily assumed by the servant. The very basis of ordinary risks is the fact that the servant contemplates the danger arising from the service, has an implied knowledge of it, and have no relation to the master's neglect of any duty he owes the servant. Such risks the servant assumes. If the plaintiff had gotten tangled up in the wire on the reel, or in the wire as it left the reel, it might be said that such danger was an ordinary risk and assumed. Extraordinary risks are such as are abnormal, or such as arise from the negligence of the master.

[5-7] We are of the opinion that circumstances of this case show that the risk was not one assumed by the servant, and that the liability of the company, if any, arose from a failure to perform some duty to plaintiff. It is the duty of the master to exercise ordinary care to furnish the servant a reasonably safe place to work. A failure to do so would be negligence, and if the negligence proximately causes an injury the master would be liable. That was the negligent act alleged by plaintiff, and the one submitted to the jury. It was purely a question of fact for the jury to determine, and we think the finding was amply supported by the evidence.

We find no error and the case is affirmed.

**WONDERLY v. HAYNES.** (No. 13802.)  
(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

**1. APPEAL AND ERROR (§ 528\*)—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS.**

A motion for new trial is not a part of the record on appeal, unless made a part of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.\*]

**2. APPEAL AND ERROR (§ 933\*)—REVIEW—PRESUMPTIONS—GRANTING OF NEW TRIAL—EFFECT.**

Where the court, compelling plaintiff, suing on notes, to elect on which of two counts in the petition he would proceed, granted a new trial after verdict for defendant on the ground of error in requiring an election, and on a subsequent trial, without formal restoration of the other count on which plaintiff on the former trial suffered an involuntary nonsuit, a judgment was rendered for defendant, it must be presumed on appeal that the subsequent trial involved issues raised by both counts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8425, 8426, 3772-3776; Dec. Dig. § 933.\*]

**3. NEW TRIAL (§ 163\*)—MOTION—ORDER—EFFECT.**

An order sustaining a motion for new trial ordinarily leaves the case as though no trial had taken place, except when the petition contains two or more counts, and the verdict is for plaintiff on one or more and for defendant on one or more, in which case the granting of a new trial to one of the parties on a count ruled adversely to him does not of itself reopen other counts well tried and decided in his favor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330-332; Dec. Dig. § 163.\*]

Error to St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Charles P. Wonderly against Louis C. Haynes. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Christy M. Farrar, of St. Louis, for plaintiff in error. Abbott, Edwards & Wilson, of St. Louis, for defendant in error.

**NORTONI, J.** Plaintiff in error, who is plaintiff also in the case, sued out this writ of error on May 19, 1909, to the end of reversing a judgment in favor of defendant in the case and defendant in error on both counts of the petition. There is no bill of exceptions before us, and the record alone is here.

It appears from the record that plaintiff instituted the suit against defendant by filing his petition in two counts in the circuit court and causing summons to issue thereon. The first count of the petition declared upon a promissory note of \$2,500, and the second count declared upon five separate promissory notes, which, it is said, all represented but one cause of action. On November 23, 1909, defendant filed his answer to both counts of the petition, and on November 27, 1909, plain-

tiff replied thereto. Thereafter, on April 6, 1910, the cause was tried in the circuit court. At the conclusion of the trial, before submitting the issue to the jury, the court sustained defendant's motion to that effect and required plaintiff to elect upon which count of the petition he would further proceed. Upon sustaining this motion, plaintiff elected to stand upon his first count, and thereupon suffered an involuntary nonsuit as to the second count and dismissed it. The jury returned a verdict in favor of defendant on the first count of the petition, and thereafter, in due time, plaintiff filed his motion for a new trial, alleging that the court erred in requiring him to elect on which count of the petition he would proceed, and thus forcing him to an involuntary nonsuit on the second count. On May 16, 1910, the court sustained plaintiff's motion for a new trial on the ground above stated (that is, that it erred in requiring plaintiff to elect and forcing him to an involuntary nonsuit on the second count of his petition), set the verdict of the jury in favor of defendant on the first count aside, and ordered a new trial. Thereafter, on May 27, 1910, defendant appealed from such order of the court, sustaining plaintiff's motion for a new trial, to this court, and the order so made was sustained here. In other words, this court affirmed the order of the trial court granting plaintiff a new trial for the error above stated, and remanded the cause for further proceedings therein, as will appear by reference to the case between these same parties. See *Wonderly v. Haynes*, 159 Mo. App. 122, 139 S. W. 813.

The record before us recites the facts above stated, but omits to disclose that plaintiff filed a motion requesting the court to reinstate the second count of his petition on the docket for trial. However, it appears that the trial of the cause came on a second time in the circuit court on the 19th day of February, 1912, and both parties appeared and contested the same. After hearing the evidence at the second trial, February 19, 1912, it appears the jury returned a verdict in favor of defendant in the trial court and defendant in error here on both counts of the petition. On this verdict, the court entered a proper judgment in favor of defendant on both counts of the petition.

[1-3] The point made and pressed upon us here for a reversal of the judgment is that the court was without jurisdiction to hear and determine the issue arising on the second count of the petition, for it is said this count was never reinstated in the trial court for trial by an order of record to that effect after plaintiff suffered the involuntary nonsuit thereon above referred to and dismissed it. Therefore it is said that the first count of the petition alone was before the court in the second and last trial, for, without a

reinstatement of the second count after the involuntary nonsuit, no valid judgment could be given thereon. The argument is an exceedingly technical one, for it appears affirmatively on the face of the record that the issue was tried on both counts of the petition and responded to in the verdict, which expressly states a finding in favor of defendant on both. Moreover, as before stated, the judgment expressly recites such finding and a judgment in favor of defendant on both counts. However, it is true the record before us does not affirmatively disclose in so many words that the trial court on plaintiff's motion reinstated the second count of the petition for trial at the time it granted the new trial in the cause. But it does appear that plaintiff moved the court for a new trial on the ground that the court erred in requiring him to elect on which count of the petition he would stand and in forcing upon him an involuntary nonsuit as to the second count. It appears, too, affirmatively on the face of the record that the court sustained this motion and set aside the verdict of the jury in the former trial on the first count because it had erred in requiring plaintiff to elect on which count of the petition he would proceed and forcing upon him an involuntary nonsuit. The motion on which the court acted with respect to this matter is not part of the record, and of course is not before us, for the reason there is no bill of exceptions here. The bill of exceptions alone is the proper repository for such a motion, and without it we are unable to ascertain just what plaintiff prayed for therein. However, the circuit court being a court of general jurisdiction, every presumption must be indulged in aid of its proceedings to sustain the same as regular and proper, unless facts revealing the contrary appear before us.

Therefore it must be presumed, among other things, that plaintiff incorporated in his motion for a new trial, grounded upon alleged error of the court in requiring him to elect upon which count of his petition he would proceed, a request that the court reinstate the second count of the petition for trial. *Needles v. Burk*, 98 Mo. 474, 11 S. W. 1008. Such appears to be the gravamen of his complaint in the motion for a new trial, and it was on this ground the court sustained the motion, for the record so recites, and this order was subsequently affirmed here. Plaintiff in error seems to overlook the effect of an order sustaining a motion for a new trial, which is, generally speaking, to leave the case as though no trial had taken place. *Hurley v. Kennally*, 186 Mo. 225, 85 S. W. 357. There is an exception, of course, when the petition contains two or more counts and the verdict is for plaintiff on one or more and for defendant on one or more. In such case, the granting of a new trial to one of the parties on a count ruled adversely to

him does not of itself reopen others well tried and decided in his favor. See *Cramer v. Barmon*, 193 Mo. 327, 91 S. W. 1038. However, it is the rule that an order granting a new trial will be presumed to award a new trial on all of the issues and to reopen the whole case, unless there are directions to the contrary. 14 Enc. Pl. & Pr. 936. Here the court expressly recited of record that it granted the new trial because it erred in requiring plaintiff to elect on which count of the petition he would proceed when it should have sent both counts to the jury. This reveals beyond question that the court receded from its position which had forced plaintiff to an involuntary nonsuit of the second count, and granted to him everything that may be presumed in his favor on that motion, and such obviously includes a reinstatement of his cause of action declared upon in the second count for trial.

Other affirmative matters of record make it appear that both counts of the petition were subsequently tried and a verdict and judgment given in express terms for defendant on both such counts.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### HERTEL v. CUBA. (No. 13810.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

#### 1. JUSTICES OF THE PEACE (§ 101\*)—ACTIONS—PLEADINGS—SUFFICIENCY AFTER VERDICT.

A statement in justice's court, which alleges that defendant is indebted to plaintiff for \$125 for medical services rendered by plaintiff to a third person at the special request of defendant, and that the services were reasonably worth \$125, and which alleges a demand and refusal, and which asks for judgment for that amount and costs, is good after judgment, on proof that the services were rendered under express promise by defendant, made before their rendition, that he would pay plaintiff therefor.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 842; Dec. Dig. § 101.\*]

#### 2. PHYSICIANS AND SURGEONS (§ 24\*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action by a physician for medical services rendered a third person at the request of defendant, a statement filed with an insurance company by the third person, in which, after setting out the facts of the accident, he stated that he thought he was entitled to his lost wages and doctor's bills, and that the doctor's bills amounted to \$150, was inadmissible, in the absence of any evidence that such statement was brought to the attention of the physician.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 53-62; Dec. Dig. § 24.\*]

#### 3. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a party's requested charge, correctly covered by instructions given at the instance of the adverse party.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 4. PHYSICIANS AND SURGEONS (§ 24\*)—ACTIONS—EVIDENCE—INSTRUCTIONS.

Where, in an action for medical services rendered to a third person by plaintiff at the request of defendant, there was evidence of a discussion between defendant and the wife of the third person as to an insurance company being liable for first aid services, but no evidence bringing knowledge of that fact home to the physician, but affirmative evidence of an employment of plaintiff by defendant at the outset, and a promise by defendant to pay for the services rendered, a requested instruction that, if the jury found that defendant did not agree to pay for more than the first aid or emergency treatment, the verdict should be for the physician for only such amount as would be reasonable for such services, was properly refused.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 53-62; Dec. Dig. § 24.\*]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by Albert L. Hertel against William Cuba. From a judgment for plaintiff, defendant appeals. Affirmed.

Adolph R. Grund, of St. Louis, for appellant. Jesse T. Friday, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff below, respondent here, commenced an action against defendant, now appellant, before a justice of the peace, filing a written statement in which it is set out that defendant is indebted to plaintiff in the sum of \$125 for medical services rendered by plaintiff to one Langford, from June 2, 1910, until on or about September 3, 1910, "at the special instance and request of defendant," and that the services so rendered by plaintiff were reasonably worth the sum of \$125. Alleging demand and refusal to pay, plaintiff asks judgment for that amount and costs.

We are not advised of the result before the justice, but on appeal to the circuit court and a trial there plaintiff recovered from which defendant has duly perfected his appeal.

Nine errors are assigned here.

[1] The first assignment is that the petition does not state facts sufficient to constitute a cause of action against defendant. We do not think that point is well taken. It is argued that the petition or statement does not contain an averment of an express promise to pay but rests on an implied contract, and that neither has been proven. *Morrell v. Lawrence*, 203 Mo. 363, 101 S. W. 571, 120 Am. St. Rep. 660, 11 Ann. Cas. 650, is relied on in support of the contention that where there is no implied promise, there must be an express one, made before the services were rendered. The point urged in that case was that the petition and the facts in the case did not make out an implied promise; that such a promise did not arise on the mere fact that the father called a physician to attend his sick son, a man of mature age. But the court held that there was evidence from which a promise to pay could be implied. It is ad-

mitted that the statement here sets out facts on which an implied promise may arise. There is evidence not only tending to sustain this but also evidence tending to show the services were rendered under an express promise by defendant, made before their rendition, that he would pay plaintiff for them. Over and above that, even if this statement, a statement filed before a justice of the peace, is defective, it is not so fatally defective that it will not sustain a judgment, and it is entirely sufficient after judgment.

This practically disposes of the second assignment of error to the action of the court in refusing to direct a verdict for defendant made at the close of plaintiff's case. As before stated, there was ample evidence of the employment of the physician by defendant and of that employment being accompanied by the promise on the part of defendant to pay.

This also disposes of the fifth and eighth assignments of error, which are to the effect that there is no evidence to support the verdict and no evidence to support the allegation of the petition.

[2] The third and fourth assignments of error are to the exclusion of competent, relevant and material evidence, as it is claimed. The evidence offered and excluded and upon which this mainly rests, was a statement filed with an insurance company by Langford, in which, after setting out the facts of the accident as far as he knew them, he stated that he thought he was entitled to his lost wages and doctor's bills, and that he "makes claim for \$500." To this he added: "My doctor's bills amount to \$150." There was no evidence whatever that this statement was brought to the knowledge of the plaintiff, so that it was inadmissible against him for any purpose whatever. So it may be said of evidence attempted to be introduced to the effect that Langford had in point of fact been paid by the insurance company for his doctor's bills. But there is no pretense that this plaintiff had been paid by any one for his services rendered in attendance upon Langford.

[3, 4] Error is assigned to the giving of plaintiff's instruction and to the refusal of the court to give two instructions asked by defendant. Consideration of the instruction given at the instance of plaintiff, discloses no error in it. It correctly placed the case before the jury. The issue sought to be placed before the jury by the first instruction asked by defendant and refused, was fully and correctly covered by the instruction given at the instance of plaintiff. Defendant's second refused instruction is to the effect that if the jury found from the evidence that defendant did not agree to pay for more than the first or emergency treatment, then the jury were instructed that they might find in favor of plaintiff for only such an amount as

the jury might believe from the evidence would be reasonable for such services. It is sufficient to say of this refused instruction that it is not supported by any substantial testimony in the case. It is in evidence that there was some discussion between defendant and the wife of the injured man, Langford, as to the insurance company being liable for "first aid" services, but there is not a particle of evidence bringing knowledge of this home to plaintiff; to the contrary there is the affirmative evidence of an employment of plaintiff by defendant, at the outset and a promise on the part of defendant to pay for the services so rendered. There is no evidence in the case of any qualification of this, of which the plaintiff had any knowledge. The verdict of the jury was obviously for the right party, is sustained by substantial evidence, and the trial was without prejudicial error committed against the interest of defendant.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

# **FIRST NAT. BANK OF MADISON v. STAM** et al. (No. 1361.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

## **1. PLEADING (§ 430\*)—VARIANCE—WAIVER.**

Under Rev. St. 1909, § 1846, providing that no variance between the pleading and proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, which must be shown by affidavit, and section 1847, providing that, where the variance between the pleading and proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment of the pleadings without costs, the variance between the petition declaring upon a note due in 90 days, executed by a corporation and defendant to themselves and indorsed to plaintiff, and the note offered in evidence, which was due in 30 days, executed by the corporation, defendant, and another, payable to the corporation and indorsed by it to plaintiff, is immaterial, in the absence of an affidavit of surprise.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430.\*]

## **2. BILLS AND NOTES (§ 487\*)—ACTIONS—PETITION—AMENDMENT—NEW CAUSE OF ACTION.**

An amended petition correcting the allegations to conform to the note was not subject to a motion to strike, as setting up a new cause of action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1575-1583; Dec. Dig. § 487.\*]

## **3. DISMISSAL AND NONSUIT (§ 50\*)—VARIANCE—WAIVER.**

Where there is a material variance between the note declared on in the petition and that filed therewith as an exhibit, while the petition is not demurrable, since the exhibit is not a part thereof, the cause may be dismissed for failure to file the instrument declared on as required by Rev. St. 1900, § 1844.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 100-102; Dec. Dig. § 50.\*]

## **4. BILLS AND NOTES (§ 523\*)—ACTIONS—EVIDENCE—INDORSEMENT.**

Where it was uncontradicted that the plaintiff had purchased the note sued on and was the owner thereof, and that the payee whose name appeared thereon as having indorsed it was a defendant who by his default admitted plaintiff's ownership, the makers cannot object that there was no proof of indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.\*]

## **5. BILLS AND NOTES (§ 491\*)—ATTORNEYS' FEES—REASONABLENESS.**

Where a note provides for a 10 per cent. attorney's fee, the holder is entitled to judgment for that amount without proving that it is reasonable, especially where there is no contention that it is unreasonable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1643-1648; Dec. Dig. § 491.\*]

Appeal from Circuit Court, Iron County; E. M. Dearing, Judge.

Action by the First National Bank of Madison against Thomas H. Stam and another. Judgment for the plaintiff, and defendant Stam appeals. Affirmed.

Edgar & Edgar, of Ironton, B. H. Boyer, of Farmington, and W. L. Coley, of East St. Louis, Ill., for appellant. Hope, Green & Selbert, of St. Louis, for respondent.

ROBERTSON, P. J. This is an action against appellant and the St. Francis Oil Company on a promissory note. A trial resulted in a verdict for the amount of the note, interest, and attorney's fee. Defendant Stam appealed.

The petition declares on a note for \$4,000, dated November 23, 1912, due in 90 days after its date, executed by St. Francis Oil Company and appellant to themselves, and indorsed to plaintiff, providing for interest at the rate of 8 per cent. per annum, and for 10 per cent. attorney's fee, if placed in the hands of an attorney for collection. The note filed therewith conforms to these allegations, except it was due in 30 days after its date, was payable to, and indorsed by, the St. Francis Oil Company, and was signed by it, another party, and appellant as makers. The plaintiff filed an amended petition accurately describing the note filed, which, upon the motion of appellant, was stricken out, because, as alleged by appellant, it set up a different cause of action from that alleged in the original petition. Plaintiff then refiled its original petition, to which appellant filed an unverified answer, and the parties proceeded to trial; the St. Francis Oil Company defaulting. When the note was offered in evidence, appellant objected thereto on account of the variance above stated. The objection was overruled, and the note was admitted in evidence. The plaintiff's cashier testified, without objection, that it owned the note, having paid \$4,000 therefor. The appellant offered no testimony.

The points urged here are: (1) The alleged error of the court in admitting the note in evidence; (2) the alleged absence of proof of indorsement; and (3) the alleged error in allowing the attorney's fee.

[1] We rule all of these contentions against appellant; the first one because our Supreme Court, in a case similar to this (*Salmon Falls Bank v. Leyser*, 116 Mo. 51, 66, 68, 22 S. W. 504), held that such discrepancies as here relied on to defeat an admission of a note in evidence is nothing more than variance, which must, to be available, be taken advantage of by an affidavit of surprise under what are now sections 1846 and 1847, R. S. 1909. In that case, as here, the note was admitted in evidence over an objection. Other cases to the same effect are *Olive Street Bank v. Phillips*, 162 S. W. 721 (St. Louis Court of Appeals); *La Belle Savings Bank v. Taylor*, 69 Mo. App. 99; *Barrows v. Million*, 43 Mo. App. 79, and *Henshaw v. Insurance Co.*, 9 Mo. 336.

[2] The plaintiff's amended petition did not change the cause of action, and the motion to strike it out should not have been sustained. *Sonnenfeld v. Rosenthal*, 247 Mo. 238, 266, 152 S. W. 321. This case, argumentatively at least, sustains the trial court's action in admitting the note. Under this authority the variance in the note and petition did not constitute an entire failure of proof, it was only a variance covered by said section 1846. No case can likely be found where it is so clear as here that a party has not been "actually misled to his prejudice." The note was on file over a year before the case was tried, and the plaintiff undertook to amend by alleging a correct description of the note, but was prevented by appellant, who went to trial on an unverified answer.

[3] Much is said in appellant's brief about an exhibit being no part of the petition; that he could not reach the variance by demurrer; and that the only way he could have his rights enforced was by an objection to the offer of the note in evidence. Even where the instrument sued on is filed in compliance with section 1844, R. S. 1909, it becomes no part of the petition (*Keator v. Helfenstein Park Realty Co.*, 231 Mo. 676, 680, 132 S. W. 1114), but it is none the less subject to the inspection of the defendant. If there is such a discrepancy in the note declared on and the one filed as to not justify its being offered in evidence, then the instrument sued on is not filed as required by said section 1844. When it is not filed defendant can have the cause dismissed. *Rothwell v. Morgan*, 37 Mo. 107.

[4] The second point urged by appellant is ruled against him, because the uncontradicted and unchallenged testimony shows that plaintiff purchased the note, was the owner thereof, and the payee whose name appeared therein as having indorsed it was a party defendant, who, by his default, admitted plaintiff's

ownership. A formal indorsement of a note is not, in every case, essential to pass title. Section 10019, R. S. 1909; *Lipscomb v. Talbott*, 243 Mo. 1, 31, 147 S. W. 798, and cases there cited; *Dawson v. Wombles*, 123 Mo. App. 340, 345, 100 S. W. 547.

[5] In support of defendant's third point it is urged that plaintiff should have proven that 10 per cent. of the amount found to be due on the note was a reasonable attorney's fee. We resolve this point against him. *North Atchison Bank v. Gay*, 114 Mo. 203, 210, 21 S. W. 479. A different rule may be applicable to a note which fixes no amount, but provides for a reasonable attorney's fee, and it may be that a maker of a note who agrees to pay a fixed per cent. as an attorney's fee should be liable for no more than is reasonable. Such questions are not before us. It is our duty to follow the decision of our Supreme Court, and as the *Gay Case* is directly in point here, since the appellant raised no point below as to the reasonableness of the fee, and did not complain in his motion for a new trial of the excessiveness of the verdict, it is better that we desist from discussing decisions from other states.

The judgment is affirmed.

FARRINGTON and STURGIS, JJ., concur.

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HORNER et al. v. FRANKLIN. (No. 1278.)  
(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

1. SALES (§ 87\*)—CONTRACT—BREACH.

In action for breach of contract for sale of corn, evidence held to warrant a finding that plaintiffs purchased all the corn grown on a certain plantation during the year 1911, and not so much thereof as defendant could deliver within 60 days after the sale.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 239-247, 1046; Dec. Dig. § 87.\*]

2. TRIAL (§ 296\*)—INSTRUCTIONS—DEFENSES.

It was not error to give an instruction on plaintiffs' behalf on the whole case, which did not incorporate defendant's defense, another instruction having been given fully submitting defendant's theory.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 706-713, 715, 716, 718; Dec. Dig. § 296.\*]

3. EVIDENCE (§ 271\*)—SELF-SERVING DECLARATIONS.

Where, on an issue as to whether a contract for sale of corn covered all defendant's corn raised on his plantation during a certain year, or only so much as he could deliver within 60 days from the date of the sale, defendant's agent testified to a telephone conversation with plaintiffs' agent, and at the time made a memorandum of the contract and terms, which recited that plaintiffs' bid for the corn was accepted for what corn could be delivered during the following 60 days, such memorandum was inadmissible as self-serving.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.\*]

4. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL.

Where, in an action for breach of a seller's contract to sell corn, plaintiff claimed that

the contract covered all the corn raised on a certain plantation for the year 1911, while defendant claimed that it only covered such corn as could be delivered within 60 days from the date the contract was made, and there was evidence that when defendant refused to deliver the balance of the corn, he sold it to another at an advanced price, argument of plaintiffs' attorney that defendant's failure to deliver was caused by such advance was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.\*]

#### 5. TRIAL (§ 121\*)—ARGUMENTS OF COUNSEL.

Where defendant, in action for breach of contract, proved that plaintiffs had made an assignment for the benefit of their creditors, defendant was estopped to object to argument of plaintiffs' counsel that plaintiffs would always be in bankruptcy if they continued to deal with fellows like defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by John J. Horner and others against J. E. Franklin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jones, Hocker, Hawes & Angert, and Hope, Green & Seibert, all of St. Louis, for appellant. Von Mayes, of Hayti, and Ward & Collins, of Caruthersville, for respondents.

ROBERTSON, P. J. This action involves the right of the plaintiffs to recover damages for the failure of the defendant to deliver a crop of corn which the plaintiffs claim to have purchased from him. The corn consisted of the 1911 crop grown on what is called the "Lakeland Plantation Farm," sometimes referred to as the "Lake Farm." The contract was entered into February 16, 1912. Plaintiff claims that they purchased all of the crop, but defendant asserts that he agreed to sell only what he could deliver within 60 days from that date. Defendant delivered a portion of the crop, over 6,000 bushels, within the 60 days, but refused to deliver the balance, over 9,000 bushels. A jury trial resulted in a verdict for plaintiffs and defendant has appealed.

[1] The defendant first urges that the jury should have been instructed to return a verdict for him, for the reason that there was no testimony tending to prove that plaintiff bought all of the corn. To sustain this contention, he quotes testimony that is most favorable to him. If there is substantial evidence to support the contract plaintiffs claim they had with defendant, we cannot disturb the verdict on that point. We notice the testimony of plaintiffs' agent, who, after testifying as to the price and the places of delivery, testified that he bought the corn "known as 'Lake' corn," and that the Lake corn was what was grown on the Lakeland plantation. This witness also testified as to the negotiations leading up to the purchase, which shows conclusively, to our minds, that the contract about which he testified was

intended to and did include the entire crop. Another witness for plaintiff testified, without objection, that defendant's agent told him that he had sold all of the crop to the plaintiff. To discuss the details of this testimony and analyze the contention of the defendant with reference thereto would require more space than we feel is justified, since we are clearly of the opinion that the instruction was properly refused.

[2] It is next urged by the defendant that the court erred in giving an instruction in behalf of plaintiffs upon the whole case which did not incorporate therein defendant's defense that he sold only what could be delivered within 60 days. In support of this contention he cites *Hamilton v. Metropolitan St. Ry. Co.*, 114 Mo. App. 504, 513, 89 S. W. 893, which involved a case wherein the instructions were conflicting, because one authorized recovery for negligence not pleaded, and the other for negligence charged in the petition. Defendant states in its brief however that plaintiffs' instruction "leaves from the consideration of the jury defendant's defense." The instruction hypothetically submitted the plaintiffs' theory, and, as it was found to be correct, the jury must have disbelieved the defendant's theory, which was submitted in an instruction given in his behalf, and on his request. It was not error to give the instruction here complained of, and especially since an instruction was given for defendant on his 60-day theory. *Johnson v. Springfield Traction Co.*, 176 Mo. App. 174, 186, 181 S. W. 1193.

[3] The negotiations relative to the corn were had with an agent of the defendant. This agent testified that he had a conversation with plaintiffs' agent over the telephone, and at the time made the following memorandum:

"2/16/12 Horner's bid on all corn we have—Lake & Tyler Supply Co.—67½ per bu. f. o. b. Tyler & Cooter, he to furnish thrower-back, and said bid was accepted for what corn we can deliver during the next sixty days from above date."

This was offered in evidence, but on the objection of the plaintiffs the court refused to admit it. The defendant excepted, and assigns the action of the court as error. We hold it was not. *Davis, Adm'r, v. McClelland*, 170 S. W. 691, in which an opinion was filed in this court November 14, 1914. The appellant cites on this point *Salmons' Adm'r v. Davis*, 29 Mo. 176, 182, which was a case where the memorandum was signed by some of the parties sought to be charged therein and read in the hearing of the other party who made no objection thereto.

[4] The following statement made by the attorney for plaintiff in his closing argument to the jury was objected to:

"Tell me, that J. E. Franklin, with his sharp financial eye, did not look out and see the prices of corn advancing."

The testimony was to the effect that, when the defendant refused to deliver the balance of the corn, he sold it to another party at a great advance in price. Plaintiff had a right to make the deduction from the testimony that defendant had in fact contracted to sell all of the corn to plaintiffs, but that on account of the advance in the price he preferred to ignore his contract with them and sell to other parties, taking his chances with plaintiffs.

[5] Again the plaintiff stated to the jury: "But Horner Bros. had bought it at the price, and the same law that governs these boys that went into bankruptcy, and they will always be in bankruptcy if they deal with fellows like J. E. Franklin, I say—."

The defendant, for some reason not disclosed by the record, offered testimony to the effect that the plaintiffs had made an assignment for the benefit of their creditors. If this subject was improper for the consideration of the jury, the defendant invited the error, and cannot be heard to complain if plaintiffs' attorney resorted to this method of overcoming any bad effect he may have conceived it would have on the jury. The court committed no error in ignoring the defendant's objections to all of the above remarks.

There being no error in the case justifying any interference on our part, the judgment will be affirmed. It is so ordered.

STURGIS and FARRINGTON, JJ., concur.

**WUEST v. UNITED STATES HEALTH & ACCIDENT INS. CO. OF SAGINAW, MICH.** (No. 13866.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

**1. INSURANCE (§ 146\*)—POLICIES—CONSTRUCTION.**

In cases of ambiguity or uncertainty, an insurance policy will be construed most strictly against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

**2. INSURANCE (§ 530\*)—ACCIDENT INSURANCE—POLICY—CONSTRUCTION.**

Where an accident policy providing an indemnity for the loss of one hand declared that loss of the member meant loss by severance at or above the wrist joint, the insured, who lost all of his hand save the little finger, which was paralyzed, cannot recover the indemnity, though, without the provision as to severance at or above the wrist, his injury would be considered as a loss of the hand.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.\*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by John H. Wuest against the United States Health & Accident Insurance Company of Saginaw, Mich. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Henry B. Davis, Chas. Erd, and Carlisle Durfee, all of St. Louis, for appellant. Collins, Barker & Britton and C. K. Rowland, all of St. Louis, for respondent.

ALLEN, J. This is a suit upon an accident insurance policy, for the recovery of the "principal sum" of the policy—to wit, \$2,000—for the alleged "loss of one hand" by the assured within the meaning of the contract of insurance. Plaintiff suffered a nonsuit below, and, after unsuccessfully moving to have the same set aside, has appealed to this court.

By the policy sued upon the respondent company agreed to pay the said principal sum thereof for (among other things) the "loss of one hand," sustained by the assured solely through external, violent, and accidental means. Immediately following this section of the policy referring to specific losses appears the following stipulation, viz.:

"In every case referred to in this policy, the loss of any member or members above specified shall mean loss by severance at or above the wrist joints or ankle joints."

The evidence is to the effect that plaintiff received injuries to his left hand, solely through external, violent, and accidental means, necessitating the amputation of the greater part thereof. The thumb and first three fingers were removed, together with a large portion of the palm, leaving only the little finger and a part of the palm supporting it. As a result of the injury, however, the little finger and the portion of the palm remaining were found to be permanently paralyzed and of no use or service to the assured. Plaintiff has therefore lost the entire use of his hand, as completely as if the same had been severed at the wrist joint. It is conceded that plaintiff proved all of the facts necessary to entitle him to a verdict for the principal sum of the policy, provided a recovery thereof may be had under the policy upon evidence disclosing the total loss of the use of the hand, as above stated, without proof of the actual physical severance thereof at or above the wrist joint.

[1, 2] It is well settled that, where, in an insurance contract of this character, the insurer indemnifies against the "loss" of a hand or of a foot, actual physical severance of such member is not necessary to authorize a recovery under the policy, but it is sufficient if the assured has been wholly and permanently deprived of the use thereof. If by injury within the terms of the contract, the assured has been entirely deprived of the use of such member, he has suffered a "loss" thereof, within the meaning of this term, as fully as though the same had been actually amputated. See *Sisson v. Supreme Court of Honor*, 104 Mo. App. 54, 78 S. W. 297; *Sheanon v. Insurance Co.*, 77 Wis. 618, 46 N. W. 799, 9 L. R. A. 685, 20 Am. St. Rep.

151; *Lord v. Accident Ass'n*, 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. Rep. 815; *Supreme Court of Honor v. Turner*, 99 Ill. App. 310; *Fuller, Accident and Employers' Liability Insurance* (1910, p. 37) et seq.; 2 Bacon, *Benefit Societies and Life Insurance* (3d Ed.) § 502; 1 Am. Eng. Ency. Law, p. 301; 1 Cyc. 272. And where the contract of insurance indemnifies the assured for "loss by severance" of one hand, instead of insuring against the "loss of a hand," it is held not to be necessary that the entire hand, anatomically speaking, be removed; but if a large portion thereof be severed, and that which remains be absolutely useless, the insured may recover as for the loss of a hand by severance.

In *Sneck v. Insurance Co.*, 88 Hun, 94, 34 N. Y. Supp. 545, the policy provided that the assured would be entitled to receive a certain sum "if loss by severance of one entire hand or foot" should result from injuries of the character insured against. About one-half of the assured's hand was cut off by a planer, and the evidence was that the remainder thereof was absolutely useless. It was said that the undertaking to indemnify the assured against loss by severance of one entire hand had reference not alone to an injury which required the amputation of the entire hand, in the strict anatomical sense, but that the effect, as well as the extent, of the loss by severance was to be considered in determining, whether, within the terms of the contract, the "entire hand" was gone. And it was said that the specification in the policy was intended to refer to the manner, rather than to the exact physical extent, of the injury. And where it is provided that the "loss" of an arm or leg shall mean "actual amputation," it is not necessary to a recovery that the entire arm or leg shall have been severed. It is sufficient if so much thereof is severed as to leave the remainder useless for all practical purposes to which it may be put by the assured.

In *Garcelon v. Accident Ass'n*, 184 Mass. 8, 67 N. E. 868, 100 Am. St. Rep. 540, it was held that the amputation of an arm four inches below the elbow was a "loss" of the arm within the meaning of a stipulation to the effect that the word "loss" as applied to arm or leg should mean "actual amputation."

And in *Gahagan v. Morrissey*, 19 Pa. Co. Ct. R. 236, 6 Pa. Dist. R. 135, where the contract of insurance provided that for the "loss of a hand at or above the wrist joint" the insured should be considered totally disabled, it was held that the entire loss of the use of the hand might be fairly regarded as coming within the legitimate application of the terms of the policy.

In none of these cases, however, was the language employed in the contract of insurance such as that contained in the clause before us. Where the assured has lost the entire use of a hand by the severance of a

large portion thereof, he may be said to have suffered a "loss" of the hand "by severance," as was held in *Sneck v. Insurance Co.*, supra. And though it is provided that the word "loss" shall mean actual "amputation," the amputation of an arm below the elbow may well be regarded as the loss of the arm within the meaning of this stipulation, as in *Garcelon v. Accident Ass'n*, supra. In such case the assured, by "severance" or "amputation," has suffered a loss of the member in question, in that he has, in such manner, lost the entire use thereof. Likewise it may well be held "that the loss of a hand at or above the wrist joint" is sustained where the assured has lost the total use of a hand, as in *Gahagan v. Morrissey*, supra; for then the assured has lost the use of the hand to the extent specified—to wit, to the wrist joint.

But here the policy provides that the loss of a hand shall mean loss by severance at or above the wrist joint. Not only is it provided that the loss of such member shall be by physical severance thereof, but the extent of such loss is made exact and definite by locating the precise point at or above which such severance shall take place.

In *Fuller v. Insurance Ass'n*, 122 Mich. 548, 81 N. W. 326, 48 L. R. A. 86, 80 Am. St. Rep. 598, it was held that a by-law of a mutual benefit association providing that any member receiving bodily injuries which alone should "cause amputation of a limb (whole hand or foot)" would be entitled to certain benefits did not cover the case of an amputation of about one-third of the foot, though the foot was rendered useless for the performance of its natural functions. And in *Chevaliers v. Shearer*, 27 Ohio Cir. Ct. R. 509, the constitution of the association defined "the loss of a hand" as meaning "amputation at or above the wrist." As a result of injuries, plaintiff's right arm was permanently disabled, whereby he lost the entire use thereof, but neither the arm nor hand had been amputated. It was held that the plaintiff could not recover.

In the instant case, had the provision of the policy agreeing to indemnify plaintiff in the amount of the principal sum of the policy for the "loss of one hand" stood entirely alone, and unaffected by any other provision thereof, beyond doubt plaintiff would have been entitled to recover, having lost the entire use of his hand. However, the very next paragraph of the policy provides, in unmistakable terms, what shall be meant by the "loss of one hand"; to wit, the loss thereof by severance at or above the wrist joint. Plaintiff has not suffered a loss of his hand by severance at or above the wrist joint; and if effect is to be given to the last-mentioned provision, plaintiff's case must fail.

If any ambiguity or uncertainty of meaning could be said to inhere in the pertinent provisions of the policy, it would readily be

resolved in favor of the insured and against the insurer. Such is the well-established and wholesome doctrine with respect to the construction of insurance contracts. As is said by Lamm, J., in *Mathews v. Modern Woodmen*, 236 Mo. loc. cit. 342, 139 S. W. 155, Ann. Cas. 1912D, 483:

"It is a just and settled rule that the restrictive terms of insurance contracts shall be taken most strongly against the insurer. The doctrine of contra proferentem is strictly applied with unaccommodating vigor, and \* \* \* ambiguities are blandly resolved in favor of the insured."

If it appeared that the portions of the policy under consideration, when read and construed together, were at all ambiguous or of doubtful import, we should not hesitate in the least to "blandly" resolve such ambiguity or doubt in favor of the insured. Indeed, the policy, should, if possible, be construed so as to effectuate the insurance, and not to defeat it; for the indemnity is the very object and purpose of the contract, for which the insured has paid a consideration. See *Stix v. Indemnity Co.*, 175 Mo. App. 171, 157 S. W. 870.

But it appears that the defendant has chosen apt language to indicate that it does not agree to indemnify the insured for the loss of a hand, unless such loss shall consist in the actual physical severance of the hand at or above the wrist joint. It is by no means likely that the policy holder so understood, or that he would knowingly have accepted the policy with such restrictive limitations upon his right to recover the indemnity for the loss of a hand or foot; but we can find the intention of the parties only from the language employed in the contract, having regard to the rules of interpretation which may be applied to contracts of this character. We cannot "blandly" construe the troublesome provision out of the contract, and disregard it altogether; for, however great may be our inclination or duty to protect a policy holder against intricate or obscure technical provisions designed for the avoidance of liability on the part of the insurer, we cannot make a contract for the parties. The stipulation in question, as we have said, follows immediately that portion of the policy providing for specific losses, in the same type in which the body of the policy is printed. Its meaning appears to be plain and unmistakable. It pointedly defines what shall constitute the "loss of a hand" so as to entitle the assured to the indemnity provided therefor. Under the circumstances, it cannot well be said to constitute a "snare to the unwary" such as is denounced in *La Force v. Insurance Co.*, 43 Mo. App. 530. See, also, *Stark v. Insurance Co.*, 176 Mo. App. 574, 159 S. W. 758. Nor do we perceive any ground upon which plaintiff may properly be relieved from the effect thereof.

Our conclusion is that the learned trial

judge committed no error in forcing plaintiff to a nonsuit.

The judgment must therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

### COONEY v. LACLEDE GASLIGHT CO. (No. 13881.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

#### 1. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—QUESTION FOR JURY.

In an action for injuries to an employé demolishing a platform, caused by stepping on an insecure board in the flooring of the platform, in position before the work of destruction was commenced, whereby he fell and was injured, evidence held sufficient to take the question of defendant's negligence to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

#### 2. MASTER AND SERVANT (§ 107\*)—SAFE PLACE TO WORK—HAZARDOUS EMPLOYMENT.

The duty of a master to furnish a reasonably safe place to work does not require him to provide against hazards such as are ordinarily incident to the employment, as when the danger is temporary, and arises from the hazard and progress of the work itself, such as the demolition of structures.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

#### 3. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSPECTION.

An employé, ordered to tear down a platform, may assume that it was reasonably safe from the fact that he was ordered to work upon it, and need not make a careful inspection of the platform for planks insecurely fastened.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

#### 4. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—DESTRUCTION OF PLATFORM—INSTRUCTIONS.

In an action for injuries to an employé demolishing a platform merely to get it out of the way, caused by stepping on a plank fastened to a joist only by a cleat, whereby he fell and was injured, an instruction that plaintiff could recover if defendant knew, or by ordinary care could have known, of the condition of the plank, and if plaintiff did not know, or by ordinary care could not know, that the board was not supported by a cross-plank, is not erroneous, as authorizing a recovery for the failure to inspect a hazardous work over which defendant had no control, since the platform was unsafe before the work of destruction commenced.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

#### 5. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT—DESTRUCTION OF PLATFORM—INSTRUCTION.

Neither is such instruction subject to the objection that it leaves it to the jury to find that defendant could and plaintiff could not by ordinary care have discovered the insecure plank, because there was no evidence that defendant had any superior opportunity to that of plaintiff for making the discovery, since the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

duty to inspect the work was on defendant, and not on plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

**6. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—DESTRUCTION OF PLATFORM—ASSUMPTION OF RISK.**

A servant, ordered to demolish a platform merely to get it out of the way, and who is injured by stepping on and falling with a plank fastened to a joist only by a cleat, which condition existed before the work commenced, and of which he had no knowledge, did not assume the risk of injury therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by John Cooney against the Laclede Gaslight Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Percy Werner, of St. Louis, for appellant. John B. Dempsey, of St. Louis, for respondent.

**REYNOLDS, P. J.** This is an action by the plaintiff to recover damages for injuries alleged to have been sustained by him while engaged in tearing down a platform upon the order of a representative of defendant, the particular work in which plaintiff was engaged at the time being the removal of the floor and footwalk from the platform, which had been used for holding coal as it was unloaded from cars. It is charged that while plaintiff was engaged in removing the planks comprising the platform, and while he was carrying a heavy plank which he was about to lower to the ground, he stepped upon a plank of the platform and the plank gave way, by reason of that plank not reaching the joist on the outside of the supporting posts and there being no joists on the inside of the posts; that this short plank did not have any support save cleats nailed underneath it and to the plank next to it, and was not strong enough by reason thereof to support the weight of plaintiff with the plank he was at the time carrying. It is averred that defendant was negligent in that it knew, or by the exercise of ordinary care could have known, that the joist above described was not in place to support the end of the plank, and that in consequence thereof the short plank was without adequate support for the load which plaintiff placed upon it, and that the platform was not a reasonably safe place for plaintiff to work. It is further averred that by reason of the negligence of defendant as above set forth, and of the unsafe condition of the platform or walk when he stepped upon the plank, it gave way with his weight and the added weight of the load he carried, and that plaintiff was precipitated to the ground, injuring him as described, so that for more than two months following the fall he suffered a partial paral-

ysis of the hand and arm and was unable to hold or lift anything, and has been unable to follow his usual or any vocation, has lost wages as a laborer, will be unable to perform labor in the future, has expended and became obligated for large sums of money for medical and surgical attendance and medicines, and is permanently injured and has suffered and will suffer in the future great pain of body and anguish of mind, to his damage, etc.

The amended answer, admitting the incorporation of the defendant and that it was engaged in business as alleged, and denying every other allegation in the petition, pleads contributory negligence on the part of plaintiff and assumption of risk by him.

A trial before the court and a jury resulted in a verdict for plaintiff, from which defendant, saving exceptions to the action of the court in overruling its motion for a new trial, has duly perfected its appeal to this court.

The errors assigned here are to the refusal of the court to direct a verdict for defendant, and to error in the first instruction given on behalf of plaintiff, it being claimed that the latter was unwarranted by the evidence and was erroneous and misleading.

There was evidence tending to prove that plaintiff, a common laborer in the employ of defendant, was working for it on its premises, along which a switch track of a railroad ran, and along which track defendant had constructed a platform on which coal delivered by car to it was unloaded. On the day of the accident the foreman came to plaintiff and told him that when he was through working at the place where he was then engaged to "come along" with him. They went back across the west side of the railroad and were joined by another workman and went to this platform. The platform was about nine feet wide and from 100 to 120 feet long, the south end of it about 12 or 14 feet from the ground, the north end about 9 feet above the ground. The flooring of this platform consisted of heavy 2x10 boards, 16 feet long. The foreman directed plaintiff to take all of the flooring off and to "hurry on and do it." Plaintiff, assisted by the other workman, started at the south end of the platform, working toward the north. He walked to the far end and, carrying the boards to the north end, handed them down, board by board, to the man on the ground below who was helping him. In the course of his work he had torn down the platform to within two 16-foot board lengths of the north end. There were about three boards lying across this north end on top of the platform. He walked out and picked up the first one which was lying there and handed it down, then went to the second and let it down, and picked up the third, which was an oak board about 18 feet long, walked out with that and stood with

both feet on the outer plank of the platform, standing there in position to hand this board down, when the board upon which he was standing gave way under him and he was precipitated to the ground and apparently lay there unconscious for awhile. It was in evidence that the board upon which plaintiff had stepped and which had given way did not rest upon the joist at its north end and was not supported at that end by the crosspieces of the platform, but fell short of that crosspiece or joist and was supported at the end by a cleat nailed under it and to the adjoining plank, and that the weight of plaintiff, with the added weight of the plank he was carrying, had caused the nails in the cleat to give way, the cleat parted from the board, and so it fell, carrying plaintiff with it. This is a brief but, as we think, a fair statement of the accident.

Plaintiff testified that he had no knowledge whatever of the manner in which this particular plank was supported, did not know that it was only supported by this cleat and that the end of it did not rest on anything; and in point of fact, he testified that he had not made any examination of the platform but had worked where he was told by the foreman to work. This was practically the evidence given by plaintiff, he being corroborated in it by the man who was working with him at the time. In addition to this there was testimony as to the nature and extent of his injuries, expenditures, etc.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict. This the court refused, defendant excepting.

On its part, the testimony of defendant, being that of the foreman, was to the effect that the foreman had left to the plaintiff the detail of the work; had not told him to go up on the platform; that he could have done the work just as well from under it as to have gone on top of it, and that the foreman had no knowledge of the manner in which this board was fastened, had no knowledge of the fact that its end, instead of resting on joists or crosspieces, was supported merely by cleats or a cleat to another board or plank adjoining it.

At the conclusion of the testimony defendant renewed its demurrer, which was overruled.

At the instance of plaintiff the court gave an instruction, the only part of which now complained of is here underscored and is to the effect that if the jury found from the evidence that while plaintiff was engaged in removing the floor planks, he stepped upon a plank in the floor; that said plank was not supported at the end near where plaintiff stepped thereon by a cross plank nailed to the upright posts forming the frame work of the platform, *or that the fastening of that floor plank to the next floor board by cleats, if the jury found that it was so fastened, was not sufficiently secure to bear plaintiff's*

*weight while discharging his duties as directed; that defendant, by its agents, foremen or overseers, knew, or by the exercise of ordinary care for the safety of its employees, could have known the condition of the floor and supports; "and if you further find and believe from the evidence, that plaintiff did not know, or that by the exercise of ordinary care he could not know that the said floor plank was not supported by a cross plank and that the said plank was insecurely fastened by cleats,"* etc., then plaintiff is entitled to recover, unless, under other instructions given, the jury find for defendant.

At the instance of plaintiff the court also instructed the jury as to the measure of damages.

At the instance of defendant it gave two instructions, one to the effect that if the jury found from the evidence that plaintiff was directed to demolish the platform in question, and given full control of the work, to choose his own methods and his own men to help him, and that plaintiff was injured by one of the dangers incident to his employment in wrecking the platform, their verdict should be for defendant; and that if the jury found from the evidence that plaintiff sustained the injuries of which he complains by reason of his own negligence directly contributing thereto, in getting upon, or standing upon, one of the planks of the platform which he was engaged in wrecking, if the jury find from the evidence that he was so engaged, because the plank had no sufficient support or underpinning at the time, and the absence of such support or underpinning he might, by the exercise of ordinary care for his own safety have known, and by the exercise of such care have avoided the injury, their verdict should be for defendant.

The court of its own motion instructed the jury as to the meaning of ordinary care and as to the number of jurors necessary to concur in a verdict. It refused instructions asked by defendant in the nature of demurrers to the evidence as also one which is to the effect "that the law which requires a master to furnish his servant a safe place in which to work does not require the master to make a structure which is in process of demolition or destruction safe."

[1, 2] Considering the first proposition made by the learned counsel, that there is no evidence in the case warranting its submission to the jury, we cannot agree to its correctness. It is true that the duty of the master to furnish a reasonably safe place to work does not require him to provide against hazards such as are ordinarily incident to the employment, as where the danger is temporary and when it arises from the hazard and progress of the work itself, and it is true that this rule has been held as particularly applicable to dangers arising out of the demolition of structures. So this court held in *Zeigemeyer, Adm'r, v. Goetz Lime & Cement Co.*

113 Mo. App. 330, 88 S. W. 139, and Bloomfield v. Worster Construction Co., 118 Mo. App. 254, 94 S. W. 304, as also the Kansas City Court of Appeals in Henson v. Armour Packing Co., 113 Mo. App. 618, 88 S. W. 166. So it has been held by the courts of Illinois in cases cited by counsel, and by the Supreme Court of the United States in Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. So too the text-writers hold, as see 3 Labatt's Master & Servant (2d Ed.) § 1177; 4 Thompson on Negligence (Ed. 1904) § 3876.

[3] But this rule is not applicable to the case before us. This plaintiff was not injured in consequence of a defect or imperfection or weakness in this platform which had been brought about while the platform was being torn down, or in consequence of tearing it down. The fatal weakness in the platform was there when plaintiff commenced his work, and plaintiff was not engaged in tearing down this section of the platform; in point of fact, he had done no work in the way of demolition of that part of it; on the contrary, he was using it as a place on which to stand and over which he could walk while lowering the planks taken from other parts of the platform. Neither the plank on which he stepped nor that part of the platform had been disarranged or rendered unsafe by any act connected with the removal or tearing down of the platform. It was unsafe from defects inherent to its own manner of support and construction. It was not within the obligation of plaintiff, as an employé, to make a careful inspection of this platform upon which he was ordered to do his work. He had a right to assume that it was reasonably safe from the fact that he was ordered to work upon it, as he testifies was the case. But the duty primarily and clearly was upon the employer, through its agent who was representing it in the general supervision of this work, to see that this platform upon which its employés were required to work was reasonably safe. It is clear that even slight inspection would have shown that this plank was supported at one end only by a cleat nailed to it and the adjoining board and that its end did not rest on anything. So it would be clear that the strain of either a very heavy man or of any heavy burden, when that burden was cast upon the loose, unsupported end of this plank, would be apt to cause it to fall. Whether that was the condition was the question submitted to the jury; that there was evidence to support it is too clear for argument.

[4] We have italicized the particular parts of the instruction given at the instance of plaintiff and on which error is now assigned. It is objected to this part of the instruction that it, in effect, tells the jury that it was the duty of defendant, by its agents, foreman or overseers, to have inspected the old platform which was to be wrecked in order to

discover the loose or insufficiently supported boards, if they could have been discovered by the exercise of ordinary care. It is said that this is not the law, Bloomfield v. Worster Construction Co., *supra*, being cited in support of this and as holding that where the work is hazardous and the master undertakes to make it reasonably safe in a manner not under the control of the servant, then it becomes the master's duty to use ordinary care in that behalf, otherwise not. It is further said that it is not charged, nor is there the slightest pretense in the evidence that defendant interfered in any way with the work, or that plaintiff was in any way induced to rely on, or that he did in fact rely on defendant or its supervisor to avoid any of the dangers which might beset the work; that the work here done could not be said to be even hazardous and that under the facts of this case no such duty rested on plaintiff to search out loose boards, as this instruction told the jury existed, and for this reason it is claimed the instruction is erroneous. We do not put that construction upon it. All that this instruction tells the jury is, that the duty of the employer is to furnish a reasonably safe place for its employé to do this work. There does not appear to have been any thing extra hazardous about this particular piece of work, nothing to show that the platform was being pulled down because it was insecure, but, so far as the evidence shows, it was simply being removed in the ordinary course of defendant's business. Why this was so, does not appear and no suggestion arises from the testimony that the work upon which plaintiff was engaged was in any way hazardous. Whatever hazard might have occurred in the mere fact of tearing down the structure has no bearing here, because at the time, and when plaintiff was injured, and at the place where he was injured, he was not tearing down this platform but was using it, as he had a right to do, in the course of his work, under the assumption that it was reasonably safe for the work he was engaged in.

[5] The second objection urged to this instruction is that the court leaves it to the jury to find that defendant could and plaintiff could not, by the exercise of ordinary care, have discovered the unsupported floor plank. It is claimed that under the evidence this was unwarranted and that there is not the slightest evidence that anybody connected with the defendant had any opportunity superior to that of plaintiff for making the discovery. The trouble with this contention is that the duty to inspect the work and to see that it was reasonably safe was on defendant, not on plaintiff. We do not think that this instruction is subject to the criticism made on it and considering it in connection with the instructions the court gave at the instance of defendant, we think that the case was properly submitted and that it was clearly a case for the jury.

[8] It is said by counsel for appellant:

"If under the facts of this case plaintiff did not assume the risk of the very mishap from which he suffered, then in our humble opinion, the old doctrine of assumption of the ordinary risks incident to a particular service, must be rooted out of our law and a new one of insurance against injury must be substituted by our courts for it."

Counsel is unduly alarmed. It is true that the doctrine of assumption of risk has been very much limited in its application by our Supreme Court, but as pointed out by Judge Faris, in *Patrum v. St. Louis & S. F. R. Co.* recently decided, not yet officially reported, but see 168 S. W. 622, under the name of contributory negligence, it is still recognized as in force. But it has no application here. To invoke assumption of risk as against the claim of this injured employé, it must appear that the risk was one incident to the employment and which did not arise from the employer's negligence. Absent that, there is no assumption. Here there was no knowledge on the part of the plaintiff of the hidden danger and hence no assumption of risk.

Finding no reversible error, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

#### HOLLRAH-DIECKMANN REFRIGERATOR & FIXTURE CO. v. ST. LOUIS HOUSE & WINDOW CLEANING CO. (No. 13831.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

#### 1. FRAUDS, STATUTE OF (§ 85\*)—SALE OF GOODS—AMOUNT OF PRICE.

A sale of goods of a value exceeding \$30 falls within the statute of frauds, and no recovery can be had on the contract, where there was neither written memorandum nor payment of earnest money, unless there was a delivery and acceptance of a part of the goods.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 141; Dec. Dig. § 85.\*]

#### 2. SALES (§ 181\*)—DELIVERY—EVIDENCE.

In an action for the purchase price of goods, evidence held sufficient to show delivery and acceptance of part of the goods.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 473-491; Dec. Dig. § 181.\*]

#### 3. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS.

A finding of fact by the trial court sitting without a jury is conclusive on appeal, if supported by substantial evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

#### 4. FRAUDS, STATUTE OF (§ 89\*)—SALE OF GOODS.

Where a sale of goods was within the statute, an acceptance of all and delivery of only a part of the goods satisfies the statute of frauds (Rev. St. 1909, § 2784).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.\*]

#### 5. FRAUDS, STATUTE OF (§ 89\*)—SALES—ACCEPTANCE—WHAT CONSTITUTES.

Acceptance and delivery, in case of a sale of goods, need not be contemporaneous; and acceptance may precede delivery, although, to take the case out of the statute of frauds, delivery must be made in pursuance of the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the Hollrah-Dieckmann Refrigerator & Fixture Company, a corporation, against the St. Louis House & Window Cleaning Company, a corporation, begun in justice court, and appealed by defendant to the circuit court. From a judgment there for plaintiff, defendant appeals. Affirmed.

George B. Webster, of St. Louis, for appellant. Rassieur, Kammerer & Rassieur, of St. Louis, for respondent.

REYNOLDS, P. J. This action, instituted before a justice of the peace on an account for office railing, glass partitions and doors, the amount being \$333, resulted in a verdict for plaintiff, from which defendant appealed to the circuit court, where on a trial before the court, a jury having been waived, judgment went for plaintiff for the amount claimed.

[1] It was insisted at the trial in the circuit court that there was no evidence of delivery or acceptance of the goods, and as the sum claimed exceeded \$30, and no memorandum in writing had been executed between the parties, that the transaction fell within the provisions of our statute of frauds. When this objection was made at the trial, counsel for plaintiff, admitting that the contract was not in writing, stated that if they did not show a compliance with the statute, proving an acceptance and delivery of part of the goods sold, plaintiff could not recover. Thereupon plaintiff introduced its testimony and at the close of it defendant asked the court to declare that under the law and the evidence in the case plaintiff was not entitled to recover. The court refused this, whereupon defendant introduced its evidence, and plaintiff introducing evidence in rebuttal, defendant again renewed its request for a declaration to the effect that plaintiff could not recover. This the court refused and rendered judgment in favor of plaintiff and against defendant and its surety on the appeal bond for the amount claimed and interest. Filing a motion for new trial and excepting to the action of the court in overruling it, defendant has duly perfected its appeal to this court.

Here it is insisted that the action is one in the nature of assumpsit for the sale of goods, wares and merchandise at a price of more than \$30, the transaction thus being within the statute of frauds; that as there

was no written contract and no payment on account of the purchase price, the declaration of law asked by defendant should have been given, as the evidence was insufficient to establish delivery and acceptance, both of which must occur to avoid the statute.

[2-4] Counsel very strenuously argues that there is a failure of evidence of acceptance and delivery. Reading the testimony in the case, we are compelled to say that we cannot agree with counsel. There is evidence tending to prove that defendant, desiring to have certain office fixtures, partitions and the like, installed in its place of business, invited a proposal for the work from plaintiff, which proposal plaintiff made in writing, proposing to do the work required for \$436. This proposal was signed by a representative of plaintiff and presented in duplicate to the president of defendant. The parties went over it, made some changes in it and plaintiff left the proposal which it had signed in duplicate, with the president of the defendant company, who retained them but never signed them in behalf of defendant. It also appears that detail plans and specifications of the proposed work were drawn up which were settled upon by both parties. Thereupon plaintiff made up the material and the president of defendant going to plaintiff's factory where the material was, it then being all completed and ready to be installed except that the paint was not dry, and all made in accordance with the plans and specifications, as a witness for plaintiff testified, defendant's president looked it over very carefully. "The entire job was complete," said a witness, when the president of defendant walked into the finishing room in which the material was standing. It was shown to him and he looked at it and said it was satisfactory. "He sized it up very closely and looked at it, and asked me how soon I was going to install it for him," said a witness, and "I told him I would install it the next Tuesday, which I did. \* \* \* As he was leaving the office door, I was standing there and asked him—I says to him, 'How do you like the job,' and he said, 'It surely looks pretty.'" The material was afterwards taken to the place of business of defendant and part of it installed. Plaintiff was proceeding to install all of it, when defendant's president made objection to various parts of it which he wanted changed, as for instance locks, and the manner in which the door was to be hung. It seems that plaintiff agreed to change the character of the locks, but the workman in charge of the job refused to make an alteration in the place and manner in which the door in the partition was located, he saying that this was in accordance with the plans and specifications by which he was working. An officer of plaintiff afterwards arrived at defendant's place and he also refused to make the change, claiming that the material was according to plans and specifications and that the change

would involve an entire change in the work, and, insisting that it was according to plans and specifications, refused to make this alteration. Whereupon the president of defendant declined to proceed any further with the matter, declined to allow plaintiff to go on with the installation of the partition and railing, or to allow it to complete the job. Whereupon, leaving the material so far as delivered on the premises of defendant, plaintiff was forced to discontinue further work. The account is for the value of the partition and railing, there being evidence that they were of the value charged for in the account.

The defense, apart from the statute of frauds, was that the articles were not as contracted for; that there had been no acceptance of them, and no delivery. As before remarked, the case was before the court without a jury and beyond the instructions asking for a verdict for defendant, no instructions or declarations of law were asked or given.

The question as to whether the articles sued for or any part thereof were accepted and received by defendant, both of which must appear, was a question of fact, to be determined by the trial court, and its conclusion is binding upon us, if supported by substantial evidence. There was substantial evidence to show an acceptance of all of the material and delivery of at least part of it. When that happens, the requirements of the statute (section 2784, Revised Statutes 1909) are met. *Rickey et al. v. Tenbroeck et al.*, 63 Mo. 563, loc. cit. 569; *Earl Fruit Co. v. McKinney*, 65 Mo. App. 220.

[5] Acceptance and delivery need not be contemporaneous; acceptance may precede delivery. A delivery, to take the case out of the statute, must be made in pursuance of the contract, and the question whether it was so made or not is for the jury or the court sitting as a trier of fact.

"Due acceptance and receipt of a substantial part of the goods will be as operative as an acceptance and receipt of the whole; and the acceptance may either precede the reception of the article, or may accompany their reception." *Garfield v. Paris*, 96 U. S. 557, loc. cit. 566 (24 L. Ed. 821).

In *Cross v. O'Donnell*, 44 N. Y. 661, it is said (loc. cit. 664):

"There is nothing in the statute which requires that the accepting and receiving should be at the same time. Either may precede the other; and, after both have concurred, the statute has been complied with and the contract becomes operative and valid."

This case presents a state of facts very similar to those in *Vietor v. Stroock*, 5 N. Y. Supp. 650, in which it was held that the facts in evidence were sufficient to take the case out of the operation of the statute. Our conclusion is that there was no error in the action of the circuit court, and its judgment in favor of plaintiff is affirmed.

NORTON and ALLEN, JJ., concur.

**RUTHERFORD v. SAMPLE. (No. 1428.)**(Springfield Court of Appeals. Missouri.  
Dec. 12, 1914.)**1. JUDGMENT (§ 252\*)—APPLICABILITY TO PETITION.**

Where plaintiff's petition justifies the relief to which plaintiff is entitled, it may be granted, though somewhat different from the specific relief sought.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.\*]

**2. MORTGAGES (§ 201\*)—INSURANCE BY MORTGAGEE—PROCEEDS—INTEREST—CREDIT.**

Where a mortgagee does not insure his own interest, but takes out insurance for and at the expense of the mortgagor, the mortgagee, on collecting the policy after loss, is bound to account to the mortgagor for the proceeds.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 532-536; Dec. Dig. § 201.\*]

**3. MORTGAGES (§ 518\*)—DEED OF TRUST—ACCOUNTING.**

Where the beneficiary under a deed of trust purchased a special tax bill against the property, paid general taxes, insurance premiums, etc., prior to a foreclosure sale, and then collected insurance on the destruction of the buildings, he was bound to credit his bid at the sale under the deed on the costs of the sale and against the payments made by him, and credit any balance remaining together with the insurance collected, on the note, paying any balance then remaining after satisfying the note to the grantor, and his failure to do so rendered him liable to the grantor for such balance, with interest at 6 per cent.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1520; Dec. Dig. § 518.\*]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by N. B. Rutherford, as administratrix of the estate of B. F. Rutherford, against T. G. Sample. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Duncan & McCarty, of Caruthersville, and J. R. Brewer, of New Madrid, for appellant. Jere S. Gossom, of Caruthersville, for respondent.

**ROBERTSON, P. J.** B. F. Rutherford, being the owner of a lot in the city of Caruthersville, executed, with his wife, under date of December 19, 1908, to one Sam Jeffress, as trustee, a deed of trust thereon to secure the payment of his note for \$500 of even date therewith to the defendant, due one year after its date, providing for interest at the rate of 8 per cent. per annum, compounded annually if not so paid. Only one year's interest was paid on this, presumably the interest for the first year. A sidewalk was built along this property, a special tax bill issued therefor to D. E. Greene, suit brought thereon against Rutherford and defendant, judgment obtained, special execution issued, the property advertised, and at the sale on July 19, 1911, it was knocked off to W. R. Lacy on his bid of \$350 or \$375. The sheriff's deed was not executed until March 7, 1913, more

than two months after the suit at bar was commenced, and after the term of office of the then sheriff had expired. The sheriff's deed was made to the defendant. After this sale the defendant had the dwelling house on the lot, then occupied by Rutherford as his home, insured against loss by fire, in defendant's name as owner, for the sum of \$1,000. The defendant caused the property to be advertised for sale under the deed of trust for January 2, 1912. At about 4 o'clock on the morning of the day of the sale the house burned; the sale was had, the defendant bid thereat, and the property was sold to him for \$418, and on February 1, 1912, he received the trustee's deed. Thereafter the defendant collected about \$950 from the insurance company for the loss of said building. Rutherford and Lacy testified that it was arranged between them that Rutherford should have the property released for the claim of the special tax bill, upon Rutherford paying him the amount of his judgment and costs, all amounting to \$181.67. Lacy and Rutherford both testified that the sheriff was directed to make a deed to Rutherford. Rutherford, not having the money with which to settle with Lacy, arranged with defendant to make the payment, which defendant did, and the sheriff testified that Rutherford directed the deed to be made to the defendant. No part of Lacy's bid was credited on the note. The sheriff testified that he *thought* he took a receipt from Rutherford for the difference between the amount that was due Lacy on his tax bill, including the court costs, and the amount of the bid, but did not produce the receipt at the trial. Defendant insists that he made the arrangement with the holder of the tax bill for the settlement of the claim, and was implicated in no way with Rutherford. The insurance agent testified that he solicited Rutherford for insurance on the building, but that Rutherford told him that defendant owned the property, "or words to that effect; he said if it was insured, Mr. Sample would have to insure it." Defendant testified that when the insurance was adjusted, Rutherford disclaimed any interest in the property, and the insurance agent testified that he did not remember anything of the kind being stated by Rutherford. About two months before the sale under the deed of trust the defendant wrote to Rutherford as follows:

"Mr. Ben Rutherford—Dear Sir. Now I have turned that over to the Bank of Caruthersville. I told you I would give you 2 months and you told me if I would wait one more month and if you did not sell the place you would turn it over to me. Now you are wanting to wait until the first. It would be the same then. I offered you \$200.00 last summer and now you have fooled around and the place will be sold. I told Dave Huffman to advertise the place if you did not bring up my part. I could have made some money out of the money I paid out to Dennis Greene and others. Ben, you have been treated as well as I could. Let me know.

I told Dave that if you wanted 180 dollars and give possession at once, I would take the place, that was the best I would do after waiting and if you did not want to do that to have the place sold let it bring what it would.

"This is the last time I expect to wait. If you had paid up the interest and settled off the sidewalk business I would have waited, but it is all up now. T. G. Sample."

The testimony discloses that at the time the deed of trust was given Rutherford had insurance on the house, and that a rider was put on the policy to protect defendant. Defendant testified that he went to Rutherford after the execution sale, and tried to get him to have the property insured. Rutherford, who was about 50 years of age and in poor health, moved to Kentucky after the house burned, and after this suit was brought died, and the suit has been revived in the name of his surviving wife as administratrix of his estate. Before his death his deposition had been taken and was used at the trial. This action is brought seeking an accounting and the petition, after alleging the facts, prays for general relief. Several witnesses testified, and were uncontradicted, that the value of the property in November, 1911, was \$1,500. The judgment of the circuit court was for defendant, and plaintiff has appealed.

[1] While it is difficult to ascertain with certainty the exact theory on which the case was disposed of below and is presented here (the facts were all developed without objection), yet as the petition justifies it, we shall dispose of the case according to the equities of the parties, although the relief granted may be somewhat different from the specific relief sought. *Phillips v. Jackson*, 240 Mo. 310, 336, 144 S. W. 112.

The testimony, under the situation of the parties as existing when the execution sale was had, leads to the irresistible conclusion that the defendant, when he paid Lacy, intended it only as a payment to protect his security as beneficiary under the deed of trust, as is done by a mortgagee in the payment of general taxes. His statements in the letter to Rutherford, his declared effort to have Rutherford secure insurance, and his conduct in not having the deed made to him until after this suit was brought, conclusively show this. And why should he cause his property to be advertised and sold under the deed of trust? Whether the fact that the sale to Lacy, and his direction to make the deed to defendant, assuming that he gave such orders, were sufficient to give validity to such a conveyance, is unnecessary to decide, as it is evident defendant desired no such conveyance, except as a weapon to use in this suit.

[2] The only troublesome question in this case is as to the insurance money. If the defendant insured his own interest in the lot without any agreement between him and Rutherford, then plaintiff is not entitled to any of the proceeds of the insurance; but if

defendant arranged with Rutherford for the insurance at the charge of Rutherford, then plaintiff is entitled to have an account taken of the proceeds. *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 376, 385; *Id.*, 81 Mo. 103; *McDowell v. Morath*, 64 Mo. App. 290, 297. It then became necessary to determine if there was an arrangement between defendant and Rutherford whereby defendant was to procure this insurance at the charge of Rutherford. We hold there was. Rutherford testified that he arranged with defendant for him to procure the insurance in his (Rutherford's) name, and charge him with the premium, and that defendant afterwards told him it was \$9; that he (Rutherford) shortly thereafter learned that the policy was issued to defendant, and upon inquiring why this was done, defendant said "it would be all right; the most of it was coming to him." This conversation the defendant did not deny. Defendant admits he went to Rutherford to try to get him to insure the property. The testimony of the insurance agent does not aid defendant. The agent, as above quoted, said Rutherford told him that "if it was insured, Mr. Sample would have to insure it." This rather corroborates Rutherford, because he said he did not have the money to pay for the insurance and had arranged with defendant therefor. Another persuasive reason for upholding this theory is that defendant had no right to take and collect a greater amount of insurance than the value of his interest (*Dick Case*, *supra*, 10 Mo. App. at page 385), which was what Rutherford owed him, and to hold that he did otherwise would be to convict him of a wrong and to permit him to take advantage of it.

[3] The situation, then, at the date of and prior to the sale under the deed of trust, was that Rutherford owed defendant the note, and interest thereon, the amount defendant paid Lacy, the general taxes, if any, paid by defendant on the lot, and the amount paid for the insurance, with interest on said sums from date of payment at the rate of 6 per cent. per annum up until the date of sale. At the date of and after the sale defendant should have credited his bid on the costs of the sale and on the said payments made by him, and if then there was any balance, it should have been credited on the note. After the insurance was collected, he should have credited on the note sufficient of the sum realized therefrom to pay the note in full and paid the balance to Rutherford. *Curtis v. Moore*, 162 Mo. 442, 454, 63 S. W. 80. His failure to do this rendered him liable to plaintiff for said balance, with interest at 6 per cent. per annum from the date of Rutherford's demand, which defendant did not deny, February, 1912, say March 1, 1912.

The judgment is reversed and the cause remanded, with directions to the trial court to take an accounting as above indicated and

to enter judgment for plaintiff for whatever sum is found to be due as a result thereof.

FARRINGTON and STURGIS, JJ., concur.

**ÆTNA LIFE INS. CO. v. KANSAS CITY ELECTRIC LIGHT CO. et al.**

(No. 11182.)

(Kansas City Court of Appeals. Missouri. Dec. 7, 1914.)

**1. INSURANCE (§ 183\*) — INDEMNITY INSURANCE—CANCELLATION.**

Under an indemnity insurance policy which contained a clause providing for the charging of the short term rate if the policy were canceled at the request of the assured and he was not retiring from business, and a special agreement that the policy might be canceled at the end of the first year if the assured concluded not to carry liability insurance, and a lower rate charged, where the policy was canceled at the request of the assured at the end of 27½ months, and it was not shown that the assured retired from business or concluded not to carry liability insurance, the rate is governed by the policy clause, and not by the special agreement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 394; Dec. Dig. § 183.\*]

**2. INSURANCE (§ 146\*) — CONSTRUCTION OF POLICY—DIFFERENT PROVISIONS.**

Different provisions of an indemnity insurance policy must be construed so as to be in harmony with each other and to give effect to each, if possible, although such construction is favorable to the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

**3. EVIDENCE (§ 471\*)—CONCLUSIONS—EXAMINATION.**

In an action by an indemnity insurance company to recover premiums due on a canceled policy, a question, asked one of plaintiff's witnesses on cross-examination, whether certain payments were not made by defendant on the theory that they covered all that was owing at that time, was subject to the objection that the witness could not testify as to the theory upon which the payments were made, and the sustaining of such objection was not error, as excluding evidence of the payment, especially where the witness elsewhere stated that he did not know whether the payments were made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**4. WITNESSES (§ 271\*)—CROSS-EXAMINATION—INSPECTION OF DOCUMENT.**

Where a witness on cross-examination is asked a question referring to a certain document, which the examiner had, the document should be shown to the witness before he is required to answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 958-962; Dec. Dig. § 271.\*]

**5. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—ERROR NOT AFFECTING RESULT.**

Error in excluding testimony as to the time a demand was made by an indemnity insurance company for the balance of premium due on a canceled policy is not prejudicial to the assured, where interest was allowed only from the date of the suit, since the institution of the suit was in itself a demand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Appeal from Circuit Court, Jackson County; Joseph A. Guthrie, Judge.

Action by the Ætna Life Insurance Company against the Kansas City Electric Light Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John H. Lucas, of Kansas City, for appellants. C. S. Palmer and C. A. Lawler, both of Kansas City, for respondent.

TRIMBLE, J. Plaintiff issued to the defendants a policy of indemnity insurance which covered a term of 3 years. At the expiration of 27½ months the policy was canceled by the assured, which right was accorded defendants by the policy. Plaintiff claimed a balance due on the premium earned during the time the policy continued in force, and brought this suit to recover \$1,843.70 as such balance.

The answer admitted the issuance of the policy to the defendants, although the name of one of the defendants does not appear in the policy as shown in the record. The answer further set up that under a special agreement, made at the time the policy was issued and accepted, the premium to be paid in case of cancellation was that actually earned at the time it was canceled, and that when the policy was canceled defendants paid the premium due for the time said policy was actually in force. This agreement was embodied in a "special cancellation privilege" indorsed upon the policy, as follows:

"It is hereby understood and agreed that if, upon the expiration of the first policy year, the assured concludes not to carry public liability insurance, this policy may be canceled on the request of the assured, and the earned premium shall be computed at the rate of four dollars and eighty-five cents (\$4.85) for each one hundred dollars (\$100.00) of wages expended during the period insurance hereunder has been in force. Nothing herein contained shall be held to affect or modify any provision or condition of the policy, other than as above stated."

Plaintiff claims that the premium earned is not governed by the above agreement, but is governed by paragraph K of the policy, which is as follows:

"Cancellation.—K. This policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation shall be effective; the date of cancellation shall then be the end of the policy period, and the earned premium shall be computed and adjusted as provided in condition J hereof. If, however, such cancellation is at the request of the assured and he is not retiring from the business herein described, the compensation for the full original policy period shall be computed upon the basis of the compensation to date of cancellation, and the earned premium calculated at the customary short rates in accordance with the table printed hereon. In any case, where cancellation is at the request of the assured, the minimum earned premium stated in condition J shall be retained by the company. Notice of cancellation mailed to the address of the assured herein given shall be a sufficient notice, and the check of the company similarly mailed a sufficient tender of any unearned premium."

The court held that, under the facts of the cancellation disclosed by the evidence, the

premium earned was to be determined by paragraph K, and rendered judgment for the \$1,843.70 sued for, with interest from date of suit.

[1] The policy was issued to the various named companies, all of whom were collectively referred to therein as "the assured." One hundred dollars was paid on the delivery of the policy as an estimated and minimum premium. The full premium for the three years was to be \$4.60 for each \$100 of "the entire compensation, whether salaries, wages, piece work, overtime, or allowances, earned by all employes of the assured not herein specifically excluded, engaged in the operation of the business herein stated during the period of this policy." According to clause K of the policy the compensation for the original policy period should be computed upon the basis of the compensation to date of cancellation, "and the earned premium calculated at the customary short rates in accordance with the table herein." The total expenditure for wages earned for the 27½ months was \$318,557.77 and on the basis of this actual expenditure for that time the expenditure for the three years would be \$417,021.05, and the premium on that would be \$19,182.97, at \$4.60 per \$100. According to "short-rate table" the rate, when the policy was canceled at 27½ months, would be 86 per cent. of \$19,182.97, which is \$16,497.35. The assured had paid \$14,653.65. So that, if clause K applied, there was still due plaintiff the difference between these two last amounts, which is \$1,843.70. The "special cancellation privilege" provided that the earned premium, in the contingency mentioned therein, should be computed at the rate of \$4.85 for each \$100 of wages expended during the period insurance was in force. According to this rate, as the expenditure for the 27½ months was \$318,557.77, the amount of premium yet due, after deducting \$14,653.65 already paid, would be \$798.45, instead of \$1,843.70.

[2] It is true, as appellant claims, that if the contract contains clauses of doubtful, ambiguous, or conflicting meanings they will be construed most strongly against the insurer. *Ætna Life Ins. Co. v. American Zinc, etc., Co.*, 169 Mo. App. 550, 154 S. W. 827, loc. cit. 829; *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483. But are the two provisions hereinabove quoted so ambiguous, doubtful, or conflicting as to require the application of this rule? Effect must be given, if possible, to all parts of the instrument. Different portions are not to be deemed conflicting, if they can be harmonized and both upheld. If they apply to different situations or circumstances, then each should be applied to the situation it was designed to meet, and neither robbed of its force and effect. The rate is to be determined under paragraph K, if the policy is canceled at any time by the assured and the latter is not going out of business. If,

however, at the expiration of the first policy year, the assured decides not to carry public liability insurance and the policy is canceled, then the rate is to be figured under the other provision.

There was no showing that defendants decided not to carry public liability insurance, and the option to discontinue the policy at the end of the first year was not exercised at the time the special cancellation privilege required. Although there was some evidence that one of the defendants—either the Consolidated Electric Light & Power Company or the Standard Electric Light Company—had ceased business because its franchise had expired, yet there was no showing when this occurred, whether before or after the expiration of the three years the policy had to run. If any of the companies went out of business, this was a matter peculiarly within the knowledge of the defendants, and should have been alleged and proved. *Kitchen v. Railway*, 59 Mo. 514, loc. cit. 519; *State ex rel. v. Schar*, 50 Mo. 393; *State v. Schatt*, 128 Mo. App. 622, loc. cit. 635, 107 S. W. 10. However, the evidence showed that the other companies remained in existence and continued in business, and were so at the time of the trial; that the Kansas City Electric Light Company furnished the reports of wages paid upon which the premiums were based, so that there was not a "retiring from business" on the part of the assured within the meaning of the policy.

[3] On the cross-examination of one of plaintiff's witnesses defendant asked him if certain payments were not made in 1909 and included in the question these words, "on the theory that we were paying you whatever we owed you at the time." Objection was made to the witness testifying as to the theory on which defendants made the payments, and this objection was sustained. It is now claimed that this was error, because defendants had a right to prove payment. But the objection sustained was not to the witness testifying to any fact, but only to his idea of what defendants' intent was in making payment. In addition to this, the witness had previously said he knew nothing about payments having been made, and after the objection was sustained defendants were allowed to ask the witness whether such payments were in fact made, and he answered, as before, that he could not say.

[4, 5] In cross-examining another witness, who testified that plaintiff made demand for the amount due in October, 1910, defendant asked him a question in reference to a receipt which the questioner evidently had before him, but which was signed by other parties, and it was not disclosed whether it related to the transaction under consideration or not. Objection was made to the question, unless the receipt referred to was shown to the witness, so that he might see it and know what it was and to what it applied. The

paper was not shown to the witness and the objection was sustained. The writing should have been shown to the witness being cross-examined. 1 Greenleaf on Ev. § 463; *Pre-witt v. Martin*, Adm'x, 59 Mo. 325. The witness was being cross-examined as to the demand he had made, and the court allowed this to be done fully. He testified that a demand was made for the balance. So far as the materiality of the date when demand was made is concerned, this became immaterial when the court allowed interest, not from date of demand, but from the date of the institution of suit. This was a demand. *Trimble v. Kansas City Ry. Co.*, 180 Mo. 574, 79 S. W. 678, 1 Ann. Cas. 363.

We are unable to see wherein any error was committed by the trial court. Consequently the judgment is affirmed. All concur.

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**BOSTON v. ALEXANDER.** (No. 11228.)  
(Kansas City Court of Appeals. Missouri.  
Dec. 7, 1914.)

**1. SALES (§ 384\*) — BREACH OF CONTRACT — MEASURE OF DAMAGES.**

The measure of damages for the wrongful refusal of a purchaser of a cow to receive it is the difference between the contract price and the market value of the property at the time of the refusal.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1093-1107; Dec. Dig. § 384.\*]

**2. DAMAGES (§ 9\*) — RIGHT OF ACTION FOR NOMINAL DAMAGES.**

An action at law for the breach of a contract to purchase a cow, by refusing to receive it, may be maintained for nominal damages where the vendor has suffered no pecuniary loss.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 7-15; Dec. Dig. § 9.\*]

**3. SALES (§ 40\*) — FALSE REPRESENTATIONS.**

A seller of a cow does not falsely represent its soundness by a statement that the cow's bag was all right, that she was a good milch cow, though he knew at a time previous, while in the possession of his vendor, the cow's bag had been injured by breachy tendencies and had given ropy, dark colored milk.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 79-83; Dec. Dig. § 40.\*]

**4. SALES (§ 53\*) — DEFECT IN COW — QUESTION FOR JURY.**

Where, during the time that the owner of a cow had her, the cow gave good milk and her bag was all right, the court could not say, as a matter of law, that she was afflicted with a permanent defect from the fact that six or eight months before, while in the hands of another owner, she had given bad milk, due to a temporary injury to her bag.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. § 53.\*]

**5. EVIDENCE (§ 13\*) — JUDICIAL NOTICE — BREACHY TENDENCY OF COW.**

Judicial knowledge cannot be taken that a cow once breachy is incurable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 18; Dec. Dig. § 13.\*]

**6. SALES (§ 269\*) — CAVEAT EMPTOR — PUFFING.**

The rule of caveat emptor will not permit the mere puffing of his ware by a vendor to be tortured into the expression of an intention to warrant the property as sound and free from

defects which are open to the discovery of the purchaser upon a reasonable examination.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 746; Dec. Dig. § 269.\*]

**7. SALES (§ 266\*) — IMPLIED WARRANTY — REPRESENTATIONS.**

No agreement of the vendor to warrant against defects will be implied from mere representations of soundness.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743, 746, 747, 754-759; Dec. Dig. § 266.\*]

**8. SALES (§ 268\*) — IMPLIED WARRANTY — DEFECTS NOT DISCOVERABLE.**

With respect to defects not discoverable on ordinary inspection, but which are known to the vendor, an agreement to warrant will be implied from representations of soundness, and when the vendor knows the use the vendee intends to make of the property, the sale for such use at a sound price carries an implied warranty that the property is free from hidden defects which would impair its usefulness for such purposes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 762, 764, 765; Dec. Dig. § 268.\*]

**9. SALES (§§ 261, 270\*) — DEFECTS IN COW — WARRANTY.**

An owner of a cow, who knew that at a time previous, while in the hands of his vendor, the cow's bag was injured by breachy tendencies, and gave for a short time ropy, dark colored milk, does not, on a sale of the cow, expressly or impliedly warrant that the cow was free from defects by a statement to the buyer that the cow's bag was all right and that the cow was as straight as a whip as far as he knew, where he had observed no breachy tendencies or a failure to give good milk while he had her, and the buyer examined the cow.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735, 766-768; Dec. Dig. §§ 261, 270.\*]

Appeal from Circuit Court, Putnam County; George W. Wanamaker, Judge.

Action by S. M. Boston against James Alexander. From a judgment of the circuit court on appeal from a justice court, directing a verdict for defendant, plaintiff appeals. Reversed and cause remanded.

Mills & Mills, of Kirksville, for appellant.  
J. C. McKinley, of Unionville, for respondent.

JOHNSON, J. Plaintiff brought this suit in a justice court to recover for a cow he sold defendant for \$65 and defendant refused to receive. The trial in the circuit court on appeal ended in a directed verdict for defendant, and plaintiff appealed. The sale and attempted delivery of the cow at the price alleged is conceded, as is also the fact that defendant refused to receive her and returned her to plaintiff on the ground of a breach of warranty.

The testimony of plaintiff, which was the only evidence heard by the court, discloses the following facts: Plaintiff, a farmer, called upon defendant, his neighbor, at the latter's home, to borrow money to buy feed for his stock, and a conversation ensued which culminated in an understanding that defendant, who said he wished to buy a good farm milch cow for the use of his family, would call at plaintiff's farm the next day and look at three cows which plaintiff owned and from

which he might make a selection, and pay the agreed price in hay at \$8 per ton. Plaintiff priced one of the cows at \$60 and another at \$70. The next day, defendant, being unable to keep the appointment in person, sent his brother-in-law, also a farmer, with full authority to select and purchase one of the cows. The agent inspected the three cows and his choice fell upon the one plaintiff had priced at \$70. Plaintiff had owned her three or four months, having purchased her from another farmer in the neighborhood, who had informed him that during the preceding summer (this was in February), she had given ropy, dark colored milk on three or four occasions after bruising her bag in jumping over logs or fences, and that he had put a yoke on her to prevent her from further indulging her breachy propensity. She still carried marks of the yoke on the back of her neck and jaws, but plaintiff states that during the time he had owned her she had exhibited no vicious inclination, and had not worn a yoke, that she gave good, pure milk, and that her bag was not in a diseased or injured condition. He was allowed to testify, without objection, to facts and circumstances corroborative of his opinion that the occasional giving of dark and ropy milk may be due to temporary causes, and is not necessarily indicative of a permanent defect. Before buying the cow defendant's agent asked plaintiff about "her milking qualities and if her bag was all right," and was told that "her bag was all right, and that this cow is as straight as a whip as far as I know." No other questions were asked by the agent and plaintiff did not go into the subject of the cow's history before he owned her, but confined his praises to the time of his ownership. The agent haggled over the price, and plaintiff finally agreed to sell her for \$65, whereupon the agent bought her and drove her to defendant's farm. The next day defendant returned her to plaintiff's farm, and she has since been there in the possession of plaintiff.

It appears, from a conversation plaintiff afterward had with defendant's agent, that a neighbor called at defendant's farm, and, seeing the cow, asked "if that wasn't the Mat Hurley cow," and, being answered in the affirmative, said: "Well, that cow gave bad milk last summer." This information moved defendant to return the cow. Plaintiff called the following day upon defendant and insisted that he accept the cow, but defendant refused on the ground that plaintiff had warranted her, and that she did not fill the warranty. He offered to take one of the other cows, but plaintiff refused, saying, "When I trade, I trade to keep, I don't never back out of a trade"—and with this Parthian shot he left and proceeded to the justice court where he brought this suit. He states the cow was worth \$75 at the time of defendant's breach of the contract, and, therefore, admits he has suffered no pecuniary damage. In unwillingly permitting the cow to be returned, and

in since keeping and using her, his position became that of a vendor who, tendering full performance of the contract of sale, is met with the wrongful refusal of the vendee to receive the property.

[1, 2] In such case the liability of the vendee is to respond in damages for the loss sustained by the vendor, such loss being measured by the difference between the contract price and the market value of the property at the time of the vendee's breach. Measured by this rule, plaintiff has sustained no actual damage, since he states the market value of the property exceeded the sale price and in no event may he recover more than nominal damages.

"In an action by vendor against vendee, for the nonacceptance of property sold or contracted for, the measure of damages is the amount of actual injury sustained by vendor in consequence of such nonacceptance, which is usually the difference between the price agreed to be paid and the value of the property." Rickey v. Tenbroeck, 63 Mo. 563.

But an action at law for the breach of a contract may be maintained by the injured vendor for nominal damages, where it appears he has suffered no pecuniary loss.

"The damages which the law infers from the infraction of a legal right are absolute, they cannot be controverted, they are the necessary consequence. The act complained of may produce no actual injury; it may, in fact, be beneficial, by adding to the value of the property, or by averting a loss which would otherwise have happened, and still it would be equally true in law and in fact that it was, in itself, injurious, if violative of a legal right. The implied injury is from that circumstance." Fulkerson v. Eads, 19 Mo. App. 620; Holt v. Railway, 87 Mo. App. 203; Brevard v. Wimberly, 89 Mo. App. 331.

Since plaintiff is entitled to nominal damages a peremptory instruction in favor of defendant should not have been given, unless the court was justified in the conclusion, as one of law, that plaintiff, by his own admissions, is shown to have made false representations to defendant and his agent which amounted to a warranty of soundness and suitability to the purposes for which plaintiff knew the cow was being purchased.

[3-5] There is no evidence of false representations in plaintiff's statement of what was said by him. He stated the cow's bag was all right and that she was a good milch cow, and from his description of her she was just what he represented, her to be. The court could not say as a matter of law that she was afflicted with a permanent and injurious defect from the fact that six or eight months before she had given bad milk, especially in the face of testimony tending to show that such a result might have been due. and, in this instance, was due, to temporary causes which no longer existed. There was no representation that the cow was not breachy, and the gist of plaintiff's testimony is that she was not subject to that vice at the time of the sale. Judicial knowledge cannot be taken of the fact, if it be a fact, that such a vice is incurable, and that when a cow

once becomes breachy she always remains so. On the hypothesis that what plaintiff said about the cow constituted a warranty that she was sound and suitable for the purposes of her intended use, the testimony of plaintiff relating to her condition at the time of the sale was sufficient, at least to take the case to the jury on the issue that the representations were true. But we go further and hold that the evidence fails to disclose either an express or an implied warranty.

"A representation of soundness, or of any other quality in an article sold, is not necessarily a warranty. The evidence of the representation, where a warranty is alleged, is admissible, and, in connection with other circumstances, may establish the warranty, but before a jury should find such representation to have been a warranty, they should be satisfied that it was 'so intended and understood, and not to have been the expression of mere matter of opinion.'" *Matlock v. Meyers*, 64 Mo. 531.

[8] The rule of caveat emptor is still in force in this state, and that rule will not permit the mere puffing of his wares by a vendor to be tortured into the expression of an intention to warrant the property as sound and free from defects which are open to the discovery of the purchaser upon a reasonable examination, nor may a warranty be implied from such praise. The buyer must avail himself of the opportunity offered him to inspect the property, and, if he fails to make reasonable use of such opportunity, he will not be heard to complain of defects which a proper inspection would have disclosed.

[7] No agreement of the vendor to warrant against such defects will be implied from mere representations of soundness. As long as buyer and seller stand upon equal ground each may deal with the other at arm's length, and the seller may sound the praises of his wares without danger of incurring the liability of a warrantor.

[8] With respect to defects not discoverable upon ordinary inspection, but which are known to the vendor, an agreement to warrant will be implied from representations of soundness, and where the vendor knows the use the vendee intends to make of the property the sale for such use at a sound price carries an implied warranty that the property is free from hidden defects which would impair its usefulness for such purposes. *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602, and cases cited.

[9] It does not appear from the evidence before us that any of the defects claimed by defendant were not discoverable upon a reasonable inspection. Defendant's agent availed himself of the opportunity to examine the cow. The marks of the yoke were plainly to be seen, and they proclaimed that she had been breachy. It is not shown that the defect in the bag and udders, if any existed, was not discoverable to an experienced farmer making a reasonable examination. If these were patent defects plaintiff's represen-

tation of soundness, despite his knowledge that defendant intended to purchase the cow for the use of his family, was a mere representation, and evidenced no intention to warrant against such defects. Of course the evidence of defendant may be such as to raise an issue of fact on the subject of warranty, or no warranty, but, as the case now stands, plaintiff neither expressly nor impliedly warranted the cow, nor was he guilty of false representations as to soundness.

The judgment is reversed and the cause remanded. All concur.

### ROARING FORK POTATO GROWERS' ASS'N v. C. C. CLEMENS PRODUCE CO. (No. 10659.)

(Kansas City Court of Appeals. Missouri. Dec. 7, 1914.)

#### 1. SALES (§ 340\*)—REMEDIES OF SELLER.

Where the subject of a sale is property owned at the time by the seller, the buyer's refusal to accept it when tendered entitles the seller either to treat the property as belonging to the buyer and to ship it to him or hold it subject to his order and recover the full purchase price, or to sell it for the buyer's account at the best price obtainable and recover the difference between the proceeds and the contract price, or to treat the sale as ended and recover from the buyer as damages the difference between the contract price and the market value of the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.\*]

#### 2. SALES (§ 340\*)—REMEDIES OF SELLER.

Where property sold must be manufactured or procured by the seller, the contract of sale is executory; and if the buyer, before the property is manufactured or procured, notifies the seller that he will not accept the property, the seller cannot force acceptance, save where equity will warrant specific performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.\*]

#### 3. SALES (§ 340\*)—REMEDIES OF SELLER—EXECUTORY CONTRACT.

Where plaintiff sold potatoes which it did not own at the time but had procured, before defendant attempted to countermand the order plaintiff could treat the potatoes as the property of defendant and ship them to it and recover the full purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.\*]

Appeal from Circuit Court, Jackson County; Jos. A. Guthrie, Judge.

Action by the Roaring Fork Potato Growers' Association against the C. C. Clemens Produce Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Sebree, Conrad & Wendorff and Charles W. Taylor, all of Kansas City, for appellant. E. McD. Colvin, of Kansas City, for respondent.

JOHNSON, J. This is an action for the purchase price of six car loads of potatoes. It was tried in the circuit court, without a

jury, on an agreed statement of facts, and the judgment was for defendant.

Plaintiff, a dealer in potatoes in Carbondale, Colo., on September 9, 1910, "sold to defendant, a produce dealer in Kansas City, 25 cars of potatoes for the price of \$1.05 per 100 pounds," under an agreement that as shipments were made they were to be billed to plaintiff's order, with directions to notify defendant, and that upon payment of sight drafts drawn for the purchase price, with bills of lading attached, defendant could obtain the shipments at Kansas City. Plaintiff did not own the potatoes at the time of the sale, but afterwards procured them and actually delivered 19 of the 25 cars in the time and manner provided in the contract. "On September 21, 1910, after all of said 25 cars of potatoes had been purchased by plaintiff for the special purpose of complying with its contract of sale of said 25 cars, \* \* \* and after 19 cars \* \* \* had been shipped to and received and paid for by defendant, and 3 of the remaining cars were loaded and the other 3 were ready to be loaded upon the railroad cars," defendant telegraphed plaintiff requesting that further shipments be postponed, and on the following day telegraphed that no more shipments would be received. Plaintiff answered, refusing to accept such cancellation of the remainder of the order, and notifying defendant that six car loads would be shipped. This notice was followed by shipments of the six cars. Drafts were drawn for the purchase price and, with bills of lading attached, were forwarded to Kansas City through banks for collection. Payment was refused by defendant, and it is not known what disposition the railroad companies made of the potatoes. They were not received by defendant nor returned to plaintiff, and neither party received any proceeds from them.

The petition declares upon a sale of 6 car loads of potatoes delivered to defendant on board cars at Carbondale at various dates between and including the 21st and 26th days of September, 1910, and makes no mention of the sale and delivery of the 19 car loads accepted and paid for by defendant. The answer alleges a "countermand of all orders given the plaintiff for potatoes" and the attempted delivery of the six cars in controversy after plaintiff was notified that defendant would not accept them.

It is argued by defendant that plaintiff had no right to "ship these potatoes after the order had been countermanded and due notice had been given plaintiff that defendant would not accept the potatoes. It was the duty of plaintiff, under the law, to dispose of the potatoes at the best price it could secure, reducing the damages as far as possible, and collect its damages for breach of contract."

[1] In effect defendant admits, as it must, that it was without legal justification in attempting to cancel the contract, and that

plaintiff, the vendor, was not bound to accept such cancellation, but could stand upon the contract. Where the subject of the sale is property owned at the time by the vendor, the refusal of the vendee to accept it when tendered affords the vendor a choice of three remedies, viz.: First, he may treat the property as belonging to the vendee, ship it to him, or hold it subject to his order and recover the full purchase price; or, second, he may sell it for the account of the vendee at the best price obtainable and recover the difference between the proceeds and the contract price; or, third, he may treat the sale as ended and the property as his own and recover from the vendee the difference between the contract and market values of the property. *Dobbins v. Edmonds*, 18 Mo. App. 307.

[2] Where the property sold must be procured or manufactured by the vendor, the contract of sale is executory; and if, while executory, the vendor receives notice from the vendee of the latter's intention not to accept the property on tender of delivery, the vendor cannot force a sale upon the vendee (except in those instances, in equity, of specific performance), and may only have recourse, in law, to his remedy for the recovery of the damages he has sustained from the vendee's breach of contract which occurs by the giving of such notice.

[3] But in the present case the contract was not executory. True, at the time of the sale plaintiff did not have the potatoes to fill the order, but it procured them and had them ready for shipment before defendant gave notice of its intention not to receive them. An executory contract of sale is regarded as executed when the vendor acquires the property for delivery pursuant to the contract, but is entitled to retain possession until the purchase price is paid by the vendee. As is said in *St. Louis Range Co. v. Kline-Drummond Mercantile Co.*, 120 Mo. App. 438, 96 S. W. 1040:

"If the contract has been so far performed by the seller that the property is ready for delivery before he has notice or knowledge of the buyer's intention to decline acceptance, he may treat the property as belonging to the buyer, hold it subject to the latter's order, and recover the full agreed price." *Koenig v. Boat Mfg. Co.*, 155 Mo. App. 685, 135 S. W. 514; *Frederick v. Willoughby*, 136 Mo. App. 244, 116 S. W. 1109.

In such case the vendor is not required to sell the property for the account of the vendee, and, instead of holding it subject to the latter's order, he may ship it pursuant to the contract, subject to his right to retain its possession until payment of the purchase price. *Estis v. Harnden*, 153 Mo. App. 381, 134 S. W. 43; *Dobbins v. Edmonds*, supra; *Oehler v. Fruit Co.*, 162 Mo. App. 446, 142 S. W. 811; *Dehner v. Miller*, 166 Mo. App. 504, 148 S. W. 953; *Danforth v. Walker*, 37 Vt. 239; 24 Am. & Eng. Encyc. of Law (2d Ed.) 1058 et seq.; *Benjamin on Sales* (7th Ed.) § 83. In the authority last cited the author tersely states the rule "that if a ven-

dor sell a thing not belonging to him, and subsequently acquires title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser," subject, of course, where so provided in the contract, to the right of the vendor to hold possession until the purchase price be paid or tendered by the vendee.

The election of remedies made by plaintiff in the present case was one it had a legal right to make, and there is no reason in law for denying plaintiff recovery for the agreed price of the potatoes. Defendant had the opportunity of protecting itself by paying the drafts and accepting the potatoes, and is in no position to complain of plaintiff's performance of the strict letter of the contract.

The judgment is reversed, and the cause remanded. All concur.

### BROWN v. WALL. (No. 13821.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

#### 1. LANDLORD AND TENANT (§ 130\*)—IMPLIED COVENANT—DELIVERY OF POSSESSION—INTERFERENCE BY POLICE.

Where a lessor tendered to the lessee the key to the premises which were then unoccupied, and the lessee began moving his goods in, but was stopped by the police because he was a negro and his locating there would cause trouble, there was no breach of the lessor's implied covenant of peaceable possession, since that requires only that the lessor had authority to make the lease, and that the premises should be open for occupancy, and not that the lessee would be placed in physical possession against the interference of a stranger.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470-481; Dec. Dig. § 130.\*]

#### 2. LANDLORD AND TENANT (§ 184\*)—DEPOSIT OF RENT—RIGHT TO RETAIN.

The right of the lessor to the sum paid by the lessee to bind the lease and which was to be applied on the lease two months rent accrues through the contract, and not by reason of the occupancy, and therefore the lessor may retain such sum when the lessor tenders possession but the police prevent the lessee from entering.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 743-750; Dec. Dig. § 184.\*]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by Robert A. Brown against Charles W. Wall. Judgment for the plaintiff, and defendant appeals. Reversed.

John C. Vaughan, of St. Louis, for appellant. Willis H. Clark, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages and to recover \$150 paid on a contract of lease. The finding and judgment were for plaintiff, and defendant prosecutes the appeal.

[1] It appears that on February 4, 1910, plaintiff leased an apartment from defendant situate at the northwest corner of Vandeventer avenue and Olive street, in the city of St. Louis, for the term of one year, to commence on the 15th day of that month. By the terms of the agreement entered into between the parties, plaintiff was to pay a rental of \$75 per month, but was to pay \$150 in advance, which should be applied in payment of the last two months' rent under the lease. It was agreed, too, that while plaintiff's term should not commence until the 15th day of February, 1910, he might move into the premises and occupy the same at any time theretofore he chose to elect. On the day the contract was entered into—that is, February 4, 1910—plaintiff paid defendant \$150 to be applied in payment, as before stated, on the last two months' rent for the term. A day or two thereafter plaintiff was given the key to the premises, for they were then unoccupied, and his wife visited them with a view of preparing to move in and taking possession. On the occasion of this visit, she swept the rooms and prepared them for occupancy. Thereupon plaintiff elected to take immediate possession under the agreement and remove his household goods thereto. On February 7th or 8th, he caused two loads of his household goods to be transported and placed in the apartment, and the third load was being unloaded when the police of the city of St. Louis interfered. About this time plaintiff's wife reached the premises with a view of arranging the furniture in position and establishing the home, when she met with objection from a police officer against further proceeding thereabout. It appears plaintiff and his wife are negroes, and, it is said, the police asserted that colored people would not be tolerated in that neighborhood. Thereupon plaintiff's wife remonstrated with the officer, saying her husband had leased the premises, and as a result of the controversy she was taken into custody and lodged in the city jail. On the following day, her husband, plaintiff, called to see her at the jail, and he, too, was arrested and incarcerated therein, where both remained until the following day. Upon their release, or soon thereafter, plaintiff caused his furniture to be removed from the apartment, stored it, and failed to occupy the premises or pay further rent therefor. There is no evidence even suggesting an inference that the police acted either for or at the instance of defendant (lessor), and the case is one where the lessee was prevented from occupying the premises by the intrusion of a stranger. On these facts, the suit proceeds to recover the \$150 paid defendant on the contract of lease which was to be applied on the last two months' rental of the term and damages flowing from a breach of the implied covenant for quiet enjoyment, which embraces the obligation to confer possession on the lessee.

There can be no doubt that, where there is a contract of lease and no stipulation to the contrary, there is an implied covenant on the part of the lessor that when the time comes for the lessee to take possession under the lease, according to the terms of the contract, the premises shall be open to his entry. Such is the English doctrine which has been adopted and obtains in this state, as will appear by reference to *Hughes v. Hood*, 50 Mo. 350. In the case cited, the suit of the lessee for damages on this implied covenant, because of its breach, was sustained, where it appeared a former tenant of the landlord held over at the expiration of his term and thus prevented the entry of the lessee therein. Such, indeed, were the facts of the English case of *Coe v. Clay*, 5 Bing. 440, the rule of which was adopted and approved by our own Supreme Court in *Hughes v. Hood*. But cases of that character are to be distinguished from this one, for here all of the evidence concedes that the premises were open and ready for entry at the beginning of the term and the lessee was prevented from enjoying them by the act of an entire stranger over whom the lessor had no control. It is true the term of the lease was to commence—that is, for the payment of rental—on the 15th day of February, 1910; but by agreement of the parties plaintiff was entitled to enter on any day theretofore after February 4th, on which the contract was made, that he might choose to do so. The evidence is conclusive and the case concedes that plaintiff elected to move in and to take possession on Saturday, the 7th or 8th day of February, and went about so doing by actually installing two loads of furniture in the premises and attempting to install the third. He and those representing him had possession of the key at the time as well. Therefore the case is to be viewed as if the right of possession in the lessor had ceased under the terms of the lease and the right of entry on the part of the lessee attached, for, indeed, he had entered through removing his goods thereto and was in possession at the time. This being true, the covenant of the landlord must be regarded as having been kept intact, and no breach appears which may be attributed to him. The implied covenant of the lessor under consideration extends no further than to guarantee he had authority to make the lease and that the premises should be open for occupancy when the contract gave to the lessee the right to enter. See *King v. Reynolds*, 67 Ala. 229, 234, 42 Am. Rep. 107; 24 Cyc. 1050, 1051. Therefore the distinction between cases casting liability on the lessor for his failure to give possession of the prem-

ises under the lease is to be taken with respect to the time the right of the lessor over the possession ceases and that of the lessee begins. If it appears, as in *Hughes v. Hood*, supra, that some one was occupying the premises at the time the lessee's right of entry accrues and he is prevented because of that fact from entering, then liability is entailed on the lessor for the breach. But, on the other hand, if the premises are open for entry at the time the right of the lessee to enter accrues under the lease, the covenant is fulfilled, and a subsequent impediment offered by a stranger is regarded as a trespass against the rights of the lessee, and no liability is entailed on the part of the lessor because of it. See *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107. It is certainly true that the implied covenant alone without more does not impose upon the lessor the obligation to physically place the lessee in possession of the premises. It is enough if the premises are open for occupancy at the time the right of the lessee to enter accrues. See *Browder-Manget Co. v. Edmondson*, 7 Ga. App. 843, 68 S. E. 453; *Podalsky v. Ireland*, 137 App. Div. 257, 121 N. Y. Supp. 950; 24 Cyc. 951. Here, as before stated, the evidence is conclusive, and the case concedes that the premises were open for occupancy at the time plaintiff's (lessee's) right thereto accrued, and he was prevented from enjoying them through no fault of the lessor, but rather because of the act of a stranger. Therefore the damages sued for do not flow from a breach of the implied covenant in the lease, but rather from the act of the police officer who prevented him from enjoying the premises. There was no duty on the part of the lessor to restrain them, as the interference occurred after his obligation was fulfilled, and the trespass was one against the estate of the plaintiff (lessee).

[2] There can be no doubt of the right of the lessor to retain the \$150 rent paid under the lease, for such right accrues to him through the contract, and not at all from the fact of occupancy, unless it be in the case of a common-law tenancy at will where rent becomes due only in consequence of occupation. See *Taylor's Landlord & Tenant* (9th Ed.) § 15; and *Forder v. Davis*, 38 Mo. 107. Here the contract of lease expressly stipulated for the payment of \$150 as above stated, and it appearing that defendant in no wise breached his covenant, of course, the amount may not be recovered from him.

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur..

**LA RUE v. KEMPF. (No. 13792.)**

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

**1. DIVORCE (§ 323\*)—SUPPORT OF CHILDREN—LIABILITY OF FATHER—MAINTENANCE.**

In the absence of a provision made for the support of minor children, the father continues primarily liable therefor after divorce, and the mother, having their custody, may ordinarily recover from him for their maintenance, if he fails or refuses to furnish it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. § 323.\*]

**2. DIVORCE (§ 323\*)—SUPPORT OF CHILDREN—LIABILITY OF FATHER—PROVISION.**

Where, in connection with divorce proceedings, a settlement is made between the parents, whereby the father makes provision for the future support of minor children, which is accepted by the mother as satisfactory, he is no longer liable in an action by her for their support furnished by her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. § 323.\*]

**3. DIVORCE (§ 324\*) — SUPPORT OF MINOR CHILDREN—ACTION FOR MAINTENANCE—DEFENSES.**

In an action by a divorced wife to recover from her former husband for the support of their minor children, whose custody had been awarded to her, the fact that he had repeatedly offered to take the children himself and support them was no defense to the action; and her refusal to permit him to take them did not justify his refusal to provide for their maintenance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. § 324.\*]

**4. JUDGMENT (§§ 540, 713\*)—FORMER ADJUDICATION—EFFECT OF JUDGMENT AS BAR.**

A judgment upon the merits is an absolute bar to a subsequent suit on the same claim or demand, and concludes the parties and their privies, not only as to every matter offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1079, 1099, 1234—1237, 1239, 1241, 1247; Dec. Dig. §§ 540, 713.\*]

**5. JUDGMENT (§ 735\*)—FORMER ADJUDICATION—ESTOPPEL—IDENTITY OF ISSUES.**

Where a second action between the same parties is upon a different claim or demand, the former judgment is an estoppel only as to the matters in issue or points controverted, upon the determination of which the finding or verdict was rendered, so that, where it is sought to apply the estoppel of a judgment, the inquiry always is as to the matters actually litigated and determined in the former action, and not the matters that might have been litigated and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. § 735.\*]

**6. JUDGMENT (§§ 735, 741\*)—CONCLUSIVENESS—INCIDENTAL AND COLLATERAL MATTERS.**

The judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter which came collaterally in question, though within its jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. §§ 735, 741.\*]

**7. JUDGMENT (§ 713\*)—"RES ADJUDICATA"—THEORY.**

The doctrine of "res adjudicata" or former adjudication goes upon the theory, on the one hand, that it is to the interest of the state that there should be an end of litigation, and, on the other hand, that the individual shall not be twice vexed for the same cause; the estoppel raised being in the nature of an estoppel by verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234—1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

**8. JUDGMENT (§ 951\*)—RES JUDICATA—MATTERS DETERMINED—PAROL EVIDENCE.**

Where the record, in a former action, does not show what questions were determined therein, that may be shown by extrinsic parol evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808—1812; Dec. Dig. § 951.\*]

**9. JUDGMENT (§ 744\*) — CONCLUSIVENESS — MAINTENANCE OF CHILDREN—QUESTION OF LAW OR FACT.**

In an action by a divorced wife, who had been awarded the custody of minor children, to recover from her former husband for their maintenance for ten years, defended on the ground that he was released from liability by an agreement under which he had paid her a sum of money in satisfaction of his liability for their maintenance, judgment for defendant in a former suit by plaintiff to recover on an account for their maintenance for 13 months, in which defendant pleaded the same agreement as a release, was, as a matter of law, an estoppel to the subsequent action; and it was error to leave it to the jury to say whether the same questions were presented and submitted in the former action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278—1281; Dec. Dig. § 744.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Alice La Rue against Paul Kempf. Judgment for defendant, and plaintiff appeals. Affirmed.

H. C. Whitehill, of St. Louis, for appellant. Schnurmacher & Rassieur, of St. Louis, for respondent.

ALLEN, J. This is an action whereby plaintiff seeks to recover from her former husband for the support and maintenance of two minor children of plaintiff and defendant, alleged to have been provided by plaintiff during the period from October 1, 1900, to October 1, 1910. The cause was tried before the court and a jury, resulting in a verdict and judgment for the defendant, and the plaintiff appeals.

The petition alleges that the plaintiff and defendant were married in 1896, and lived together as husband and wife until on or about December 24, 1898, during which time there were born of the marriage two children. It is alleged that the defendant abandoned plaintiff and said minor children on or about December 24, 1898, and took up his residence in the state of North Dakota, where, on September 1, 1899, he obtained a

decree of divorce from plaintiff, by the terms of which decree plaintiff (defendant in the divorce proceeding) was awarded the custody and control of said minor children. And it is averred that from October 1, 1900, to October 1, 1910, the defendant neglected and refused to provide for said minor children, or either of them, except that he furnished plaintiff approximately \$200 on account thereof; that plaintiff provided for their support and maintenance, the reasonable value thereof being \$50 per month, a total of \$6,000. And judgment is prayed for the sum of \$5,800.

The answer denies that defendant abandoned plaintiff or said minor children, but admits that he took up his residence in the state of North Dakota, where he obtained a decree of divorce from plaintiff, as alleged by her. The answer further denies that defendant neglected and refused, during the period in question, to provide for said minor children, and avers that he expended certain sums of money for their support during such time. And it is alleged that defendant repeatedly offered to take said children and rear them, but that plaintiff refused to permit him so to do. The answer further avers that, at the time of the divorce proceedings in North Dakota, defendant paid to plaintiff the sum of \$4,500 for the maintenance and support of herself and said minor children, during the latter's minority, which plaintiff accepted and received and for a suitable and satisfactory provision thereof. The answer then alleges that on October 3, 1900, plaintiff instituted against defendant an action before a justice of the peace in the city of St. Louis to recover \$500 for the support and maintenance of said children from September 1, 1899, to October 1, 1900; that in said action judgment was rendered by the justice of the peace in favor of defendant; that plaintiff thereupon prosecuted an appeal to the circuit court of the city of St. Louis, where, upon a trial de novo, judgment was again rendered for defendant, from which no appeal was prosecuted. And it is averred that the same identical issues were involved in said former suit as are involved herein; and defendant pleads said judgment "as a determination and adjudication of the question of his liability to plaintiff for the support of said minor children, and pleads the same as a former adjudication and in bar of this action."

The evidence discloses that plaintiff retained counsel to represent her in said divorce proceedings, and filed an answer therein which, however, was afterwards withdrawn. It appears that the sum of \$4,000 was paid by defendant to counsel representing plaintiff in the North Dakota court; and defendant testified that he permitted plaintiff to retain the proceeds of the sale of certain household furniture amounting to \$500, and that, prior to the hearing of the divorce

suit, an agreement was entered into between counsel representing plaintiff and defendant, respectively, therein, evidenced by a stipulation filed in court, and which the court evidently considered in entering its decree. By this stipulation it was agreed that the charge of adultery made against plaintiff (defendant in said action) would be withdrawn, and that the suit would proceed, if at all, upon other grounds set forth in the complaint, and that plaintiff (defendant there) should have the care and custody of the two children born of the marriage. By the stipulation it was further agreed:

"That the plaintiff (defendant here) has made suitable and satisfactory provision for the maintenance and support of the defendant (this plaintiff) and said minor children."

The decree entered in the divorce suit on September 1, 1899, merely grants this defendant a divorce, and awards to this plaintiff the custody and control of said minor children.

On October 1, 1900, plaintiff, who in the meantime had married one La Rue, instituted an action before a justice of the peace in the city of St. Louis to recover the sum of \$500 as for moneys expended by her from September 1, 1899, to October 1, 1900, for the support and maintenance of said minor children, as is alleged in the answer. The suit was based upon an account filed. The defendant appeared in the action, and judgment was rendered in his favor. Thereupon plaintiff prosecuted an appeal to the circuit court of said city, where the cause was tried de novo before the court without a jury, and at the conclusion of the trial the court gave a declaration of law to the effect that plaintiff could not recover; and, plaintiff not taking a nonsuit, judgment was entered for defendant, from which no appeal was prosecuted.

Plaintiff denied having taken an appeal from the judgment of the justice of the peace, in the former action, and denied that she appeared and testified therein in the circuit court, though the affidavit for appeal appears to have been made by her, and the cause was prosecuted to a finality in the circuit court. As there were no pleadings in the former action, and as the judgment entered therein was merely a general judgment for defendant, the record itself does not show what were the questions therein presented and submitted. However, there was parol evidence to the effect that the defense interposed therein was, as here, that the monetary settlement in North Dakota, and the stipulation above referred to, operated to relieve defendant from any liability to plaintiff for the support and maintenance of these children. And briefs filed in the circuit court in the former suit, by counsel for plaintiff and defendant, respectively, were admitted in evidence in the instant case, from which it appears that the above-mentioned defense was the only controverted question in the trial of the former cause.

There is much conflict in the evidence as to what provision the defendant made for his children during the period here in question. Plaintiff's testimony is to the effect that he contributed practically nothing to their support and maintenance. Defendant's testimony, on the other hand, is that he thus expended large sums of money during such period; and the evidence shows that he at least materially contributed to the children's support, and that, at the time of the trial below, he was making monthly payments to a juvenile court officer for their support and maintenance. And defendant declared that plaintiff was addicted to strong drink, and had squandered therefor moneys given her for the support of the children, which plaintiff denied. It is unnecessary, however, to rehearse in detail the evidence relating to these matters.

It is unnecessary to state fully the many assignments of error before us. They pertain to the giving of instructions at defendant's request, to the refusal to give certain instructions offered by plaintiff, and to the admission and exclusion of evidence. Such thereof as appear to be of consequence will be noticed later.

[1] I. It cannot be doubted that, in the absence of a provision made for the support and maintenance of minor children, the father continues primarily liable therefor after divorce; and that the mother, having the care and custody of such children, may ordinarily recover from the father for their support and maintenance, should he fail or refuse to furnish the same. See *Rankin v. Rankin*, 83 Mo. App. 336; *McCloskey v. McCloskey*, 98 Mo. App. 393, 67 S. W. 669; *Shannon v. Shannon*, 97 Mo. App. 119, 71 S. W. 104; *Lukowski v. Lukowski*, 108 Mo. App. 204, 83 S. W. 274; *White v. White*, 169 Mo. App. 40, 154 S. W. 872. This, however, is conceded here; the defenses being: (1) That the agreement evidenced by the stipulation above mentioned, and the payment of the said sum of money thereunder, released defendant from liability to plaintiff in the premises; (2) that defendant had nevertheless stood ready and willing to take the children and support and rear them; and (3) the plea of former adjudication.

[2] II. Though a father will ordinarily remain liable for the support and maintenance of his children after divorce, and the law will imply a promise on his part to reimburse the mother therefor, where the latter has the custody of such children and supports and maintains them, nevertheless where, in connection with the divorce proceedings, a settlement is made between the parents, whereby provision is made by the father for the future support of the children, which is accepted by the mother as and for a suitable and satisfactory provision therefor, this court has held that the father will no longer be liable in an action by the mother for such

support and maintenance furnished by her, whatever liability may otherwise continue to attach to the father growing out of his natural and legal duty to provide for his offspring. See *Dixon v. Dixon*, 107 Mo. App. 682, 82 S. W. 547. And the ruling appears to be sound.

In the case before us, if the money paid by the defendant to plaintiff's counsel, at the time of the divorce proceeding, was paid under an agreement that the same should constitute a full and satisfactory provision for the future support and maintenance of the children, and was accepted by plaintiff as and for a suitable and satisfactory provision therefor, then it seems clear that plaintiff cannot maintain this action. The stipulation offered in evidence shows upon its face that such was the agreement in the premises, under which the money was paid plaintiff. But plaintiff denied that her attorney was authorized to insert such a provision in the stipulation, and contended that the money was received by her from her former husband as her "interest in his estate," and in no measure for the support of the children. And the matter was submitted to the jury by instructions for both plaintiff and defendant.

III. We think that no error was committed in refusing instructions offered by plaintiff; and, in the view which we take of the case, it is unnecessary to review such refused instructions. Neither do we perceive any error in the admission or exclusion of evidence, other than with respect to the admission of certain evidence now to be briefly noticed in connection with an instruction given for defendant, of which plaintiff complains.

Defendant was permitted, over plaintiff's objections, to testify in effect that he was, and had always been, ready and willing to take the children and support them, and had frequently offered to do this, but that plaintiff would not permit him so to do. And defendant's instruction, above mentioned, told the jury that if they found and believed that defendant had "at all times been ready and willing to maintain, support, and provide for such children, but that plaintiff refused to permit him to do so," then their verdict must be for defendant. The instruction may be well enough in form. That is to say, if the defendant ever sought to provide for the maintenance and support of the children, while they remained in the care and custody of the plaintiff, but was not permitted by her so to do, then doubtless plaintiff could not recover. But there is no such evidence here, so far as we have been able to discover from the record.

[3] Defendant's testimony (which was admitted over plaintiff's objections) is that he repeatedly offered to take the children himself and support and rear them. But this constituted no defense to plaintiff's action. Defendant, if not otherwise relieved therefrom, could not escape liability for the sup-

port and maintenance of his minor children by offering to take them from the mother, who had been awarded their custody; and her refusal to permit this would afford no justification to him for refusing to provide for their support and maintenance. See *McCloskey v. McCloskey*, 93 Mo. App. 393, 67 S. W. 669. It was error to admit this testimony, and likewise to give the instruction in question, predicated upon such testimony. Such errors would ordinarily be highly prejudicial in a case of this character; but, for reasons which will be made to appear later, we think that they are here not reversible errors.

IV. As to the plea of former adjudication: The court evidently proceeded upon the theory that the judgment in the former suit was conclusive upon plaintiff here, precluding her recovery, if it was determined and adjudicated therein that the defendant was relieved from liability in the premises by reason of the agreement in North Dakota and the payment of the money by defendant thereunder. The matter, however, was referred to the jury by an instruction which directed a verdict for defendant in the event that the jury found that in said former action "the same questions were presented and submitted by the plaintiff and defendant as have been presented and submitted in the present cause."

It is earnestly insisted by learned counsel for appellant that the judgment in the former action cannot be invoked here, in bar or as an estoppel, and that the court should have so declared, as a matter of law. This is said to be so, particularly for the reason that the cause of action is not the same as that sued upon in the former action, and that the proof of the items claimed by appellant in this proceeding, covering the period of ten years in question, was necessarily not the same as that adduced in support of the former demand for support and maintenance of the children for the prior period of 13 months.

As to the effect of the former judgment, it may be well to refer to certain general principles which should be here borne in mind. There is more or less confusion in the cases relative to the matter of former adjudication; and it is, of course, not possible to reconcile all of the cases, much less the dicta to be found therein. However, the principles here involved appear to be clear and firmly established in our jurisprudence.

[4-6] There is a marked difference between the effect of a former judgment as a bar to the prosecution of a second action upon the same identical claim or demand and the estoppel arising from the previous adjudication of some question upon which liability hinges in the subsequent suit, where the latter involves a different cause of action. Here it seems quite clear that the former suit between these same parties was not to enforce

the same identical cause of action as that now sued upon. There the demand was for a different amount, claimed to be due for an entirely different period of time; and though the same questions may have been involved, affecting the right of recovery, the cause of action was not identically the same as that here sued upon, and the rules to be applied are those which must obtain in such a situation.

In the famous case of *Rex v. The Duchess of Kingston*, 20 How. St. Tr. 538, 2 Smith, Lead. Cas. (8th Ed.) 784, the statement of the law governing the force and effect of judgments and decrees was formulated as follows:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a (court of) concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

In the leading case of *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, the rule is stated as follows:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. \* \* \* But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In *Cyc.* the rule is thus stated:

"The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit.

otherwise not. Or as the rule is otherwise stated, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And, in order that this rule should be applied, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first." See 23 Cyc. p. 1300 et seq.

In *Bigelow on Estoppel*, loc. cit. 45, after the discussion of many interesting cases, it is said:

"The rule in these cases is that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral suit, in the same or any other court, at law, or in chancery, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it; and this, too, whether the subsequent suit is upon the same or a different cause of action. The cases upon this subject are very numerous."

That, where the cause of action in the subsequent suit is not the same identical cause of action as that involved in the former, the judgment is nevertheless conclusive as to all questions which were actually in issue and adjudicated in the former proceeding is abundantly supported by the authorities, both in this state and elsewhere. See *Garland v. Smith*, 164 Mo. loc. cit. 22, 64 S. W. 188; *Gymnastic Soc. v. Hagerman*, 232 Mo. 693, 135 S. W. 42; *Dickey v. Helm*, 48 Mo. App. loc. cit. 118; *Barkhoefer v. Barkhoefer*, 98 Mo. App. loc. cit. 381, 382, 67 S. W. 674; *Paving Co. v. Field*, 132 Mo. App. 628, 97 S. W. 179; *Roberts v. Neal*, 187 Mo. App. loc. cit. 115, 119 S. W. 461; *Hartwig v. Insurance Co.*, 167 Mo. App. loc. cit. 180, 181, 151 S. W. 477; *Freeman v. Barnum*, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355; *Koehler v. Mfg. Co.*, 146 Cal. 335, 80 Pac. 73; *Markley v. People*, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; *Reynolds v. Mandel*, 175 Ill. 615, 51 N. E. 649; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; *Freeman on Judgments*, § 253; 24 Am. & Eng. Ency. Law (2d Ed.) p. 780.

[7-9] In the case before us, though the two suits covered different periods of time, and were hence founded upon different causes of action, nevertheless if, in the former suit, the question whether defendant was released from liability to plaintiff in the premises, by reason of the previous agreement aforesaid, was submitted, and was adjudicated in defendant's favor, then the judgment resting thereupon must operate as an estoppel here, where the very same matter is drawn in controversy, and upon which liability hinges.

The doctrine of *res adjudicata*, or former adjudication, proceeds upon the theory, on the one hand, that it is to the interest of the state that there should be an end to litigation (*interest republicæ ut sit finis litium*), and, on the other hand, that the individual should not be twice vexed for the same cause

(*nemo debet bis vexari pro eadem causa*). Here the estoppel raised is rather in the nature of estoppel by verdict (see *Markley v. People*, supra, 171 Ill. loc. cit. 263, 49 N. E. 502, 63 Am. St. Rep. 234; *Reynolds v. Mandel*, supra, 175 Ill. loc. cit. 615, 51 N. E. 649), but the general principle is the same, and so is the result, whatever it may be denominated.

Nor can it be doubted that, where, as here, the record in the former suit does not show what questions were determined therein, this may be shown by extrinsic evidence, though it be by parol. See *Spradling v. Conway*, 51 Mo. 51; *West v. Moser*, 49 Mo. App. 201.

The trial court left it to the jury to say whether the "same questions were presented and submitted" in the former suit as here. But we have reached the conclusion that the court should have passed thereupon, as a matter of law. Relative to the trial of the former cause in the circuit court, all of the evidence is that the defense predicated upon the agreement in North Dakota was the only controverted question in the case. This is undisputably shown by the briefs of counsel filed therein, which were properly admitted in evidence here to show what was presented and submitted in the other suit. In the brief filed therein for plaintiff it is said:

"Plaintiff brings this suit to recover money paid by her in support of these children. Defendant contends that the stipulation offered in evidence by him defeats her action."

Then follows certain argument, and points made, with authorities cited in support thereof.

In the brief filed therein by defendant, the latter's counsel concedes defendant's liability for support of his minor children, in spite of the divorce and the awarding of the custody thereof to the plaintiff, unless provision has been made for their support. Reference is then made to the settlement made with plaintiff in North Dakota, and to the stipulation in question whereby it was agreed that "suitable and satisfactory provision" had been made for the maintenance and support of plaintiff and said children, which is asserted to be a complete defense. In these briefs, which constitute the only written evidence as to what was actually adjudicated in said proceeding in the circuit court, there is no suggestion or intimation that any question was involved other than that to which we have referred. And to the same effect is the parol testimony adduced. This being so, it appears that the evidence on this question was such as to leave room for no possible conclusion other than that there was presented and submitted in the former suit, and determined in defendant's favor, the chief defense (other than this plea of former adjudication) here pleaded and relied upon. Hence, without saying when, in general, such a question is for the court and when for the jury, we are convinced that the

court should here have passed thereupon, as a matter of law, and should have declared that plaintiff could not recover in this action, as requested by defendant at the close of the case. In this view, the errors noted above cannot affect the result.

Our conclusion is that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

# MAYGER v. NICHOLS. (No. 13819.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

## 1. CORPORATIONS (§ 492\*)—LIABILITY OF CORPORATION FOR TORT OF AGENT.

Where the secretary of a corporation converted corporate stock sent in to be transferred on the books, the corporation is not liable for his act, unless he was acting for the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1903; Dec. Dig. § 492.\*]

## 2. JUDGMENT (§ 701\*)—PERSONS CONCLUDED—SECRETARY OF CORPORATION.

The holder of corporate stock mailed the certificate to the secretary for transfer on the books, and the secretary converted the shares. *Held*, that as the corporation was not liable for the tort of the secretary, unless he was acting for its benefit, and as there is no privity between a master and servant where the subject of the litigation is one not concerning the employment, the judgment in favor of the corporation was not conclusive against the right of the shareholder to recover from the secretary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1228; Dec. Dig. § 701.\*]

Appeal from St. Louis Circuit Court; William M. Kinsey, Judge.

Action by George E. Mayger against John R. S. Nichols. From a judgment sustaining demurrer to the reply, plaintiff appeals. Affirmed.

Frank Y. Gladney, of St. Louis, for appellant. Frank E. Ritchey and Campbell Allison, both of St. Louis, for respondent.

NORTONI, J. This is an action in trover as for conversion. The court sustained a demurrer to plaintiff's reply to defendant's counterclaim, and plaintiff appeals from that judgment.

Plaintiff sued defendant as for the conversion of 430 shares of stock in the St. Louis Mining & Milling Company of Montana, said to be owned by him. Among other things, defendant answered by setting up a counterclaim to the effect that plaintiff converted to his own use 70 shares of stock in the same corporation owned by him. In reply to this counterclaim, plaintiff pleaded, as a bar to the right of recovery for the 70 shares of stock, a former adjudication in a suit wherein the present defendant was plaintiff and the St. Louis Mining & Milling Company of Montana was defendant. The court sustained a demurrer to this reply in the

view that the subject-matter of defendant's counterclaim is not *res adjudicata* because of the former suit between defendant as plaintiff and the corporation as defendant.

It appears that plaintiff is the secretary of the St. Louis Mining & Milling Company of Montana, and defendant was an agent engaged in selling stock for that corporation. Defendant insists that the 500 shares of stock (the conversion of 430 of which is declared upon in plaintiff's petition and the conversion of the 70 shares of which is declared upon in his counterclaim) were given to him by the corporation as a bonus. On the other hand, plaintiff insists the 500 shares of stock belonged to him, and that he merely loaned them to defendant for a purpose. At any rate, it appears defendant mailed 70 of the shares of stock to plaintiff, as secretary of the mining company, with the request to cause them to be transferred on the books, and plaintiff retained them as his own. Thereafter defendant, as plaintiff, sued the St. Louis Mining & Milling Company in conversion for the value of the 70 shares of stock, alleging that the corporation had converted them through the act of its secretary, Mayger, plaintiff here. On a trial of this issue, the finding and judgment were for the corporation. Subsequently plaintiff, Mayger, secretary of the corporation, instituted this suit against defendant as for the conversion of the remaining 430 shares of stock, and thereupon defendant in his answer counterclaimed against plaintiff as for the conversion of the 70 shares of stock before mentioned, which were involved as the subject-matter of his former suit against the corporation. The judgment having been for the defendant corporation in the former suit with respect to these shares of stock, plaintiff pleads it in his reply to defendant's counterclaim as *res adjudicata* of the subject-matter here. So much of plaintiff's reply to defendant's counterclaim as is necessary to look to in disposing of the question presented by the appeal is as follows:

"The St. Louis Mining & Milling Company of Montana, mentioned in the counterclaim of the cause herein, is the same corporation that was a party defendant to the former proceeding just described; that the 70 shares of stock mentioned in said counterclaim are the same shares of stock involved in the former proceeding; that the certificate No. 760 is the same as that described in the former proceeding; that the acts and deeds set out in said counterclaim as a cause of action against this plaintiff are the same acts and deeds of which the said J. R. S. Nichols complained in the former proceeding; that in said former proceeding the said J. R. S. Nichols offered and introduced evidence to prove that the plaintiff herein, George E. Mayger, was secretary and agent of the St. Louis Mining & Milling Company of Montana, and that, as such officer and agent, he converted to his own use the said certificate of stock referred to as No. 760, both in the former proceeding and in said counterclaim; that in said former proceeding the said J. R. S. Nichols did not prove or attempt or offer to prove that said corporation had con-

verted said stock in any other manner or by any other means than through and by the acts of its secretary, who was the present plaintiff, George E. Mayger."

[1,2] The court sustained defendant's demurrer to this reply in the view that, though a judgment had been given for the defendant corporation in the former suit, it did not conclude the matter in favor of plaintiff, Mayger, as he may have (even though secretary of the corporation) converted the stock individually. It is argued this was error, for it is said since the wrongdoing of the corporation was alleged to be exclusively an imputed wrong of Mayger, acting as secretary, the judgment for the corporation in the former suit necessarily implies that there was no wrongdoing on the part of Mayger. We are unwilling to accede to this view, for it may be that Mayger, plaintiff, individually converted the 70 shares of stock to his own use so as to entail no obligation whatever on the corporation, of which he was secretary, to respond. If such be true, the cause of action is not identical in the two cases, for in the former case the alleged tort was that of the corporation, and in this one the tort is that of the secretary, Mayger, unless the case reveals the essential privity which renders the act of Mayger that of the corporation. It is conceded that Mayger, the secretary of the corporation, who is plaintiff here, was not a party to the former suit against the corporation; and, this being true, the judgment in favor of the company of which he is secretary could inure to his benefit only through the doctrine of respondeat superior, affording the privity. The case is not one where it is clear the agent was acting within the scope of his authority for the master corporation, for, because of the tort involved, the implication of law excludes that view. In order to have rendered the corporation liable for the tort of its secretary in converting the stock, something more than the mere relation of corporation and officer must appear; that is to say, something tending to show that plaintiff, Mayger, was acting for the company. In such circumstances alone would the tort of Mayger be the tort of his principal, the corporation of which he was secretary. On the other hand, if Mayger, the secretary of the company, as an individual, converted the 70 shares of stock to his own use aside from his employment and without authority or ratification on the part of the company, he alone should respond therefor. The mere fact that plaintiff was secretary of the company does not render him a privy to the judgment acquitting the corporation of a tort committed by him outside of the line of his authority and apart from his employment. It is certain that there is no privity between master and servant where the subject of the litigation does not concern the employment, or the relation of employer and employé is

not a feature of the subject-matter in controversy. See 23 Cyc. 1265. The principle of respondeat superior is beside the case, for it does not appear that Mayger was acting for and with the authority of the corporation at the time he is alleged to have converted the stock for which the company was acquitted of fault in the former judgment. If plaintiff converted the 70 shares of stock, acting for himself, and without authority from the company, he is, of course, liable to respond in this suit therefor.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

DAVID v. CLARKSVILLE CIDER CO.  
(No. 18834.)

(St. Louis Court of Appeals. Missouri.  
Dec. 8, 1914.)

1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF MASTER.

In an action for injuries received by a servant when a barrel fell from a stack nearby, evidence held insufficient to show that the fall was due to either the vibration of the ground at the place where the barrels were stacked, or to the negligent stacking of the barrels, or, if they were negligently stacked, that the employer had knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

2. MASTER AND SERVANT (§ 196\*)—INJURIES TO SERVANT—LIABILITY OF MASTER—NEGLIGENCE OF FELLOW SERVANT.

Where a cooper employed by a cider company was required, when so directed, to assist in stacking barrels ready for delivery, other servants who stacked the barrels which subsequently fell on the cooper were fellow servants, for whose negligence the master is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 375-378, 486-488; Dec. Dig. § 196.\*]

3. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—LIABILITY OF MASTER.

The doctrine of *res ipsa loquitur* does not apply where the injury to a servant was caused by the falling of a barrel from a stack near where the servant was working.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from St. Louis Circuit Court; W. M. Kinsey, Judge.

Action by Edward David against the Clarksville Cider Company. From an order refusing to set aside the nonsuit suffered by plaintiff at the trial, plaintiff appeals. Affirmed.

Kinealy & Kinealy, of St. Louis, for appellant. Holland, Rutledge & Lashly, of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries sustained by plaintiff while in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

employ of the defendant corporation as its servant. Plaintiff suffered a nonsuit below, and, after unsuccessfully moving to have the same set aside, prosecuted his appeal to this court.

At the time of plaintiff's injury he was employed by the defendant as a cooper, engaged in repairing barrels and kegs. From time to time he was also called upon to assist in handling barrels. Defendant's business was conducted in a building formerly used as a brewery, and beneath the premises were large excavations or artificial caves, in one of which plaintiff worked when performing the duties of a cooper. Above such caves was a yard or court, through which a driveway extended. On Saturday afternoon, November 4, 1911, plaintiff was directed to assist in rolling certain barrels from the sidewalk adjoining the premises into the yard, where they were to be stacked. It appears that the work of putting in and stacking such barrels was ordinarily performed by certain "porters," though plaintiff at times assisted both in rolling in barrels and in stacking them. Plaintiff testified, however, that upon this Saturday afternoon he stacked none of the barrels, but rolled in some of them shortly before 5 o'clock, his quitting time, and that others did the stacking. On the following Monday morning plaintiff was ordered to assist in loading barrels upon a wagon which had driven into the yard upon the driveway. It appears that along one side of the driveway stood a row of barrels standing upright, upon the top of each of which was a barrel lying lengthwise or horizontally, and that about two feet back of this row stood a row of stacks or tiers, each consisting of three upright barrels, one upon another. At the time of plaintiff's injury he was engaged in lifting one of the horizontal barrels lying upon the top of another in the first row along the side of the driveway. As he took hold of this barrel to load it into the wagon, a barrel from the top of the nearest of the tiers consisting of three barrels fell upon his hand, crushing two of his fingers so that they had to be amputated.

The negligence charged in the petition, and which it said caused plaintiff's injuries, is that the surface of the driveway, by reason of the caves beneath the same, was caused to shake and vibrate from the passage of cars and vehicles along the adjoining street, which caused the barrels stacked along or near the same to become "insecure and dangerous and likely to fall"; and that the barrels in the stack or tier from which the barrel in question fell were carelessly and negligently piled or stacked; which matters are alleged to have been known to defendant, or could have been discovered by defendant by the exercise of ordinary care. And it is averred that, by reason of the negligence charged, the driveway was a dangerous and unsafe place for plaintiff to work. The answer is a general denial and a plea of contributory negligence.

[1] Plaintiff's evidence is to the effect that the surface of the premises above the caves was caused to vibrate considerably, from time to time, by cars and heavy vehicles passing along the nearby street, and particularly by wagons driving through the yard along the driveway, which shook the barrels stacked in the yard. But there is positive testimony that no wagon was moving in the driveway at the time of plaintiff's injury; and there is no evidence that any vibration from cars or vehicles passing along the street actually caused, or contributed to cause, this barrel to fall, nor proof of facts from which this could be fairly and reasonably inferred.

One witness, when asked if he saw the barrels shaking in the yard at the time of the accident, said: "Yes, sir; I did; I seen them." In answer to further questions, he said that this was due to the heavy vehicles moving through the driveway, saying that a wagon was moving through the same at the time to which he referred. He then stated that no wagon went through the driveway at "the same moment" when plaintiff was injured, and could not have done so for the reason that two wagons were then standing therein. This testimony cannot be taken to mean that there was any shaking of the barrels by reason of the alleged vibration of the premises at the time when the barrel fell upon plaintiff's hand, and there is none other tending to show this; and it is certain that there was nothing shown as to the effect of any vibration, if such there was, upon the stack of barrels in question, nor anything tending to show that the top barrel thereof was thereby caused to fall. What the tendency of the surface of the premises to vibrate had to do with the falling of the barrel, if anything, is purely a matter of conjecture.

As to the alleged negligent piling of the barrels, nothing whatsoever appears as to the manner in which the barrels were stacked in the tier from the top of which the barrel in question fell. Nor is there any evidence whatsoever as to the condition of this tier or stack prior to the falling of the barrel therefrom. True, there is plaintiff's general statement as to the happening of the accident, viz.: "The barrels was piled too shaky; that is how it happened." But this is clearly a mere conclusion on his part, and without probate force; for he repeatedly declared, that he did not observe this stack of barrels at all prior to the accident, and paid no attention whatsoever to its condition or how the barrels were stacked therein. The barrel which plaintiff was lifting gave no lateral support to the tier behind it from which the barrel fell; for the testimony is that there was an intervening space of about two feet between the barrels at the edge of the driveway, which were being loaded, and the row of tiers behind them. It is clear, therefore, that the falling of the barrel was not due to any act of plaintiff in removing lateral support from the stack containing

it. But there is no evidence that the barrels had been negligently piled in this stack, in such manner as to render the stack dangerous and likely to fall. And if the stack was, in fact, in a dangerous condition (as to which nothing appears), it is not shown that the defendant, through a vice principal, or otherwise, had any notice thereof; nor is there anything in the record to show when such dangerous condition, if any, began, unless, indeed, we are to infer from the fact alone that the barrel fell that the stack from which it fell was negligently erected on the preceding Saturday afternoon; whereby a dangerous condition was created which continued until the time of the accident.

[2] From the record before us we think nothing appears that can cast liability on defendant for plaintiff's injuries. Plaintiff and his collaborators who stacked the barrels in this yard were undoubtedly fellow servants; for, though plaintiff says that he did not assist in stacking these barrels, it was his duty to assist in the stacking and loading of barrels when so directed, and he did so from time to time. But it is said that, though this be conceded, defendant is nevertheless liable, for the reason that it was negligent in using this "shaky place" for piling barrels, and that such negligence on its part co-operated with that of a fellow servant to produce the injury. But this theory we regard as untenable, for the reason that liability cannot be predicated upon the vibration of the premises under the evidence relating to this matter, which we have set out above. And conceding, for the sake of argument only, that liability may arise from the supposed negligence of plaintiff's collaborators in piling the barrels, upon the theory that a dangerous condition of the premises was thereby created, which defendant by the exercise of ordinary care could have discovered, surely such negligence in the erection of the stack of barrels or the existence of such dangerous condition must be in some manner established.

[3] It is not suggested that the maxim, "*Res ipsa loquitur*," here applies; nor does it. It is said not to be inapplicable merely because of the existence of the relation of master and servant (*Klebe v. Distilling Co.*, 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. [N. S.] 140); but for the reasons mentioned in the case just cited, if none other, the doctrine would not here apply. And it is clear that, in the absence of any evidence touching the matter, we are asked to infer a negligent erection or dangerous condition of the stack of barrels from the fact alone that a barrel fell therefrom.

The case is not like that of *Rigsby v. Oil Well Co.*, 115 Mo. App. 297, 91 S. W. 460; *Id.*, 130 Mo. App. 128, 108 S. W. 1128; where the defendant's foreman created a dangerous place, through the negligent erection of a pile of lumber, and, knowing such place to be

unsafe, ordered the plaintiff to go into it. Neither are the facts quite such as were present in *Bradley v. Forbes Tea & Coffee Co.*, 213 Mo. 320, 111 S. W. 919, where a recovery was denied the servant; for there a stack of bags of coffee bulged and fell because of the taking away of another such stack which gave it lateral support, and in which work the plaintiff was engaged.

The case is much like that of *Bowman v. Car & Foundry Co.*, 226 Mo. 53, 125 S. W. 1120, where plaintiff was engaged in helping to pile pig iron near an old pile thereof, which fell and injured him. In an opinion by Valliant, J., it is said:

"There was no evidence of negligence on the part of the defendants to justify the submission of the case to the jury. \* \* \* There was no evidence that the pile that fell was negligently constructed, or that it contained a defect that was known or could have been known by the exercise of ordinary care. \* \* \* The petition charges that it 'had been so piled and placed as that it was liable to fall over at any time,' but it does not specify in what particular it was defective. Under that averment (assuming, without conceding, that it was sufficient to state an act of negligence) the plaintiff could have introduced evidence to prove any defect in the construction or location of the pile that would indicate its dangerous condition, as that it was leaning to one side, or was not compact, or otherwise, but the only thing he attempted to prove was that it was higher than usual. He offered no evidence to show that the height rendered it dangerous. Men of experience in that business could have been found to testify that the height of seven or eight feet rendered the pile dangerous, if such was the fact, but neither the court nor the jury could take judicial cognizance that such was the fact. \* \* \* Yet, with no evidence except that the pile was seven or eight feet high, the jury was left to conjecture that from that fact alone it was dangerous. \* \* \* The burden was on the plaintiff to show that the pile fell because of its own inherent defect, and that it was a defect which the defendants knew, or would have known if they had exercised reasonable care."

In the case before us no evidence whatsoever was adduced touching the condition of this stack of barrels. It does appear that it consisted of three barrels, one upon another; but there is nothing to suggest that this rendered it dangerous. Regardless of other questions involved, had the demurrer been overruled, the jury would have been left to grope in the dark, and authorized to base a verdict, if they so saw fit, upon a mere conjecture that the stack of barrels was in a dangerous condition, through negligent piling or otherwise, and that such dangerous condition had existed for such length of time and was of such character as to enable the defendant to discover the same by the exercise of ordinary care. We do not mean to say that liability could attach to the master for a dangerous condition created by the negligence of plaintiff's fellow servants in piling these barrels, had such been shown. As to this it is sufficient to say that nothing whatsoever appeared as to the erection of the stack which fell, or its condition prior to the accident. But see *Sutherland v. Lum-*

ber Co., 149 Mo. App. 338, 130 S. W. 40; Dickinson v. Jenkins, 144 Mo. App. 132, 128 S. W. 280.

Neither is it necessary to decide whether plaintiff himself should be regarded as negligent, as a matter of law. In his testimony he reiterated time and again that he did not look to see how the barrels were piled, did not notice them, or pay any attention whatsoever to the condition of the stacks. Under the circumstances shown in evidence, the question of plaintiff's negligence in failing to observe his surroundings, or to take any heed for his own safety, would be an important factor to be reckoned with, were the case not disposed of on other grounds. See Bradley v. Forbes Tea & Coffee Co., supra.

The judgment must be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

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#### DUBACH v. DYSART. (No. 11239.)

(Kansas City Court of Appeals. Missouri. October Term, 1914.)

LANDLORD AND TENANT (§ 252\*)—LIEN ON CROPS—LIABILITY OF PURCHASER FROM TENANT—"KNOWLEDGE."

Under Rev. St. 1909, § 7888, giving a landlord a lien on the crops for the rent for the year and section 7896, making any purchaser of any crop grown to the "knowledge" of the purchaser thereof on demised premises on which the rent is unpaid liable for the value thereof, a purchaser of a crop from a tenant under a lease for less than one year is not chargeable with constructive notice of the landlord's lien, because of the recording of the lease, notwithstanding sections 2809 and 2810, authorizing the recording of any instrument whereby any real estate may be affected, and providing that every instrument so recorded shall impart notice to all subsequent purchasers, though the lease provides that the landlord shall have a lien on the crops for the rent, since as between the landlord and the tenant the crop was personalty, and since there is no statute declaring that the record of a lease shall impart constructive notice that crops grown on lands described therein shall be subject to a lien for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1002, 1022-1026, 1029; Dec. Dig. § 252.\*]

For other definitions, see Words and Phrases, First and Second Series, Knowledge.]

Appeal from Circuit Court, Andrew County; Alonzo D. Burns, Judge.

Action by Christian Dubach against C. R. Dysart. From a judgment for defendant, plaintiff appeals. Affirmed.

Lawrence Bothwell, of St. Joseph, for appellant. Stephen Fee and Booher & Williams, all of Savannah, for respondent.

TRIMBLE, J. This is a suit brought by a landlord to recover the value of certain corn raised on demised premises and sold by the tenant to the defendant. Section 7888, R. S. Mo. 1909, gives the landlord a lien upon the

crops grown on the demised premises in any year for the rent that shall accrue for such year, which lien shall continue for eight months after the rent becomes due; and the last clause of section 7896, R. S. Mo. 1909, provides that:

"If any person shall buy any crop grown on demised premises upon which any rent is unpaid, and such purchaser has knowledge of the fact that such crop was grown on demised premises, he shall be liable in an action for the value thereof, to any party entitled thereto," etc.

The corn was grown during the season of 1912 and was sold to defendant by the tenant, Lance, somewhere between December 15, 1912, and January 1, 1913. There was no evidence tending to show that defendant knew the corn was grown on leased premises, or that Lance, vendor of the corn, was a tenant. In fact, at the beginning of the season, March 1, 1912, he was the owner of the land on which the crop was planted and told defendant he had bought the place. Shortly thereafter, however, Lance sold the land to one Reed and took a written lease from him from May 2, 1912, to March 1, 1913, in which the rent was due and payable on said last-named date. The lease was signed by the lessor and lessee, but was not acknowledged. On July 18, 1912, Reed conveyed the land to plaintiff and indorsed on the lease an assignment thereof to plaintiff and duly acknowledged the assignment before a notary public. The assignment was of "my interest in the within lease as lessor," and plaintiff at once had the lease and assignment recorded. Defendant knew nothing of Lance having sold his land, or of having taken the lease thereon, or of plaintiff having acquired the land and the lease. At the time the corn was hauled to him in town, he supposed Lance still was the owner of the land.

There being no evidence to show that defendant had knowledge of the fact that the corn was grown on demised premises, plaintiff relied upon the recorded lease to give defendant constructive notice of that fact, and asked an instruction telling the jury that the record of the lease was notice of its contents and of the fact that the corn raised on the land described in said lease was subject to the landlord's lien for rent. The court refused to give this instruction. The jury found for defendant, and plaintiff appealed, claiming that the failure to give said instruction was error.

It would seem that the "knowledge" spoken of in the statute means actual knowledge, or such actual notice as would put defendant upon inquiry, and does not mean constructive notice such as would be given by a public record. The lease ran from May 1, 1912, to March 1, 1913, less than a year. It was therefore personalty and not real estate. As between the landlord and the tenant, the growing crop was personalty, and certainly when the corn was gathered and hauled away

from the premises by the tenant it was personal property. Now, there is no statute saying that the record of a lease shall impart constructive notice that crops grown on lands described therein are subject to the landlord's lien for rent. The record of a deed would not be constructive notice of its contents were it not made so by statute. *Kelley v. Vandiver*, 75 Mo. App. 435, loc. cit. 440. Consequently, section 2810, R. S. Mo. 1909, was enacted for this purpose and performs this office. Neither would the record of a chattel mortgage be constructive notice of its existence if there were no statute giving it such effect. *Jordan v. Pence*, 123 Mo. App. 321, loc. cit. 324, 100 S. W. 529, and authorities cited. Consequently, section 2861, R. S. Mo. 1909, was enacted to make it "notice of the contents thereof to all the world." But there is no statute making the record of a lease constructive notice of a lien on crops for rent, or notice that agricultural products in the hands of the lessee were grown on demised premises.

But, although there is no statute requiring leases of so short a term as the one at bar to be recorded, yet plaintiff says section 2809, R. S. Mo. 1909, provides that every instrument in writing, duly acknowledged, whereby any real estate may be "affected," shall be recorded, and section 2810 says every such instrument shall impart notice to all subsequent purchasers; and since the lease in question "affects" real estate, and since it, with its acknowledged assignment, has been recorded, it imparted notice to defendant. Doubtless it would if defendant had purchased the real estate itself or an interest therein, but he merely bought corn after it had been gathered and hauled to town. The notice imparted by force of this section is notice of the possession, use, and title of the real estate itself and of any interest therein. It can have no power to make the record of a lease impart notice that a commodity, which is purely personal property and is in a condition to pass readily in the operations of commerce and trade, was grown on the real estate affected by such lease. To hold that the mere recording of a lease would have this effect would be "to place too great an embargo upon the transfer of so large a portion of the personal property of the country."

"There is no provision made in the statute for public notice of a landlord's lien, and it is fair to assume that, in the absence of general notice, it was intended that there should be knowledge binding upon the purchaser." *Toney v. Goodley*, 57 Mo. App. loc. cit. 249.

If the recording of a lease imparted notice of a landlord's lien on the crops, then a landlord would not have to be alert and watchful and attach when the crops are about to be moved. All he would have to do would be to have his lease acknowledged and recorded and then sit back in ease, and no one could

with safety buy grain on the market without first running to the recorder's office to see if the vendor was the lessee in any leases recorded therein. In *Castleman v. Harris*, 86 Mo. App. 270, and in *Toney v. Goodley*, supra, it was held that knowledge that the vendor was not a landowner but lived on rented property, without knowledge that the property sold was grown on rented premises, was not sufficient to charge the purchaser with knowledge. It follows from this that, even if the recorded lease gave defendant constructive notice that the vendor was a tenant and not a landowner, this would be wholly insufficient.

The lease contained a provision that the landlord should have a lien upon all the crops on the leased premises to secure the rent. Plaintiff says this clause converted the lease into a chattel mortgage, citing *Faxon v. Ridge*, 87 Mo. App. 299, loc. cit. 308. This might be so as between the lessor and lessee and those having notice of the fact that the property in controversy was located and used in leased premises as was the situation in that case. There the property was in a building rented and used by the lessee, and the lease was on record, and the lessor did not have a lien otherwise. The location of the property and the recording of the lease was notice to the attaching creditor. That case has no application to one like this. Besides, the lease in the case at bar did not describe any specific corn and could not have done so, since at the time it was executed, May 2d, the corn was not in existence. The lease was not intended as a mortgage, and was not such, for it merely gave to the landlord what the law gave him and no more. It merely repeated the language of the statute. Section 7888, R. S. Mo. 1909.

The judgment of the trial court was right. Let it be affirmed. All concur.

#### HORNE v. JOHN A. HERTEL CO. (No. 11809.)

(Kansas City Court of Appeals. Missouri.  
Dec. 7, 1914.)

#### 1. CONTRACTS (§ 264\*)—FRAUD (§ 31\*)—RESCISSI—CONDITIONS PRECEDENT—NATURE OF ACTION.

A party induced to enter into a contract by fraud and deceit may rescind the contract and recover back what he has paid or sold, in which case he must tender back the benefits he has received; or he may affirm the contract and sue for damages, in which case his election to stand on the contract does not waive his right to recover damages for the fraud and deceit.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1184, 1185; *Dec. Dig.* § 264; *Fraud*, Cent. Dig. § 27; *Dec. Dig.* § 31.\*]

#### 2. FRAUD (§ 18\*)—WHAT CONSTITUTES.

For the sales manager of a publishing house to represent to a prospective agent that the book which he should sell was the only extant publication of that nature, when in reality there were similar publications, is a misrep-

sensation of an existing and material fact, for which the agent who entered the service of the publishing company may recover damages.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 16; Dec. Dig. § 18.\*]

### 3. FRAUD (§ 25\*)—ACTIONS—DEFENSES.

Where the sales manager of a publishing house, in inducing an agent to enter into its service, misrepresented the facts, it is no defense to an action for fraud, brought by the agent, that he was impecunious; it being apparent that his services were a thing of value, and the fraudulent representation having been made to induce him to enter into the services of the publishing company.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 24; Dec. Dig. § 25.\*]

### 4. EVIDENCE (§ 434\*)—PAROL EVIDENCE RULE—FRAUD.

The rule that all prior and contemporaneous oral representations are merged in the written contract does not apply to fraudulent representations made to induce a party to enter into the contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005–2020; Dec. Dig. § 434.\*]

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Action by R. C. Horne, Jr., against the John A. Hertel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Virgil V. Huff, of Marshall, for appellant.  
W. D. Bush, of Marshall, for respondent.

JOHNSON, J. The petition alleges a cause of action in tort resulting from false and fraudulent representations which induced plaintiff to enter into a contract of employment with defendant and to attempt the performance of the same to his damage in the sum of \$250. The sufficiency of the petition to state a cause of action was attacked by a demurrer, which the court overruled, whereupon defendant answered, interposing a general denial and the affirmative defense that "plaintiff has received from the defendant under and by the terms of said contract, the sum of \$24.20, and still retains the same, \* \* \* and by so receiving and retaining said benefits under said contract is estopped to deny the validity of the same." Verdict and judgment were for plaintiff in the sum of \$50, and defendant appealed.

The material facts of the case are as follows: Defendant is the publisher of a child's book entitled "Bible Symbols, or the Bible in Pictures," in which simple narratives of biblical truths, events, and stories are interpreted and impressed upon the childish memory by a series of puzzle pictures, which illustrate and symbolize the narrative. The book is sold by subscription, and defendant maintains an office in Kansas City for its sale and distribution in states of the Middle West. Agents are usually procured by the sales manager of that office from among students attending colleges and universities who desire remunerative employment during vacations. Plaintiff, who was such a student at-

tending school at Marshall, was solicited by the sales manager to enter into an agency contract for the sale of the book on commission, for a period beginning June 1, and ending September 5, 1912, and was induced to accept the offer by the representation, among others, that the method of instruction employed in the book was unique and not to be found in any other book on the market. Plaintiff alleged in his petition, and introduced evidence tending to show, that the representation was false, and its falsity known to the manager at the time, that there were numerous other similar publications on the market, that the territory assigned to plaintiff had been and was being canvassed by agents selling such other publications, and that plaintiff, who devoted a month or more of arduous effort to sell the book, lost his time and his expenses, which exceeded the commissions he received by \$50.

Other false representations are alleged in the petition and are shown by the evidence of plaintiff to have been made; but as they consisted either of promises or expressions of opinion, and not of representations of existing facts, they were not submitted to the jury as representations upon which a cause of action could be founded, and the only issue submitted in the instructions given at the request of plaintiff was whether or not defendant's manager represented to plaintiff that he "was an experienced agent, and did know of his own knowledge that agents introducing the new and novel method of studying the Bible, namely, by puzzle pictures, would have no competition, that the said puzzle pictures was the only book of its kind in existence, and that said representation was false, and that plaintiff relied upon said representation and was induced thereby to enter into the said contract of service with defendant, and that the said representation was false to the knowledge of the said W. D. Bond, or made by him in reckless disregard to its truth or falsity, and that plaintiff was damaged by reason of being induced to enter into said contract thereby."

Following this instruction, the verdict for plaintiff expressed the conclusion as one of fact, that the manager made the alleged false representation respecting the novelty of the book either knowingly or recklessly, that plaintiff, relying and compelled to rely upon the statement, was induced thereby to enter into the contract of employment, and that the loss he incurred was the direct result of the wrong thus done to him by the manager.

[1] It is contended by defendant that plaintiff neither pleaded nor proved a cause of action. This is not a suit to rescind a contract, nor for the recovery of damages as upon a rescinded contract. In the latter class of cases the rule is well settled, as stated by defendant, that a party will not be allowed to keep the fruits of a contract and

maintain an action for its rescission, on the ground that he was induced to enter into it by fraud of the other party. *Watson Windfrow Co. v. Wels Cornice Co.*, 181 Mo. App. 318, 168 S. W. 905. A party induced to enter into a contract by fraud and deceit has his election of remedies. "He may stand to the bargain even after he has discovered the fraud, and recover damages on account of it, or he may rescind the contract and recover back what he paid or sold." *Parker v. Marquis*, 64 Mo. loc. cit. 41. If he chooses the latter remedy, he must tender back the benefits he has received from the contract; but if he elects to stand to the bargain, he "may retain the benefit from the contract and yet sue for damages." *Shultz v. Christman*, 6 Mo. App. 388. When plaintiff, in canvassing the territory assigned him, discovered that he had been deceived, he continued to work in an effort to make the best of a bad bargain, instead of repudiating the contract, as he might have done. He elected to stand on the contract, and in so doing did not waive his right to recover damages resulting to him from defendant's fraud and deceit; nor was he under any legal obligation to offer to return the commissions he had received for his services.

[2, 3] There is no merit in the point that the representation in question did not relate to an existing and material fact. Whether or not the book was the only extant publication of its kind was a most important and material fact, and the statement that no other such book was on the market fell clearly within the purview of the rule that:

"Actual or positive fraud consists in deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the thing designed. The deception must relate to facts then existing, or which had previously existed, and which were material to the dealings between the parties on which the deception was employed." *Bullock v. Wooldridge*, 42 Mo. App. 356, and cases cited.

The object of the deception, duly accomplished, was to engage the services of plaintiff, and we find it difficult to understand the argument in the brief of defendant that there could have been no actionable fraud, since plaintiff was impecunious and had nothing to lose. He had his time and ability to work, which both he and defendant's manager appraised as a thing of value.

[4] The rule that all prior and contemporaneous oral agreements and representations are merged in the written contract entered into by the parties does not apply to fraudulent representations made for the purpose of inducing a party to enter into such contract. *Gooch v. Conner*, 8 Mo. 391; *Leicher v. Keeney*, 98 Mo. App. 394, 72 S. W. 145; *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979. To hold to the contrary in the present case would be to say that, since the deception was

successful in procuring the signature of plaintiff to the written contract of employment, it cannot be judicially inquired into, nor may the injury it wrought be rectified. The mere statement of such proposition is its own sufficient refutation. There is no substantial error in the record.

The judgment is affirmed. All concur.

### MEYER v. BOBB. (No. 13594.)

(St. Louis Court of Appeals. Missouri. Nov. 3, 1914. Rehearing Denied Dec. 22, 1914.)

#### 1. COURTS (§ 488\*)—APPELLATE COURTS—TRANSFER OF CAUSE—EFFECT OF RETRANSFER.

Where a cause is transferred from the Court of Appeals to the Supreme Court on the ground that title to realty and constitutional questions are involved, and the case is retransferred as involving no such questions, they are out of the case.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1316-1323; Dec. Dig. § 488.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 297\*)—PUBLIC IMPROVEMENT—ORDINANCE—PASSAGE AGAINST MAJORITY OF REMONSTRANCES.

Where the record of the Board of Public Improvement shows that the committee on Street Department transmitted to the board for its approval an ordinance to improve a street notwithstanding that there was a majority remonstrance against the improvement, and an entry was made on the report that it was adopted, ordinance approved notwithstanding the majority remonstrance "the improvement being deemed necessary" and signed by all the members after which the ordinance, etc., was forwarded to the municipal assembly, there is a sufficient compliance with a charter provision providing that the Board of Public Improvement must report their reasons to the municipal assembly where they adopt an improvement against the remonstrance of the majority of abutting owners, as a substantial compliance with the charter is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 297\*)—PUBLIC IMPROVEMENT—PASSAGE OF ORDINANCE OVER REMONSTRANCES.

Such recorded action of the board was sufficient to authorize the secretary of the board in transmitting the proposed ordinance to the municipal assembly to write: "I am instructed to say that the Board of Public Improvement having considered such remonstrances is nevertheless of the opinion that the public interest demands this improvement and that it recommends the ordinance above named for passage by a unanimous vote of all members present."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 269\*)—PUBLIC IMPROVEMENT—CHARACTER OF STREET—CONSTRUCTION OF CHARTER—"CHARTER AND LAW."

A city charter provision forbidding the improvement by the city of streets not acquired "according to the provisions of the charter \* \* \* and according to law" covers not only streets acquired under the provisions of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

charter but also those acquired under statutory and common law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 718-724, 733; Dec. Dig. § 269.\*]

**5. APPEAL AND ERROR (§ 1008\*)—REVIEW—FINDINGS OF COURT—PRINCIPLES OF LAW.**

Though findings of fact in a case tried without a jury has the force of a special verdict if supported by substantial testimony, it must appear, to sustain the finding, that correct principles of law were applied to the facts in the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

**6. MUNICIPAL CORPORATIONS (§ 269\*)—PUBLIC IMPROVEMENT—STREETS—PRESCRIPTION—COLOR OF TITLE.**

Under Rev. St. 1909, § 1882, providing that the possession of part under claim and color of title to the whole for the requisite time gives title, and *possessio pedis* of the whole tract is not essential, the actual possession of only the traveled path of a road sought to be improved as a street is sufficient to extend the possession, other elements of prescription occurring, to the whole width of the proposed street, where the public had color of title by virtue of a plat purporting to be signed and filed by all of the abutting owners showing the full width, and that an objecting owner did not, in fact, sign the plat, would not destroy its effect as color of title.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 718-724, 733; Dec. Dig. § 269.\*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Alfred C. F. Meyer against Clara P. Bobb. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded, with directions to enter judgment.

H. P. Rodgers and Schulenburg & Diehm, all of St. Louis, for appellant. T. J. Rowe, of St. Louis, for respondent.

**REYNOLDS, P. J.** This is an action to enforce three special tax bills, the bills issued by the city of St. Louis against defendant's property to plaintiff's assignor for paving that portion of Cooper street in the city of St. Louis, lying between Old Manchester Road on the south and Bischoff avenue on the north. The petition is in the ordinary form.

The amended answer upon which the case was tried, admitted that the city of St. Louis, by authority of a certain ordinance, had entered into a written contract with plaintiff's assignor for the improvement of the street, but avers that the ordinance was null and void and the Municipal Assembly without authority to pass it. First, because, being null and void, it would deprive defendant of the equal protection of the laws and deprive her of her property without due process of law, contrary to the amendments of the Constitution of the United States and to sections 20 and 30, article 2, of the Constitution of this state. Setting out the first

paragraph of section 14, article 6, of the Charter of the city of St. Louis, it is averred that in January, 1909, a public meeting of the Board of Public Improvements of the City of St. Louis was held to consider the improvement of Cooper street between Old Manchester Road and Bischoff avenue; that within 15 days after the public meeting the owners of the major part of the area of the land made taxable for the improvement of Cooper street between Old Manchester Road and Bischoff avenue filed with the Board of Public Improvements their written remonstrance against the proposed improvement; that thereafter, in direct violation of the Charter, the Board of Public Improvements caused the ordinance to be prepared and reported to the Municipal Assembly without legal and proper reasons for their action and for making said improvements, as required by article 6, section 14; that on January 15, 1909, the secretary of the board transmitted to the Municipal Assembly a draft of the ordinance with a communication signed by him as secretary, which, so far as here material, stated that he, the secretary, had the honor to report "that the Board of Public Improvements has adopted drafts of ordinances hereinafter named and respectfully recommends the same for passage by the Municipal Assembly." Referring to and including the proposed ordinance relating to the improvement of Cooper street, the letter of transmittal of the secretary continues:

"Accompanying the above-named ordinance are written remonstrances of the owners of the major part of the property on the line of the proposed improvements, and I am instructed to say that the Board of Public Improvements, having considered said remonstrances, is nevertheless of the opinion that the public interests demand these improvements and that it recommends the ordinance above-named for passage by a unanimous vote of all the members present."

This is signed by the secretary. It is charged in the answer that this letter of the secretary was beyond his authority and not warranted by any action of the Board, and that two-thirds of the Board of Public Improvements failed and neglected, as in duty bound, by virtue of article 6, section 14, of the Charter "to report their reasons to the Municipal Assembly for their action in approving the said improvement of Cooper street." Hence it is charged that the ordinance was illegal and void for that reason. It is further charged that to assess the tax bills against the property of plaintiff under these pretended ordinances would take defendant's private property for a public use without just compensation, in violation of section 21 of the second article of the Constitution of this state, and would deprive her of her property, contrary to article 14, section 1, of the amendments to the Constitution of the United States, and to section 30, of article 2, of the Constitution of this state. It

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is further set up in the answer that section 15, article 6, of the Charter of the city of St. Louis, provides that no improvements shall be ordered on any street "which shall not have been opened, dedicated or established according to the provisions of the Charter of the city of St. Louis and according to law." That the Cooper street which is mentioned in the several counts of the petition, in the ordinance and in the contract under which plaintiff's assignor did the work, was not at any of the times mentioned, or at any other time, opened or dedicated or established according to the provisions of the Charter of the city of St. Louis or in accordance with law, and that Cooper street was not at any of the times mentioned or referred to, or at any other time whatsoever, a public street or highway of the city of St. Louis, and that the ordinance and the contract referred to are illegal, null and void because the city of St. Louis, by reason of the provisions of section 15, article 6, of its Charter, is prohibited from passing the ordinance or letting the contract, and that all work done on Cooper street was done without warrant or authority of law.

A lengthy reply was filed to this, denying generally the allegations. Particularly replying to the last cited allegation, the reply avers that Cooper street, at the place referred to in the petition, was and is in truth and in fact a public street of the city of St. Louis, and that so far as the eastern 20 feet of the street are concerned, defendant is estopped to deny that the same is a public street for the reason that defendant acquired her right, title and interest in and to the property in the petition described by devise from one John H. Bobb, now deceased; that heretofore, by conveyance dated June 27, 1866, John H. Bobb with one William C. Jamison acquired title to a one-fifth interest in the eastern 20 feet of what is now Cooper street, in trust for the sole use and benefit of one Robert F. Letcher; that subsequent thereto Bobb and Jamison, as trustees, joined with the majority of the other owners of what is now Cooper street in the execution of a certain plat of an addition to the city of St. Louis known as "Fairmont," recorded in the office of the recorder of deeds of the city of St. Louis, by which plat the parties dedicated Cooper street as a public street, and that Cooper street has been duly accepted as a public street by the city of St. Louis; that this plat was signed by all of the owners of the adjacent land except John L. and Jacob J. Letcher, who together owned an undivided two-fifths interest in that portion of the street between Manchester Road and Bischoff avenue, and that this interest was subsequently acquired by John H. Bobb, who devised it to defendants; that by the execution of the plat as trustees for Robert F. Letcher, Bobb became forever estopped from afterwards acquiring an outstanding inter-

est in that portion of Cooper street and from claiming the same as his private property free from the public easement, and that defendant is estopped by reason of having acquired her interest through John H. Bobb; that at the time the work was done John H. Bobb was alive, and was the owner of the property in plaintiff's petition described; that he had full knowledge of all the matters and facts connected with the dedication of Cooper street as a public street; had full knowledge of the manner and the occasion upon which the respective dedications of the various portions of Cooper street were made and of all things connected therewith; that John H. Bobb knew all the facts connected with the ownership of this eastern 20 feet, knew of its dedication by the owner of three-fifths thereof as a public street; that he thereafter acquired the interest of the owners of the other two-fifths and that, with full knowledge of all of the foregoing facts at the time the work of improvement was done and the ordinances authorizing the same were passed, well knowing that the street improvement was to be paid for by special assessment, he had failed to assert any title to that portion of Cooper street and failed to take any action to prevent the work from being done. Wherefore it is claimed that he was, and defendant, as his devisee, is estopped from now disputing the title.

The trial was before the court without the intervention of a jury, being submitted to the court in part on stipulation of fact as to the passage of the ordinance, execution of the bills and notice, etc., and on oral testimony as to the location of Cooper street and its use by the public, its width and location being gone into quite extensively on the theory that a right had been acquired to the public by use and prescription although, as will be noticed, that does not appear to have been distinctly pleaded.

At the request of plaintiff the court made a finding of facts, which, in addition to the admissions in the pleadings and agreed statement of facts, is to the effect: First, that the secretary of the Board of Public Improvements had no direct authority from the Board to write the letter of January 5th, or to report and recommend to the Municipal Assembly the ordinance for the improvement of Cooper street. Second, that Cooper street between Old Manchester Road and Bischoff avenue is only 30 feet in width and that the addition of 20 feet along the east side, which was improved along with the 30 feet under the ordinance, was never acquired by the city by dedication or by prescription; that in 1868, there was a road legally established in St. Louis county, in which the premises were then located, paying a width of 30 feet between Manchester Road and Bischoff avenue, which is now known as Cooper street; that over this road, which was unimproved, there

was a wagon road of a width of between 8 and 12 feet; that the thirty-foot strip is the western part of Cooper street; that the only use made of said thirty-foot strip was by travel along the wagon road, and that the wagon road lies entirely within the west 30 feet, except that it diverged eastwardly at one or two points and particularly at one point where there was a tree in the center of the road, around either side of which the road was used; that the road east of the thirty-foot strip was unfenced and uncultivated; that no public labor or money was expended on the twenty-foot strip of ground east of the strip described when the ordinance for its improvement was passed, and that prior to the passage of the ordinance there was not at any time an open, notorious and adverse use of the 20 feet adjoining said road for ten consecutive years sufficient to constitute a road by prescription; that the twenty-foot strip was not laid out, worked or improved by public authority prior to 1909.

The court in a written memorandum also stated that he saw no ground of estoppel as against defendant, and that if this was a case in which there could be an apportionment, which he doubted, there is no evidence by which the apportionment could be made. He accordingly rendered judgment for defendant. Plaintiff filed a motion for new trial, and saving exception to the action of the court in overruling it, has duly perfected appeal to this court.

This court, on motion of counsel for respondent, transferred the cause to the Supreme Court on the ground that this case involved the construction of the Constitution of the United States and that of this state, and that title to real estate was involved. The Supreme Court holding that there were no such questions involved, sent the case back to our court. Hence these questions, so far as we are concerned, are out of the case.

There are just two points for our consideration and determination: First, action by the Board of Public Improvements in transmitting the ordinance to the Municipal Assembly; second, the question of title in the public to what is known as Cooper street.

[1] As to the first proposition, it appears from the record of the Board of Public Improvements that the committee on street department presented to the Board for its approval an ordinance to improve Cooper street between Old Manchester Road and Bischoff avenue, estimating the cost to the property owners at \$12,521. The committee also noted that there was a majority remonstrance against the improvement. This report appears to have been signed by all the members of the committee. Whereupon this entry appears:

"Report of committee adopted, estimate of committee and draft of ordinance was approved; notwithstanding the majority remonstrance, the improvement being deemed neces-

sary, and forwarded to the Municipal Assembly for passage in each case by the following vote."

Here follow the names of all the members of the Board. It was after this action that the secretary transmitted this ordinance with others and the remonstrances to the Municipal Assembly by the letter hereinbefore set out.

We are unable to agree with the learned trial judge that this was an insufficient compliance with the Charter. It very clearly appears that with the remonstrances of the majority of the property owners before it, the proper committee drafted the ordinance and submitted it to the Board with the remonstrances, by unanimous vote of the committee; that then the Board, by unanimous vote, approved of the action of its committee, accepted its estimate, and directed that the ordinance along with the remonstrances be forwarded to the Municipal Assembly for passage.

[2] It is argued that the Board in using the words "the improvement being deemed necessary," had not made a sufficient statement of its reasons for its action, and that there was no authority contained in the recorded action of the Board for the secretary, in transmitting the ordinance, to write:

"And I am instructed to say that the Board of Public Improvements, having considered such remonstrances, is nevertheless, of the opinion that the public interests demand these improvements and that it recommends the ordinance above-named for passage by a unanimous vote of all members present."

It is true that this letter of transmittal of the secretary is fuller than the minute of the Board, but that it correctly stated just what action the Board had taken, is clear. He was secretary and undoubtedly the officer through whom the Board would act in the transmittal of its reports to the Municipal Assembly. We see no substantial variation between his letter and the recorded action of the Board. It is true that the words in the resolution of the Board are, "the improvement being deemed necessary," while the secretary in transmitting the ordinance and remonstrances wrote that he was instructed to say "that the Board of Public Improvements, having considered said remonstrances, is nevertheless of the opinion that the public interests demand these improvements." But we see no substantial difference between them; those used by the Board as recorded in its minutes are sufficient and as transmitted by the secretary, they, while fuller, conveyed the same and the essential idea, that is to say, that the Board, notwithstanding the remonstrances, recommended the improvement as necessary and that was the requirement of the Charter. Substantial compliance with the provisions of the Charter is all that is required, as has been many times held by the Supreme Court and by our court, as see, in passing, *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491; *Id.*, 37 Mo. App. 427; *Jaicks v. Merrill*, 201 Mo. 91, 98 S. W. 753; *Steffen v. Fox*, 56 Mo.

App. 9. In this latter case it is said (56 Mo. App. loc. cit. 12):

"A substantial compliance with the law is essential as a foundation of the plaintiff's right of recovery in these cases, but a literal compliance has never been deemed essential for that purpose."

This has been repeated in many later cases, and is always to be borne in mind in passing upon the acts of public officers in making public improvements. So too, in the late case of *Gist v. Rackliffe-Gibson Construction Co.*, 224 Mo. 369, loc. cit. 379, 123 S. W. 921, 924, it is said:

"While laws and ordinances anent the improvement of streets should be subjected to reasonable analysis and construction, yet they should not be subjected to an over-nice analysis or to any unfriendly construction, springing from the notion that the contractor is prone to mischief or that street improvements are evils to be judicially circumvented."

We applied this rule in *Gratz v. Wycoff*, 185 Mo. App. 196, 145 S. W. 870, and again in *Gratz v. City of Kirkwood*, not yet officially reported, but see 166 S. W. 319, loc. cit. 324. We hold, therefore, that the ordinance was properly submitted by the Board of Public Improvements to the Municipal Assembly, together with the remonstrances against it and is a valid ordinance.

This brings us to the consideration of the second proposition involved; that is, whether the testimony shows that Cooper street, as a highway 50 feet in width, had become a public street either by dedication or prescription, "by ordinance or by law."

[3] It is to be observed that the construction placed upon section 15, of article 6, of the Charter of the city of St. Louis, which forbids the improvement and repair by the city of streets not acquired "according to the provisions of this Charter and law," covers not only the provisions of the Charter but statutory and common law. *McGinnis v. City of St. Louis*, 157 Mo. 191, loc. cit. 198, 57 S. W. 755, 757.

[4, 5] While it is true that the case at bar was tried before the circuit court without a jury, and a finding of facts made by the learned trial judge, under the statute, and while it is further true, as argued by learned counsel for respondent, that such a finding has the effect of a special verdict and if supported by substantial testimony is controlling upon the appellate court, it is equally true that it must appear, to sustain that finding, that correct principles of law were applied to the facts in the case.

[6] We are compelled to hold that the learned trial judge overlooked a very fundamental principle in the law of real property, namely, that possession of part under claim and color of title to the whole for the requisite period of years, gives title and that in such case *possessio pedis* of the whole tract is not essential. So says our statute, R. S. 1909, § 1882. This has been so often applied by the courts that it is hardly necessary to cite the authorities.

In *Chapman et al. v. Templeton et al.*, 53 Mo. 463, loc. cit. 465, it is said:

"The object of showing color of title is to extend the possession of a part of a tract of land so as to include the whole tract. A mere trespasser can only claim the land of which he has the actual possession, so as to acquire title under the statute of limitations. But if he goes into the possession under the color of title, his possession of a part will extend to the whole tract as described in the defective conveyance. To this end a defective conveyance, or a conveyance from one having no title, if bona fide taken, may be used in connection with adverse possession of a part of a tract in the name of the whole, so as to acquire title under the statute of limitations."

This same rule was repeated in *Ware v. Johnson*, 55 Mo. 500, loc. cit. 503, in *Hannibal & St. Joseph R. R. Co. v. Clark*, 68 Mo. 371, loc. cit. 377, *Pharris v. Jones*, 122 Mo. 125, 26 S. W. 1032, and in *Joplin Brewing Co. v. Payne*, 197 Mo. 422, loc. cit. 429, 94 S. W. 896, 114 Am. St. Rep. 770. It is recognized as a controlling principle in *Perkins Land & Timber Co. v. Irvin*, 200 Mo. 485, loc. cit. 491, 98 S. W. 580.

Furthermore it is recognized as applying to the use by the public of a highway which has been designated as such in a plat or other conveyance. Thus *Elliott on Roads & Streets* (3d Ed.) § 193, says:

"If the right to the way depends solely upon user, then the width of the way or the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user; but if there were defective proceedings, and the use was under color of the claim supplied by them, then the extent of the easement should generally be measured by the claim exhibited by the proceedings and by them intended to be established. This is in strict accordance with the elementary principle of the law of real property, which declares that, where there is color of title, and possession of part is taken under the claim of title, it will cover the whole, but that where there is no color of title the right will not extend beyond the actual possession, the *pedis possessio*."

A case applying the rule to highways is that of *Sprague v. Waite*, 17 Pick. (34 Mass.) 309. There Chief Justice Shaw (17 Pick. [34 Mass.] loc. cit. 317) said:

"It was contended on the part of the plaintiff, that as this was an ancient highway, of the location of which no record was or could be produced, it was proved only by public use, and whenever a public or private easement is proved by use only, the limitations and restrictions of the right, as well as the right itself, are established by such use, and of course no right can be established, beyond what has been in fact used and enjoyed. This, as a general rule, is correct; but if it is intended to say, in regard to ancient highways, that the right of the public is limited to that portion of the highway usually called the travelled path, that part actually used and worn by feet or wheels, it is a misapplication of the rule. Where a tract three or four rods wide, such as is usually laid out as a highway, and like the ancient road in question, \* \* \* has been used as a highway, although 20 or 30 feet in width only have been used as a travelled path, still this is such a use of the whole as constitutes evidence of the right of the public to use it for a highway, by widening the travelled path, or otherwise, as the increased travel and the exigencies of the public may require."

Further along at page 320 of 17 Pick. (34 Mass.) Chief Justice Shaw said:

"The long and uninterrupted use of a public highway, is legally and justly taken to be evidence of a previous legal and regular proceeding, by which a certain portion of land has been appropriated to public use as a highway. But of what precise width, in what precise direction, and precisely how much surface of land, is thus appropriated, as no record or document specifies, it must be inferred from circumstances. Suppose the road deviates, or divides into two parts, to avoid a rock, a hill or a slough, which the public cannot then afford, and do not think fit to remove; but afterwards the rock is blown, the hill levelled, the slough filled, to meet the public exigencies and calls for improvement, may not the public so improve, because that precise spot has not before been travelled upon? It appears to me difficult to say, in point of law, that they cannot; and the proper mode of considering it, seems to be to regard it as a question of fact, to be inferred from all the circumstances of the case, whether the place in question was or was not included in the land appropriated to public use, as a highway."

The case at bar differs from *Sprague v. Waite* in the very important particular that we are not left to conjecture as to the probable width of this strip now called Cooper street. The plat duly filed, executed by the owners of the greater part of it, and purporting to convey the whole of the street to the public as a fifty-foot street, did constitute color of title to the whole 50 feet.

A case very much in point to the one at bar is that of *Pillsbury v. Brown*, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94. There the plaintiff claimed that the location of a certain road was not legal and that only so much of its width as was actually prepared for travel and had been so used for twenty years or more at the time of the widening could then be held for a street. The Supreme Court of Maine held the proposition not maintainable. After a discussion of the general rule, it is said (82 Me. loc. cit. 454, 19 Atl. 858, 9 L. R. A. 94):

"Still, we do not doubt that it is generally true that when an easement of any kind is attained by adverse use alone, its extent must be measured by its use. But this rule does not apply to ways which have commenced under an actual and a recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law. In such cases, the use is presumed to be co-extensive with the location, precisely as possession under an invalid deed is presumed to be co-extensive with the land purporting to have been conveyed by it. This result is sometimes reached by the presumption of a dedication, and sometimes by the presumption that the proceedings were all regular."

Referring to what Chief Justice Shaw has said in *Sprague v. Waite*, supra, and which we have quoted, the court continued (17 Pick. [34 Mass.] loc. cit. 455):

"This seems to us to be sound law as well as good sense; and we hold in this case that the public is entitled to a way three rods wide, as originally laid out, notwithstanding the wrought part of it, and the part actually used by travellers, may have been very much less than that; and that the travelled path may from time to

time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out."

In *Bolton v. McShane*, 79 Iowa, 28, loc. cit. 28, 44 N. W. 211, 212, it is said, treating of highways:

"The use, in order to draw the benefit of the statute (of limitations), must correspond with the claim of right."

In the case at bar it was admitted that as platted in what was known as "Fairmont Addition," this Cooper street, extending from the Old Manchester Road to Northrup avenue, that is to say, extending to the street now known as Bischoff street, formerly Bernard avenue, and for a distance of five blocks north of that street, is designated and dedicated as a fifty-foot street. As we understand, it is admitted that this plat was duly recorded. It is true it now appears that the owners of a two-fifths interest in the land covered by these tax bills did not sign this instrument. Nevertheless it purports to be signed by the owners of all the land; these signers purport to dedicate all of the streets marked on it to public use, designating Cooper street as having a width of 50 feet. This plat undoubtedly constitutes color of title. *Plaster v. Grabeel*, 160 Mo. 669, 61 S. W. 589. In *McCain v. Des Moines*, 174 U. S. 168, loc. cit. 175, 19 Sup. Ct. 644, 646 (43 L. Ed. 936), it is said:

"Color, as a modifier in legal parlance, means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right.' Kin. Law Dict. & Gloss."

The evidence in the case shows beyond all question that for more than 20 years this street had been used as a public thoroughfare. It is true that the evidence tends to show that its user was commonly along the center of the fifty-foot strip over the wagon track, which was from six to twelve feet wide; that the center of the street was about 25 feet from the west line or fence. So, assuming the wagon track to be 12 feet wide, this would throw the larger part of the track on the thirty-foot strip on the west. The learned trial court found that all the user was on the 30 feet. But he overlooked the proposition that the 30 feet, under the designation in the plat, were a part of the 50 feet and that use of the part under claim and color of title to the whole for 10 years or more, gave title to the whole. He even found that the use varied along the whole width of the 50 feet, but overlooked the legal effect of that. Furthermore, it is beyond dispute that on this same Cooper street, north of Bischoff avenue it is true, and north of the district included within these tax bills, but still a part of this same Cooper street as designated on the plat, some 10 or 12 years before, a cinder path had been built along the west front of a church, situate apparently on the southeast corner of Cooper and Wilson street, one block north of Bisch-

off, and the evidence is that the sidewalk or pavement as now constructed over Cooper street covered what had been this cinder path, and that extending that path south along the east side of Cooper street would put it directly under the located sidewalk of Cooper street between Old Manchester Road and Bischoff. It is immaterial that this was at a point beyond Bischoff street; it was on Cooper street as laid off in the plat and was to be considered in determining the true width of Cooper street.

We are compelled to hold, therefore, in the light of this evidence, as well as of abundance of evidence in the record as to the long continued use of the greater part of Cooper street by the public as a highway, that the learned trial judge in his finding of fact and conclusions of law overlooked the very important proposition that this filed plat of Fairmont Addition constituted color of title in the public to the whole of this fifty-foot street and that proof of the user of the street by the public for more than 20 years, although that use may have been in only the center of it or a part of it, carried title by adverse use and by prescription over the whole width of the 50 feet. For these reasons we hold that the conclusion arrived at by the learned trial judge was incorrect and that on the evidence in the case he should have rendered up a judgment in favor of plaintiffs.

As will be noted the learned trial court disregarded the plea of estoppel as against defendant and her deviser. Without going into this at length, and without expressing any opinion here on that issue, it is not out of place to say that the trend of the later decisions of the Supreme Court and of this court is not to look upon these tax bills with so critical an eye as to overthrow them when it appears, as in the case at bar, that the work was let according to contract, was provided for by proper ordinance, was let in accordance with law, was performed in a satisfactory manner, and that the deviser of this defendant under whom she claims stood by and made no objections; instituted no proceedings to stop the progress of the work. It has been held in cases of like character that such acts amount to an estoppel against the property owner from disputing the levy of the assessment. See *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210, 158 S. W. 4, as well as authorities heretofore cited.

Our conclusion is that the judgment of the circuit court should be reversed and the cause remanded with directions to the circuit court to enter judgment declaring the tax bills, with interest thereon at the rate of 8 per cent. per annum from November 22, 1909, the date of demand, until the date of such judgment, together with the costs of the action, to be a lien upon and as such to be enforced against the respective pieces of

real estate described in plaintiff's petition, and it is so ordered.

NORTONI and ALLEN, JJ., concur.

**MEYER v. GOLDSMITH et al.** (No. 13704.) (St. Louis Court of Appeals. Missouri. Nov. 3, 1914. Rehearing Denied Dec. 22, 1914.)

Appeal from St. Louis Circuit Court; W. B. Homer, Judge.

Action by Alfred C. F. Meyer against David Goldsmith and others. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded, with directions to enter judgment.

Hickman P. Rodgers and Schulenburg & Diehm, all of St. Louis, for appellant. David Goldsmith, of St. Louis, for respondents.

**REYNOLDS, P. J.** This case was argued and submitted to us along with the case of *Alfred C. F. Meyer v. Clara P. Bobb*, 171 S. W. 600. The points involved in it are practically as in that case, with this difference: That the cause was tried before the court without a jury and at the conclusion of it the learned trial judge announced that he had gone over the case and examined the proofs and did not find that there was any substantial difference in favor of the plaintiff between the case tried by his Honor, Judge Shields (that is the case of *Meyer v. Bobb*), and this case, and he concludes: "In cases where I find myself in doubt I think I ought to follow the decision of a co-ordinate branch of this court. The judgment will therefore be for the defendant."

In the light of this frank statement by the learned trial judge we feel warranted in holding that this case should take the same course as the case of *Meyer v. Bobb*, *supra*, and for the reasons there given.

Accordingly it is ordered that the judgment of the circuit court in this cause be reversed and the cause remanded with directions to that court to enter up judgment declaring the tax bills, with interest thereon at the rate of 8 per cent. per annum from November 22, 1909, the date of demand, until the date of such judgment, together with the costs of the action, to be a lien upon and as such to be enforced against the respective pieces of real estate described in plaintiff's petition, and it is so ordered.

NORTONI and ALLEN, JJ., concur.

**AYLOR et al. v. McINTURF.** (No. 11320.) (Kansas City Court of Appeals. Missouri. Dec. 7, 1914.)

1. **FRAUDS, STATUTE OF (§ 63\*)—CONTRACT FOR ASSIGNMENT OF LEASE.**

A contract for the assignment of a 10-year mining lease on a royalty basis is required to be in writing by Rev. St. 1909, § 2783, providing that no action shall be brought upon a contract not in writing for the sale of lands, or an interest in them, or any lease thereof, for a longer term than one year.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 33, 97-104; Dec. Dig. § 63.\*]

2. **FRAUDS, STATUTE OF (§ 44\*)—CONTRACTS NOT PERFORMED WITHIN YEAR—PURCHASE OF LEASE.**

A contract, by which defendant agreed to purchase a mining lease from plaintiffs and to work the property under the lease, which then

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had more than nine years to run, and the purchase price for which was not to be paid for more than one year, is a contract not to be performed within one year, which is required to be in writing by the statute of frauds (Rev. St. 1909, § 2783).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

### 3. FRAUDS, STATUTE OF (§ 129\*)—PART PERFORMANCE—ACTION AT LAW.

Where defendant orally agreed to purchase from plaintiff a mining lease which had more than nine years yet to run, and to work the premises thereunder, the purchase price to be paid more than one year later, part performance by the defendant by taking possession and beginning operations does not render the contract valid in an action for the purchase price, since the equitable doctrine of part performance which will take an oral contract out of the statute does not apply in an action at law.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. § 129.\*]

### 4. FRAUDS, STATUTE OF (§ 129\*)—PART PERFORMANCE—ASSIGNMENT OF LEASE.

Since Rev. St. 1909, § 2782, prohibits a parol assignment of a lease for a term of years, delivery of possession to one who orally agreed to purchase a mining lease, without the execution of a written assignment until after the purchaser had repudiated the contract by refusing to make the payment when due, which was more than one year after the date of the contract, is only partial and not complete performance.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. § 129.\*]

### 5. FRAUDS, STATUTE OF (§ 139\*)—PART PERFORMANCE—PERFORMANCE AFTER ONE YEAR.

Even if the plaintiffs had fully performed their part of the contract, such performance would not take it out of the provisions of the statute of frauds, forbidding a suit on the contract not to be performed within one year.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 334-341; Dec. Dig. § 139.\*]

### 6. FRAUDS, STATUTE OF (§§ 119, 129\*)—PART PERFORMANCE—REMOVAL OF ORE.

Where defendant entered into possession under an oral contract for the assignment of a mining lease having more than ten years to run and took ore from the premises, that fact does not entitle plaintiffs to recover on the contract, but they may recover the value of the ore taken.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 113, 266, 267, 270, 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. §§ 119, 129.\*]

### 7. FRAUDS, STATUTE OF (§ 144\*)—PLEADING—ADMITTING EXISTENCE OF CONTRACT.

Defendant does not lose his right to plead the statute of frauds by admitting in his answer that he made the oral agreement claimed by plaintiff.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 351; Dec. Dig. § 144.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by J. W. Aylor and others against Andy McInturf. From a judgment for defendant after plaintiffs' motion to set aside a nonsuit taken by them at the conclusion of

their evidence, the plaintiffs appeal. Affirmed.

R. M. Sheppard, of Joplin, and M. T. January, of Nevada, Mo., for appellants. Scott & Bowker, of Nevada, Mo., and George V. Farris and H. W. Currey, both of Webb City, for respondent.

TRIMBLE, J. This is a suit to recover \$5,000 as the purchase price for the sale or assignment of a mining lease. The defense interposed the statute of frauds, and also alleged that the sale was induced by means of fraudulent representations on the part of plaintiffs. At the close of the latter's evidence, the trial court sustained a demurrer and was about to have the jury return a verdict for defendant, when plaintiffs took a nonsuit, with leave to move to set the same aside. This motion was afterwards made and overruled, and plaintiffs have appealed.

Defendant was a mine operator engaged in mining certain ground under a lease by which he paid a royalty of 15 per cent. to the owner of the land. Plaintiffs held a written mining lease on land immediately adjoining the land defendant was working. This lease ran for 10 years from January 1, 1912, and provided that plaintiff was to mine the land and pay a royalty of 15 per cent. to the landowner. Defendant verbally agreed to buy said lease from plaintiffs and pay \$5,000 therefor. The money was not to be paid until after the expiration of a year, and apparently the lease and the assignment thereof was not to be turned over or executed to defendant until the money was paid. At least no attempt was made to do so until after the year had expired and demand was made for the \$5,000. This verbal agreement to buy the plaintiffs' lease was made in February, 1913, and defendant, who had mined on his own lease up to the edge of the land held by plaintiffs, was allowed by them to take possession of their leased land and to mine therein and take ore therefrom, which he did by the extension of cuttings from his own mine. After the expiration of the year from the time the oral agreement was made, plaintiffs demanded payment of the \$5,000 and had their lease with their assignment thereof indorsed thereon ready to deliver to defendant whenever he paid the money. Defendant refused to pay for the lease, claiming that the ground was not as plaintiffs had represented it to be. (They had, prior to the verbal agreement, drilled into it to ascertain the richness and body of the ore.) Thereupon plaintiffs brought this suit.

Appellants assume or proceed upon the theory that the suit is one in equity for specific performance. But we see nothing in the petition which makes it anything other than a suit at law to recover the \$5,000 alleged to be due on the contract.

[1] The lease, which was the subject of

the verbal agreement on which the suit is based, was an interest in land, and ran for 10 years. The contract for the sale of said lease, therefore, came within that provision of the statute which provides that no action shall be brought "upon any contract for the sale of lands, tenements, hereditaments, or an interest in or concerning them or any lease thereof for a longer time than one year." Section 2783, R. S. Mo. 1909. Hence said contract had to be in writing and signed by the party to be charged therewith. This is true without regard to when it was to be performed. *Donovan v. Brewing Co.*, 92 Mo. App. 341, loc. cit. 344.

[2] The contract for the purchase of the lease, so far as concerns the payment of the \$5,000, was not to be performed within one year. Whether plaintiffs were to execute the assignment before that time or not, certain it is that they did not offer to deliver the lease with the assignment until after the expiration of the year. The acceptance by the defendant of a valid assignment of the lease would obligate him to perform the terms of said lease during the years it had to run. For this reason, the contract to buy the lease involved an agreement upon the part of defendant to do things which were not to be performed within a year, but which were to be done within the unexpired term of nearly nine years. The agreement to buy the lease, therefore came within another clause of the above-mentioned statute, which forbids suit "upon any agreement that is not to be performed within one year from the making thereof." Clearly this is true for both of the reasons mentioned above, namely, the payment of the money after the lapse of a year, and the assumption of the duties, contained in the lease necessarily following and involved in an acceptance by defendant of an assignment thereof.

"A promise to pay money, as much as a promise to do any other act after the expiration of a year, is within the statute." *Browne on the Statute of Frauds*, § 290.

[3] Plaintiffs concede that the contract in question was within the statute of frauds, but assert that it has been taken out of the operation of the statute by reason of the fact that defendant was put into immediate possession of the land and mined and took away a large amount of valuable ore. In other words, they rely upon the equitable doctrine of part performance. This doctrine that part performance will take a case out of the operation of the statute is purely one in equity, and has no application in a suit at law. *Johnson v. Reading*, 36 Mo. App. 306, loc. cit. 314. No amount of part performance will remove the bar of the statute in a suit at law. 29 Am. & Eng. Ency. of Law (2d, Ed.) 831; *Chenoweth v. Pacific Express Co.*, 93 Mo. App. 185; *Smith v. Davis*, 90 Mo. App. 533. Clearly the defendant has performed nothing so far as paying the money is concerned, and his entering on the land and min-

ing thereon was only a partial performance of the duties and obligations involved in the acceptance of an assignment of the lease. Such partial performance on his part would not avail anything. *Shacklett v. Cummings*, 178 Mo. App. 309, 185 S. W. 1145; *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754.

[4] With reference to the question what sort of performance plaintiffs have shown in putting defendant into possession, it might be said that their performance is only partial, since all they did was to invest defendant with livery of seisin. The statute says no lease for a term of years shall be assigned by parol. Section 2782, R. S. Mo. 1909. The only thing plaintiffs have done is to permit defendant to take possession of and mine the land. But plaintiffs' contract required them, not only to surrender possession, but also to confer upon defendant the remainder of their leasehold term. This can be done only in writing, as required by the statute. Mere surrender of possession would not execute the contract. It is true, plaintiffs afterward complied with section 2782 by indorsing upon the lease a written assignment thereof, but this was not done nor made effective by delivery, or offer of delivery, until after defendant had refused to be bound by the contract. It was made in February, 1912, and plaintiffs' lease was not executed till June 2, 1913, nor the assignment till June 23, 1913.

[5] However, if putting defendant in possession and then, after the expiration of more than a year, reducing the assignment to writing was a full performance upon plaintiffs' part, what then? Are such acts full performance, and, if so, does such full performance on their part take the contract out of that provision of the statute allowing no suit to be brought upon contracts not to be performed within one year? We must bear in mind that in this case the contract is within the ban of two clauses of our statute. And it will avail nothing to present a fact which will take the contract out of the operation of the first clause of the statute hereinbefore mentioned unless a way of escape can also be shown from the second clause. Where the only objection to a contract is that it violates the first clause heretofore quoted, full performance upon one side would justify a recovery on the contract. *Johnson v. Reading*, 36 Mo. App., supra, loc. cit. 319; 29 Am. & Eng. Ency. of Law (9th Ed.) 832. But can it do so when the contract is also within the ban of the second clause? In the case at bar, not only was defendant not to perform within a year but plaintiffs have construed the contract to mean that they also were not to perform within a year, since they did not procure the lease to themselves until after a year from the making of the contract and did not execute a written assignment till the day they brought suit. So that, if full performance on plaintiffs' part means

performance of the assignment and not of the terms of the lease, there was no full performance on their part *within the year*.

Now, in 29 Am. & Eng. Ency. of Law (2d Ed.) 835, it is said that while contracts not to be performed within one year may be taken out of the statute through performance by one party thereto, yet such performance *must be within the year*. This seems to be the rule in England and in many of the states. Thus in Donellan v. Read, 3 B. & Ad. 890, 110 English Reports, 330, it was held that, inasmuch as the contract was fully performed on one side *within the year*, and that the intention of the parties was that such party should perform within that time, the other party could not claim the benefit of the statute, although such other party was not to perform within the year. In Johnson v. Watson, 1 Ga. 848, the same ruling was made. In McDonald v. Crosby, 192 Ill. 283, 61 N. E. 505, the parties intended that the plaintiff should perform the contract within the year, and she did perform within that time, and the court held that, as there was nothing remaining for defendant to do but pay plaintiff the money due on the contract, the statute of frauds did not apply. In Curtis v. Sage, 85 Ill. 22, the contract was verbal that, if plaintiff would make a certain conveyance, defendant would pay certain debts which were not payable for more than a year after the contract was made. It was held that the statute of frauds did not apply because the contract had been fully executed on plaintiff's part *as soon as made*, and there was nothing left for defendant to do but to pay the money. In Haugh v. Blythe's Executor, 20 Ind. 24, it was held that, as one party performed at the time the contract was made, the other party could not rely on the statute of frauds, even though he was not to perform within the year; that the statute applies only to cases "where the contract is not to be performed by either party to it within a year." The same rule is announced in Saum v. Saum, 49 Iowa, 704; Ellicott v. Turner, 4 Md. 476; McClellan v. Sanford, 26 Wis. 595. Other states hold to the same effect, a list of which may be found in 29 Am. & Eng. Ency. of Law (2d Ed.) 835, note 2. This doctrine, however, is repudiated in a number of other states, which hold that if the contract is not to be performed by one party within a year, recovery cannot be had against him by the other, even though such other party has fully performed and has done so within the year. 29 Am. & Eng. Ency. of Law (2d Ed.) 836; Frary v. Sterling, 99 Mass. 461; Dietrich v. Hoefelmeir, 128 Mich. 145, 87 N. W. 111; Broadwell v. Getman, 2 Denio (N. Y.) 87; Lockwood v. Barnes, 8 Hill (N. Y.) 128, 38 Am. Dec. 620; Pierce v. Paine, 28 Vt. 34.

In Blanton v. Knox, 3 Mo. 342, our Supreme Court held that as plaintiff's part of the contract was to be performed within the year, and was so performed, the contract

was taken out of the statute. In Pitcher v. Wilson, 5 Mo. 46, the plaintiff could not perform his part of the contract within one year, nor was defendant to do so. The court says the case is not like Blanton v. Knox, because in that case plaintiff fully performed within the year. Suggett v. Cason, 26 Mo. 221, Self v. Cordell, 45 Mo. 345, and Tatum v. Brooker, 51 Mo. 148, hold with Blanton v. Knox. By these and other cases, Missouri was put in the list of states holding that full performance on one side would entitle that party to recover from the other, though such other was not required to perform within the year. Matters stood thus until the case of Johnson v. Reading, 36 Mo. App. 306, was decided by Judge Rombauer of the St. Louis Court of Appeals, which was certified to the Supreme Court because it was in conflict with the above-mentioned cases. It appears in the Supreme Court reports as Nally, Adm'r of Tatum, v. Reading, 107 Mo. 350, 17 S. W. 978, and, in it, Judge Rombauer's opinion was fully approved. It may be a little uncertain whether this case was intended to hold that full performance by plaintiff *within the year* would be unavailing, since in that case plaintiff did not fully perform within the year, because he made no written assignment of the lease. He put defendant in possession, but did not vest in him the unexpired term. 36 Mo. App. loc. cit. 316. He held a lease which had several years to run, and verbally agreed to transfer it to defendant. The latter held the land for a year, and paid the rent therefor, but afterwards abandoned it and refused to pay further. While the Supreme Court affirmed and approved Judge Rombauer's opinion, yet it did not specifically overrule the cases cited by Judge Rombauer as opposed to his opinion, but held that the contract not only violated one clause of the statute of frauds, but also another clause, in that it was not to be performed, and could not be performed, within a year, and remarked that, "if there are any authorities in conflict with the views here announced, we overrule them." As said above, plaintiff in this case did not fully perform within a year, since he did not vest defendant with the unexpired term, but merely surrendered possession. In nearly all of the cases cited by Judge Rombauer as conflicting, except Pitcher v. Wilson, the plaintiffs therein had fully performed within the year. Especially was this true in the case of Self v. Cordell. That case was by a plaintiff who had purchased and paid for a machine, and as a part of such purchase the defendant verbally agreed not to erect or superintend the running of another in that vicinity for a period of four years. The suit was for damages for the violation of this agreement. The plaintiff, however, had fully performed his part of the contract *at once* when he purchased the machine, and the case was therefore not like Johnson v. Reading nor Pitcher

v. Wilson, but was like *Blanton v. Knox*, in that plaintiff had performed within the year and the intention of the contract was that he should do so. It may be this is the reason the Supreme Court in *Nally v. Reading* did not specifically overrule the *Self-Cordell Case*. But in *Reigart v. Coal & Coke Co.*, 217 Mo. 142, loc. cit. 163, 117 S. W. 61, it is remarked that *Nally v. Reading*—

"overruled so much of the *Self-Cordell Case* which held that the full performance of the contract would take the case out of the statute."

In the *Reigart Case*, although there was a written contract, yet as it did not contain any consideration, but oral proof had to be depended upon to show what plaintiff had done as consideration upon his part, it was the same as if the whole contract was oral, since it could not be pieced out with oral testimony. In that case plaintiff had orally agreed to go out and create a market for coal which defendant agreed to furnish for a number of years. It is not clear whether plaintiff had fully performed his part of the contract within the year or not by finding a market, but presumably he had, since the court says the exact question which was decided by the Supreme Court in *Self v. Cordell* was overruled by *Nally v. Reading*. We take it, therefore, that the Supreme Court in *Reigart v. Coal & Coke Co.* construed *Nally v. Reading* as definitely changing the rule theretofore existing in Missouri that full performance by one party within the year would take a contract, not to be performed by the other party, out of the particular clause of the statute now under consideration. It would seem from the authorities cited in *Nally v. Reading* that the Supreme Court did intend therein to announce the other rule, although in that case the fact was that plaintiff did not fully perform. It cites *Pierce v. Paine's Estate*, 28 Vt. 34, which held that:

"If the agreement, for the nonperformance of which an action is brought, was not to be performed within one year, no recovery can be had upon it, although that which formed the consideration of the agreement was to have been, and was paid or performed within that period."

It also cites *Browne* on the Statute of Frauds, § 290, which severely criticizes the rule that:

"If all that is to be performed on one side is to be performed within a year from the making of the contract, the statute does not apply to it." Sections 286-290.

So that, even though plaintiffs in the case at bar *could* have fully performed their part within the year by executing a written assignment of their lease, this will not change the situation, nor would it have been different if plaintiffs, in fact, had done so within the year. Plaintiffs, however, not only did not fully perform within a year, but also, by not executing the assignment until after the money was due, evidently construed the verbal contract to mean that *they* were not required to execute the

assignment until after the year had elapsed and the money was due. But, even if they had fully performed within the year, as the defendant was not to pay the money until after that time had elapsed, and was not to perform the terms of the lease for a number of years, then under the later and doubtless better rule adopted by our courts, this would not take the contract out of that provision of the statute of frauds which forbids suit on an oral contract which is not to be performed within a year. At least it would not take it out of that clause of the statute when the suit is against the party who is not required to perform within the year. *Sheehy v. Adarone*, 41 Vt. 541, 98 Am. Dec. 623. In that case it was held that whether the statute applies or not depends on the question whether the suit is brought against the party that was to perform his part of the contract within a year. If it is so brought, then the statute would not apply, but if brought against the party whose agreement was not to be performed within a year, then the statute would apply.

[6] The fact that defendant took ore from the premises while in possession of the ground does not change the situation. Although we hold that plaintiffs cannot sue upon the contract, we do not say they cannot recover in another action for use and occupation and for the value of the ore he has taken. It is held that in such cases they can do so. 29 Am. & Eng. Ency. of Law (2d Ed.) 841-843; *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754.

[7] Defendant did not lose his right to plead the statute of frauds by admitting in his answer that he made the oral agreement to purchase a lease for 10 years. *Lockett v. Williamson*, 37 Mo. 388.

In view of the foregoing, we are of the opinion that plaintiffs were not entitled to recover on the contract, and accordingly the judgment is affirmed. All concur.

#### FIELDS v. SEVIER. (No. 10872.)

(Kansas City Court of Appeals. Missouri. October Term, 1914.)

#### 1. HIGHWAYS (§ 184\*)—FRIGHTENING HORSES—AUTOMOBILES—QUESTION FOR JURY.

In an action for injuries to the occupant of a buggy, resulting from an automobile coming up behind the buggy, whereby the horses were frightened and ran away, evidence held sufficient to take the question of defendant's negligence to the jury, as against a demurrer to the evidence.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

#### 2. HIGHWAYS (§ 184\*)—AUTOMOBILE FRIGHTENING HORSES—PLEADING—INSTRUCTION.

In an action for injuries to the occupant of a buggy caused by an automobile frightening the horses, a petition alleging that defendant, with an unobstructed view, drove his automobile almost upon, and within a few feet of, the buggy,

without slackening speed and without warning, thereby frightening the team, charges negligence in suddenly coming upon the buggy, as well as negligence in failing to give warning, so that an instruction, that, if the jury believed the defendant negligently drove his car upon, or so near, the buggy as to frighten the team and thereby injure plaintiff, then they should find for plaintiff, is correct.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

3. HIGHWAYS (§ 184\*)—FRIGHTENING HORSES—PLEADING—INSTRUCTION.

A petition alleging that defendant drove his automobile almost upon plaintiff and frightened her team authorizes an instruction that it was defendant's duty to keep a lookout for plaintiff and to stop when necessary to prevent injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

4. HIGHWAYS (§ 184\*)—FRIGHTENING HORSES—INSTRUCTIONS.

In an action for injuries to the occupant of a buggy caused by an automobile frightening the horses, in which defendant claimed that he gave warning of his coming, an instruction, that, if defendant approached the buggy from the rear and failed to stop his automobile soon enough to prevent frightening the horses, and thereby caused the runaway, the plaintiff could recover, is erroneous, as authorizing a recovery without showing negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

5. HIGHWAYS (§ 181\*)—AUTOMOBILES—FRIGHTENING HORSES.

The failure of an automobile, approaching a buggy slowly from the rear without warning, to stop would not be negligence, unless the driver of the automobile saw, or should have seen, that the horses were frightened.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.\*]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Action by Deoma Fields against J. D. Sevier. From a judgment for plaintiff, defendant appeals. Reversed and cause remanded.

E. F. Nelson, of Jefferson City, and Jno. W. Bingham, of Milan, for appellant. Jno. W. Clapp and J. M. Wattenbarger, both of Milan, for respondent.

TRIMBLE, J. Respondent and her 16 year old son were riding south along a country highway. They were in a topless buggy, to which was hitched a team of horses driven by the boy. Appellant approached from behind in an automobile. The team became frightened, plunged forward, and then swerved to the right, causing the buggy to topple into the ditch, throwing the occupants out of the vehicle, after which the team ran away.

Respondent thereupon brought this suit to recover \$500 damages for personal injuries alleged to have been received as a result of the above occurrence. Her petition alleges, that although defendant's view along the road was unobstructed, so that he could and did see her going in the same direction the automobile was going, yet appellant carelessly, recklessly, negligently, and without re-

gard for the safety of plaintiff and her son, and with full knowledge of their perilous situation, drove said automobile almost upon and within a few feet of said buggy without slackening speed, and without giving warning or notice of his approach, thereby frightening the team and causing plaintiff to be thrown out and injured. The jury returned a verdict for respondent and appellant brings the case here.

Respondent's testimony tended to prove that she was sitting on the east side of the buggy with her body fronting south but with her face turned to her son who was sitting on her right and driving; that one of the horses suddenly took fright and plunged forward, and she looked back to see what was the cause, and, for the first time, became aware of the approach of the automobile, which was coming directly behind her, and not out to one side of the road; that the automobile approached within 25 or 30 feet of the buggy, and then the frightened team jumped or swerved into the ditch, throwing her and her son out, after which the team ran away. The evidence offered in her behalf tends to show that no warning was given of the approach of the car.

Appellant testified that when he was at least 100 feet behind the buggy he gave one "honk" of his horn, whereupon the boy in the buggy looked back, and turned his team out to the right, thereby indicating to him that he could pass; that he noticed no fright on the part of the horses, and for that reason went on until his automobile was 60 or 70 feet behind the buggy, when said vehicle, having been driven by the boy too near the edge of the ditch, fell into it and threw the occupants out. He admitted that there was nothing in the road to obstruct his view of the buggy for a quarter of a mile before he got to them, that he never slackened the speed of his automobile on account of any danger to the occupants of the buggy, and did not think of that, as he did not see anything to indicate danger.

[1] The foregoing statement of the respective contentions of the parties discloses that if respondent's claim as to what took place be true, then appellant did not exercise the care that the law required of him, and, in that event, he is liable for whatever damage that his negligence caused. The jury were the judges of the truth of the respective claims, and when the issues have been properly submitted, the finding of the jury must be respected. Appellant is in error in thinking that a demurrer to the evidence should have been sustained.

[2] Complaint is made of several of respondent's instructions, on the ground that the petition alleged a specific act of negligence, but that the instructions, especially No. 1, allowed a recovery upon a finding of general negligence; also, that the said in-

structions were based upon or included issues not raised in the petition. We do not think the instructions are open to the last-named objection. Instruction No. 1 merely told the jury that if they believed the defendant carelessly and negligently drove his car upon or so near the buggy as to frighten the team, and thereby injure plaintiff, then they should find a verdict in her favor. Then followed the other instructions, telling the jury what would constitute negligence in so doing. A study of the petition will disclose that the defendant was charged with negligently driving his automobile upon and so near to the buggy as to frighten the team, and that he did so without notice or warning. The negligence charged was not limited solely and specifically to the failure to warn, but included the act of driving suddenly upon and so near the horses as to frighten them, and, with reference to this, the negligence charged was general, rather than specific. So that whatever the defendant failed to do, in driving so close to the buggy, whereby he failed to exercise "the highest degree of care that a very careful person would use under like or similar circumstances" would constitute negligence under our Motor Vehicle Statute. Section 9, Laws 1911, p. 330. Among the precautions which a very careful person exercising the highest degree of care would use, would be that of watching to see whether the plaintiff's team was becoming badly frightened. If so, then it would be defendant's duty to stop. Laws 1911, p. 326, § 2.

[3] Now the elements of negligence in plaintiff's other instructions, which defendant says were not covered by the petition, related to defendant's duty to keep a lookout for plaintiff, and to stop when necessary to prevent injury. These could reasonably be included in the charge that he negligently drove his car almost upon plaintiff and frightened her team. So that we do not think plaintiff's instructions went outside of and beyond the issues raised by the petition, merely because they referred to defendant's duty to keep a vigilant watch, and to stop if it became necessary.

[4] But, in telling the jury under what circumstances a failure to stop will constitute negligence, the instruction dealing with that feature must do so correctly and properly. This we do not think the plaintiff's instructions did. For example, plaintiff's instruction No. 2 told the jury, without qualification, that if defendant approached the buggy and failed to stop his automobile soon enough to prevent frightening the horses, and thereby caused the runaway, then plaintiff could recover. Nothing was therein said about the approach being sudden or unknown to plaintiff, whereby the horses took fright at the car's sudden appearance and before the occupants of the buggy could take any precautions for their safety or give defendant

the statutory signal to stop by the raising of the hand, nor (in case the approach was not sudden and without warning) was anything in said instruction requiring the jury to find that the horses' fright was observable to, or could have been seen by, defendant before he was required to stop. The defendant testified that his approach was not sudden nor without warning, but that he approached, going about seven or eight miles per hour, and when within about 100 feet of the buggy he sounded a note of warning on his horn, and that then the driver of the buggy looked back and turned his horses to the right, thereby signifying to the defendant that he should come on, that thereupon defendant did not stop, but came on, seeing no manifestations of fright on the part of the horses, and, therefore, did not stop until the buggy suddenly went into the ditch. Now, the jury could have found the facts to be exactly as appellant says they were, and yet, under plaintiff's instruction No. 2, the jury could find for plaintiff merely because defendant "failed to stop the automobile soon enough to prevent frightening the horses." The automobile certainly did not stop 'until the accident occurred.

[5] But, if timely warning was given, then defendant's failure to stop did not constitute negligence, unless he saw, or should have seen, that the horses were frightened. And an instruction telling the jury that a failure to stop constituted negligence should not omit to state the circumstances under which such failure would constitute negligence. Of course, if it was the automobile's sudden and close approach without warning that caused the fright of the team, then defendant could not escape liability because the team did not manifest fright sooner. But in such case it would be the close approach suddenly and without warning that would constitute the negligence and not the failure to stop. As worded, instruction No. 2 amounted practically to a peremptory instruction to find for plaintiff, when we consider its application to the testimony in the case. All the testimony showed that the automobile did not stop until the buggy went into the ditch. But one side claimed that the approach was too close and also sudden and without warning, the other that it was not sudden and that warning was given. If the approach was made slowly and after warning was given, as defendant says it was, then his failure thereafter to stop would not be negligent, unless he saw or should have seen, that the horses were frightened. Consequently it was erroneous to give an instruction telling the jury, without qualification, that if the automobile failed to stop soon enough to prevent frightening the horses, this constituted negligence for which the defendant was liable.

For this error, the judgment is reversed and the cause remanded. All concur.

**JENNEMANN v. BUCHER. (No. 13812.)**

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

**1. APPEAL AND ERROR (§ 1010\*)—QUESTION OF FACT—FINDING OF COURT.**

A finding of fact by the court in a case tried without a jury is conclusive on appeal, if sustained by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

**2. APPEAL AND ERROR (§ 971\*)—REVIEW—DISCRETION OF COURT—LEADING QUESTIONS.**

Unless there is a flagrant violation of the rule against allowing leading questions to a witness, the discretion of the court will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.\*]

**3. APPEAL AND ERROR (§ 581\*)—RECORD FOR PURPOSE OF REVIEW—EXCLUDED EVIDENCE.**

Excluded evidence must be shown by the abstract; otherwise, an objection to its exclusion cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2575-2581, 2599, 2601; Dec. Dig. § 581.\*]

**4. APPEAL AND ERROR (§ 907\*) — REVIEW — PRESUMPTIONS.**

Where there is no showing to the contrary, the presumption is always in favor of correct action on the part of the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

**5. EVIDENCE (§ 341\*) — DOCUMENTARY EVIDENCE—COPIES.**

In an action by one of the two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, caused by the mistake of adding the whole of the outstanding assets to the half share of the seller in arriving at the valuation of the stock, a certified copy from the office of the Secretary of State of the report of the corporation, made by plaintiff prior to the sale, is irrelevant to show the value of the stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1289-1292; Dec. Dig. § 341.\*]

**6. CORPORATIONS (§ 121\*) — TRANSFER OF SHARES—ACTIONS—PLEADING—AVERMENT OF PROMISE TO PAY.**

A pleading alleging that plaintiff, one of the two stockholders of a corporation, bought all the shares of stock of the other after a valuation of the stock had been made, but by mistake an overpayment was made to the seller, due to a mistake in adding to the half share of the seller the whole outstanding assets, states a good cause of action for money had and received, and an averment of a promise to pay was immaterial, as the law would imply that promise under the facts pleaded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

**7. CORPORATIONS (§ 121\*)—SALE OF STOCK—MISTAKE—ADMISSIBILITY OF EVIDENCE.**

Where one of the two stockholders in a corporation, who bought out the shares of stock of the other, sought to recover an overpayment to the seller, due to a mistake in adding the whole outstanding assets to the half share of the seller, and the seller defended on the ground that the transaction was closed, evidence that the value of the good will was not figured in the sale, as

it should have been, is inadmissible, as the value may not be reopened.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

**8. PLEADING (§ 433\*) — OBJECTIONS AFTER JUDGMENT—WAIVER.**

A petition in an action for money had and received, based on mistake, but not alleging that the mistake was mutual, is not open to objection after judgment, where the trial was had on the theory of mistake without objection of either party.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

**9. CORPORATIONS (§ 121\*)—SALE OF STOCK—MISTAKE—"BOOK VALUE."**

Where, in an action by one of the two stockholders of a corporation, who bought out the shares of the other, to recover an overpayment to the seller, due to a mistake in adding the whole of the outstanding assets to the half share of the seller, the petition alleged that the stock was sold at its book value, a valuation on the invoice value will be considered its "book value," no other value being given, whether formally carried on the books of the concern or not.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

For other definitions, see Words and Phrases, Second Series, Book Value.]

**10. CORPORATIONS (§ 121\*)—SALE OF STOCK—MUTUAL MISTAKE—EVIDENCE.**

In an action by one of two stockholders of a corporation for money had and received, evidence held to sustain a finding that the stockholder, buying the stock of the other stockholder, had overpaid the seller by reason of a mutual mistake in adding the outstanding assets to the half share of the seller in arriving at the valuation of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

**11. NEW TRIAL (§ 103\*)—NEWLY DISCOVERED EVIDENCE—ISSUES.**

Newly discovered evidence, material only in case of a counterclaim by defendant, is not ground for a new trial, where the only defense was a general denial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. § 103.\*]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by Theodore Jennemann against John Bucher. From a judgment for plaintiff, defendant appeals. Affirmed.

A. H. Roudebush, Edward A. Raithel, and John W. Mueller, all of St. Louis, for appellant. Edward V. P. Schneiderhahn, and E. C. Slevin, both of St. Louis, for respondent.

REYNOLDS, P. J. The petition in this case charges that defendant, at a day named, was the owner of 15 shares of the capital stock of the Jennemann-Bucher Retail Liquor Company; that on that date defendant entered into a contract with plaintiff whereby he agreed to sell to plaintiff the 15 shares of capital stock, "at and for its book value, which was then and there ascertained and agreed between the plaintiff and defendant to amount to the sum of three thousand three hundred and sixty-one dollars and thirty-one cents." Averring that defendant duly delivered and assigned these shares of stock to

plaintiff, it is averred that on the day mentioned plaintiff paid to defendant "through a mistake and error upon his part, the sum of four thousand three hundred and thirty-four dollars and eighty-one cents as payment in full for said shares instead of the said agreed sum of three thousand three hundred and sixty-one dollars and thirty-one cents, whereby plaintiff, by reason of said error and mistake, paid to said defendant the sum of nine hundred and seventy-three dollars and fifty cents in excess of the sum agreed to be paid for said shares of stock." Averring demand for repayment of this sum as soon as plaintiff discovered this error and mistake, and refusal of defendant to refund, plaintiff demands judgment for this amount with interest and costs.

The amended answer upon which the case was tried admits that prior to the date named, defendant was the owner of 15 shares of the stock of the company, and that on or about that date defendant delivered and assigned these shares to plaintiff and plaintiff paid defendant therefor the sum of \$4,334.80. Every other allegation in the petition is denied generally.

The trial was before the court, a jury having been waived. At its conclusion the court found for plaintiff, rendering judgment for the amount claimed and interest. Filing motions for new trial and in arrest as well as amended motions, all however filed within due time, and excepting to the action of the court in overruling them, defendant has duly appealed.

There is evidence in the case tending to prove that plaintiff and defendant were doing business under the name of Jennemann-Bucher Retail Liquor Company, which was a corporation with a paid up capital of \$3,000, each of the parties, plaintiff and defendant, owning 15 shares of the total capital stock, although one share actually owned by Jennemann appears to have been in the name of his son. The defendant was the president of the concern, having charge of its sales. Plaintiff was the secretary and treasurer and attended to the buying for the concern and apparently kept its books, looked after its accounts, was its financial manager. Difficulty having arisen between these two parties, Jennemann proposed that one or the other draw out, selling his stock, 15 shares, to the other. For the purpose of arriving at the value of the assets of the concern, Jennemann employed a gauger to measure up the liquors in stock. He also appears to have been the active party in arriving at the value of the other articles and in stating the financial condition of the concern, but there is evidence tending to show that his figures were all submitted to defendant and gone over by both of them. The result of this was that Bucher's share, that is the value of his 15 shares, as evidenced by the stock on hand, was figured at \$2,387.81. In addition to stock

on hand it appears that there belonged to the concern evidences of debt or accounts for moneys loaned out by the concern to different parties, amounting to \$1,947. In arriving at the value of the interest of Bucher this whole amount of \$1,947 was added to Bucher's one-half interest in the stock, etc., that is to say, added to the \$2,387.81. According to this, Bucher's interest was figured at \$4,334.81. It appears that Jennemann was the party who made this mistake, but it is very clear from the evidence that both parties acceded to the trade on the basis of this mistake. Having thus arrived at the value of Bucher's interest, and Bucher saying he was unable to buy out Jennemann and was willing to sell on that valuation and for that sum, Jennemann agreed to buy at those figures, that is \$4,334.81, and gave Bucher his check for that amount which Bucher accepted and apparently cashed. Some time afterwards plaintiff Jennemann discovered the mistake that had been made in giving Bucher credit for the whole of the money loaned out, that is, for the \$1,947, instead of for only one-half of this amount, that is to say \$973.50. It is to recover this amount as an overpayment that this action was brought.

[1] It is earnestly insisted by counsel for appellant that the burthen of proof being upon plaintiff, it was incumbent upon him to sustain the allegations of his petition by the preponderance of the evidence, and that this, it is submitted, he has absolutely failed to do. Inasmuch as the learned trial judge, acting as trier of fact, found for plaintiff, we must assume that his finding is correct, if sustained by substantial evidence. The weight or preponderance of the evidence is for his sole determination. This disposes of the first point made by counsel for appellant.

[2] The second point made by those counsel is on the rulings of the trial court on the evidence. The principal error upon which this rests is that the court allowed leading questions to be asked. That is so much a matter within the discretion of the trial court that unless there is a flagrant violation of the rule against asking leading questions, and that to the injury of the party objecting, we will not interfere with the exercise of that discretion. We find no such abuse of the discretion here.

[3-5] Complaint is also made of the action of the trial court in excluding from evidence a certified copy from the office of the Secretary of State of the report of the Jennemann-Bucher Retail Liquor Company for the year 1908, made by plaintiff, it being stated that it was offered for the purpose of impeaching the witness in his testimony as to the value of the stock of that company. This was objected to on the ground that it was neither competent nor relevant to the issues in the cause, and the objection sustained. We might dispose of this by remarking that the certificate is not in the abstract of

the record. That absent we cannot pass upon either its materiality or competency. This on the settled rule that if error is assigned to the exclusion of evidence offered, that evidence or its substance must be included in the record. All that appears as to this certificate is that it is the report of the Jennemann-Bucher Retail Liquor Company for the year 1908, made by Theodore Jennemann and was offered for the purpose of impeaching his testimony as to the value of the stock. Whether it did that, or even tended to do it, in the absence of the certificate, is a matter impossible for us to determine. The presumption always is in favor of correct action on the part of the trial judge, absent a showing to the contrary. Apart from that, under the issues made by the pleadings, we are unable to see the relevancy of the certificate as showing the value placed upon the stock by Jennemann at the time he made it.

[6, 7] It is further assigned as error and as a reason why the judgment in this cause should be reversed, that there is no account stated, nor any averment that defendant agreed to pay or, more correctly speaking, to repay the money, it being here argued that the real value of the stock had become material and that error was committed in excluding testimony as to the value of the good will of the concern, as that was an asset which should have been included. We cannot agree with counsel on either of these propositions. This petition, liberally construed, as it must be after judgment in support of the judgment, is a good petition for money had and received, which *ex æquo et bona*, defendant was bound to pay back to plaintiff. The amended answer upon which the case was tried admitted the receipt of the money but denied liability to make repayment. That is all that is in the answer and that was the only issue. Here was no attempt to open up the valuation of the asset or impeach the transaction. On the contrary, defendant stood by it and insisted on it as a closed transaction. So that the value of the good will was not involved and could not enter into consideration. An averment of a promise to pay was immaterial. Under the case pleaded the law would imply that promise, and a demand and refusal being averred, the cause of action was properly stated. This does not purport to be an action on an account stated and was not tried on any such theory.

[8] It is further assigned by counsel for appellant that there can be no recovery in the case because there was no mutuality of mistake. It is true that the petition alleges that the mistake made was by plaintiff and that it does not allege a mutual mistake. If any objection had been made at the trial to the sufficiency of the petition on this score and that objection had been properly saved if overruled, there might be something in this point. But the case was tried on both sides

on the question as to whether there had been a mutual mistake; there was evidence strongly tending to prove a mutual mistake. The finding of the trial court clearly was made on the theory of a mutual mistake, and judgment went for plaintiff. After judgment, this petition is sufficient.

[9, 10] But it is said that as set out in the petition the agreement was to sell the stock "at its book value," and that there is no "book value" shown. This is more a play on words, than a substantial criticism. Moreover, the evidence tends to show that the stock was purchased on what was assumed to be its invoice value—and that is its book value—no other value being given—whether formally carried on the books of the concern or not. That this value was written out in the form of account was in evidence. The schedule of accounts, properly grouped, is in the record. The mistake clearly appears, namely, that defendant was given credit and plaintiff charged with the whole of the amount of money loaned out by the concern instead of being credited with one-half of that amount which was all to which either was entitled. To repeat, it is clear that there is evidence justifying the finding of the court that the overpayment by plaintiff to defendant was the result of a mutual mistake. Each of the parties was attempting to arrive at the "book value" of the assets of their concern, and the purchase and sale was to be made on that basis.

[11] As before stated, there was an amended motion for a new trial. One of the grounds of that was that material evidence had been discovered by defendant after the end of the trial and after the finding and judgment. That newly discovered evidence, when we examine the affidavit accompanying this amended motion for new trial, is to the effect that while Jennemann was secretary and treasurer of the concern and as such in sole charge of its money transactions, he had paid out moneys of the concern for his private account, for which he should have been charged, and so the value of the stock included, it being claimed that if a new trial was granted defendant would interpose a counterclaim and introduce evidence in support thereof. The court rejected this offer and overruled the motion for new trial and, as we think, in so acting committed no error. Testimony of that kind might have been introduced under a counterclaim but there is no pretense whatever of any counterclaim being interposed here. In point of fact, as we have already stated, the answer as amended was a general denial except as to the fact of the reception of the money. At the trial defendant undertook to prove that he had sold out his stock for a lump sum, irrespective of any appraisement or valuation. This new claim, as well as that made concerning the value of the good will, was directly antagonistic to any such position. Parties are not

permitted to blow hot and cold. To avail himself of newly discovered evidence, it must appear that it was within the issues. We know of no case in which it has ever been held that newly discovered evidence is a ground for a new trial, when it relates to a matter not included within the issues joined and on trial before the court.

We are asked to impose 10 per cent. statutory damages as for a vexatious appeal. We do not think that the case warrants any such action.

Finding no reversible error, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

STATE v. WESTBROOK. (No. 1310.)  
(Springfield Court of Appeals. Missouri.  
Dec. 12, 1914.)

1. LIBEL AND SLANDER (§ 152\*) — CRIMINAL RESPONSIBILITY—INFORMATION—EVIDENCE.

To sustain a criminal charge for uttering slanderous words, substantial proof of the identical words, or enough of the identical words as will support the charge, is necessary, and equivalence is not enough.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417, 419-424, 426, 427; Dec. Dig. § 152.\*]

2. CRIMINAL LAW (§ 731\*)—TRIAL—INSTRUCTIONS.

It is not error to charge on a trial for slander that the jury are the judges of the law and fact and not bound to find as the judge directs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1694, 1695; Dec. Dig. § 731.\*]

3. LIBEL AND SLANDER (§ 152\*) — CRIMINAL RESPONSIBILITY—INSTRUCTIONS.

An instruction on a trial for slander, which authorizes a conviction on the jury's finding that accused spoke the words charged, "or words substantially the same," is erroneous, because the charge and the proof thereof must substantially correspond.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417, 419-424, 426, 427; Dec. Dig. § 152.\*]

4. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS—APPLICATION TO CASE.

Where, on a trial for slander, there was no evidence on which to justify a conviction for want of proof of the identical words complained of, or enough of them to support the charge, an instruction authorizing a conviction on the jury's finding that the accused spoke the words charged, or words substantially the same, was erroneous because not sustained by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

5. CRIMINAL LAW (§ 811\*)—TRIAL—INSTRUCTIONS—SINGLING OUT TESTIMONY OF WITNESS.

An instruction directing the jurors' attention to the fact that a witness had been impeached by proof of contradictory statements, and stating that, if the witness had made contradictory statements, the jury should take the same into consideration in determining his cred-

ibility as to the remainder of his testimony, was erroneous as singling out testimony and commenting thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

6. LIBEL AND SLANDER (§ 152\*)—CRIMINAL RESPONSIBILITY—INFORMATION—OFFENSES.

The better practice requires an information charging slander to state separately the several conversations had by accused at different times in the presence of different persons, instead of charging the speaking of the slanderous words at one time in the presence of all the persons.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417, 419-424, 426, 427; Dec. Dig. § 152.\*]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

James Westbrook was convicted of slander, and he appeals. Reversed and remanded.

Moxley & Woody, of Bloomfield, for appellant. John L. Hodge, Pros. Atty., of Bloomfield, for the State.

FARRINGTON, J. The appellant was convicted in the circuit court of Stoddard county on an information charging him with having unlawfully, falsely, and maliciously charged and accused one Eva G. Pentacost of fornication, "by then and there falsely speaking of and concerning her (the said Eva G. Pentacost), in the presence and hearing of Milo Castleman, Charley McMillan, Frank Asa, James Young, Frank Fowler, and divers other persons to the prosecuting attorney unknown, \* \* \* the following false and slanderous words, imputing to the said Eva G. Pentacost the act and offense of fornication; that is to say, 'We saw her [meaning, the said Eva G. Pentacost] and Chester Bridges holding sexual intercourse together with each other.'"

Instructions numbered 1 and 3 given on behalf of the state are as follows:

"(1) The court instructs the jury that if you believe and find from the evidence that at the county of Stoddard and state of Missouri, within one year prior to September 1, 1913, the defendant, James Westbrook, did, in the presence and hearing of Milo Castleman, Charley McMillan, Frank Asa, Frank Fowler, or either of them, falsely and maliciously charge and accuse Eva G. Pentacost of fornication by then and there, in the presence of and hearing of Milo Castleman, Charley McMillan, Frank Asa, Frank Fowler, or either of them, falsely and maliciously speaking of and concerning the said Eva G. Pentacost, in a conversation then and there had, concerning the character and reputation of the said Eva G. Pentacost for virtue and chastity, the following words, to wit, 'We saw her and Chester Bridges holding sexual intercourse together with each other,' or words substantially the same, the said James Westbrook then and thereby falsely and maliciously charging and intending to charge the said Eva G. Pentacost with, and accuse and impute to her, the act and offense of fornication, by then and there having illicit sexual intercourse with the said Chester Bridges, then the jury should find the defendant guilty of slander as charged in the information, and assess his punishment at imprisonment in jail for a term of not exceeding one year, or a fine of not exceeding

\$1,000, or by both imprisonment in jail and by a fine not exceeding the above limit in each instance. And the court further instructs the jury that by the term 'maliciously,' as used in the instructions and information, is not meant necessarily either ill will, hatred, or spite, but means the intentional doing of a wrongful act without just cause or excuse."

"(3) The witness Chester Bridges was asked if he had stated to one Claud Jarrell that he had felt the legs and breasts of the said Eva G. Pentacost, and the said Chester Bridges denied that he had made such statement. Witness Jarrell testified that he had made such statement to him. Now, if you believe that said Bridges made such statement to said Jarrell, you may take such contradiction into consideration and give it such weight as you may deem it entitled to receive in determining the credibility of such Bridges as to the remainder of his evidence given before you by the witness Bridges, and such testimony as to said contradiction is not competent for any other purpose in this case."

The record before us contains numerous errors.

[1] Without detailing the conversations and reproducing the language used by the witnesses on behalf of the state in relating what the defendant did say to them with reference to Chester Bridges and Eva G. Pentacost, it is enough, so far as this opinion is concerned, to state that no single witness throughout the entire record testified that the defendant used the words charged in the information or any substantial number of the words used to sustain the charge made. They did testify to conversations with defendant from which it would be reasonably inferred that he stated that he had seen Chester Bridges and Eva G. Pentacost in the act of having sexual intercourse; but the words sworn to by the witnesses as having been used by the defendant were merely the equivalent and not the words actually charged in the information to have been used nor any of the words charged in the information.

It has been so long the settled rule in this state, both in criminal and civil trials, that there is a variance where the proof fails to show that substantially the same words were used by the accused as he is charged with having used that it will require a mere reference to the decisions to sustain the ruling we make. In the opinions it is pointed out that to substantially sustain the charge means that substantial proof of the identical words, or enough of the identical words as will support a charge, is necessary. Equivalence will not do; there must be enough of the same words. This rule is found stated in the following cases: *State v. Fenn*, 112 Mo. App. 531, 86 S. W. 1098; *Conran v. Fenn*, 159 Mo. App. 664, 140 S. W. 82; *Coe v. Griggs*, 78 Mo. 619; *Christal v. Craig*, 80 Mo. 367; *Noeninger v. Vogt*, 88 Mo. 589; *Berry v. Dryden*, 7 Mo. 324; *Street v. Bushnell*, 24 Mo. 328; *Birch v. Benton*, 26 Mo. 153; *Bundy v. Hart*, 46 Mo. 460, 2 Am. Rep. 525; *Mix v. McCoy*, 22 Mo. App. 488; *Wood v. Hilbish*, 23 Mo. App. 389; *Hauser v. Steigers*, 137 Mo. App. 560, 119 S. W. 52; *Kunz v. Hartwig*, 151 Mo. App. 94, 131 S. W. 721;

*Parsons v. Henry*, 177 Mo. App. 329, 164 S. W. 241; *Crandall v. Greeves*, 168 S. W. 264; *Lemaster v. Ellis*, 173 Mo. App. 332, 158 S. W. 904.

Appellant charges that instruction numbered 1 is faulty in several particulars: (1) That it invades the province of the jury because section 4821, R. S. 1909, provides that the jury, under the direction of the court in slander cases, shall determine the law and the fact. (2) That on reading the instruction it is found that the jury was told on the finding of certain facts to return a verdict of guilty. (3) That this was a peremptory charge. (4) That the instruction pretended to cover the whole law of the case, and that the jury might well have found defendant guilty and never looked at another instruction given in the case. A discussion of this subject is found in *Sands v. Marquardt*, 118 Mo. App. 490, 87 S. W. 1011; *State v. Simpson*, 136 Mo. App. 664, 118 S. W. 1187; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457; *State v. Powell*, 66 Mo. App. 598.

[2] There was an instruction given at appellant's request telling the jury that it was the judge of the law and fact in this character of cases, and that it was not bound to find as the judge directed. However logical appellant's argument may be considered, the Supreme Court in the case of *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361, approved instructions given as these were, which, of course, is binding on us.

[3] The instruction is defective because it authorized a conviction if the jury found that defendant spoke the words "or words substantially the same." It is the charge and the proof thereof which must substantially correspond, and not the words.

[4] Again, there was no evidence whatever that defendant ever spoke the words charged in the information, and the instruction should not have been given, because there was no evidence upon which to base a finding of guilty.

[5] Instruction numbered 3 was a singling out of testimony and a comment thereon and should not have been given. *Dungan v. Railroad*, 178 Mo. App. 164, 165 S. W. 1116.

[6] The charge was that these words were spoken then and there in the presence of some four or five men. The proof shows that at no time were all of these witnesses or in fact more than any two of them present when the story told them by the defendant was related. One was told at a barn, another at some other place, and another at still some other place. Appellant contends that the proof did not sustain the charge in this respect; that, where a slander is uttered to different persons at different places, each utterance is a separate offense; and that one charged with such offenses should be charged

in separate counts. Without deciding this point we will say that the better and safer practice, at least, would require that the several conversations be separately stated. *Brown v. Wintsch*, 110 Mo. App. 264, 84 S. W. 196; *Schmidt v. Bauer*, 60 Mo. App. 212; *Adams v. State*, 62 Tex. Cr. R. 426, 138 S. W. 117. In the case last cited it was pointed out that the admission of testimony showing separate offenses was admissible only for the purpose of showing motive and intent, and that the jury should have been so instructed.

It was admitted by the prosecuting witness and the witness Bridges that they were at a place in a road in a buggy on the date the witnesses for the defendant say they were there. All agree that a scuffle occurred in the buggy between Bridges and the prosecuting witness. Bridges and the prosecuting witness say the scuffle was over a card and a ring. The witnesses for defendant say the scuffle was over an entirely different thing. The issue was sharply drawn on this point and the testimony irreconcilably conflicting.

This case involves a serious question concerning the character of two persons, one the prosecuting witness and the other this defendant; and, before guilt can be stamped upon the accused, he must have been accorded a fair trial under the law of this state, as guaranteed to him by the Constitution and statutes and decisions, together with the evidence adduced. He did not get a fair trial, so far as the law is concerned.

The judgment is therefore reversed, and the cause remanded.

STURGIS, J., concurs. ROBERTSON, P. J., concurs herein, but without changing his views as to the application of the law in the case of *Lemaster v. Ellis*, 173 Mo. App. 332, 158 S. W. 904.

SWEZEA v. JENKINS et al. (No. 1328.)  
(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

1. JUSTICES OF THE PEACE (§ 161\*)—APPEAL FROM DEFAULT JUDGMENT—FILING MOTION AS APPEARANCE.

Since taking an appeal from a default judgment does not waive defective service and confer jurisdiction of the person, filing a motion on appeal to dismiss the action would not be an appearance except for the purpose stated therein.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 592-599, 601, 602, 604; Dec. Dig. § 161.\*]

2. JUSTICES OF THE PEACE (§ 167\*)—APPEAL FROM DEFAULT JUDGMENT—MOTION TO DISMISS ACTION—QUESTIONING JURISDICTION.

In a case wherein a justice had jurisdiction of the subject-matter, the circuit court on appeal from a default judgment properly overruled a motion to dismiss the action, question-

ing the justice's jurisdiction of the subject-matter only.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. § 167.\*]

3. JUSTICES OF THE PEACE (§ 58\*)—JURISDICTION—HOW SHOWN.

A justice's court is of limited jurisdiction, and hence jurisdiction assumed must be shown somewhere in the proceedings.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 207-215; Dec. Dig. § 58.\*]

4. JUSTICES OF THE PEACE (§ 173\*)—JURISDICTION.

A justice's jurisdiction of the person may be ascertained by looking not only to the face of the proceedings, but to the evidence, and if that sufficiently shows that the township where defendants reside adjoins that wherein suit is brought, as required by Rev. St. 1909, § 7399, his judgment is not without jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 660-664; Dec. Dig. § 173.\*]

5. JUSTICES OF THE PEACE (§ 164\*)—REVIEW OF JUSTICE'S JURISDICTION—RECORD.

Where the record proper only is brought up on writ of error to the circuit court, questioning jurisdiction of the person in a case appealed from a justice of the peace, jurisdictional facts claimed not to exist may be shown by evidence aliunde, and hence his judgment cannot be held to be necessarily void because the face of the proceedings fails to show jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

Error to Circuit Court, Carter County; W. N. Evans, Judge.

Suit by A. D. Swezea against W. E. Jenkins and another in justice court. A default judgment for plaintiff was entered, and defendant appealed to the circuit court, where they moved to dismiss the case for want of jurisdiction in the justice of the subject-matter. The motion was denied, and the appeal was dismissed for want of prosecution, and defendants bring error. Affirmed.

Garry H. Yount, of Van Buren, for plaintiffs in error.

FARRINGTON, J. Plaintiff (defendant in error) commenced suit on a promissory note for \$50 signed by defendants (plaintiffs in error) before a justice of the peace within and for Kelley township in Carter county. The summons was issued and placed in the hands of the constable of Kelley township for service. His return shows that he executed the writ by reading the same to and in the presence of the defendants "in Johnson township." The transcript of the justice shows that defendants failed to appear for trial, and a judgment was entered against them for \$50.51. An appeal to the circuit court of Carter county was perfected by defendants, and, when the case was reached on the docket there, the defendants filed a motion to dismiss the plaintiff's action because the justice "had no jurisdiction of the subject-matter" and because "the circuit court

acquired no jurisdiction of the subject-matter on appeal." The motion was overruled. Whereupon the circuit court proceeded with the cause, its judgment being that the appeal be dismissed for want of prosecution and that plaintiff recover of and from the defendants the sum of \$54.15. Defendants sued out a writ of error and have brought here for our consideration only the foregoing proceedings, and ask that we set aside the judgment of the circuit court on the record proper. The evidence was not preserved by bill of exceptions and brought here.

The point made by plaintiffs in error is that the transcript filed in the circuit court does not show that the justice had jurisdiction of this cause. They direct our attention to the fact that neither the transcript of the justice nor the record entries in the circuit court show the residence of any of the parties; nor does the fact anywhere appear that Johnson township adjoins Kelley township. They insist that, since the justice court is one of limited jurisdiction, its transcript must affirmatively show jurisdiction of the cause, and that, if it does not, as the jurisdiction of the circuit court on appeal from the justice is derivative, the action should be dismissed.

[1] Since the last decision of the Supreme Court (*Meyer v. Insurance Co.*, 184 Mo. 481, 83 S. W. 479) holds that the taking of an appeal from a judgment by default in a justice's court by a defendant to the circuit court does not operate as a waiver of the matter of defective service and confer jurisdiction over the person, the filing of the motion in the circuit court would not be an appearance except for the purpose therein stated. *Handlan-Buck Manufacturing Co. v. Railroad*, 167 Mo. App. 683, 151 S. W. 171.

[2] Now the motion filed in the circuit court by defendants asking that plaintiff's action be dismissed questions the jurisdiction of the justice over the "subject-matter," saying nothing as to jurisdiction of the person. The circuit court therefore had sufficient ground for overruling the motion because the "subject-matter" of the suit was a promissory note for \$50, over which the justice of course had jurisdiction; and this would be sufficient ground upon which to dispose of the writ of error. *State ex rel. Pacific Mut. L. Ins. Co. v. Grimm*, 239 Mo. loc. cit. 177, 143 S. W. 483.

[3] The plaintiffs in error, however, are in no better shape to insist on the point here had their motion been directed to the jurisdiction as to the person. All the decisions evidence the general proposition that a justice court is one of limited jurisdiction, and, being such, the jurisdiction the justice assumes must somewhere be shown in his proceedings. Some confusion has arisen as to just where the jurisdictional facts must appear. It would seem that, in all cases where the property which is the subject-matter of

a suit brought before a justice of the peace fixes his jurisdiction, then the jurisdiction must be made to appear from some entry made by him in the case. *Sawyer v. Burris*, 141 Mo. App. 108, 121 S. W. 321; *State ex rel. Castleman v. Cunningham*, 106 Mo. App. 58, 79 S. W. 1017; *Belshe v. Lamp*, 91 Mo. App. 477; *Barnes v. Plessner*, 162 Mo. App. loc. cit. 464, 142 S. W. 747; *Severn v. Railroad*, 149 Mo. App. 631, 129 S. W. 477; *Robinson v. Schiltz*, 135 Mo. App. 32, 115 S. W. 472. This will be found on reading cases involving injury to live stock by railroad companies, suits in attachment, mechanics' lien suits, and the like. As was said in the case above cited (162 Mo. App. loc. cit. 464, 142 S. W. 748):

"But though such be true as to cases of this character, the doctrine is much relaxed with respect to the ordinary class of cases falling within the jurisdiction of the justice, when the essential jurisdictional facts appear in the proof made in the case, though they are not shown on the face of the record proper. For instance, where it appears in the proof that both plaintiff and defendant reside in the same or an adjoining township in which the suit is instituted, the matter of jurisdiction sufficiently appears. *Trimble v. Elkin*, 88 Mo. App. 229-236. Our statute (section 7399, R. S. 1909) provides that 'every action recognizable before a justice of the peace shall be brought before some justice of the township, either: First, wherein the defendants, or one of them, resides, or in any adjoining township,' etc."

See, also, *Lutes & Dulany v. Perkins*, 6 Mo. 57; *Collins v. Kammann*, 55 Mo. App. 464; *Rowe v. Schertz*, 74 Mo. App. loc. cit. 606; *Powell v. Adams*, 98 Mo. 598, 12 S. W. 295; *Sutton v. Cole*, 155 Mo. loc. cit. 213, 55 S. W. 1052; *Smith v. Lyle Rock Co.*, 132 Mo. App. 297, 111 S. W. 831; *Sappington v. Lenz*, 53 Mo. App. 44; *Hammond v. Darlington*, 109 Mo. App. 333, 84 S. W. 446; *Wissman v. Meagher*, 115 Mo. App. loc. cit. 87, 91 S. W. 448; *Randall v. Lee & Randall*, 68 Mo. App. 561; and 24 Cyc. 498.

In considering the same question as to jurisdiction of a county court, the Supreme Court, in the case of *State v. McCord*, 207 Mo. loc. cit. 526, 106 S. W. 27, 123 Am. St. Rep. 410, held that it is sufficient if jurisdiction appear from the entire record, citing and approving cases hereinbefore referred to.

[4] It will therefore be seen that although the proceedings in a justice's court must somewhere disclose the jurisdiction, and in certain cases the jurisdiction must appear on the face of the proceedings, yet in other cases of which such courts entertain jurisdiction one may look not only to the face of the proceedings but to the entire proceedings, that is, the evidence, to ascertain whether the justice had jurisdiction; and, as the case before us falls within the last-mentioned class of cases, if the evidence sufficiently showed that Johnson township adjoins Kelley township, and that the justice had jurisdiction of the cause fixed by the residence of the parties, his judgment was not without jurisdiction.

[5] That such jurisdiction can be shown by evidence allunde requires us to hold that the justice's judgment was not necessarily void because the face of the proceedings fails to show jurisdiction. As before stated, only the record proper is brought here for our review, and, as we hold it unnecessary that the record proper in this case show the jurisdictional facts claimed by plaintiffs in error not to exist, the contention of the plaintiffs in error is without merit.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J.,  
concur.

FOWLER v. BURRIS. (No. 1262.)  
(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

1. DAMAGES (§ 141\*)—PLEADING—PETITION—PARTIES—FINANCIAL CONDITION.

Where, in an action against a surgeon for malpractice, there was no claim for punitive damages, allegations in the petition that plaintiff was a "widow woman" without property or effects and a common laborer wholly dependent upon manual labor for a living and support, and that defendant "possessed considerable wealth," were improper, though plaintiff was entitled to allege and prove the kind of work she had been engaged in and her inability after the injury to follow her usual avocation, to show the extent of her injury and her impaired ability to earn a living.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 406-408, 412, 414, 415; Dec. Dig. § 141.\*]

2. PHYSICIANS AND SURGEONS (§ 14\*)—CARE AND SKILL REQUIRED—USE.

It is not sufficient that a surgeon called to treat an injury possesses ordinary skill and uses proper and approved medicines and appliances, but he is required, in treating the particular case, to use and put in practice his reasonable skill and diligence.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 21-30; Dec. Dig. § 14.\*]

3. PHYSICIANS AND SURGEONS (§ 18\*)—MALPRACTICE—DAMAGES.

In an action against a surgeon for malpractice in treating plaintiff for a broken and dislocated wrist, an instruction that in estimating plaintiff's damages, if any, the jury should consider the character and extent of her injury, whether it was permanent, the pain of body and anguish of mind she had suffered, if any, and would suffer in the future on account of the injury, and the impairment of her earning capacity, if any, etc., and assess her damages at such sum as would reasonably compensate her therefor, not to exceed the sum prayed for in the petition, was erroneous as charging the physician with liability for all the results of the original accident in which the wrist was injured, as well as the necessary results of his unskillful treatment.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

4. PHYSICIANS AND SURGEONS (§ 18\*)—MALPRACTICE—DAMAGES.

Where a surgeon was sued for malpractice in negligently treating plaintiff's broken and dislocated wrist, defendant was only liable for the increased injury, if any, together with the

pain of body and mind or the impairment of the use of plaintiff's arm which was occasioned by his negligence in the manner of treating the same.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

5. PHYSICIANS AND SURGEONS (§ 18\*)—MALPRACTICE—CARE REQUIRED—INSTRUCTIONS.

An instruction, in an action against a surgeon for malpractice, that the care and skill which a surgeon is required to use in his practice must be proportionate to the character of the injury he treats, within the limits of all ordinary skill and knowledge, was improper as requiring too high a degree of care and in requiring that the skill should increase in proportion to the severity of the injury.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Action by Mary Fowler against Levi Burris. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wammack & Welborn, of Bloomfield, and E. F. Williamson, of Puxico, for appellant.

STURGIS, J. This is a suit for malpractice on the part of the defendant, a physician. The petition alleges that the plaintiff accidentally fell and broke and dislocated the bones of her left wrist; that she employed the defendant, a practicing physician, to set, heal, and otherwise treat her said injury, which employment the defendant accepted; that defendant did not exercise ordinary skill in the treatment of her injury, but, on the contrary, treated it so carelessly, negligently, and unskillfully that the bones of her arm and wrist were not properly set and the dislocation reduced; and that by reason thereof her said wrist became stiff, and it and her left arm remained greatly and permanently deformed and wholly useless. She asks for \$2,000 damages. The answer is a general denial and sets up a special defense that plaintiff, in caring for her hand and arm after the injury complained of, was so careless and negligent as to cause any permanent injury she may have suffered; that the plaintiff failed and neglected to follow the directions given by the defendant; and that this negligence on her part and refusal to obey the directions of the defendant in the care of her arm caused the injuries she complains of.

[1] We notice that the petition in this case alleges that the plaintiff is a "widow woman" without property or effects, a common laborer, and wholly dependent upon manual labor for a living and support; and that the defendant "possesses considerable wealth." As this case will have to be retried for the errors hereafter mentioned, it is proper to state that, under the issues of this case, these matters are not proper allegations of the petition. There is no claim for punitive dam-

ages, and we know of no case holding that, in an action for actual damages based on negligence, the question of plaintiff's poverty or defendant's wealth has any proper place either in showing defendant's negligence or as a basis for estimating plaintiff's damages. The defendant's liability for negligence or the amount of plaintiff's recovery therefor are in no wise dependent on the poverty of the plaintiff or the wealth of the defendant. This applies both to the pleadings and the evidence. By this we do not mean, however, that plaintiff might not properly prove, as showing the extent of her injury and her impaired ability to earn a living, the kind of work she has been engaged in and her inability to follow her usual occupation.

[2] The petition in this case alleges that the defendant is a skilled physician and surgeon. The negligence complained of is that in treating plaintiff's injuries he neglected same and did not use the reasonable skill he possessed. In the case of *Spain v. Burch*, 169 Mo. App. 94, 101, 154 S. W. 172, this court said that it is not sufficient that a physician possesses ordinary skill and that he use proper and approved medicines and appliances in treating a patient, but that in treating any particular case he must in that case use and put in practice his reasonable skill and diligence. The evidence in this case shows that the defendant only treated plaintiff's injuries once. At that time the arm was considerably swollen, and the evidence tends to show that it would be difficult to determine the kind or extent of the injuries. Defendant testified that he thought that the arm was only sprained. Plaintiff's evidence shows that he stated at the time that the arm was badly fractured. There is also evidence tending to show that, in case the arm was so badly swollen at the time the physician first examined it that he could not tell whether the arm was merely sprained or the bones fractured, ordinary skill and prudence would require him to dress the arm temporarily and again examine it and give proper treatment a few days later after the swelling had gone down. There is a conflict in the evidence as to whether defendant gave directions to plaintiff to report the condition of the arm in a few days, so that defendant could, if necessary, give the same further treatment. He states that he expected the plaintiff to come to his office for further treatment; but there is other evidence to the effect that he gave no directions for her to do so, but, on the contrary, said that his first treatment was all that was necessary. The evidence is also conflicting as to whether the splints used by the defendant in setting the arm and keeping it in position so as to prevent deformity were such as an ordinarily skillful physician would use. The defendant, however, does not complain that there is not sufficient evidence to take the case to the jury.

[3] On the measure of damages, the court gave the following instruction:

"The court instructs you, gentlemen, that, if your verdict shall be for the plaintiff, then, in estimating the amount of damage you will award her, you should take into consideration the character and extent of her injury (if any), whether said injury is permanent, the pain of body and anguish of mind she has suffered, if any, and the pain of body and anguish of mind she will suffer in the future, if any, on account of said injury, and the impairment of her earning capacity, if any, since the — day of May, 1912, on account of said injury, together with all the other facts and circumstances in the case, and assess her damages at such sum as will reasonably compensate her therefor, not to exceed the sum of \$2,000, prayed for in the petition."

It will be noticed that this instruction proceeds on the theory that plaintiff should be awarded damages for her entire injury and the physical pain and mental anguish resulting therefrom, and holds defendant accountable for all impairment of her earning power, provided the jury finds for the plaintiff on the ground of defendant's negligence in treating the injury. The evidence in this case shows, and common sense teaches us, that a broken arm is itself a serious injury, regardless of the way in which it is treated by the attending physician, and that it necessarily results in much bodily pain and mental anguish, and that it takes considerable time for the injured member to regain its normal strength and efficiency, and that in many, if not most, cases the injury is more or less permanent and the usefulness of the arm impaired even with skillful surgical treatment. The attending surgeon, therefore, cannot be held liable for all the damages growing out of the injury. He is not responsible for the original injury and its usual and natural consequences with proper treatment.

[4] It would be proper for the jury to be told that in estimating the amount of damages they should not take into account the injury and pain of body and mind, or any impairment of plaintiff's strength or earning power due to the breaking of the arm, and that the defendant, if found negligent, is only to be held in damages for any increased injury and pain of body and mind, or impairment of the use of the arm occasioned by defendant's negligence in his manner of treating the same. *Carpenter v. McDavitt & Cottingham*, 53 Mo. App. 393, 403, and cases cited.

[5] Instruction numbered 2, given for plaintiff, is also subject to criticism. This instruction requires that the care and skill a surgeon should use in his practice should be proportionate to the character of the injury he treats. We think that this is true with reference to the care and diligence which he should use in attending an injured person, but it can hardly be said that his skill should increase in proportion to the severity of the injury. One's skill is a matter of slow growth and cannot be increased on short no-

tice. We think also that this instruction requires too great a degree of skill and diligence in treating an injury to say that this should be proportionate to the character of the injury "within the limits of all ordinary skill and knowledge." The language of this instruction is not clear nor accurate, and it is apt to be misleading to a jury.

Other minor errors are complained of which are not likely to occur at another trial.

It results that this cause must be reversed and remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

### BLEDSON v. WEST et al. (No. 1369.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

#### 1. CARRIERS (§ 283\*)—INJURIES TO PASSENGER—ASSAULT BY SERVANT—SCOPE OF EMPLOYMENT.

Where plaintiff went to defendants' station, purchased a ticket, and was assaulted by defendants' ticket agent while plaintiff was endeavoring to induce him to return the change to which plaintiff claimed himself entitled, the assault was committed by the agent while acting within the scope of his employment, for which defendant was liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119-1124, 1140, 1141; Dec. Dig. § 283.\*]

#### 2. CARRIERS (§ 247\*)—"PASSENGER"—INITIATION OF RELATION—PURCHASING TICKETS.

Where plaintiff went to defendants' railroad station to take passage on a train expected shortly to arrive, and was assaulted by the ticket agent, while endeavoring to induce him to return plaintiff's change, plaintiff was a passenger to whom the carrier owed the duty of protection from unlawful assaults by strangers or employees.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.\*]

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

#### 3. CARRIERS (§ 321\*)—INJURIES TO PASSENGER—TRIAL—INSTRUCTION—APPLICABILITY TO EVIDENCE.

Where plaintiff was assaulted by defendants' ticket agent, while purchasing a ticket over defendants' railroad, a request to charge that, if the assault grew out of a personal difficulty between plaintiff and defendants' agent, plaintiff could not recover, was properly refused, as not applicable to the case-made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

#### 4. CARRIERS (§ 319\*)—INJURIES TO PASSENGER—DAMAGES—EXCESSIVENESS.

Plaintiff, a boy of 16, went to defendants' station to purchase a railroad ticket. He testified that he gave the agent 50 cents, the fare being 38 cents, and, when he requested the agent to return his change, the agent threw a metal stamp at plaintiff, striking him on the head, making a scalp wound, and also threatened to throw an inkstand at him. The blow did not knock plaintiff down, and he walked around the station a few minutes, then went to a physician, who dressed his wound, and testified that it was only a flesh wound without injury to the skull

or brain. Plaintiff returned to the train, and went to his home without assistance, and his wound was dressed four or five times by another physician, who testified that it healed rapidly and after ten days or two weeks plaintiff received no further medical attention, and there was no evidence that his injury was permanent. On a former trial a verdict allowing \$500 actual and \$500 punitive damages was set aside as excessive, but on a second trial on the same damages, a verdict allowing \$1,000 actual and \$500 punitive damages was sustained by the same judge. Held, that the second verdict was excessive and should be reduced to the verdict rendered at the first trial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.\*]

Robertson, P. J., dissenting in part.

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Action by Obie Bledson by B. F. Bledson, his next friend, against Thos. H. West and others, as receivers of St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed conditionally.

W. F. Evans, of St. Louis, and Moses Whybark and A. P. Stewart, both of Cape Girardeau, for appellants. C. G. Shepard and Everett Reeves, both of Caruthersville, for respondent.

ROBERTSON, P. J. This action, against the receivers of the St. Louis & San Francisco Railroad Company, was brought to recover actual and punitive damages for an assault made upon plaintiff by defendants' ticket agent at Caruthersville. This appeal is by defendants from the result of the second trial, in which a judgment was obtained by plaintiff for \$1,000 actual and \$500 punitive damages. The first trial resulted in a judgment for \$500 actual and \$500 punitive damages. Both trials were to a jury, and the court granted a new trial as to the first verdict on the ground that it was excessive. Whether the actual or punitive damages, or both, were considered excessive is not disclosed. The same judge who sustained the motion for a new trial as to the first verdict passed on and overruled a similar motion as to the verdict here involved.

The plaintiff, a small boy, 16 years of age, went to the defendants' depot in Caruthersville, 10 or 15 minutes before train time, for the purpose of taking passage on defendants' train to Holland. He went to the ticket window, called for and was delivered a ticket to that point by the man in charge. Plaintiff gave the agent 50 cents, the fare being 38 cents. Plaintiff stood there a short time and remarked to the agent: "Say, pardner, you forgot to give me my change." The agent replied: "I haven't got no pennies." The plaintiff waited a short time, and then said: "Well, give me my dime then." The agent then retorted: "You heard what I said"—and threw a metal stamp, used for stamping

tickets, at plaintiff, striking him on the head. The agent then picked up an inkstand as if to throw that, but, on the suggestion of some one, desisted. The testimony of the defendants' witnesses was to the effect that plaintiff used abusive language, and thereby provoked the assault, but that question was submitted to the jury and found adversely to defendants.

The plaintiff pleads the facts as above stated, and alleges that at said time the agent was acting within the line and scope of his employment.

The errors assigned are refusal to direct a verdict for defendant, giving and refusing instructions, and excessive verdict.

It is said that the peremptory instruction should have been given (a) because the agent in making the assault "was not within the scope of his employment, and did not pertain to his particular duties under the employment," and (b) the difficulty was personal to the agent and was brought on by plaintiff's own misconduct.

[1] It was the duty of the agent to sell tickets, collect the price therefor, and return change received in so doing. In these transactions, and in baffling the plaintiff in his effort to secure his change, he was acting within the scope of his employment, and if as an incident thereto, and a result thereof, he committed a tort the master is liable. *Shamp v. Lambert*, 142 Mo. App. 567, 574, 121 S. W. 770; *Bouillon v. Laclede Gas Company*, 148 Mo. App. 462, 473, 129 S. W. 401; *Chandler v. Gloyd*, 217 Mo. 894, 412, 116 S. W. 1073.

[2] Another valid reason for refusing the peremptory instruction is that the plaintiff assumed a burden greater than was necessary on his part. The plaintiff became a passenger when he went to the depot to take passage on defendants' train (*Albin v. Chicago, Rock Island & Pacific Railway Co.*, 103 Mo. App. 308, 316, 77 S. W. 153), and, therefore, the defendants owed him the duty of protecting him from unlawful assaults by strangers and its employees. *Shelby v. Metropolitan St. Ry. Co.*, 141 Mo. App. 514, 517, 125 S. W. 1189; *Tanger v. Southwest Mo. Ry. Co.*, 85 Mo. App. 28, 31; *Keen v. St. Louis, I. M. & S. R. Co.*, 129 Mo. App. 301, 307, 108 S. W. 1125; *Farber v. Mo. Pac. Ry. Co.*, 116 Mo. 81, 91, 22 S. W. 681, 20 L. R. A. 350. A sufficient answer to the second reason, (b), urged for the giving of the peremptory instruction, is that the jury found the assumed fact therein stated against defendants.

[3] The defendant complains of the refusal of the court to give an instruction to the effect that if the assault grew out of a personal difficulty between the agent and plaintiff that then he could not recover. The instruction was properly refused, because it is shown by all of the testimony that it grew out of the business of the sale of a ticket, as above stated, and also the same hypothesis

is included in an instruction given at the request of the defendants.

Defendants complain of the refusal of an instruction asked that stated plaintiff should not recover punitive damages. This, it is stated in the brief, should have been given, because plaintiff used insulting language in his controversy with the agent, but all of his witnesses testified he did not, and the jury so found under an instruction given at the request of defendant. It was not error to refuse this instruction.

Lastly, it is said the verdict for actual damages is excessive. A gash about two inches in length was cut on plaintiff's head to the skull. He and his father testified that he had been unable to work; that he was nervous and could not sleep as before the injury. The doctor who first dressed the wound, called by defendants as a witness, testified that such a lick as this might result as plaintiff testified that it had. This doctor also said that an internal injury might be caused without a break of the skin and that complications might arise later that were not indicated soon after the injury. Defendants cite, in support of this contention, *Briscoe v. Metropolitan St. Ry. Co.*, 222 Mo. 104, 117-121, 120 S. W. 1162, where the plaintiff received a slight cut on the chin and other alleged injuries the court was inclined to think were feigned, yet he was required to reduce his judgment to only \$3,000. An examination of the cases of *Marriott v. Mo. Pac. Ry.*, 142 Mo. App. 199, 203, 126 S. W. 231, and *Lorton v. Wabash Ry. Co.*, 159 Mo. App. 559, 567, 141 S. W. 478, cited by appellants, will disclose that the amount to which the judgments were there reduced then exceeded in amount the sum recovered here, and the injuries were probably less than in this case. The verdict in this case is not, in my opinion, so excessive as to require any interference therewith (*Dean v. Wabash Railroad*, 229 Mo. 425, 457, 458, 129 S. W. 953; *Sampson v. St. Louis & San Francisco Ry. Co.*, 156 Mo. App. 419, 138 S. W. 98; *Moudy v. St. Louis Dressed Beef & Provision Co.*, 149 Mo. App. 413, 130 S. W. 476), and that it should be unconditionally affirmed, but as the majority of the court entertain a different view of this phase of the case, as stated in a separate opinion by FARRINGTON and STURGIS, JJ., the judgment will be affirmed if the plaintiff, within 10 days after this date, will remit \$500 of the actual damages allowed him; otherwise the judgment will be reversed and the cause remanded.

FARRINGTON and STURGIS, JJ., concur, except as to the last paragraph relating to damages, and file a separate opinion.

FARRINGTON and STURGIS, JJ. We concur in the foregoing opinion, except as to the last paragraph and think that the verdict of the jury is excessive and that plaintiff

should be required to remit the actual damages to an amount not exceeding \$500.

[4] As stated, the trial court set aside the first verdict allowing \$500 actual, and \$500 punitive, damages as being excessive. It was stated at the argument that the trial judge refused to set aside the present verdict, though larger than the first one, on the ground that in setting aside the first verdict as being excessive he did so because it was against the weight of the evidence as to the amount, and that the trial court was not allowed to grant a new trial a second time because the verdict is against the weight of the evidence. By reference to *Chouquette v. So. E. R. Co.*, 152 Mo. 257, 266, 53 S. W. 897, and cases there cited, it is held that in setting aside a verdict because of being excessive or inadequate the court does not necessarily do so because against the weight of the evidence, but because the verdict is the result of passion or prejudice, or misconduct of the jury.

The two trials were only a few months apart. The evidence as to plaintiff's injuries is practically the same on the second trial as on the first. There is nothing in the evidence to show any new developments in the injuries, or any reason whatever for saying that the injuries were worse at the second trial than at the first. The plaintiff had received no medical attention or examination during the interval. The two physicians who testified had the same knowledge of his injuries at the first trial as at the second. Neither plaintiff nor his father claimed that any new symptoms had developed or that he was in any worse condition during the last two or three months than he was before. The physician who first examined him and dressed his wound testified positively that he made a careful examination, and that the wound was only a flesh wound, and no injury to the skull or brain resulted. The other physician dressed his wound four or five times, found nothing to indicate that it was more than a flesh wound, said that it healed rapidly and after ten days or two weeks the plaintiff received no medical attention whatever. The blow did not knock plaintiff down, and he stood around the depot four or five minutes, walked out the door alone, and then went with a companion up town to have the wound dressed. He returned to the train and went home without any assistance. There is no claim for loss of wages. The injury occurred in July and the plaintiff helped in gathering the cotton crop in September and October, and then attended school during the winter. He increased in weight from the time of his injury to the second trial, about eight months, some 13 or 14 pounds. The trial court did not submit the case on the measure of damages so as to allow the jury to find anything for permanent injury or future pain or suffering. This was cor-

rect, because the evidence did not justify any such submission. The case was correctly tried on the theory that whatever injuries plaintiff had received were cured, and that his pain and suffering was in the past.

### CODY v. LUSK et al. (No. 1316.)

(Springfield Court of Appeals. Missouri.  
Dec. 12, 1914.)

#### 1. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—PRESUMPTION—NEGLIGENCE.

While there is no presumption of negligence from the mere fact of injury to a servant, yet where injury to a servant was traced to a defect in horses supporting a scaffold, with extensions consisting of upright boards five inches wide and one inch thick, nailed to the upper crosspiece of the horses by one nail, having notched tops supporting a bar from which was suspended a motor used in drilling holes in an upright boiler, one of which extensions, without any violent movement or extra weight, gave way and caused him to fall, the proof of the occurrence and its attending circumstances, in the absence of any explanation, and without the aid of any presumption from the occurrence alone, warranted an inference of actionable negligence, in that the injury was due to a defective appliance furnished by the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

#### 2. MASTER AND SERVANT (§ 125\*)—APPLIANCES FOR WORK—DEFECTS—ACTUAL OR CONSTRUCTIVE NOTICE.

A defect in the original construction of horses used to support a scaffold and extensions to support a motor used in drilling an upright boiler, made by defendant's servants, charged defendant with actual knowledge thereof; and, if the defect resulted from long usage without any inspection, it would warrant a finding of the master's constructive notice.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

#### 3. MASTER AND SERVANT (§ 124\*)—MASTER'S DUTY—SAFE APPLIANCES.

It is a master's duty to inspect the appliances furnished to a servant for use, both to see that they are reasonably safe to start with, and to keep them in that condition, so that the duty to inspect and make ordinary mechanical tests at reasonable intervals is an affirmative and continuous duty; and the master must take notice that instrumentalities, such as wooden horses used in supporting scaffolding, deteriorate and weaken by usage.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

#### 4. MASTER AND SERVANT (§ 233\*)—APPLIANCES FOR WORK—SELECTION BY SERVANT—CONTRIBUTORY NEGLIGENCE.

The principle that a servant is guilty of negligence as a matter of law in selecting a defective appliance out of a large number applies only to such defects as are so obvious that reasonable care must lead to their discovery; and where a servant made use of his eyes in selecting a wooden horse which appeared to be sound and safe out of a number, some good and some bad, that was all the law required of him; but, if the defect had been so obvious that a man of his knowledge and experience would have dis-

covered it by ordinary care, it would have been his duty to discard such defective appliance and select another apparently safe, or to make the necessary repair.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.\*]

**5. MASTER AND SERVANT (§ 235\*)—APPLIANCES FOR WORK—CONTRIBUTORY NEGLIGENCE—RELIANCE ON MASTER'S INSPECTION.**

Unless the duty to inspect appliances furnished him for work is imposed on the servant, he may rely on the master's discharge of such duty, and on the tools and appliances furnished as being reasonably safe.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

**8. MASTER AND SERVANT (§ 238\*)—APPLIANCES FOR WORK—CONTRIBUTORY NEGLIGENCE.**

A servant working on a scaffold 11 feet high, supported by wooden horses, with board extensions 5 inches wide and 1 inch thick, notched at the top to support a bar from which was suspended a motor used in the work of drilling, was not necessarily negligent in staying on the platform while his helper was moving one end of the horse a few inches, and who then went to the other end so that little, if any, of his weight was on the end being moved, and receiving injury by the giving way of one of the extensions through a defect not apparent to him; since he was only required to do what a reasonably prudent man would do under the circumstances, relying on the master to furnish him safe appliances to work with.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.\*]

**7. MASTER AND SERVANT (§ 135\*)—INJURY TO SERVANT—UNSAFE METHOD OF WORK.**

The placing of an 11-foot boiler on end instead of in a horizontal position, necessitating a scaffold and extensions to support a servant engaged in drilling holes in the boiler and a motor used in his work, was not of itself negligence which would warrant a recovery for injury from the giving way of the extension and a fall of the scaffold, as in order to establish negligence more must be shown than that the method of doing the work was different from that used by others, and within the limitations of reasonable safety the master may conduct his work in his own way, even if another method is less dangerous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 271, 281, 293; Dec. Dig. § 135.\*]

**8. MASTER AND SERVANT (§ 130\*)—INJURY TO SERVANT—METHOD OF WORK—CUSTOM.**

In such case, the servant could prove that the master adopted a method less safe than the usual method, though the less safe method must be one which is not itself reasonably safe.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.\*]

**9. MASTER AND SERVANT (§ 135\*)—INJURY TO SERVANT—METHOD OF WORK—EVIDENCE.**

A master charged with negligence in his method of work may disprove it by showing that the act done or the instrumentalities or method used conformed to common usage in the same business; but, while conformity to usage disproves negligence, nonconformity to usage does not prove negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 271, 281, 293; Dec. Dig. § 135.\*]

**10. MASTER AND SERVANT (§ 129\*)—INJURY TO SERVANT—METHOD OF WORK—"PROXIMATE CAUSE."**

The method of drilling an 11-foot boiler by standing it on end and using a scaffold consisting of wooden horses supporting crosswise planks, with extensions consisting of planks 5 inches wide and 1 inch thick, fastened to the horses by only one nail, with notched tops for a rod supporting a motor used in the work, in the course of which one of the extensions gave way as the horse was being moved a few inches, causing a servant's fall and injury, was not the proximate cause of the injury; the negligence which is the "proximate cause" of an injury being that negligence which operates to produce particular consequences without the intervention of any independent unforeseen cause, without which the injury would not have occurred, that negligence which sets in motion a train of events which in their natural sequence might and ought to be expected to produce an injury, if undisturbed by any independent or intervening cause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

For other definitions, see *Words and Phrases*, First and Second Series, Proximate Cause.]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by Joseph Cody against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Mann, Todd & Mann, of Springfield, and W. F. Evans, of St. Louis, for appellants. Fielding P. Sizer, of Monett, for respondent.

STURGIS, J. Plaintiff recovered a judgment for personal injuries received by him while in the employ of defendants, as receivers of the St. Louis & San Francisco Railroad Company, in the capacity of a boiler maker working at defendants' shops in Springfield, Mo. His injuries resulted from a fall from the scaffold on which he was working at drilling flexible sleeves from the boiler sheet of a locomotive, using for that purpose a drill operated by electric power. The locomotive boiler on which he was working had been stripped from the trucks and other machinery and set up on end on the floor in a perpendicular manner; the top being between 11 and 12 feet high. Part of the work had to be done near the top, and in doing this plaintiff used a scaffold made of two "wooden horses" with boards 16 to 20 feet long extending horizontally from one to the other, forming a platform on which he stood at his work. These horses were about 10 feet high, each formed of two ladders, similar to an ordinary carpenter's ladder, hinged together at the top and spreading at the bottom, with an iron rod near the bottom extending from one to the other so as to keep them from spreading further apart, making a horse on the principle of a stepladder which would stand without leaning against anything. The platform was made of two

boards about a foot wide resting on a cross-piece of each ladder or horse and could be made higher or lower by putting these boards on higher or lower crosspieces.

The motor used weighed about 150 pounds and was suspended, raised, and lowered by means of a chain attached to it and passing over an iron bar made of 2-inch gas pipe extending from the top of one horse to the top of the other, and, as these horses were not built high enough, an extension to each was made of an upright board, 1 inch thick and 5 inches wide and 3 to 4 feet long, nailed on each horse with a V-shaped notch sawed in the top of each extension and the pipe laid in these notches. This horizontal bar supporting the motor was therefore about 13 or 14 feet from the floor, and the chain passing over it held the motor suspended at one end and a balance weight at the other. The cause of plaintiff's fall and resultant injury was that it was necessary in drilling to have the motor at right angles with the hole being drilled, and to do this to move from time to time by sliding along the floor one of the horses a distance of from 2 to 5 or 6 inches. The plaintiff had a helper in doing his work and, while the helper was moving one of these horses for the purpose just mentioned, the extension thereon gave way, letting down the end of the rod supporting the motor, which in turn slid down against the horse, tipping it over, and the whole thing collapsed, throwing plaintiff to the floor, one of the boards falling on him and breaking his leg.

The petition, after stating that while plaintiff was working with the boiler placed in an upright position the scaffold fell by reason of the extension giving way, alleges defendants' negligence as follows:

"Plaintiff states that his injuries as aforesaid were due to the negligence of the defendants in failing to exercise ordinary care to furnish plaintiff with a reasonably safe place to work, and in failing to exercise ordinary care to furnish plaintiff with reasonably safe horses and extensions, and in furnishing plaintiff with old and defective and insecure horses and extensions, improperly and insecurely fastened thereto, or extensions too weak and insecure to support the weight of the motor and balance weight, when the defendants knew, or by the exercise of ordinary care could have known, of the defective and insecure or too weak condition of the horses or extensions, and in adopting the method of doing said work as above set forth, which was not a reasonably safe method."

The answer is a general denial, coupled with a plea of contributory negligence that plaintiff himself selected the horse with the defective and insecure extension from a number of similar ones and that plaintiff voluntarily remained on this scaffold while the same was being moved and adjusted while he could and should have descended to the floor.

The errors complained of are the refusal to direct a verdict for defendants and the giving and refusal of instructions, of these in their order.

[1] The defendants insist that the doctrine

of *res ipsa loquitur* does not apply to an action by a servant against the master, and that nothing showing negligence was proven except the mere fact that the extension board gave way. It is true that there is no presumption of negligence arising from the mere occurrence which resulted in injury to a servant, as there is in case of a passenger or a mere stranger. But where, as here, the injury to the servant is traced to a defect in a particular instrumentality or appliance being used by the servant in his work, then there are many cases holding that the proof of the occurrence and its attendant circumstances furnishes sufficient proof of actionable negligence. Thus, in *Hamilton v. Railroad*, 123 Mo. App. 619, 623, 100 S. W. 671, 673, it is said:

"There is, however, authority based on the best of reason, showing that the servant's case may be made out by mere proof of the occurrence which caused the injury in those instances where the occurrence itself, without the aid of a presumption, shows negligence. In case of a passenger, as we have seen, the occurrence itself may not show negligence and the presumption comes to his relief. But, in the servant's case, if the occurrence is of that nature, which, of itself, shows negligence without the aid of a presumption, he may, as just stated, make a case by showing the occurrence only."

*Blanton v. Dold*, 109 Mo. 64, 74, 18 S. W. 1149, is to the same effect, and quotes from *Mooney v. Lumber Company*, 154 Mass. 407, 28 N. E. 352:

"That the starting, without apparent cause, of the carriage of a sawing machine, when left at rest, with 'the lever locked which was used to start and stop it,' whereby the plaintiff was injured, constituted evidence to support a finding that there was negligence in the construction or condition of the machine with reference to its reasonable safety."

In *Stoher v. Railroad*, 91 Mo. 509, 4 S. W. 389, where a culvert, over which a train passed after a heavy rain, gave way, the court held that:

"The sudden giving way of a part of the structure is, if unexplained, some evidence of negligence in its construction."

In *Johnson v. Railroad*, 104 Mo. App. 588, 592, 78 S. W. 275, where carpenter employes were taking up a floor, using a crowbar over the place where plaintiff, an employe, was working, the court said:

"The only evidence is that it fell and struck plaintiff on the head. There is nothing to show why, or how, it fell. We believe such evidence sufficient to cast upon defendant the necessity of explaining."

See, also, *Sackewitz v. Amer. Biscuit Mfg. Co.*, 78 Mo. App. 144, 151; *Shuler v. Railroad*, 87 Mo. App. 618; *Kelley v. Railroad*, 105 Mo. App. 365, 79 S. W. 973.

In this case it is shown that the extension board five inches wide and one inch thick was nailed only to the upper crosspiece of the horse, and did not, as in case of some others used there, extend down so as to be fastened to the next lower crosspiece also. Nor was it fastened on with clasps or bolts, as was the case with some others used there. One

witness, the plaintiff's helper at the time of the accident, who saw it after the accident, said that the cause of its giving way was that "the nail pulled out of the horse." This implies that only one nail was holding it and this one not "clinched," and neither party ventured to ask him directly the number or size of the nail or nails. The broken horse was defendants' property, was left with it, and plaintiff was never able to inspect it afterward on account of his severe injury and long stay in the hospital. It was shown that there was no violent movement of or extra weight placed on the extension when it gave way. It did so while being used as it was intended to be used. Under the authorities there is sufficient evidence, in the absence of any explanation by defendants of its cause otherwise, to warrant an inference that this accident was caused by a defective appliance furnished by the master.

[2] In this connection defendants say that, even if defective, there is no evidence to warrant the jury in finding, as it was required to do, that the defendants had knowledge of the defect, or that it existed for such a length of time as to warrant a finding of knowledge. It is shown that these horses with the extension pieces nailed thereon had been in use for a long time and had never been inspected. It is not shown, and it does not matter, whether the extension board was originally insecurely fastened or had become so by long use, or both combined. If the defect was in the original construction, then, as it was made by defendants' employes, defendants could be charged with actual knowledge, and, if it became so by long usage without any inspection, the jury would be warranted in finding constructive notice. It is not such a defect as would be brought about in a short time from any apparent natural cause.

[3] It is defendants' duty to use reasonable care in furnishing reasonably safe appliances in the first instance and to keep them in that condition so long as they are used. This implies the duty to watch over and inspect such appliances both to see that they are reasonably safe to start with and to keep them in that condition.

"In cases such as the present, the duty to inspect and to make ordinary mechanical tests at reasonable intervals is an affirmative and a continuous duty. It will not do to say that having furnished suitable and proper machinery and appliances, the master can thereafter remain passive, so long as they work well and seem safe. The duty of inspection is affirmative and must be continually fulfilled and positively performed. Anything short of this would not be ordinary care." *Ogan v. Railroad*, 142 Mo. App. 248, 252, 128 S. W. 191.

See, also, *Bible v. Railroad*, 169 Mo. App. 519, 530, 154 S. W. 383; *Guttridge v. Railroad*, 105 Mo. 520, 526, 529, 16 S. W. 943.

If it is proper to hold, as the court did of a chain in the *Ogan Case* and of a rope in the *Bible Case*, *supra*, that the defendant must take notice that such instrumentalities de-

teriorate and weaken by usage and heavy strain, why is this not true of the instrumentalities used in this case?

[4, 5] We come now to consider whether plaintiff is shown to have been guilty of contributory negligence as a matter of law and herewith his duty to make inspections and slight repairs. We cannot agree that plaintiff was necessarily guilty of negligence in selecting, out of a number, some good and some bad, a defective wooden horse with which to work. In the first place, he testified that he made no selection, that the boiler and these horses were already in place, and that the only thing done by him and his helper was to get the boards used as a platform. We think, also, that the principle that a servant is held guilty of negligence as a matter of law in selecting a defective appliance out of a large number applies only to such defects as are so obvious that the use of reasonable care must lead to their discovery. It might apply to one selecting a dull pick or a hammer battered or worn round. But, as we have seen, the duty of inspection and making tests to discover defects is originally on the master and not the servant. Unless this duty of inspection is imposed on the servant, he may rely on the fact that the master has discharged his duty and that all the tools and appliances furnished are reasonably safe. 3 *Labatt's Master & Servant*, § 1270; 4 *Labatt's Master & Servant*, §§ 1330, 1336; *Combs v. Construction Co.*, 205 Mo. 367, 378, 104 S. W. 77, 120 Am. St. Rep. 772. Plaintiff says he did in this case make use of his eyes and looked at the wooden horse in question and it appeared to be sound and safe. That was all the law imposed on him in making a selection. *Gibson v. Bridge Co.*, 112 Mo. App. 594, 598, 87 S. W. 3; *Yongue v. Railroad*, 133 Mo. App. 141, 159, 112 S. W. 985. The plaintiff denied that any duty of inspection was imposed on him as to these wooden horses. There is no testimony to the contrary. He was not a carpenter, and his business was to work on boilers with the tools and appliances furnished him. The evidence shows that repairs of these appliances were usually made at the carpenter shop. Of course, if the defect had been so obvious that a man of his knowledge and experience must have discovered it by using ordinary care, then it would have been his duty to have discarded the one there at hand apparently for his use and selected another apparently safe, or to have made the necessary repair by driving additional nails in this extension and clinching them or putting on a new extension board or some such means. But that is not this case.

[6] Nor was it necessarily negligence that plaintiff stayed on the platform while his helper was down moving one end a few inches. The plaintiff went to the other end or horse and stood there, and there was little, if any, of his weight thrown on the end being

moved and none on the iron rod or extension which gave way. Plaintiff said he could and did to some extent steady the iron bar supporting the motor and thereby lessen the danger of an accident. There would have been danger of the motor or boards falling on him from this very accident had he been on the floor assisting to move the wooden horse. All he was required to do was what a reasonably prudent man would do under the circumstances relying on the master to have furnished him safe appliances to work with. Viewed from the hind-sight, his remaining on the platform proved to be the more dangerous in this particular incident, but that is only because the appliance furnished by the master proved defective—a fact not apparent to him and which he was not required to search out. The evidence is certainly not conclusive that he knowingly remained in a dangerous position. *Johnson v. Railroad*, 164 Mo. App. 600, 623, 147 S. W. 529; *Johnson v. Railroad*, 160 Mo. App. 69, 78, 141 S. W. 475; *Gordon v. Railroad*, 222 Mo. 516, 536, 121 S. W. 80. We hold therefore that the plaintiff made a case for the jury on the negligence of defendants in furnishing the wooden horse with the unsafe and insecurely fastened extension to support the motor, and we find no error in the instructions on this point.

[7-9] We find, however, that the court submitted the case to the jury by plaintiff's instruction on defendants' negligence in another respect, the method of doing the work, as a ground of negligence separate and distinct from the negligence in furnishing a defective appliance, to wit:

"Or if you find that the method adopted by defendants was not a reasonably safe method, and by ordinary care defendants could have known that such method was not reasonably safe in time to have avoided injury to plaintiff, then you will be justified in finding the defendants guilty of negligence."

This instruction appears to be too broad and indefinite, giving the jury a roving commission in the field of conjecture. No particular method is pointed out by the instruction as being negligent. We gather, however, from plaintiff's brief and argument, that what he claims, to be a negligent method of doing the work is that defendants placed the boiler on end in a perpendicular position, thus making it about eleven feet high, instead of laying it down horizontally, making it only about seven feet high; that the perpendicular position alone necessitated the extensions being placed on the horses and the same being moved from time to time as the work progressed. It was shown that placing the boiler in a horizontal position was the method used in two other railroads' shops. Under this evidence, was this method of doing the work a ground of negligence sufficient to warrant a recovery distinct from the defective extension? We think not. In order to establish negligence, something more must be proven than that the method of doing the work was different

from that used by others. It is always competent to prove custom to negative negligence. *Gordon v. Railroad*, 222 Mo. 516, 535, 121 S. W. 80; *O'Mellia v. Railroad*, 115 Mo. 205, 21 S. W. 503; *Overby v. Mears Min. Co.*, 144 Mo. App. 363, 374, 128 S. W. 813. It would be competent to prove that defendants adopted a method "less safe" than the usual one (*Spencer v. Bruner*, 126 Mo. App. 94, 102, 103 S. W. 578), though the less safe method must be one not reasonably safe. Negligence, however, is not inferable from the mere fact that the method used is not that used by others in the same business. Conformity to usage disproves negligence, but nonconformity does not prove it. A party charged with negligence may disprove it by showing that the act done or the instrumentalities or method used conformed to common usage in the same business, but the converse of this is not true. *Glenn v. Railroad*, 167 Mo. App. 109, 117, 150 S. W. 1092; *Chaffee v. Erie R. Co.*, 140 App. Div. 38, 124 N. Y. Supp. 272; *3 Labatt's Master & Servant*, §§ 946, 949; *Chicago & E. I. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921.

Whether the boiler was placed on end or laid horizontal, the wooden horses, with the platform and iron rod supporting the motor, would be used. The only difference is that when horizontal the motor need not be raised quite so high, dispensing with any necessity for extensions or the horses being moved. But making the horses higher in the first place would also dispense with the necessity for extensions so that negligence might as well be predicated on the use of horses too short for the purpose for which they were being used. It seems apparent therefore that the height of the boiler was not the cause of the injury independent of the defective wooden horse. If the wooden horse had been constructed of sufficient height without extensions, this accident could not have occurred as it did, as there would have been no extension to give way; and it is apparent that, had the extension been sufficiently strong and securely fastened to the horse, the appliance would have been reasonably safe the same as if the horse had been high enough without them. There is no inherent danger in causing a servant to work at a height of 11 feet rather than 7 feet; and, given a safe place to work, the increased height could not be a ground of negligence here. The same is true of the fact that placing the boiler on end instead of horizontal necessitated moving one of the horses a few inches from time to time. If the horses had been kept sufficiently substantial, either in the original build or with the extensions, to stand this strain, the accident would not have occurred. We must keep in mind that within the limits of reasonable safety the master has a right to conduct his business in his own way, even if another method is less dangerous. *Dickinson v. Jenkins*, 144 Mo. App. 132, 128 S. W. 230; *Bradley v. Railroad*, 138 Mo. 293, 302, 39 S.

W. 763; *Steinhauser v. Spraul*, 127 Mo. 541, 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Sutherland v. Lumber Co.*, 149 Mo. App. 338, 130 S. W. 40; *Fleeman v. Bemis Bros. Bag Co.*, 159 Mo. App. 593, 141 S. W. 481.

[10] Nor was the method of doing the work the proximate cause of this injury. The proximate cause was the defective extension which gave way.

"A proximate cause in the law of negligence is such a cause as operates to produce particular consequences, without the intervention of any independent unforeseen cause, without which the injuries would not have occurred." *Schwartz v. Railroad*, 110 La. 534 [34 South. 667]. "That negligence is the proximate cause of the injury which sets in motion a train of events that in their natural sequence might, and ought to be expected to, produce an injury, if undisturbed by any independent or intervening cause." *Holverson v. Railway*, 157 Mo. loc. cit. 231 [57 S. W. 770, 50 L. R. A. 850]—quoted in *Glenn v. Railroad*, 187 Mo. App. 109, 116, 150 S. W. 1092, 1093.

In that case it was held that where a street car, approaching a switch at a street crossing, ran away and became unmanageable through the negligence of the motorman and the defective brakes and thereby ran into a curve of the switch and was derailed resulting in plaintiff's injury, the manner of constructing the switch was not the proximate cause of the injury, although it was shown that it would have been much safer if this switch had been so constructed as to be open for cars running straight ahead on that street instead of curving to the cross street. The court said:

"Had the car been in good serviceable order and managed in a reasonably careful manner, it would not have entered the curve at a rapid rate of speed, and would not have jumped the track, and Glenn would not have been killed. It was the rapid rate of speed with which the car entered the curve that caused it to jump the track."

So here, if the extension to the wooden horse had been in "good serviceable order," this accident would not have happened. In *Saxton v. Railroad*, 98 Mo. App. 494, 502, 72 S. W. 717, 719, the court held that, where a person was caused to fall in alighting from a slowly moving train by reason of a sudden and quick jerk thereof, the starting of the train before such person had time to get off was not the proximate cause—that the sudden quick jerk was the proximate cause. The court said:

"If nothing else except the slow moving of the train before he had time to leave it had occurred, the conclusion is irresistible that the accident would not have happened. The failure to hold the train, at most, did no more than to furnish the condition, or give rise to the occasion, by which the injury was made possible."

See, also, *Strotzman v. Railroad*, 211 Mo. 227, 270, 109 S. W. 769. It seems clear that there was nothing inherently dangerous in causing plaintiff to work three or four feet higher than he would if the boiler had been placed horizontal, nor in making the horses higher by extensions; nor in making it nec-

essary to move one end of the scaffold a few inches from time to time, providing always that plaintiff had safe appliances on which and with which to work. His injury must be attributed solely to negligence in not furnishing safe appliances as the proximate cause. It results that the method of doing the work should not have been submitted as a ground of negligence. Defendants' refused instructions D and F should have been given.

Because of these errors, the cause is reversed and remanded.

ROBERTSON, P. J., and FARRINGTON, J., concur.

# GILMORE v. MODERN BROTHERHOOD OF AMERICA. (No. 1416.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

## 1. INSURANCE (§ 819\*)—FRATERNAL SOCIETY —CERTIFIED COPY OF LICENSE AS EVIDENCE.

A prima facie showing by certified copy under Laws 1911, p. 292, providing (section 16) that a duly certified copy of its license shall be prima facie evidence that the licensee is a fraternal benefit society, is sufficient, in absence of contrary evidence, to bring it within the provisions of the law relating thereto.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.\*]

## 2. INSURANCE (§ 694\*)—BENEFIT ASSOCIATION—REQUISITE OF MEMBERSHIP.

Initiation is a condition precedent to membership in an insurance benefit association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.\*]

## 3. INSURANCE (§ 818\*)—ACTION ON BENEFIT CERTIFICATE—EVIDENCE.

In an action on a benefit certificate, defended on the ground that it was delivered without the initiation required by defendant's by-laws as a condition precedent to membership, it was not error to refuse evidence of a contrary custom of the local lodge without an offer to show the number of certificates thus delivered, or that such a course of dealing was carried on so as to have necessarily been known to the Supreme Lodge, and that decedent knew they were thus delivered.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.\*]

## 4. INSURANCE (§ 818\*)—ACTION ON BENEFIT CERTIFICATE—EVIDENCE.

By-laws authorized by Laws 1911, p. 292, § 22, prohibiting a waiver of a provision for initiation by subordinate officers, and requiring such a condition precedent to membership, were admissible.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.\*]

## 5. INSURANCE (§ 825\*)—ACTION ON BENEFIT CERTIFICATE—QUESTION FOR JURY.

Evidence on the issue of decedent's initiation as a member held insufficient to go to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

## 6. EVIDENCE (§ 584\*)—"PRIMA FACIE CASE."

A prima facie case is that which is received or continues until the contrary is shown, and is one which is, in absence of explanation or contradiction, an apparent case, sufficient in the eyes of the law to establish the fact, and,

if not rebutted, remains sufficient for that purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2424, 2426, 2427; Dec. Dig. § 584.\*]

For other definitions, see Words and Phrases, First and Second Series, Prima Facie Case.]

**7. EVIDENCE (§ 584\*)—"PRIMA FACIE EVIDENCE."**

Prima facie evidence means evidence which is sufficient to establish the fact, unless rebutted; evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2424, 2426, 2427; Dec. Dig. § 584.\*]

For other definitions, see Words and Phrases, First and Second Series, Prima Facie Evidence.]

**8. TRIAL (§ 169\*)—DIRECTION OF VERDICT.**

It is as much the duty of a trial court to direct a verdict for defendant, when the undisputed facts show no liability to have been incurred, as it is to submit conflicting evidence to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.\*]

**9. INSURANCE (§ 817\*)—POSSESSION OF BENEFIT CERTIFICATE—PRESUMPTION AS TO REGULABILITY.**

In the absence of evidence, it is presumed that a certificate was regularly deposited in proper hands, but such presumption cannot be permitted to contradict plain uncontroverted facts as to how it got into the hands of the individual.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.\*]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by Cordelia Gilmore against the Modern Brotherhood of America. From a judgment for defendant, plaintiff appeals. Affirmed.

Bradley & McKay, of Kennett, for appellant. Ely, Pankey & Ely, of Kennett, and Sparrow & Page, of Kansas City, for respondent.

**FARRINGTON, J.** This is an action by the widow of David Gilmore on a beneficiary certificate for the sum of \$1,000, in which her husband was the assured, and she was named the beneficiary. The certificate was issued on November 20, 1912, and was delivered by the secretary of the local lodge of the Modern Brotherhood of America at Cardwell, Mo., either on December 4 or December 14, 1912, at which time the proper amount was paid by the assured to the secretary of the local lodge. David Gilmore died on January 5, 1913, from the ravages of pneumonia. The Supreme Lodge declined to furnish blanks on which proof of his death could be made, and instructed the secretary of the local lodge to return to the widow the two assessments which Gilmore had paid him (one was paid on January 4th, the day before Gilmore died). She refused to accept them, and brought this suit. To defeat the action the Supreme Lodge alleged in its

answer that deceased had never been initiated, adopted, or admitted into the society as a member thereof, having first alleged that it is, and was at all times mentioned in plaintiff's petition, a fraternal benefit society organized and incorporated under and by virtue of the laws of the state of Iowa; "that it is without capital stock, and was formed and organized, and is carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit; that it has a lodge system, with ritualistic form of work and representative form of government, and makes provision for the payment of benefits in event of the death or disability of its members; that, as such fraternal benefit society, it has, and had at all times mentioned in plaintiff's petition, complied with all the laws of the state of Missouri relating to such societies, and at said times was engaged in transacting the business of such society in said state of Missouri by authority of, and in compliance with, the law of said state." The answer then proceeds to set forth provisions appearing in the application, the certificate, and the by-laws of the society concerning the necessity of initiation to constitute an applicant a member. The reply was a general denial, coupled with a plea that defendant by its acts and conduct had waived its right to rely on failure to initiate and a plea of estoppel. At the close of all the evidence the court directed a verdict for the society, and plaintiff appealed.

[1] Appellant contends that respondent did not offer sufficient evidence to bring itself within the provisions of our law relating to fraternal beneficiary associations, citing *Thompson v. Royal Neighbors*, 154 Mo. App. loc. cit. 121, 133 S. W. 146. Since the decision in that case the law as to fraternal beneficiary associations has been changed. Laws 1911, pp. 284 to 301. Section 16 of the law as it now stands (Laws 1911, p. 290) provides: "A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this act"—the "license" referred to being one obtained by such associations from the superintendent of the insurance department of the state. This is the first time that provision has come before the appellate courts of this state since its enactment. Respondent complied with that law and at the trial introduced in evidence a certified copy of its license to do business in Missouri as such society. There was no attempt to overcome this prima facie showing; hence, it was sufficient. However, respondent went further, and introduced in evidence a certified copy of its articles of incorporation, showing that it was organized as "a fraternal beneficiary society for the sole benefit of its members, and not for profit"; that it has a "lodge system, with ritualistic form of work and representative form of government"; that

provision is made "for the payment of benefits in case of death"; and that "the fund from which the payment of such benefits shall be made and the expense of said fraternity defrayed shall be derived from beneficiary calls, assessments, and dues collected from its members." See *Westerman v. Supreme Lodge K. of P.*, 196 Mo. loc. cit. 701, 702, 94 S. W. 470, 5 L. R. A. (N. S.) 1114. Respondent also introduced in evidence the laws of Iowa under which it was organized.

Appellant contends that the judgment should be reversed, and the cause remanded, with directions to enter judgment for her, because the court erred in admitting in evidence a copy of the purported by-laws of the society without proper authentication. It is unnecessary to discuss this question. Gilmore, in his application which became a part of his certificate, agreed as follows:

"I waive for myself and beneficiary any and all rights to any benefit under this application, or any benefit certificate issued thereon, until \* \* \* I shall have been regularly adopted or initiated in accordance with the ritual of said society, \* \* \* and said benefit certificate shall have been issued in pursuance of this application and delivered to me, after adoption or initiation. \* \* \*

There is no contention that Gilmore was ever initiated, and it is shown that he was never in the lodge room.

[2] The authorities agree that initiation is a condition precedent to membership in such associations. *Porter v. Loyal Americans*, 167 S. W. 578, and cases cited.

[3, 4] Appellant contends that the court erred in not permitting her to prove that it had been the custom of the local lodge to not exact initiation, and that such conduct had been continued on the part of the local lodge for such a length of time as to have necessarily been known to the Supreme Lodge, and that such evidence was competent on the question of whether or not the defendant by its acts was estopped to deny liability. On cross-examination of defendant's witness Jones, secretary of the local lodge, it developed that during the year he had been secretary but one person (besides Gilmore) had applied for membership. Jones testified that he delivered the certificate to that applicant on November 19, 1912, and that the books of the local lodge showed he was initiated on February 15, 1913. He testified that he left the impression on that applicant, as well as on Gilmore, when he delivered their certificates, that they would be in force whether they were initiated or not. Plaintiff, in rebuttal, called as a witness a man who had served five years as secretary of this local lodge, and offered to show that during that period he had "delivered a number of policies to members without their obligation, adoption, or initiation." The objection to this offer was sustained, and exception saved. There was no offer to show what "number" of certificates had been thus delivered, or that such a course of dealing had been carried on by this local lodge so as to have necessarily

been known to the Supreme Lodge. Moreover, there was no offer to show that Gilmore knew that certificates had ever been delivered without initiation. He told his wife that he was to be initiated. None of respondent's supreme officers knew that Gilmore had not been initiated. They were informed that he had been initiated. Section 22 of the act of 1911 (Laws 1911, p. 292) provides that the constitution and laws of the society may provide that no subordinate body, nor any of the subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and respondent's by-laws (which, we think, were properly admitted in evidence) did contain such a provision as to subordinate officers, and did require initiation as a condition precedent to membership.

[5] Appellant insists that the court erred in directing a verdict for the defendant, because she contends that on the question of whether or not Gilmore was initiated she had sufficient proof of that—made by her prima facie case—to take the question to the jury. The proof that appellant had was simply the possession of the certificate sued on, and the fact that it was delivered to Gilmore on December 14, 1912. Besides this, the secretary of the local lodge had reported on either the 14th or 15th of December, 1912, to the Supreme Lodge that the certificate had been delivered, and that Gilmore had been "adopted." In a subsequent report sent in by him in January after Gilmore's death, being a report of the lodge for the month of December, Gilmore's name is shown as having been "adopted" on December 14, 1912. The plaintiff testified that her husband told her he was to be initiated, but she did not know whether he was initiated or not. This is all the evidence offered by plaintiff that she contends should have taken the case to the jury.

Jones, the secretary of the local lodge, was placed on the stand by the defendant, and testified that he took the application of Gilmore and sent it in, and that in due time the certificate was sent to him to be delivered to Gilmore under the rules and regulations of the society. As hereinbefore shown, the by-laws require that before the certificate shall be binding on the Supreme Lodge the applicant must be "adopted, initiated, and obligated." Whether these three words call for one and the same proceeding and form is not made very clear in the record, as in some places in the certificate and by-laws the words are connected by the conjunctive "and," while in other places they are connected by the disjunctive "or." Jones testified that when the certificate was received by him from the Supreme Lodge he, not having had much experience in handling and delivering certificates, was under the impression that the matter of initiation was left to the option of the local lodge, and was not a requirement of the Supreme Lodge, and that he was further of the impression that when

he delivered the certificate to the applicant that was an "adoption." He testified that, acting under this belief, he delivered the certificate, and led the applicant to believe that the insurance was in force. He stated that the reports which he sent in concerning this case were not made at any lodge meeting, but were made by him outside of the lodge room. He also testified that no meeting of the local lodge was held from the time this certificate was delivered to him by the Supreme Lodge until after Gilmore's death. He stated that he also reported the same facts as to the "adoption," etc., with reference to one other member to whom he had delivered a certificate without having him first go through the initiation and take the ritualistic work. Being the secretary of the local lodge, he is the one person connected therewith above all others who would be at any lodge meetings and record the proceedings. His testimony stands uncontradicted, as plaintiff makes no attempt to show that there was a meeting at which Gilmore could have been initiated, or that he ever went to the lodge room for the purpose of being initiated, or that there was ever any entry made during a lodge meeting evidencing an initiation.

[6, 7] Plaintiff relies solely upon the presumption raised by the possession of the certificate and the reports made under the circumstances above detailed; for plaintiff's prima facie case was no more than a presumption that the applicant had been initiated. When that issue was raised by the answer, and the facts developed by positive, uncontradicted testimony bearing no stamp of suspicion, nor any attempt on the part of the plaintiff to show that such evidence was untrue or improbable, and in no way attempted to show any countervailing evidence or circumstance, the presumption must, of necessity, submit to the facts. As said in 22 Am. and Eng. Ency. Law, 1294:

"A prima facie case is that which is received or continues until the contrary is shown. 'Prima facie' evidence means evidence which is sufficient to establish the fact unless rebutted; evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced."

It is, in the absence of explanation or contradiction, an apparent case, sufficient in the eyes of the law to establish the fact, and, if not rebutted, remains sufficient for that purpose. See *Smith v. Burrus*, 106 Mo. loc. cit. 100, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; also *Gilpin v. Railway Co.*, 197 Mo. loc. cit. 325, 94 S. W. 869. Presumptions disappear in the light of actual facts. *Mockowik v. Railroad*, 196 Mo. 550, 94 S. W. 256; *Schaub v. Railroad*, 133 Mo. App. loc. cit. 450, 113 S. W. 1163.

[8] It is as much the duty of a trial court to direct a verdict for the defendant where "spurious facts show no liability to have

been incurred as it is to submit the case to the jury where the evidence is conflicting. *Powell v. Railway Co.*, 76 Mo. loc. cit. 83; *Gee v. Drug Co.*, 105 Mo. App. 27, 78 S. W. 288; *Carter-Montgomerie & Co. v. Steele*, 83 Mo. App. 211, 215; and *May v. Crawford*, 150 Mo. 527, 51 S. W. 693.

The cases cited by appellant are cases where the question of whether an initiation took place or whether the applicant had never become a member of the society was not involved. In those cases it was admitted that the individual at one time had become a member, and was regularly initiated and in good standing, but, through some fault, had forfeited his membership. Those cases therefore deal with the forfeiture of a right conceded to have once existed. But in our case the vitality of the certificate is denied from its inception; there is a denial that a certificate on which liability could exist ever passed into the hands of any one having a right to it.

If the position contended for by appellant should be sustained, a certificate in the hands of a person who under uncontradicted evidence obtained it by theft would be some evidence upon which an issue could be put to the jury for them to possibly find that it had been regularly issued and delivered.

[9] The presumption prevails, and should prevail, as the decisions declare, that, in the absence of evidence, the certificate was regularly deposited in proper hands; but such presumption cannot be permitted by a court or jury to contradict the plain, uncontroverted facts as to how it got into the hands of the individual. There is no proof whatever that the Supreme Lodge ever knew, prior to Gilmore's death, that he had not been initiated and obligated. Upon ascertaining this fact, it immediately tendered the initiation fee and payments to the plaintiff, which she refused to accept.

Finding no error, the judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

RIDDLER et al. v. MISSOURI PAC. RY. CO.  
(No. 11304.)

(Kansas City Court of Appeals. Missouri.  
Dec. 7, 1914.)

# 1. COURTS (§ 97\*)—CONTROLLING DECISIONS—FEDERAL QUESTIONS.

A contract for an interstate transportation of freight is governed by and must be construed with reference to the federal decisions, without regard to the rules prevailing in the state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

# 2. CARRIERS (§ 218\*)—INTERSTATE TRANSPORTATION OF FREIGHT—CONTRACTS—STIPULATION.

A stipulation, in a contract for an interstate shipment of live stock, that as a condition precedent to a recovery for any loss the shipper

must give written notice within one day after delivery of stock at destination, does not apply to a loss from decline in market caused by delay in transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**3. CARRIERS (§ 228\*) — TRANSPORTATION OF LIVE STOCK—DELAY—PRESUMPTIONS.**

A delay of nearly double the usual time required for an interstate shipment of live stock for immediate sale on the market is proof of failure to transport within a reasonable time, and under Rev. St. 1909, § 3121, as amended by Laws 1913, p. 177, establishes a prima facie case of negligent delay, so as to authorize a recovery for loss by reason of decline in market.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

**4. CARRIERS (§ 218\*) — CARRIAGE OF LIVE STOCK—CONTRACTS—NOTICE OF CLAIM FOR LOSS—WAIVER.**

A carrier, not receiving the contract notice of a shipper's claim for shrinkage of live stock and loss by decline in market caused by delay in transportation, called on the shipper to furnish proof of the giving of the notice; but the shipper replied that that could not be done, for notice was not given within contract time. Thereupon the shipper was notified that the validity of the requirement of notice would be referred to the carrier's legal department. Thereafter the carrier wrote to the shipper, without indicating that an investigation of the facts of the claim as to shrinkage had been made, nor showing any intention to pay the claim therefor or to waive the requirement of notice, and refused to pay for the loss by shrinkage, but offered to settle for decline in the market. *Held*, that the carrier did not waive notice essential to authorize a recovery for loss of shrinkage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**5. CARRIERS (§ 218\*) — CARRIAGE OF LIVE STOCK—CONTRACTS—NOTICE OF CLAIM FOR LOSS—WAIVER.**

Where, in an action against a carrier of live stock for shrinkage and for decline in the market by delay in transportation, the parties by stipulation fixed the loss by decline in market and the loss from shrinkage, and agreed that the shipment was under a special contract limiting the liability of the carrier, and that the condition of the stock was poor when arriving at destination too late for the market on the day of arrival, and the case was submitted to the jury on the question of negligent delay and whether the carrier had waived notice of loss from shrinkage, the stipulation was not a waiver of notice by the shipper of loss from shrinkage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**6. CARRIERS (§ 218\*)—CONTRACTS—STIPULATIONS—VALIDITY.**

Where a consignee of live stock, shipped for immediate sale, was the agent of the shipper and saw at once that the cattle were stale and in poor condition because of delay in the transportation, a stipulation in the contract of shipment for notice of any claim for loss within one day after delivery at destination was not unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Morgan County; Jack G. Slate, Judge.

Action by Joe Riddler and others, compos-

ing the firm of Riddler, Williams & Hunter, against the Missouri Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Conditionally affirmed.

C. D. Corum, of St. Louis, for appellant. I. M. Schannep, of Versailles, and R. M. Embury, of California, Mo., for respondents.

TRIMBLE, J. Plaintiff shipped some cattle and sheep from Versailles, Mo., to the National Stockyards in East St. Louis, Ill. The usual time required to transport and deliver such a shipment was from 12 to 15 hours. The train was due to leave Versailles between 3:30 and 3:50 in the afternoon and arrive at the stockyards in Illinois between 3:30 and 6:50 the next morning. The cattle could then be easily sold on the market of that day which closed at 2 p. m. The shipment in question did not arrive until 4:25 p. m. the next day after it started. The animals were therefore required to be held over until the following day's market. The damages asked were \$25.91 on account of a decline in market and \$37.92 for shrinkage on the stock, aggregating \$63.83. The case started in a justice court.

The contract of shipment provided that, as a condition precedent to the recovery for any loss, the shipper would give notice in writing of the claim therefor before such stock was removed from the place of destination or mingled with other stock, "such written notification to be served within one day after the delivery of the stock at destination to the end that such claim may be fully and fairly investigated," and further provided that a failure to comply with such provision would bar recovery.

[1, 2] It was an interstate shipment, being from a point in Missouri to a point in Illinois. The contract is therefore governed by and must be construed with reference to the federal decisions without regard to the rules heretofore prevailing in this state. *Hamilton v. Chicago & Alton Ry.*, 177 Mo. App. loc. cit. 151, 164 S. W. 248, and cases cited; *Johnson Grain Co. v. Chicago, etc., Ry. Co.*, 177 Mo. App. 194, 164 S. W. 182. No notice of the claim was given within the time provided by the contract. The stock started in the afternoon of November 3, 1913, and should have arrived in the early morning of November 4th, but did not get to their destination until late in the afternoon, and were not put on the market until next day, November 5th. Notice was not given until November 11th. The requirement of such notice has been held not to apply to loss on account of decline in market. *Leonard v. Chicago & Alton Ry. Co.*, 54 Mo. App. 293; *Klass Com. Co. v. Wabash R. R. Co.*, 80 Mo. App. 164; *Aull v. Missouri Pac. Ry. Co.*, 136 Mo. App. 291, 116 S. W. 1122. As the failure to give notice did not affect loss from decline in market, the defendant offered to settle for

that, but refused to pay for loss on account of shrinkage. Plaintiff contended that the defendant had waived the requirement of notice, and insisted upon payment of the whole claim.

When the case reached the circuit court, a stipulation was entered into fixing the loss by reason of decline in market at \$25.91 and the loss from shrinkage at \$37.92. In this stipulation it was agreed upon plaintiff's part that the shipment was under a special live stock contract limiting the liability of the carrier, and on the part of the defendant it was admitted the shipment arrived at 4:25 p. m. November 4, 1913, too late for that day's market, and that the condition of the stock was poor and stale when they arrived. The case then went to the jury upon the question of negligent delay and whether defendant had waived the notice as to the loss from shrinkage.

[3] The plaintiff's evidence showed that there was a delay of nearly double the usual time required for such a shipment. This was proof of a failure to transport within a reasonable time, and, under section 3121, R. S. Mo. 1909, as amended by the Act of March 20, 1913, Laws of Mo. 1913, p. 177, made out a prima facie case of negligent delay. Plaintiff therefore established a case as to the \$25.91 lost by reason of decline in market. As to whether a case was made as to the loss from shrinkage depends upon whether or not there was evidence tending to show a waiver of the notice. The object of requiring the notice is to afford the carrier timely opportunity to investigate an alleged loss so that unjust claims may be disallowed. *Richardson v. Chicago & Alton Railroad*, 62 Mo. App. 1. The theory of plaintiff's claim that notice has been waived is that, "if the carrier learns of the \* \* \* loss and proceeds to investigate it, the necessity for the notice is dispensed with," and by such act of investigation notice is waived. *Jones Bros. v. Quincy, Omaha & Kansas City R. R. Co.*, 117 Mo. App. 523, loc. cit. 527, 94 S. W. 735, 736.

[4] The evidence relied upon by plaintiff to establish waiver is a letter written by defendant's freight claim agent to plaintiff's agents in East St. Louis, February 7, 1914. In this letter, the freight claim agent said:

"We recently corresponded in reference to this claim as regards the notice to carrier of claim to be filed within one day after delivery of the stock, and as I advised you in my letter of December 31, 1913, the fifth paragraph of our live stock contract provided as a precedent for the recovery of loss or damage to live stock in transit, carriers or an officer of the carriers, must be notified of claim within one day after delivery at destination, which it is admitted in this instance was not done. As I personally advised you on my last visit to the stockyards we would place the matter before our law dept. for an opinion as to payment under this clause, they now advise us that the exemption clause referred to has been upheld by the Supreme Court as reasonable and is applicable to all interstate shipments, in view of which fact we are not in

position to consider your claim for extra shrinkage due to delays enumerated. As regards the decline feature, desire to advise you that we are in position to offer in settlement," etc.

It will be noticed that there is nothing in the above letter which indicates that an investigation of the facts of the claim as to shrinkage had been made, nor does the letter display any intention to pay that portion of the claim or to waive the requirement of notice. The only investigation was to inquire of the legal department as to the validity of the requirement as to notice. And so far from waiving the necessity of notice, the letter emphatically declined to consider the claim for shrinkage because no notice was given. It refused to pay for that loss, but, "as regards the decline feature," offers to settle. From a letter written by plaintiff's agents it appears that on December 16th the freight claim agent had requested them to furnish evidence that they had given the notice required by the contract. This, plaintiff's agents said, they could not do, since no notice was given within the time required. Thereupon defendant's agent referred the question of the validity of the requirement of notice to the legal department, and, after getting its opinion thereon, defendant's freight claim agent wrote the letter hereinabove quoted. We do not see where there was any evidence in this letter of an investigation of the facts of the claim as to shrinkage which would constitute a waiver. Asking for proof of such notice and the name of the agent on whom it was served, and then, after learning that none had been given, asking the legal department for an opinion as to the effect of such want of notice, and then, upon receiving that opinion, declining to pay that feature of the loss to which it applied, do not constitute a waiver. The offer of settlement was expressly limited to the loss sustained by decline in market to which the notice did not apply. While the contract is construed according to the federal decisions, we know of none holding that the failure to give notice applies to decline in market as well as to shrinkage, and plaintiff has not cited us to any. So that the letter above quoted cannot be said to show a waiver of notice because it offers to pay for loss on account of a decline in market.

[5] It is urged by plaintiff that the stipulation signed by the parties and offered in evidence at the trial is evidence of a waiver. There is no admission contained therein that defendant investigated the facts of the loss. If such an inference can be drawn from the stipulation, it arises from the fact that it was agreed therein that the loss in shrinkage was \$37.92. We do not think the stipulation can be considered evidence of waiver. Evidently it was not intended to be such in a case where it was being contended that no waiver existed. The loss from shrinkage claimed by plaintiff was so small that it was better to admit the amount with-

out knowing whether it was correct or not than to compel plaintiff to bring witnesses, or take depositions, to prove the loss and thus increase the costs by a sum in excess of the amount of the claim. The stipulation was nothing more than an arbitrary valuation of the shrinkage which should be conclusive in case the notice was waived or was held not to apply.

There being therefore no evidence of waiver of notice, plaintiff is not entitled to recover for loss in shrinkage unless the notice required is invalid.

[6] It is now urged that a requirement of only one day is an unreasonably short time. These provisions in contracts of this character are held to be regulations of, and not exemptions from, the carrier's liability, provided the time is not unreasonably short. *Clegg v. Railroad*, 203 Fed. 971, loc. cit. 973, 122 C. C. A. 273; *Missouri, etc., R. Co. v. Harriman*, 227 U. S. 657, loc. cit. 672, 33 Sup. Ct. 397, 57 L. Ed. 690; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Bailey v. Mo. Pac. Ry. Co.*, 171 S. W. 44, decided by this court November 23, 1914; *Hamilton v. Chicago & Alton Railroad*, 177 Mo. App. 145, 164 S. W. 248. The question whether the time allowed was reasonable or not depends on the character of the shipment, the situation of the parties, and the circumstances of each particular case. A shorter time has been held to be valid in cases of the shipment of live stock than in other kinds of freight. 8 Cyc. 508. In the case at bar the shipment was of live stock to be sold on the market immediately and then butchered. The consignees were the agents of plaintiff and saw at once that the cattle were stale and in poor condition on account of being held over. They arrived at 4:25 p. m. of one day and were sold on the next day's market which closed at two p. m. The one-day limit did not expire at least until 4:25 p. m. of the day they were sold. As they were shipped to be converted into meat and the primary evidence of their shrunken condition would be immediately destroyed, we do not think there is anything unreasonable in requiring notice to be given within 24 hours after their arrival. When notice of the claim was given, it was made out and presented by the consignees, who, as said before, were plaintiff's agents. The notice required did not have to specify the amount and extent of the loss, but only the fact that a claim would be made. Consequently, plaintiff's agents did not have to wait until the cattle were sold and figure up the amount of loss from shrinkage before giving the notice. Now, in addition to these facts, the case does not seem to have been tried on the theory that the time was unreasonably short, but rather upon the theory that the requirement of the notice was valid and had been waived. We say this because there was no

evidence offered to show circumstances which would render notice within one day unreasonable. It is true, plaintiff did not accompany the shipment; but as the consignees were plaintiff's agents and could observe the stale condition the cattle were in, and also knew they did not arrive on time but got there too late for market on day of arrival and had to be held over until next day, the fact that plaintiff did not accompany them would not of itself show the one-day limit to be unreasonable. If there were any facts and circumstances which would have disclosed its unreasonableness, they should have been presented. In *Clegg v. Railroad*, cited above, a one-day notice was held to be valid. We desire it to be clearly understood that we do not say a limitation of one day is reasonable as a general rule or under any and all circumstances. But where the circumstances, as here, do not show that time to be unreasonable, and the case is apparently tried upon the theory that the requirement of notice is valid but has been waived, and no proof of other circumstances is made which render it unreasonable, we will not declare a limit of one day to be unreasonably short.

It follows therefore that, under the rule adopted by the federal decisions which are controlling in interstate shipments, plaintiff is not entitled to recover for loss due to shrinkage, but is entitled to recover for loss in decline of market. If therefore plaintiff will within ten days from the announcement of this opinion file a remittitur of \$37.92 and interest thereon from the date of rendition of judgment, it will be affirmed, otherwise it will be reversed and the cause remanded for a new trial. All concur.

SMITH et al. v. ST. LOUIS SOUTHWESTERN RY. CO. (No. 1259.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

1. COMMERCE (§ 8\*)—INTERSTATE COMMERCE ACT—INTERSTATE SHIPMENTS.

An interstate shipment is governed by the Interstate Commerce Act and the construction placed thereon by the federal courts.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.\*]

2. CARRIERS (§ 218\*)—CONTRACTS—STIPULATIONS—VALIDITY.

A stipulation, in a contract for interstate carriage of live stock, that, as a condition precedent to the collection of any damages for loss of or injury to the stock, the shipper shall give notice in writing within one day after delivery at destination is valid, and the shipper giving notice after the expiration of the time limit may not recover for damages caused by delay in transportation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by W. E. Smith and others, composing the firm of Smith, McMillan & Co., against the St. Louis Southwestern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Wammack & Welborn, of Bloomfield, and Sam H. West, of St. Louis, for appellant.

FARRINGTON, J. The plaintiffs, a partnership, brought suit against the defendant railway company for damages occasioned by a delay in the shipment of a car load of hogs which were loaded and turned over to the railway company on January 7, 1913. The shipment was from Malden, Mo., and was consigned to the Dimmitt-Caudle Smith Commission Company of the National Stock Yards in the state of Illinois. The plaintiffs' evidence showed that the car was delayed on account of a defective drawhead, and that by reason thereof the plaintiffs were damaged on account of shrinkage in weight.

Plaintiffs admitted that the hogs were shipped under a contract with the defendant which contained the following provision:

"Tenth. That as a condition precedent to the collection of any damages, for any loss or injury to live stock covered by this contract, the shipper will give notice in writing of the claim therefor to some general officer or the nearest station agent of the carrier, or to the agent at destination, as the case may be, and, before such stock is mingled with other stock, such written notice to be served within one day after delivery of the stock at destination. The purpose of requiring this notice is to enable the carrier to investigate and settle such claims before suit is instituted, and no action for any such damages shall be brought or maintained unless the notice in writing mentioned in this paragraph be given within one day after the delivery of the stock at destination. The filing of suit for such damage shall not be a compliance with this requirement, and no one, excepting a general officer of said carrier, has authority to waive such notice, and he only expressly in writing."

This contract, according to its terms, was made limiting the common-law liability of the carrier in consideration of a reduced freight charge.

The plaintiffs attempted to show a notice as required by the provision in the contract by testifying that the consignees advised them that they had put in a claim against the defendant for the damages, and that they had sent plaintiffs a copy of the letter, which the plaintiffs had lost. Plaintiffs' witness, however, testified that a copy which was shown him, and which was introduced in evidence by the defendant, was to the best of his recollection about what his copy contained. This letter, when introduced by the defendant, showed that it was written on January 13, 1913. The hogs reached the stockyards so as to be sold on January 10, 1913. This letter of January 13th, making a claim against the defendant, is the only attempted showing of the notice required by the tenth section of the contract, and the evidence clearly shows that this was written

after the expiration of the one-day time limit specified in the contract.

[1, 2] It is unnecessary to discuss the law on this question, as it is now well settled that such a shipment as this (an interstate shipment) is governed by the Interstate Commerce Act and the construction placed thereon by the federal courts. Our state courts have recently passed on the question in the cases hereinafter cited. The identical question was considered in a case where a similar contract provision appeared, decided by the United States Circuit Court of Appeals for the Eighth Circuit (Clegg v. St. Louis & S. F. R. Co., 203 Fed. 971, 122 C. C. A. 273), and the contract provision (requiring notice to be given within one day after the delivery of the stock at destination) was upheld. The giving of the required notice was a condition precedent to recovery. This the plaintiffs failed to show; indeed, the evidence shows without controversy that such notice as was required was not given. The railway company is subject only to the liability imposed by this contract, and the decisions of our state uniformly so hold. See Joseph v. Railroad, 175 Mo. App. 18, 157 S. W. 837, and Hamilton v. Railroad, 177 Mo. App. 145, 164 S. W. 248, and cases cited. The plaintiffs failed to make out their case, and the jury should have been so instructed.

The judgment is reversed.

ROBERTSON, P. J., and STURGIS, J., concur.

#### JOHNSON v. BUSH. (No. 13890.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

#### 1. LIBEL AND SLANDER (§ 7\*)—WORDS SLANDEROUS PER SE.

A charge that plaintiff was a thief is slanderous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.\*]

#### 2. LIBEL AND SLANDER (§ 80\*)—ACTIONS—PETITION.

Under Rev. St. 1909, § 1837, providing that in an action for slander, it shall not be necessary to state any extrinsic facts to show application to the plaintiff, but it shall be sufficient to state generally that the defamation was spoken concerning plaintiff, a petition charging slander need not set forth the names of the persons in whose presence the slanderous words were uttered, or that they were understood by those present.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.\*]

#### 3. LIBEL AND SLANDER (§ 80\*)—PETITION—SUFFICIENCY.

A petition, alleging that on the 6th day of January in the city of St. Louis, defendant wantonly and maliciously spoke certain slanderous words concerning plaintiff is sufficiently definite and certain as to the place where the words were spoken.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.\*]

#### 4. LIBEL AND SLANDER (§ 80\*)—PETITION—SUFFICIENCY.

Under Rev. St. 1909, § 1818, declaring that no party shall be required to state evidence in his pleading, and section 1837, providing that it shall not be necessary to state in the petition in an action for slander any extrinsic facts to show the application of the defamation to plaintiff, a petition charging slander, which set out the slanderous words and alleged that they were spoken at a named time and place, cannot be required to be made more definite and certain by setting forth the circumstances under which defendant spoke the slanderous words.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.\*]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Action by Justus W. Johnson against Wade H. Bush. From a judgment dismissing the case, plaintiff appeals. Reversed and remanded.

Geo. W. Wadlow and Blevins & Jamison, all of St. Louis, for appellant. S. T. G. Smith, of St. Louis, for respondent.

NORTON, J. This is a suit for damages said to have accrued on account of an alleged slander. The court sustained defendant's motion to make the petition more definite and certain, and this he declined to do. Thereupon the court dismissed the case, and plaintiff prosecutes the appeal.

[1-3] The petition is as follows:

"Plaintiff in this, his amended petition, leave to file the same being first had and obtained, for his cause of action states that the defendant, on or about the 6th day of January, 1911, at the city of St. Louis, Mo., willfully, wantonly, and maliciously spoke of and concerning plaintiff, in the presence and hearing of divers persons, certain false, defamatory, and slanderous words, to wit, 'He [meaning plaintiff] is a thief, a rascal, a scoundrel, a damned hound,' thereby charging and intending to charge plaintiff of the crime of larceny and of dishonesty, whereby plaintiff has been greatly injured in his good name and fame, to his damage in the sum of \$5,000, for which he prays judgment."

Defendant's motion so sustained by the court, requiring the petition to be made more definite and certain, invoked an order that plaintiff be compelled to state the names of the persons to whom or in whose presence the slanderous words were uttered, also the circumstances under which defendant spoke the alleged slanderous words and the place where the same were spoken. So much of the alleged slander above set forth as charges plaintiff with being a thief is, of course, slanderous per se. See *Bridgman v. Armer*, 57 Mo. App. 528; *Johnson v. Dicken*, 25 Mo. 580. It appears from the context of the words used and as set out in the petition that they all form a part of one conversation in which defendant charged plaintiff with being a thief. Our statute (section 1837, R. S. 1909) provides as follows:

"In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the

application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary."

[4] Under this statute it has been expressly decided that it is not necessary for plaintiff to set forth the names of the persons in whose presence the words were uttered, or that they were understood by those present. See *Atwinger v. Fellner*, 46 Mo. 276. See, also, *Guard v. Risk*, 11 Ind. 156. It is true in both of the cases cited the question was presented after verdict on the petition, but the rule is declared the same where the slanderous words are actionable per se when the question is raised, as here, on a motion to make more definite and certain. See *Marks v. Jacobs*, 76 Ind. 216. Indeed, the statute above copied says that it shall be sufficient to state generally the fact that the words were published or spoken concerning the plaintiff. See, also, 25 Cyc. 446. Touching the matter of requiring the petition to be made more definite and certain by stating the place where the slanderous words were spoken, the averment seems to be sufficient, for it is expressly alleged the slander was uttered at the city of St. Louis, Mo., and the date is given as on January 6, 1911. This will suffice. See *Dent v. Ryan*, 55 Hun, 610, 8 N. Y. Supp. 806. The requirement that the petition be made more definite and certain by setting forth the circumstances under which defendant spoke the alleged slanderous words not only in a measure impinges the spirit of the statute above quoted, which provides that it shall not be necessary to set forth any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter, but seems more particularly to run counter to section 1818, R. S. 1909, which provides that no party shall be required to state evidence in its pleading. We regard the petition sufficiently definite when considered in connection with the statutes touching the subject-matter, and the motion to make more specific should have been overruled.

The authorities apparently holding a contrary view on the question in judgment are not persuasive here, for they proceed on a statute requiring a bill of particulars in every case when it is called for in order to advise the party, as was ruled in *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337, and see its application in *Stiebeling v. Lockhaus*, 21 Hun (N. Y.) 457. We have no such statute in this state, and the rule flowing from it is without influence.

The judgment is therefore reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**GILLEN v. HALEY et al.** (No. 11276.)  
(Kansas City Court of Appeals. Missouri.  
Dec. 7, 1914.)

**WORK AND LABOR (§ 24\*)—SERVICES RENDERED—FAILURE TO PROVE VALUE.**

In an action for services, not based on a written contract, rendered by plaintiff to defendant, including personal attention, housekeeping, cooking, business matters, etc., the failure to prove the value of the services is fatal to a recovery for plaintiff.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 43-46; Dec. Dig. § 24.\*]

Appeal from Circuit Court, Clay County; F. P. Divilbiss, Judge.

Claim by Kate Gillen against Michael Haley, administrator. From a judgment for plaintiff in the circuit court on appeal by the administrator from the allowance of the claim in probate court, the executor appeals. Reversed, and cause remanded.

Theodore Emerson and Martin Lawson, both of Liberty, and Denton Dunn, of Kansas City, for appellant. Simrall & Simrall, of Liberty, for respondent.

**ELLISON, P. J.** Plaintiff presented a claim in the probate court of Clay county against the estate of Mary M. Heenan, and obtained judgment for \$600. On appeal by the administrator to the circuit court, she again recovered judgment, and the case has been appealed to this court.

The claim is for services during parts of five years, from 1908 to 1913. The parties were cousins; the plaintiff living in Kansas City and the deceased in Liberty, in an adjoining county. There was evidence tending to show that frequently, in each of these years, they were at each others' houses for considerable periods of time, and that deceased was distressingly afflicted, requiring services of the most menial, as well as delicate, character, and that plaintiff rendered those services. There was evidence, too, connected with circumstances and legitimate inferences, which tended to prove that, while there was no express contract to pay, yet that the services were not intended by either party as a gratuity, springing from kindness, affection, or relationship; and that there was an implied contract to pay what such services were reasonably worth. But the difficulty with plaintiff's case is that there was no evidence of the value of her service. That was as important as to show she rendered the service. The record shows the case was only half proven.

The character of the service not only included personal attention to deceased, together with housekeeping, cooking, etc., but likewise attending to business matters and going from home with her. It was once decided (*Murray v. Railway Co.*, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601) that the value of the service of an ordinary nurse could be recovered without particular proof, since the

value of that character of service was generally known. But that case would not cover this, and, besides, it has been overruled. *Cobb v. Railway Co.*, 149 Mo. 609, 630, 50 S. W. 894; *Slaughter v. Railway Co.*, 116 Mo. 269, 276, 23 S. W. 760. See, also, *Graefe v. Transit Co.*, 224 Mo. 232, 274, 123 S. W. 835; *Brake v. Kansas City*, 100 Mo. App. 611, 615, 75 S. W. 191; *Kaiser v. Transit Co.*, 108 Mo. App. 708, 711, 84 S. W. 199; *Bradner v. Rockdale Co.*, 115 Mo. App. 102, 113, 91 S. W. 997; *Esque v. United Ry.*, 174 Mo. App. 317, 157 S. W. 1061.

In an endeavor to overcome this error, plaintiff suggests that there was evidence from which the value could be inferred. We do not think so. There was something stated by a witness to the effect that the deceased was thinking of making a present to plaintiff of a house and lot. The record would not justify us, in any degree of fairness, in considering this as proof of value of the service rendered. The cases cited by plaintiff are not in point; in each of them there was affirmative proof of value.

The judgment is reversed, and the cause is remanded. All concur.

**STEPHENS v. REBERERT.** (No. 1285.)  
(Springfield Court of Appeals. Missouri.  
Dec. 12, 1914.)

**JUSTICES OF THE PEACE (§ 43\*)—JURISDICTION—STATUTES.**

Rev. St. 1909, § 7758, limits the jurisdiction of justices of the peace in replevin in certain counties to cases where the value of the property sought to be recovered and the damages claimed for the taking or detention shall not exceed \$250; section 7759 requires plaintiff to accompany his statement with an affidavit stating the actual value thereof; section 7772 provides that the value as set forth in the statement and affidavit fixes the jurisdiction as to the value; and section 7395 gives justices of the peace jurisdiction of actions, etc., where the sum demanded, exclusive of interest and costs, does not exceed \$250. Plaintiff filed a statement and affidavit in replevin, which, as amended, left the value \$250, and claimed \$50 as damages for the taking and detention. *Held*, that the justice's court had no jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 75, 149-156; Dec. Dig. § 43.\*]

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Replevin by C. E. Stephens against Henry Reberert in justice court, and from the judgment, defendant appealed to the circuit court, which dismissed the action, and plaintiff appeals. Affirmed.

Jere S. Gossom, of Caruthersville, for appellant. Ward & Collins, of Caruthersville, for respondent.

**ROBERTSON, P. J.** Plaintiff filed his statement and affidavit in replevin before a justice of the peace to recover possession of a

cow and corn in the possession of the defendant. The defendant appeared and filed a motion to dismiss, alleging as his reason therefor that the justice had no jurisdiction. The motion was sustained, and later the judgment sustaining it was set aside, and thereafter the motion was overruled. The plaintiff then filed an amended statement and affidavit, alleging the value of the cow and corn to be \$250, and claimed \$50 as damages for the taking and detention thereof, for all of which he prayed judgment. The cause then proceeded to trial before the justice of the peace, and, as the result, it was found that the value of the property was \$140, and the judgment recites that the plaintiff claimed no damages. The defendant appealed to the circuit court, and there renewed his motion to dismiss, which was sustained, and the plaintiff has appealed. The plaintiff did not offer to amend his statement in the circuit court, and his right to do so is not, therefore, before us for consideration. At the hearing of the motion, plaintiff, over the objection of defendant, offered testimony for the purpose of proving that he, in the justice of the peace court, abandoned all claim for damages. Under section 7758, R. S. 1909, the jurisdiction of a justice of the peace in counties such as this county is, having a population less than 50,000 inhabitants, in actions brought for the recovery of personal property, is limited to cases where the value of the property sought to be recovered and the damages claimed for the taking or detention and for all injuries thereto shall not exceed, in the aggregate, \$250. By section 7772, R. S. 1909, it is expressly provided that the value of the property, as set forth in the statement and affidavit, fixes the jurisdiction as to the value, and we are governed by the statement and affidavit as to the "damages claimed" by reason of said section 7758. *Payne v. Weems*, 36 Mo. App. 54, 56, 57; *Saunders v. Scott*, 132 Mo. App. 209, 214, 111 S. W. 874. These two sections of the statute are the same as when first enacted (R. S. 1879, §§ 2881, 2895), except that there has been a change as to the amount that may be involved (Laws 1891, pp. 174, 175). Other decisions are cited by respondent as bearing upon this construction of the statute. *Gottschalk v. Klinger*, 33 Mo. App. 410, 417; *Malone v. Hopkins*, 40 Mo. App. 331, 332; *Knoche v. Perry*, 90 Mo. App. 483, 488.

Appellant has cited *Best v. Best*, 16 Mo. 530, *Koester v. Lowenhardt*, 177 Mo. App. 699, 160 S. W. 566, *Wells v. De Gouveia*, 161 Mo. App. 563, 143 S. W. 517, and *Cook v. Decker*, 63 Mo. 328, on the question of the right of a plaintiff, where he has brought an action to obtain a money judgment in an amount in excess of the jurisdiction of a justice of the peace, to abandon a portion of his claim and thereby confer jurisdiction. But in all of those cases there was an amend-

ment of the account or statement to bring the demand within the jurisdiction, except in the *Best Case*, where it is said "that the justice was authorized to enter a credit on the claim." In the case at bar no one but the plaintiff, or his agent or attorney, could amend. Since, in an action of replevin, the courts have been holding that section 7758 is as conclusive on the "damages claimed" as is section 7772 on the value of the property, and some of these opinions were extant long before the Legislature amended what is now section 7758, we should hesitate to change that rule, because, if the Legislature deemed this construction unreasonable, it would likely have changed the statute in this respect when the amendment was made. *State v. Schenk*, 238 Mo. 429, 455, 142 S. W. 263.

The "sum demanded" under section 7395, R. S. 1909, conferring jurisdiction where a money judgment is sought, differs very materially from an action in replevin, where, under section 7759, the plaintiff must accompany his statement with an affidavit. In the case at bar the plaintiff, in the face of the motion to dismiss, amended his statement so that the justice of the peace had no jurisdiction, and we can see no equity in his claim that he, as a matter of fact, intended to, and did, waive the damages.

The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

# JONES v. CITY OF CARUTHERSVILLE. (No. 1170.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

## 1. MUNICIPAL CORPORATIONS (§ 753\*)—STREET COMMISSIONER—UNAUTHORIZED ACTS.

Since a municipality is liable for the acts of its officers and agents only when they act within the scope of their authority, a city was not liable for injuries to plaintiff's property by the acts of its city street commissioner in constructing a system of drainage whereby surface water was collected and thrown onto plaintiff's lot, to his damage, without any authorizing ordinance, and this though the city paid the street commissioner and his collaborators for the work under a general appropriation ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1584, 1586; Dec. Dig. § 753.\*]

## 2. MUNICIPAL CORPORATIONS (§ 301\*) — FOURTH-CLASS CITIES — IMPROVEMENTS — DRAINAGE.

Under Rev. St. 1909, § 9400, regulating fourth-class cities' surface drainage improvements, such improvements can be legally undertaken only by ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 802; Dec. Dig. § 301.\*]

Appeal from Circuit Court, Pemiscot County; Charles B. Faris, Judge.

Action by Charles Jones against the City of Caruthersville. Judgment for plaintiff, and defendant appeals. Reversed.

Vance J. Higgs, of Caruthersville, for appellant. Ward & Collins, of Caruthersville, for respondent.

**FARRINGTON, J.** This action was brought by the plaintiff to recover damages alleged to have been sustained by him by reason of the defendant, through its street commissioner, and by and under the direction of its street and alley committee, having constructed a system of street improvements—drains, sewers, and ditches—to convey the surface water from some 40 blocks of the city so that the system terminated near plaintiff's property, by reason whereof a large quantity of surface water collected and stood on plaintiff's lot, to his damage in the sum of \$2,500.

The answer of the defendant, after admitting that it is a city of the fourth class, is a general denial.

Plaintiff introduced evidence to show that surface water accumulated on his lot in large quantities, and stood there and became stagnant, and damaged a number of trees and improvements. His evidence shows that no ordinance or resolution was ever passed authorizing any one for the city to dig this ditch and the drains that led into it, which terminated at plaintiff's property. There was a general ordinance of the city specifying the powers and duties of the street commissioner, as well as those of the street and alley committee or committee on improvements. In this general ordinance the street commissioner is given power to superintend the construction of any drain or other improvement whenever required by any ordinance or resolution of the board. He is also empowered to see that all streets, alleys, drains, and other public places are kept free from obstructions and in a cleanly condition. This last-mentioned duty does not seem to be, in the general ordinance, one that requires his duties to be performed under a special ordinance.

The charge in the petition is that:

"The defendant constructed a large number of ditches, drains, and sewers, and wrongfully, negligently, and carelessly changed the natural flow of the surface water, rainwater, and sewage, and negligently and carelessly collected, gathered, and held the same in a body down on and upon plaintiff's property, and negligently failed to devise or construct any way or means to remove said water so collected and held on plaintiff's property."

At the close of plaintiff's case the defendant offered an instruction in the nature of a demurrer to the evidence which was overruled. The defendant showed that no ordinance or resolution was ever passed authorizing any one to build the ditch in question or the drains leading up to it, by reason whereof surface water was collected so as to overflow on plaintiff's property.

[1] The respondent seeks to supply the ab-

sence of an ordinance or resolution by showing that the city ratified the act of the street commissioner in paying him and the workmen for digging the ditch. We have recently gone into this same question in the case of *Bigelow v. City of Springfield*, 178 Mo. App. 463, 162 S. W. 750, where a number of cases in this state bearing on the question will be found cited and discussed: First, as to the liability of the city for acts of a street commissioner in performing duties which result in damage to property owners, where there is no ordinance authorizing the work to be done when, under the law, the city can only act through an agent who has been empowered by ordinance to do the work; and, second, as to the payment of the street commissioner and his collaborators under a general appropriation not taking the place of the ordinance required to authorize the work.

Plaintiff here seeks to hold the city because the street commissioner failed to see that the drains and other public places were kept free from obstruction and in a cleanly condition. The charge in the petition is that the city wrongfully, carelessly, and negligently changed the flow of surface water by gathering and holding the same in a body on plaintiff's property, and negligently failed to devise or construct any way or means to remove the water. There is no allegation or proof that there were any obstructions that made the water flow on plaintiff's property other than the manner in which the ditch was constructed. Besides, that part of the general ordinance referred to means that the street commissioner shall keep the lawfully constructed drains, alleys, etc., free from obstruction and in a cleanly condition.

A great many of the cases cited by respondent were referred to in the *Bigelow Case*, supra, and it is unnecessary to discuss them here.

The case of *Lewis v. City of Springfield*, 142 Mo. App. 84, 125 S. W. 824, was an action for discharging water on a citizen's property, and the city was held liable, but the opinion shows that the drain in that case was constructed under and by virtue of ordinances.

[2] Section 9400, R. S. 1909, provides that such improvements as were made in this case, when undertaken by cities of the fourth class, must be by ordinance. The evidence clearly shows that, if plaintiff was damaged, it was through the act of the street commissioner and those acting with him, absent any ordinance or resolution making their act an act of the city.

The plaintiff failed to make out a case against the defendant, and the jury should have been so instructed.

The judgment is reversed.

**ROBERTSON, P. J., and STURGIS, J.,** concur.

JABLONSKY v. WUSSLER et al.  
(No. 16977.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

EASEMENTS (§ 16\*) — IMPLIED EASEMENT —  
RIGHT OF WAY.

Where one of two adjacent tracts of land sold by the same owner to different persons touched both a street and an alley, so that there was no reasonable necessity for continuing the use of the alley after the sale for the benefit of the tract touching the street and alley, the purchaser had no implied easement over the alley.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. § 16.\*]

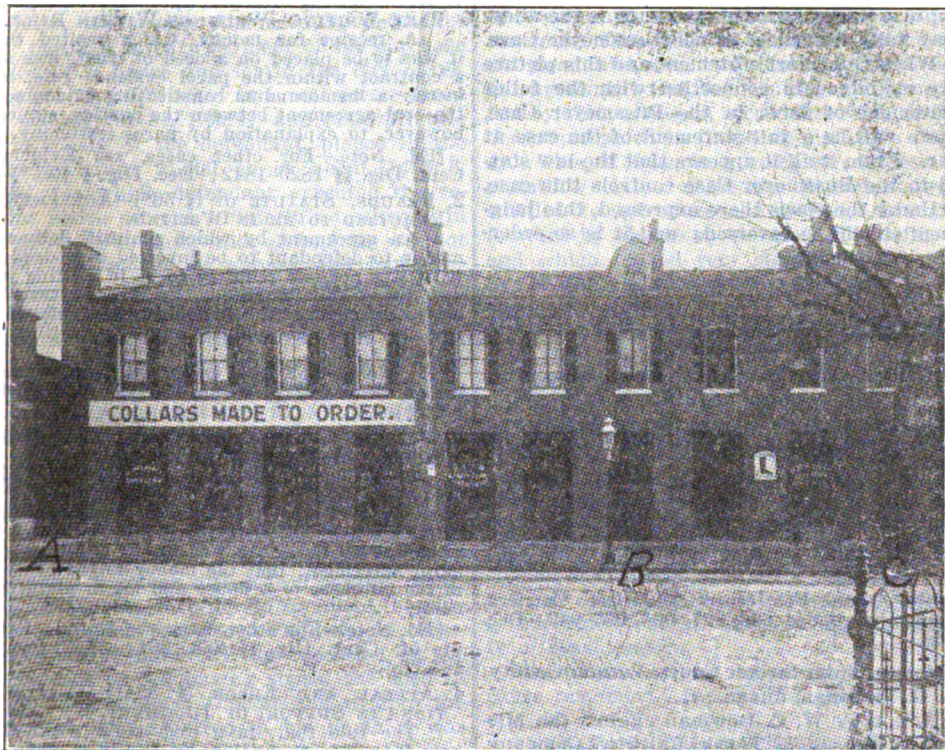
Appeal from St. Louis Circuit Court;  
James E. Withrow, Judge.

Suit by Charles Jablonsky against Bernard Wussler and others. Decree for complainant, and defendants appeal. Reversed.

The following is the picture referred to in the opinion:

Both the facts and the law of this case were before this court in the case of Bussmeyer v. Jablonsky, 241 Mo. 681, 145 S. W. 772, Ann. Cas. 1913C, 1104. The present plaintiff was the defendant in the Bussmeyer Case. He urged upon us then the doctrine of there being required the element of necessity before there could be an easement by implication of law. He says in the record before us that the facts of the two cases are practically identical. The admission thus reads:

"Mr. Carpenter: If your honor please, I may concede right now that, so far as any easement is concerned by prescription, we don't claim any. We are after an easement upon a different theory from that, and I want to call your honor's attention to this case here. This is a case in the Utah Supreme Court, the case of Rollo v. Nelson, 34 Utah, 16, June 1, 1908 (citing and reading from opinion; also from case from Pennsylvania Supreme Court, Liquidated Carbonating Co. v. Wallace; also case from Oregon Supreme Court). These are all reported in the 26 L. R. A., New Series. One is reported at page 331, another at page 327, and



Muench, Walther & Muench, of St. Louis, for appellants. August Walz, Jr., and W. G. Carpenter, both of St. Louis, for respondent.

GRAVES, J. Action in equity to enforce an implied easement. Such action takes the form of a petition by which it is sought to enjoin the defendants from obstructing the entrance to a three-foot passageway upon the western part of a lot owned by the defendant.

the other case at page 315. All of them were heavily annotated. Here is a line of cases identical with this case [reading extracts from cases]. This is all on the theory that these easements are appurtenant to this use in connection with the property sold. At this point it may be proper to state to your honor that this very passageway on the south side of this man's property, going into the Bussmeyer property, was litigated in the circuit court here in 1908 in the same way that this is now being litigated. There Mr. Jablonsky stopped up the passageway, and this same identical proceeding was brought against him, and, in the hearing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—41

of that case before Judge Rule, the right to the easement was upheld. That case is now on appeal in the Supreme Court in this state. It raises the same identical question and practically the same identical facts here involved. And we hope to reach that in the Supreme Court next year. This is not a prescription easement we are seeking here. This is an easement where it was made specifically to the property by the owner himself, and where it was conferred upon one piece of property in favor of an adjoining piece of property by the owner and appurtenant to it and enhances the value of that property. I want to offer that evidence, your honor, and merely save an exception to the overruling of the objection."

A picture in the record will explain the situation. We have "Exhibit 2," which shows both the passageway in dispute in the case at bar and the one in the Bussmeyer Case. Here is the exhibit: The passageway in dispute we have marked with the letter "A." Then there is another passageway marked "B," and still a third one which we have marked "C." The one marked "C" is the one in dispute in the Bussmeyer Case, supra. Back of all this property is the alleyway fully described in the Bussmeyer Case.

When this short statement and this picture are examined in connection with the fuller statement of facts in the Bussmeyer Case, there will be a full statement of the case at bar. From it all it appears that the law stated in the Bussmeyer Case controls this case.

Under the views there expressed, this judgment should be reversed; and it is so ordered. All concur.

#### **BOWMAN v. MISSOURI, K. & T. RY. CO.** (No. 11318.)

(Kansas City Court of Appeals. Missouri.  
Dec. 7, 1914.)

#### **CARRIERS (§ 218\*)—CONTRACT OF SHIPMENT—TIME FOR NOTICE OF DAMAGES AND BRINGING SUIT.**

No recovery can be had for injuries to a car load of mules, where the provisions of the contract of shipment relating to times within which to give written notice of damages, file written notice of claim, and bring action are not observed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-940; Dec. Dig. § 218.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by W. C. Bowman against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Jamison, of St. Louis, for appellant. Scott & Bowker, of Nevada, Mo., for respondent.

**ELLISON, P. J.** Plaintiff brought this action against defendant for negligence in shipping a car load of mules from Walker, Mo., to East St. Louis, Ill., whereby they were injured and depreciated in value. He recovered judgment in the circuit court.

The contract of shipment provided that plaintiff should give written notice of his damages to defendant within 5 hours after the stock was unloaded, and that within 30 days of the happening of the injury he would file with defendant a written verified claim. It was further agreed in the contract of shipment that plaintiff would bring his action within 91 days from the date of the injury. None of these provisions was complied with.

The case is governed by the cases of *Hamilton v. C. & A. Ry. Co.*, 177 Mo. App. 145, 164 S. W. 248, and *Johnson Grain Co. v. C., B. & Q. Ry. Co.*, 177 Mo. App. 194, 164 S. W. 182, decided by this court on the same day.

The judgment will therefore be reversed. All concur.

#### **MARTIN v. PRINTZ. (No. 13814.)**

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

#### **1. EVIDENCE (§ 408\*)—PAROL EVIDENCE TO VARY WRITING—WRITINGS WITHIN RULE.**

A receipt for money, which recited that it was to be placed on a deed of trust, was not a contract within the parol evidence rule, but merely a memorandum constituting evidence of the oral agreement between the parties, subject, however, to explanation by parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

#### **2. FRAUDS, STATUTE OF (§ 56\*)—AGREEMENTS REQUIRED TO BE IN WRITING.**

An agreement by which plaintiff delivered money to defendant to be invested in a deed of trust was not one required to be in writing under the statute of frauds, as it constituted a mere agreement as to what disposition defendant was to make of plaintiff's money acting as plaintiff's agent.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

#### **3. FRAUDS, STATUTE OF (§ 131\*)—WRITTEN CONTRACTS—PAROL MODIFICATION.**

As an agreement by which plaintiff delivered money to defendant for investment in a deed of trust was not required by the statute of frauds to be in writing, it could be varied or altered, even though in writing, by a subsequent parol agreement, that the money might be used in the purchase of a house and lot in plaintiff's name.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.\*]

#### **4. APPEAL AND ERROR (§ 854\*)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.**

The rule that, in a case tried without a jury in which no findings of fact are made or declarations of law requested or given, the judgment will be affirmed unless so manifestly erroneous that it cannot be sustained upon any theory supported by the evidence, did not apply where reversible error was committed in the exclusion of evidence whereby a perfectly valid defense sought to be introduced was wholly excluded from consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

Appeal from St. Louis Circuit Court; Chas. Claflin Allen, Judge.

Action by Oscar Martin against Arthur G.

Printz. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Koenig & Koenig, of St. Louis, for appellant. Wyrick & Eaken, of St. Louis, for respondent.

ALIEN, J. Plaintiff instituted this action for the recovery of \$1,000 alleged to have been received by defendant from plaintiff for the purpose of purchasing for the latter a deed of trust upon property in the city of St. Louis, and for which the defendant executed the following receipt:

"St. Louis, June 3rd, 1908.

"Received of Oscar Martin one thousand and no/100 dollars, to be placed on first deed of trust 5% loan in Dixie Place, for 3 years.  
"\$1,000.00.

Arthur G. Printz."

Plaintiff in his petition avers that defendant failed to so invest the money, and refused to repay the same to plaintiff. The answer admits the execution of the receipt, but avers that, at plaintiff's instance and request, the money was used by defendant for plaintiff in part payment of the purchase price of a house and lot in the city of St. Louis. The defendant is a real estate agent in the city of St. Louis; and plaintiff, who is a cousin of the defendant, placed in the latter's hands \$1,000 on or about June 3, 1908, for which defendant executed the receipt above set out. Plaintiff's testimony in chief went to show that defendant did not apply the money as agreed, and had ever refused to repay the same to plaintiff. And plaintiff denied that he had given defendant authority to otherwise invest the money. On behalf of defendant it was sought to show that after the money had been placed in the defendant's hands it was agreed, and plaintiff directed, that it be used in the purchase of a house and lot; that the same was done, and a warranty deed to the property executed to plaintiff on February 1, 1909; and that plaintiff, on the last-mentioned date, executed a note for \$1,200 and six semiannual interest notes, together with a deed of trust securing such notes, in order to complete the purchase of such property. Plaintiff, on cross-examination, admitted the execution of the notes, but denied having signed the deed of trust, and claimed that if the title to the property was acquired in his name it was done without his knowledge or consent. Defendant, as a witness in his own behalf, undertook to testify to the alleged subsequent agreement regarding the disposition of the money, and plaintiff's directions in the premises, and to introduce in evidence the warranty deed and deed of trust above mentioned. The court, however, sustained objections to the admission of substantially all of the evidence thus sought to be introduced in support of the defense set up by the answer. It is unnecessary to refer to these rulings in detail. It is sufficient to say that the court

excluded practically everything offered in support of this defense. The defendant thereupon rested; and, judgment going for plaintiff, defendant has brought the matter here for review.

[1-3] Respondent's argument appears to be that the receipt constituted a written contract between the parties which could not be varied by parol. But there is clearly no merit in this. The receipt is not a written contract, though as a memorandum it constitutes evidence of the original oral agreement between the parties, subject however to explanation by parol testimony. Neither was the contract itself one required to be in writing under the statute of frauds, for it constituted a mere agreement as to what disposition the defendant was to make of plaintiff's money, acting as the latter's agent. And had the original contract been in writing, it could be varied or altered by a subsequent parol agreement between the parties.

It is said that plaintiff did not plead, or offer to prove, compliance with the original contract. This is quite true; but defendant did plead, and sought to show, that the original agreement had been subsequently modified by the parties, in accordance with which defendant acted in investing plaintiff's money. This, if true, is a complete defense to plaintiff's claim. And the defendant was entitled to introduce the evidence brought forward by him to substantiate this defense, and which tended very strongly to support it. It was plainly error for the court to exclude this evidence.

[4] But respondent urges that as the case was tried without a jury, and no findings of fact were made, and no declarations of law requested or given, the judgment should be affirmed, unless it is so manifestly erroneous that it cannot be sustained upon any theory supported by the evidence. This is true, where no reversible error of law intervenes below. Here it is quite clear that reversible error was committed in the exclusion of evidence, whereby a perfectly valid defense sought to be interposed was altogether ruled out of the case and excluded from consideration.

The judgment must be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

WARNKE v. A. LESCHEN & SONS ROPE CO. (No. 13889.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

1. TRIAL (§ 140\*)—QUESTIONS OF LAW OR FACT—CREDIBILITY OF WITNESSES.

In an action for injuries to plaintiff's son while in defendant's employ, evidence held not to show that the injured boy's story of the accident was contrary to the physical facts, so as

to require the direction of a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

**2. EVIDENCE (§ 588\*)—TRIAL (§ 140\*)—DIRECTED VERDICT—TESTIMONY CONTRARY TO PHYSICAL FACTS—CREDIBILITY OF WITNESSES.**

The testimony on behalf of plaintiff cannot be disregarded, although contrary to that of defendant, so as to warrant directing a verdict for defendant, unless plaintiff's testimony is directly, wholly, and beyond doubt contrary to physical laws, and therefore unworthy of belief.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\* Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

**3. MASTER AND SERVANT (§ 153\*)—INJURY TO CHILD—NEGLIGENCE OF EMPLOYER.**

Where plaintiff's minor son was employed by defendant to wind wire on spools, and, when a wire caught on a defective pulley and broke, defendant's foreman ordered the boy to get the wire out and splice it, without giving him instructions or warning him of any danger, and the boy was injured by the wire slipping from his pliers and striking him in the eye while carrying out the order, the master was negligent and liable to plaintiff for the loss of his son's earnings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

**4. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—MISLEADING INSTRUCTION.**

In an action for the loss of a son's services, resulting from his injuries while in the employ of defendant, an instruction as to defendant's liability for furnishing a defective machine, and for the negligent orders of its foreman, held not to be such as to mislead or confuse the jury, although unnecessarily long and somewhat lacking in clearness.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

**5. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.**

In an action for loss of earnings of plaintiff's son, an instruction which in one part required the jury to find that a pulley was defective, and that as a result a wire which the boy was winding broke, but later stated that if the jury further found that, while plaintiff's son was attempting to splice the wire, the wire caught in said defective pulley, does not assume that the pulley was defective or that the wire broke.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**6. MASTER AND SERVANT (§ 291\*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.**

Where the petition, in an action for injuries to plaintiff's son while in defendant's employ alleged that a pulley was badly worn, out of repair, and unfit for use, that the wire which the boy was winding caught thereon and broke, and that it was dangerous to attempt to splice the wire because of the defective condition of the pulley, an instruction, predicated recovery on a finding that the pulley was out of repair and because thereof the wire caught and broke, and that when plaintiff's son was attempting to splice the wire it caught in the defective pulley and pulled away from the pliers with which the boy was holding it, was not erroneous as being broader than the allegations of the petition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

**7. MASTER AND SERVANT (§ 286\*)—INJURIES TO CHILD—EVIDENCE—NEGLIGENCE OF MASTER—QUESTIONS FOR JURY.**

In an action for injuries to plaintiff's son while in defendant's employ, evidence held sufficient to carry to the jury question whether it was reasonably safe for defendant's foreman to order plaintiff's son to attempt to splice a wire which had become broken, and which caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**8. MASTER AND SERVANT (§ 278\*)—INJURIES TO CHILD—EVIDENCE—NECESSITY FOR INSTRUCTIONS.**

In such an action evidence held sufficient to warrant the jury in finding that the plaintiff's son needed instruction in splicing the wire, and that he appealed to the foreman for such instruction, but received none.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**9. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS CURED BY VERDICT.**

An instruction, which authorized the jury to allow damages for certain items not exceeding the amount claimed in the petition, which were greater than the amounts shown by the evidence, is not prejudicial, where the verdict does not indicate that any amount in excess of those shown by the evidence was allowed, since it will not be assumed that the jury disregarded the evidence and found the full amount limited by the instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**10. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR—INSTRUCTIONS CURED BY VERDICT.**

In an action for injuries to plaintiff's son while in defendant's employ, error in instruction, allowing recovery for loss of future earnings which was unwarranted by the evidence, does not require a reversal, where the verdict was for less than loss of earnings shown to have accrued up to the time of the trial, under Rev. St. 1909, § 1850, requiring the court to disregard errors in affecting substantial rights of the parties, and section 2082, prohibiting reversals unless the Supreme or appellate court believe that error was permitted materially affecting the merits of the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Michael Warnke against A. Leichen & Sons Rope Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Watts, Gentry & Lee, of St. Louis, for appellant. Sterling P. Bond, of St. Louis, for respondent.

ALLEN, J. Plaintiff brings this action to recover for the loss of the earnings of his minor son resulting from an injury received by the latter while in the employ of the defendant corporation, and alleged to have been occasioned by its negligence, and for certain items of expense incurred by plaintiff in and about the treatment of his son's injury. Plaintiff recovered judgment below in

the sum of \$1,000, and the defendant appeals.

On March 22, 1910, plaintiff's son, being then a minor about 16 years and 9 months of age, was in the employ of the defendant in the latter's factory, and engaged in operating a machine for "spooling" or winding steel wire upon certain spools or "bobbins." Though plaintiff's son had been in the defendant's employ for some three years, he testified that he "had been working at that particular work about three weeks." The machine which he was operating had three of these bobbins, upon each of which wire was wound from a bundle thereof which had been placed upon an upright roller termed a "winch". In this operation the wire was directed by certain pulleys or rollers over or under which it ran in passing from the winch to the bobbin.

Plaintiff's son testified that on Saturday, March 19, 1910, one of the wires thus being wound upon a bobbin of this machine became caught under one of the rollers above mentioned. It appears that this wire was held in position by four rollers located between the winch and the bobbin, and, according to the testimony of plaintiff's son, it became caught beneath the second roller from the bobbin. Plaintiff's son stated that prior to this Saturday morning he had always wound small wire on these bobbins, but that this morning, shortly before the accident, he was required to use a larger wire, that the small wire had worn a groove in the roller in question, and that the larger wire became caught in such groove, causing the wire to break. He further testified that when the wire thus became caught and broke, he went to defendant's foreman and told the latter thereof, saying that he "couldn't do a thing with it," but that the foreman told him that he must splice the wire and proceed with the work. The boy states that he made a further effort to remove the wire, but did not succeed therein, and ran the machine the remainder of the forenoon operating the remaining two bobbins only; that he quit work at noon of that day, and did not return to work until the following Tuesday morning, March 22, 1910; that upon returning to work he found the machine in the same condition in which he had left it, and again appealed to the foreman, who said, "You must go over there and splice that machine." Plaintiff's son says that he had not been given any special instructions with respect to the work which he was doing, when he was put at the same, and that the foreman gave him no instructions as to what to do in the emergency in question, nor any warning of danger in the premises, but merely ordered him to remedy the matter himself; that he thereupon took a pair of "pliers," caught hold of the broken wire near the roller under which it was caught, and endeavored to pull it out so that he could braze or weld it, and, after pulling

at it for some time, succeeded in getting about a foot and a half thereof from beneath the roller; that he had the wire caught by the pliers about six inches from the roller, with the remaining one foot of the wire "bending a little down," and was standing pulling the wire, with his hands against his stomach, when the pliers slipped from the wire. He says:

"I pulled as hard as I could with both hands. The wire was tight. The pliers slipped, and I went back about six inches from the position I had been in before that. \* \* \* When this wire slipped the end of it flew over the top of the roller towards the bobbin, and then it came back towards me again—it went back just as quick as lightning. It first went back towards the bobbin. \* \* \* After it had gone as far that way as it could, it rebounded and came towards me and struck me in the eye."

On behalf of defendant there was testimony of one witness, a young man, to the effect that plaintiff's son did not receive his injury in pulling a wire from beneath a roller, but in an altogether different manner. There was testimony for defendant to the effect that nothing was found wrong with the machine in question after plaintiff's son was injured; but, on the other hand, defendant's foreman, in testifying as to the condition of the machine after the accident, said, "I saw broken wire there." There was also much testimony adduced by defendant in an effort to show that the accident could not have happened in the manner in which plaintiff's son claims that it did, for the reason that a small wire would not wear a small groove in one of these rollers, but that the groove thus worn would be so large that a larger wire, such as the boy was using, could not become caught therein.

Other pertinent facts will be referred to, so far as may be necessary, in the course of the opinion.

[1] I. It is strenuously urged that defendant's demurrer to the evidence should have been sustained. This contention is predicated entirely upon the proposition that it was physically impossible for plaintiff's son to have been injured in the manner in which he claims to have received his injury, and that his version thereof should for this reason be wholly rejected. It is first said to have been utterly impossible for the wire, under the circumstances related by plaintiff's son, to spring back over the roller which held it and then recoil toward the boy, and that if this were possible, the wire in question could not have reached the boy's eye, as he said it did. But we cannot accede to this. There was ample evidence, if any be needed, to the effect that the steel wire, being then unwound from a coil thereof, was "springy" and likely to fly about when released from a given position. Clearly we could not say that such a wire, after slipping from a pair of pliers in the hands of plaintiff's son, could not fly back and then rebound toward him. Neither, under the circumstances, could we say that the

end of the wire could not reach and pierce the boy's eye, as he said it did; for he states that he had hold of the wire at about six inches from the roller, with about one foot thereof between him and the point at which the wire was held by the pliers. It does not appear just what was the distance from the roller to the boy's eye, and certainly we could not say that it was physically impossible for the foot and a half of wire to reach the eye under the circumstances shown by plaintiff's evidence.

A further insistence is that the wire could not have become caught in the roller in the manner in which plaintiff's son says that it did. It is said to be utterly impossible for a small wire to wear a narrow groove in the roller, so that a larger wire, when run over the same roller, would become caught therein. This is said to be so particularly because of the fact that this roller and that one nearest the bobbin were both contained in a "frame," which moved somewhat from side to side in order that the wire might be smoothly wound upon the bobbin. And it is said that it would inevitably result from such movements of the frame, and the vibration of the wire due to its rapid motion, that the roller would be worn in such a wide groove as to make it impossible for a wire such as plaintiff was using to become fastened therein. It appears that these rollers or pulleys, when new, have what is termed a "V-shaped" groove, in which the wire runs and which prevents it from slipping off. That the cast-iron rollers wore down from the rapid action of the steel wire over them quite clearly appears from defendant's own evidence. It appears that these rollers revolved from 200 to 300 times per minute, and, being of cast iron, wore rather rapidly. Defendant's witnesses differed considerably in their statements, or opinions, as to the usual life of such a roller. However, defendant's superintendent said that they were generally allowed "to wear down pretty near to the outside diameter of the hub," saying: "We never change them until they are worn out." The distance which the frame, above mentioned, moved back and forth, carrying with it the roller in question and the roller nearest to the bobbin, does not appear. Plaintiff's son testified that these two rollers "move the least bit from one side to another." We are unable to see how we could say that it was a physical impossibility for the wire to have become caught in the roller, in substantially the way in which plaintiff's son says it did.

[2] With the conflict of the testimony respecting this matter we have naught to do, unless the situation is such that we could and should say that the evidence adduced by plaintiff concerning the manner in which his son was injured is directly and wholly contrary to physical laws, and for that reason unworthy of belief. It is quite true that we might reject the testimony of plaintiff's son, as being

wholly lacking in probative force, if it were plainly and palpably incompatible with physical laws or undisputed physical facts. But clearly no court should proceed to thus wholly disregard positive testimony, unless the situation is one so plain, simple, and clear as to admit of no conclusion other than that such testimony is demonstrated to be utterly false by the physical facts appearing. The rule has been applied in cases where a plaintiff, with good eyesight, declared that he looked for but did not see an approaching train, in broad daylight, which was in fact at the time in his plain, unobstructed view, close at hand, as in *Kelsay v. Railway Co.*, 129 Mo. 362, 30 S. W. 339, *Schaub v. Railroad*, 133 Mo. App. 444, 113 S. W. 1163, and *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308, and many other cases, and to many other situations where the testimony was absolutely and wholly refuted by the conceded or uncontroverted physical facts. See *Nugent v. Milling Co.*, 131 Mo. 241, 33 S. W. 428; *Scroggins v. Street Railway Co.*, 138 Mo. App. 215, 120 S. W. 731. Numerous other authorities might be referred to in this connection, but to do so would serve no useful purpose. We take it that no authority may be found for applying such doctrine, except to a situation which, upon its face, plainly and clearly demonstrates that the testimony in question cannot be true.

In the instant case we have to deal with a somewhat intricate machine, the construction and operation of which is not made fully clear, in all of its details, by the evidence adduced. It is not contended that we are bound to accept the opinions of defendant's witnesses to the effect that the roller could not have been worn in such manner as to catch and break the wire; but it is contended that the movement of this frame, carrying the two rollers above mentioned, and the vibration of the rapidly moving wire, would necessarily prevent the roller, under any circumstances, from wearing down in a narrow groove, such as would catch and break a wire such as that with which plaintiff's son was working. But we are not prepared to give to this phase of the matter the importance ascribed to it by learned counsel for defendant. It is natural to suppose that the movement of this frame would have some effect upon the wearing of the rollers which it carried, but just what precise effect it must necessarily have had it is impossible for us to say. Plaintiff's son says that the frame moved "the least bit," and if this be true, the effect of such movement upon the wearing of the roller might be of small consequence. That a wire broke upon this machine at the time is indicated by testimony of defendant's foreman, as well as by that of plaintiff's son. The roller in question was not preserved, and was not in evidence below. There was nothing, therefore, in the way of positive evidence to show just how this pulley had become

worn, beyond the testimony of plaintiff's son. Under the circumstances, we cannot say that that testimony should be rejected.

[3] And if plaintiff's evidence may be accepted as to the manner in which his son was injured, it is not contended that the evidence did not make out a case of negligence on the part of the master. That is to say, if the wire did in fact sink into this roller, and if plaintiff's son, inexperienced in this work, repeatedly sought the aid of the foreman and was each time told that he must get the wire out and splice it, as best he could, without instruction or warning of any sort, it is not argued that this would be insufficient to make a prima facie case against defendant. And there appears to be no room for such contention.

Upon the whole, we think that the demurrer was well ruled.

[4] II. At plaintiff's instance the court gave the following instruction:

"The court instructs the jury that, if you find and believe from the evidence that on the 22d day of March, 1910, the plaintiff, Michael Warnke, was the father of Leo Warnke; that on said date, he resided with his said father, and still resides with him; that on said date Leo Warnke was a minor over 16 and under 17 years of age, and was in the employ of the defendant, A. Leschen & Sons Rope Company, as a common laborer; and if you further find that one George Keisker was at said time in the employ of the defendant, A. Leschen & Sons Rope Company, as a foreman in its factory, and by virtue of his employment and position had immediate control and direction of the plaintiff's said son and others engaged in work in said factory, and had authority to control and direct the work of Leo Warnke—then in that case you are instructed that the said foreman in giving orders to plaintiff's said son and in directing and controlling his work was the vice principal of defendant, A. Leschen & Sons Rope Company, and it became and was the duty of the defendant and its foreman, while acting in his capacity as foreman, to exercise reasonable care in giving orders to plaintiff's son, and to exercise reasonable care not to order plaintiff's son to do work that was not reasonably safe; and in case you find and believe from the evidence that the said foreman on the 22d day of March, 1910, ordered the plaintiff's son to splice the broken wire in question, and you find and believe from the evidence that the pulley in question over which the wire in question passed was defective and out of repair, and if you find and believe from the evidence that on account of said pulley being defective and out of repair, said wire caught in said pulley and broke, and if you further find from the evidence that in attempting to splice said wire, it sank into and caught in said defective pulley, and thereby caused said wire to pull out of the plaintiff's son's grasp, or his grasp to pull from said wire, and said wire to recoil, strike, and injure his son, and if you find and believe from the evidence it was not reasonably safe work in which to order a boy of his age, judgment, and experience to do, and that the defendant's foreman knew, or by the exercise of ordinary care might have known, of the unsafe character of the work of pulling and attempting to splice the wire when caught in the pulley, if you find it was caught, then it was the duty of the foreman to instruct the plaintiff's son, Leo Warnke, in respect thereto, that the plaintiff's son might conduct himself so as to guard against such danger, and if you further find that said foreman neglected to so instruct him, and that while plaintiff's son was trying to splice the wire pur-

suant to the direction of said foreman, if you believe from the evidence said foreman did so direct him, he was injured by reason of the want of reasonable care of the defendant's said foreman in ordering a boy of the age of plaintiff's son and experience under the circumstances in evidence to splice the broken wire in question, by reason of his youth, want of experience, and judgment as to the perils of the work of splicing the wire, and that the plaintiff's son did some act in the discharge of his duty as he understood it, such as a boy of his age, judgment, and discretion might reasonably have done, which caused the injury and which he did not know to be likely to injure him, and had not been properly advised and instructed thereabout by the foreman, plaintiff is entitled to recover."

The first insistence is that this instruction is "drawn in a loose, rambling fashion, does not clearly define the issues," and that the length thereof, and the involved sentences therein contained, were such as to confuse the jury as to the issues on trial. As to this we think that it need only be said that, while the instruction appears to be unnecessarily long, somewhat lacking in clearness, and should not by any means be taken as a model, we are not prepared to say that it was such as to mislead or confuse the jury.

[5] The next insistence is that the instruction assumes that the roller or pulley in question was defective. This is predicated upon that part of the instruction wherein it is said:

"And if you further find from the evidence that in attempting to splice said wire it sank into and caught in said defective pulley," etc.

And it is also said that the instruction assumes that the wire broke. But it is quite apparent that there is no merit in the contention that the instruction assumes these things to be true. The early part of the instruction requires the jury to find "that the pulley in question over which the wire in question passed was defective and out of repair" and "that on account of said pulley being defective and out of repair, said wire caught in said pulley and broke." See *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763; *Garrard v. Coke & Coal Co.*, 207 Mo. 242, 105 S. W. 767; *Pendegrass v. Railway Co.*, 162 S. W. 712.

[6] It is further urged that the instruction is erroneous in that it is broader than the pleadings and the evidence. It is said that plaintiff's case was bottomed, so far as concerns the condition of the pulley, upon a notch or groove being worn, by a small wire so that a larger wire caught therein; while under the instruction the jury could find that the pulley was defective in any particular whatever. But we think that this contention cannot be upheld. The petition alleged that the pulley was "badly worn, out of repair, and unfit for use, and the wire in question would sink into and catch therein, thereby causing said wire to break, \* \* \* and that it was dangerous to splice said wire because of the difficulty of putting such broken wire over and under the said defective,

out of repair, and unfit pulley, over and under which said wire passed, in that said wire would sink into and catch in said badly worn, defective, and unfit pulley," etc. Plaintiff's evidence is that the pulley was defective on account of a groove worn therein, into which the wire sank and became caught. The instruction requires the jury to find that the pulley was defective and out of repair, and that on account thereof the wire became caught in the pulley and sank into it. While the language of this portion of the instruction is not entirely free from criticism, it appears to require the jury to find the sort of defect in this pulley which plaintiff charged and which was shown by his evidence, viz., a defect such as would permit or cause the wire with which plaintiff was working to sink into the pulley and become fastened. Furthermore, the gravamen of the charge of negligence is the negligent order of the foreman, in the premises, without instructions or warning to plaintiff's son.

[7] The instruction is further assailed upon the ground that it was error to submit to the jury the question of whether or not it was reasonably safe to order plaintiff's son to undertake to splice the wire under the circumstances, for the reason that there was no evidence to support this part of the instruction. But clearly the evidence was such as to make this a question for the jury.

[8] It is also urged that there was no evidence whatever tending to show that plaintiff's son needed instruction, and that the instruction in fact did not require the jury to so find, but made it the absolute duty of the defendant to instruct the boy, regardless of whether such was necessary or not. But a reading of the instruction sufficiently disposes of the contention that it does not require the jury to find that instruction was necessary. And the evidence was plainly such as to warrant a finding on the part of the jury that plaintiff's son needed instruction with reference to the doing of the very thing which he claims resulted in his injury, and that he repeatedly appealed to the foreman for such instruction and guidance, but received none.

Plaintiff's second instruction is assailed, but the questions thus raised are either disposed of by what we have said above as to plaintiff's first instruction, or do not warrant discussion.

The two instructions given for plaintiff on the question of liability, when read and considered together, we think fairly covered the case, and contained no reversible error—no error, in our belief, materially affecting the merits of the action. Section 2082, Rev. Stat. 1909.

III. The instruction on the measure of damages is assailed in several particulars; and it is claimed that the verdict is excessive. These two assignments of error may be disposed of together. The instruction authorized a recovery for doctors' bills, not ex-

ceeding \$100, for hospital bill, not exceeding \$25, and for "car fare," not exceeding \$16.20. It then authorized a recovery of such sum as the jury might believe from the evidence plaintiff would reasonably sustain "by the way of loss of services, wages, or salary of his said minor son, if any, from the time of his said son's injuries, if any, until he attains the age of 21 years of age, and directly caused by his son's injuries, taking into consideration the earning capacity of the boy in his injured condition, and deducting that amount from his probable and reasonable gross earnings had he not been injured, and also taking into consideration the possibility of the death of his son, Leo Warnke, that is, on the question of his earnings, before his arrival at the age of 21 years, not to exceed \$5,300."

[9] There is no dispute as to the item of \$100 for doctor's bills. As to the hospital bill, the petition avers a loss of \$25 on this account, while the proof was that the bill was \$24. There is no averment in the petition as to the amount of car fare expended: but plaintiff's testimony is that this item of expense amounted to 60 cents per day for three weeks, a total of \$12.60. It is said that the instruction is erroneous in allowing a recovery on the two last-mentioned items of \$1.60 more than is shown by the proof. But the limit of recovery placed by the instruction upon each of these items is within the pleadings. And we do not think that we ought to assume that a jury of 12 men, presumably intelligent, wholly disregarded the evidence and assessed the limit permitted by the instruction to be assessed upon these items, when the verdict does not in any manner so indicate. We think that no reversible error was committed in this regard (see *Shinn v. Railroad*, 248 Mo. 173, 154 S. W. 103); but the matter will be touched upon later.

[10] It is insisted that it was error for the court to authorize a recovery by plaintiff for the future loss of his son's earnings during the latter's minority, for the reason that there was no evidence tending to show that at the time of the trial the earning capacity of plaintiff's son was lessened by the loss of his eye, or that any diminution of earning power would result therefrom in the future. And it is claimed that the verdict is excessive by reason of being predicated in part upon such future loss of earnings, as well as on account of excessive allowances on account of the hospital bill and car fare. It may be said that the evidence does not appear to show a diminished earning power, whereby loss would result to plaintiff beyond the time of the trial below. It does appear that plaintiff lost earnings of his son prior to the trial, resulting from the injury. In this respect a substantial loss was shown, but there appears to be no evidence tending to show that, after plaintiff's son had entirely recovered from the effect of the injury, and from the

operation whereby his injured eye was removed, his earning capacity was diminished by the loss of the eye. But it remains to be seen whether or not the judgment should be reversed on this account. The evidence discloses that at the time of his injury plaintiff's son was earning \$8 per week. As to how long he was incapacitated for work on account of his injury the evidence is quite meager. He testified:

"I was laid up from this injury six months and more. Since I was injured I have been able to work about nine months, I guess, nine or ten months. I never just kept track of it."

He was injured on March 22, 1910, and the cause was tried below on January 28, 1913. The boy says that he was able to work, during the intervening time, but nine or ten months, and that his wages differed at different times; that when he began to work again, at another factory, he earned \$6 per week for the first month, then \$7 per week, and later \$12 per week. He was earning \$12 per week at the time of the trial. Learned counsel for appellant have furnished us with a computation showing, as claimed, the extent to which plaintiff is entitled to recover, if at all, under the evidence. Figuring the boy's earnings at \$8 per week, which he was receiving when injured, it is said that had plaintiff's son not been injured, he would presumably have earned \$736 from the time of his injury to the time of the trial; that adding to this \$100 for doctor's bills, \$24 for hospital bill, and \$12.60 for car fare expended, the total would be \$872.60. From the last-mentioned amount learned counsel then deduct the amount estimated to have been actually earned by the boy during this period, according to the latter's testimony. This is arrived at by estimating that the boy's average earnings amounted to \$8 per week for the period of nine months during which he says that he was able to work between the date of the injury and the date of the trial, amounting to a total of \$288. Deducting this sum from \$872.60 leaves \$584.60, which counsel say is "the actual loss sustained by plaintiff on account of his son's injury, including all elements, between the date of injury and the date of trial." It is therefore urged that, if we cannot agree with counsel that the cause should be reversed, appellant is in any event entitled to a remittitur of \$415.40.

But unfortunately for appellant, the foregoing computation is based upon an error vitally affecting the result. In making such computation counsel have taken January 19, 1912, as being the date of the trial below; whereas that was in fact the date of the institution of the suit, and the trial was not had until January 28, 1913, more than a year after the filing of the petition. We think that we may properly adopt the above-men-

tioned method of arriving at plaintiff's loss prior to the trial below. In doing so, we do not say that the earnings of plaintiff's son after he became able to work and prior to the trial should be averaged at eight dollars per week, when in fact he was receiving different amounts during different periods of such time, and with no evidence to show for what length of time he received any specific amount. But he was earning \$8 per week when injured, and as the evidence fails to show that he averaged more than this amount per week for the period during which he was able to work, following the injury, it appears to be proper to base the entire computation upon earnings at \$8 per week, as counsel have done. So doing, we find that from the date of the injury to the date of the trial, 2 years, 10 months, and 6 days elapsed, amounting to almost exactly 148 weeks. Plaintiff's son says that during this time he worked about 9 months—9 or 10 months. Taking this at 9 months, as the jury were at liberty to do, and as counsel have done, it amounts to 39 weeks. This, deducted from the 148 weeks elapsing between the date of the injury and the date of the trial, leaves 109 weeks. Plaintiff's loss, therefore, for this period of 109 weeks, at \$8 per week, amounts to \$872. Adding to this the doctor's bills, \$100, hospital bill, \$24, and car fare \$12.60, we have a total of \$1,008.60. It, therefore, appears that, adopting this general method of arriving at plaintiff's loss of earning, and which appears to be well enough, the evidence is such as to sustain a verdict for plaintiff, on account of all items of loss to him, in excess of \$1,000, the amount of the verdict and judgment herein. This, of course, includes nothing by way of loss of future earnings, i. e., beyond the date of the trial. It, therefore, appears that any error in authorizing a recovery on account of such future loss of earnings is harmless, and not reversible error. It does not appear that appellant has been in any respect injured or prejudiced thereby. We do not regard it, under the circumstances, as error "affecting the substantial rights of the complaining party" (section 1850, Rev. Stat. 1909); nor do we believe it to be error "materially affecting the merits of the action" (section 2082, Rev. Stat. 1909). See *Shinn v. Railroad*, supra.

And by the same reasoning, if any error inheres in the instruction on account of the limit of recovery authorized on account of hospital bill and car fare, which we do not say, it is likewise rendered harmless, and not reversible error.

Our conclusion is that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

**MCDONALD v. GODDARD GROCERY CO.**  
et al. (No. 10797.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914. Rehearing Denied  
Dec. 17, 1914.)

**1. RELEASE (§ 29\*)—CONSTRUCTION—JOINT WRONGDOERS.**

A wrong jointly committed or a debt jointly payable by several makes each liable for the entire wrong or debt, for which there is but one satisfaction, and therefore a release of one is a release of all; and Rev. St. 1909, § 5431, allowing contribution after judgment between wrongdoers, does not change the rule, since, the injured party having the right to omit any wrongdoer from the action, the wrongdoers sued have no right to demand that all be included in the action, so as to increase the contributors to the judgment and thereby lessen their burden.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.\*]

**2. RELEASE (§ 37\*)—"COVENANT NOT TO SUE"—EFFECT.**

Where a sum was received from one or more of several wrongdoers or debtors not in full satisfaction of the wrong or debt, but in consideration of the injured party's agreement not to sue them, it was not a "release" at all, but merely a "covenant not to sue" those paying, especially where the right of action against the other wrongdoers or debtors was expressly reserved, and the injured party might still successfully sue, leaving to those whom he covenanted not to sue their right of action against him for breach of covenant.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 63, 71; Dec. Dig. § 37.\*]

For other definitions, see Words and Phrases, First and Second Series, Release.]

**3. RELEASE (§ 37\*)—COVENANT NOT TO SUE—SINGLE WRONGDOER.**

A covenant with the only wrongdoer or debtor not to sue him is in effect a discharge, for, if the covenantor then sues, the covenantee can turn about and sue him in damages on the covenant in an identical amount, so that, to avoid circuity of action, the covenant is a discharge of the action, since there is nothing left against any other person.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 63, 71; Dec. Dig. § 37.\*]

**4. RELEASE (§ 37\*)—CONSTRUCTION—INTENTION OF PARTIES.**

In the construction of a release or covenant not to sue, the purpose is to discover the intention of the parties which should govern.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 63, 71; Dec. Dig. § 37.\*]

**5. RELEASE (§ 29\*)—CONSTRUCTION—EFFECT.**

Where one, in fact, receives full satisfaction from one of several wrongdoers, he extinguishes his claim, and cannot recover thereon from the others, and in such case his intention to recover from such others could not prevail.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64, 70; Dec. Dig. § 29.\*]

**6. MALICIOUS PROSECUTION (§ 12\*)—GROUNDS OF ACTION—INSTITUTION OF BANKRUPTCY.**

Where one maliciously and without probable cause institutes an ordinary suit or bankruptcy proceedings against another, the latter may sue for malicious prosecution, even though there be no seizure of his person or property; bankruptcy proceedings being much more injurious to one than an ordinary civil suit.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 5; Dec. Dig. § 12.\*]

**7. MALICIOUS PROSECUTION (§ 16\*) — ELEMENTS—MALICE OF PROBABLE CAUSE.**

In an action for malicious prosecution, the evidence must show both malice and a want of probable cause for the prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22, 59; Dec. Dig. § 16.\*]

**8. APPEAL AND ERROR (§ 1064\*)—INSTRUCTIONS—PROBABLE CAUSE—HARMLESS ERROR.**

In an action for the malicious prosecution of a bankruptcy proceeding, an instruction that, if defendant in good faith and "without malice" took the advice of counsel, there was no malice in the prosecution of the bankruptcy proceeding was reversible error, since, if the advice must be taken by one having no malice, there would be no malice for the advice to destroy, and the rule that advice negatives or destroys malice would be rendered useless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**9. MALICIOUS PROSECUTION (§ 16\*)—PROBABLE CAUSE.**

Probable cause will justify the institution of a prosecution against another, however great the malice, since it is the presence of malice and the absence of probable cause that sustains an action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22, 59; Dec. Dig. § 16.\*]

**10. MALICIOUS PROSECUTION (§ 25\*)—MALICE—ADVICE OF COUNSEL.**

Advice of counsel taken in good faith in instances where the alleged malicious prosecution is dismissed negatives malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 56-58; Dec. Dig. § 25.\*]

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by John J. McDonald against the Goddard Grocery Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Eugene S. Wilson and John Brennan, Jr., both of St. Louis, and Higbee & Mills, of Kirksville, for appellants. Thomas F. Gatts, of Kansas City, for respondent.

ELLISON, P. J. Plaintiff's action is for malicious prosecution of a bankruptcy proceeding against plaintiff by the several defendants herein. The judgment in the trial court was for the plaintiff.

The action was begun in 1910. Before it was tried, on the 2d of October, 1912, plaintiff accepted \$50 from two of the defendants (Youle and Bozarth), in consideration of which he agreed to dismiss the action as to them, but reserved the right to continue to prosecute as to the others. The agreement was put in writing and is as follows:

"It is hereby stipulated and agreed that, so far as the defendants J. W. Youle and J. R. Bozarth are concerned, this cause shall be dismissed as to them, and the same will not be further prosecuted as against the said J. W. Youle and J. R. Bozarth, and that the further prosecution of this case shall be against the defendants Goddard Grocery Company and J. Schotten. The plaintiff only hereby agrees

to dismiss this action as to J. W. Youle and J. R. Bozarth, and agrees not to further prosecute as to them, reserving the right to further prosecute this case against the Goddard Grocery Company and said J. Schotten, and not acknowledging, which has not been paid, any satisfaction in this cause of action against any of the defendants herein, but simply covenants not to further prosecute this action against J. W. Youle and J. R. Bozarth at any time. This agreement is made in consideration of the sum of \$50 paid by J. W. Youle and J. R. Bozarth."

The remaining defendants insist that, as plaintiff's claim is based on a joint wrong, this paper is a release of a part of the wrongdoers, and therefore, in legal effect, became the release of all. The trial court refused to take that view, and adopted that of plaintiff to the effect that the paper was merely a covenant not to sue those defendants, leaving the cause of action intact against the others.

[1-8] A wrong jointly committed by several makes each liable for the entire injury, for which there is but one satisfaction; and therefore a release of one is a release of all. And where a sum is received from one or more of several wrongdoers, not in full satisfaction, but in consideration of the injured party agreeing not to sue, it is not a release at all; it is merely a covenant not to sue those paying. By so doing he does not release any of them, but only his remedy against those with whom he covenants. He may still successfully sue all, leaving the right to those with whom he made the covenant to sue him thereon. *Lacy v. Kinnaston*, Holt, 178. That case is several times reported (1 Lord Raymond, 688; 2 Salk. 573, and 3 Salk. 298; 12 Mod. 548), and is adopted by Lord Kenyon in *Dean v. Newhall*, 8 T. R. 168. If one covenants with a single wrongdoer not to sue, this is in effect his discharge, for, if he then sues him, he can turn around and sue the covenantor in damages on the covenant in identical amount, and therefore, so as to avoid circuity of action, the covenant not to sue a single wrongdoer is a discharge of the action, since there is nothing left against any other person. But not so where there are others left to whom the cause of action applies. The rule is illustrated in this way in 3 Salk. 298, supra: Where W. R. enters into an obligation to H. S., who covenants never to sue W. R., if afterwards he does sue upon it, W. R., to avoid circuity of action, may plead the covenant in bar to the action, for H. S. by his covenant has deprived himself of all remedy he can have upon the bond—

"but if W. R. and R. W. are jointly and severally bound in a bond to H. S., who covenants never to sue W. R. upon that bond, this is no release or defeasance of the bond; neither can it be pleaded in bar if an action should be brought upon it, because it doth not discharge the right, but only the remedy against W. R., for he still hath a right of action against R. W., the other obligor; therefore, if he (the obligee) should bring an action of debt upon this bond against W. R., he is put to his action of covenant against the obligee, which would not lie if this covenant was a release,

because a release to one obligee is a release to both."

This rule, coming to us from early times, is recognized with practical unanimity today. Why should an injured person not be allowed to receive a portion of his compensation for an injury from some of the wrongdoers, without discharging the others? There is no more hindrance to freedom of contract in this than in any other instance. The parties to such a contract knew that, if the covenant not to sue was violated, the covenantees could have their action for the breach, in which they would recover the damages flowing from such breach. The other wrongdoers have no cause to complain, for in fact it was a relief to them, since, as there can be but one satisfaction, whatever was paid by the covenantees lessens their liability that much.

But now, since the statute (section 5431, R. S. 1909) allows contribution after judgment between wrongdoers, it may be said that the others have an interest in seeing that no injustice is done them by a settlement with a part at a less sum than would have been their contributory share had they been defendants in the judgment. The answer to this is that the injured party now has a right to omit any wrongdoer from the action. The wrongdoers sued have no right to demand that all be included in the action, so as to increase the contributors to the payment of the judgment, and thereby lessen their burden. If, therefore, the injured party may let a part of the wrongdoers go free and hold the others for his full injury, why should he not be allowed to receive part compensation for his injury from one or more of the wrongdoers without discharging the others, especially when he does not increase, but lessens, the burden of such others?

So there being no legal disability upon the right to deal with a part without releasing the others, and there being no wrong done to those not released, there would seem not to be a semblance of reason in the statement that a covenant not to sue a part will operate as a release of all, when that was not intended.

The cases above cited from the English courts have been consistently followed to the present time with the exception, so far as we have seen, of *Nicholson v. Revill*, 4 A. & E. 675, and that was overruled in *Thompson v. Lack*, 3 C. B. 540, and other cases.

In *Duck v. Mayeu*, 2 L. R. Q. B. Div. (1892) 511, the court recognizes as—

"clear law that a release granted to one joint tort-feasor or to one joint debtor operates as a discharge of the other joint tort-feasor or the other joint debtor; the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released."

But the court continues:

"We have found no case in which it has been held that a covenant not to sue releases a joint tort-feasor; and in our judgment the principle upon which it has been held that such a

covenant does not release a joint debtor applies to the case of a joint tort-feasor." (*Italics ours.*)

The court then goes on to state that the character of the instrument is determined by the intention which it discloses.

In this country the same rule has been stated in nearly all of the states. It is put in these words in *Mason v. Jouett*, 2 Dana (Ky.) 107:

"A covenant never to sue a sole obligor, will, to avoid circuity, be deemed a release of the obligation. But a similar covenant with one of several joint obligors should not be construed as a release of even the covenantee, because such an interpretation would frustrate the intention of the parties and operate unjustly, for if one of the joint obligors be released, no suit could be maintained against the others; and the inconvenience and circuity incident to a suit on the covenant for a breach of it would be far less unjust and would be much more consistent with the intentions of the parties than the constructive exoneration of all the joint obligors. In such a case, therefore, such a covenant will not be deemed a release."

Again the rule is affirmed in *Illinois v. Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271, and in *C. & A. Ry. Co. v. Averill*, 224 Ill. 516, at page 522, 79 N. E. 654, at page 656. In the latter case it is said that:

"The legal effect of a covenant not to sue is not the same as that of a release. A covenant not to sue a sole tort-feasor is considered in law a discharge and a bar to an action against him, but the rule is otherwise where there are two or more tort-feasors and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantee or the other tort-feasor, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to an action against him."

In *Gilbert v. Finch*, 173 N. Y. 455, at page 463, 66 N. E. 133, at page 135, 61 L. R. A. 807, 93 Am. St. Rep. 623, there is found a clear statement of the rule with a full review of the authorities. It is stated that:

"In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tort-feasors, a release given to one releases all; but, if the instrument contains a reservation of a right to sue the other joint debtor or tort-feasors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort-feasor."

In *Ellis v. Esson*, 50 Wis. 154, 6 N. W. 523, 36 Am. Rep. 830, the same decision is made. We quote:

"Certainly the receipt of a partial satisfaction from one of two joint tort-feasors is no injury to the other, who is afterwards sued for the trespass. On the other hand, it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him. The party injured is under no duty to the joint wrongdoer to proceed at all against his associate, and his refusal to proceed against him is no ground of defense. As it is wholly optional with the injured party to proceed against one of two joint wrongdoers for the whole of his damages, there is no equity in holding that because he has received a part satisfaction for his injury from the one not proceeded against,

upon an agreement not to sue him for the wrong, the other may set up such receipt as a complete defense to the action. He is benefited, and not injured, by such proceeding."

That view is adopted literally in *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 800, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. Rep. 273, where like statements were quoted and approved from *Snow v. Chandler*, 10 N. H. 92, 84 Am. Dec. 140, and *Lovejoy v. Murray*, 3 Wall. 17, 18 L. Ed. 129.

It will be found frequently stated in the foregoing cases that there is no difference in principle whether the question concerns joint debtors or joint wrongdoers; and, in examining the question as applied to the former, we find the same unanimity of opinion. *Price v. Barker*, 4 El. & Bl. 760; *Bateson v. Gosling*, L. R. 7 C. P. 9 (1871); *Green v. Wynn*, L. R. 7 Eq. 28 (1868), affirmed on appeal in L. R. 5 Ch. App. Cases, 204; *Solly v. Forbes*, 2 Brod. & B. 38; *North v. Wakefield*, 13 Q. B. 536. Among many other American cases we cite the following: *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Catskill Bk. v. Messenger*, 9 Cow. (N. Y.) 37; *Couch v. Mills*, 21 Wend. (N. Y.) 424; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Parmelee v. Lawrence*, 44 Ill. 405, 410-414; *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; *Bradford v. Prescott*, 85 Me. 482, 486, 487, 27 Atl. 461; *Benton v. Mullen*, 61 N. H. 125.

Against this array of authority we have been cited to only three cases of consequence. The first is *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416, 1 Ann. Cas. 61. That case does support defendant, but it is itself without support. It is true other cases expressing the same view are cited in the opinion, but they have ever since (with few exceptions) been ignored or have been overruled. The principal of these is *Ruble v. Turner*, 2 Hen. & M. 38, decided by the Supreme Court of Appeals of Virginia in 1808. The agreement executed by Ruble and construed in that case was:

"I do hereby acknowledge that Joel Motley's paying my expenses at Mount Relief with Capt. Alexander Hunter shall be satisfaction for the part he (the said Motley) took in assault and battery committed upon me at said Mount. Provided this shall not be considered as any satisfaction in favor of Joseph Nunn, Stephen Maynor, James Turner, or Archibald McNanny, who were guilty of the same at the same time and place."

The decision is that it was a release of all, notwithstanding the provision that it should not be. That court, as is evidenced by the reports, generally made free use of English authorities, and it is worthy of remark that the English cases to the contrary are all overlooked, and no authority from any source is cited. Subsequent to that case a like question came before Chief Justice Marshall in *Garnett v. Macon*, 2 Brock. 185, 10 Fed. Cas. 12, who wholly ignored it and took precisely

the opposite view. The Chief Justice said that in none of the cases—

"does the obligation contain any other party than him with whom the covenant is made. In all of them the covenant, if broken, gives a right of action to the parties bound in the obligation, and the measure of their damages is given by the recovery of the obligee in his suit against them. If A. is bound to B. in an obligation, and they enter into a covenant, stipulating that it shall never be put in suit, notwithstanding which B. puts it in suit, this breach of covenant gives A. an action against B., in which he must recover in damages precisely the sum to which the judgment obtained by B. may amount. To avoid circuity of action, this covenant may be pleaded as a release. Thus far the cases go, and, if there be one which goes farther, I have not found it."

The Chief Justice then proceeded to recognize the law as stated in the English authorities cited herein. There is also cited in *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416, 1 Ann. Cas. 61, two cases from the Appellate Division of the Supreme Court of New York. *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Mitchell v. Allen*, 25 Hun (N. Y.) 543. Neither of these are in harmony with a long line of cases from that state, and each of them was overruled in *Gilbert v. Finch*, 173 N. Y. 463, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623. There is also cited *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370, which was a straight release of one party without reservation, and is wholly unlike the one in the present case. There is also cited *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504. The paper there construed was on its face a release in full "from all claims of every description" for the wrong, "hereby abandoning and acknowledging ourselves to be fully paid and satisfied for all and singular the trespasses complained of by us." That was held to be what it says—a clear release of all claims—and it was said that a reservation at the close that it should not prejudice claims against others was necessarily noneffective. In neither of the other cases cited in the *McBride Case* (*Brown v. Kenchelo*, 3 Cold. [Tenn.] 192, and *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534) was there a reservation of right against the remaining wrongdoers.

In view of the foregoing authorities, to which could be added many more, did space permit, it may be stated as the rule that, if the injured party releases one joint tortfeasor, he will discharge all, yet a covenant not to sue is not a release, and it could not be pleaded by the covenantee in bar of an action by the injured party against him and the other wrongdoers. He would have to submit to the suit and be remitted to his action on the covenant, as has been pointed out above. Where there is no release or satisfaction, especially where the right of action against the others is reserved, there is no discharge of such others.

[4, 5] There is no reason why the intention of the parties should not govern, and through

all the authorities there is seen a purpose to discover what was intended. Chief Justice Marshall, in discussing the question in *Garnett v. Macon*, 2 Brock. 185, 10 Fed. Cas. 12, said:

"The common rule of law, and it seems also to be the rule of reason, is that words shall subserve the intent."

Of course one's unlawful intent will not prevail; as if he should, in fact, receive full satisfaction from one, he kills his claim and could not recover it again from others, whatever he intended. And, by reference to the cases in this state, it will be seen that, even as to wills and deeds, all technical rules of construction as to the character of an estate devised or conveyed will be overcome by the intention of the testator or grantor clearly expressed. Otherwise we would be giving technicality superior place to manifest intention.

It thus appears that the Michigan case is not in line with authority, and we are brought to a consideration of the question from the standpoint of the decisions in this state. Three are cited by defendant. *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125; *Hubbard v. Railway Co.*, 173 Mo. 249, 72 S. W. 1073; *Shippey v. Kansas City*, 254 Mo. 1, 162 S. W. 137. Three others (*Arnett v. Mo. Pac. Ry. Co.*, 64 Mo. App. 268; *Judd v. Walker*, 158 Mo. App. 156, 138 S. W. 655; *Lumber Co. v. Dallas*, 165 Mo. App. 49, 53, 146 S. W. 95) are cases where the question was considered at length by this court and the St. Louis Court of Appeals. We decided the question again at last term. *Hawkins v. Railway Co.*, 170 S. W. 459. The cases from the Supreme Court are not applicable. In the first there was a settlement with two defendants and a paper executed as in "full settlement and satisfaction of all claims and demands set up or referred to in the petition so far as said two defendants are concerned." The two defendants were concerned in the entire cause of action, and each was liable for all. The court held, full satisfaction having been received, the other defendants were discharged. In the second there was a straight and unqualified written release. In neither case was there any reservation or qualification—a prominent feature in the release now under consideration. Both cases were considered by Judge Norton in *Judd v. Walker*, *supra*, and clearly shown not to be applicable to this case. So they were considered by the Supreme Court of Kentucky and held not to be opposed to the views we have herein expressed. *East Mail Co. v. Barnes*, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. Rep. 273.

The remaining case from the Supreme Court, referred to above, concerned the effect of an agreement not to sue, or, as expressed by the court, "not to further pursue the other defendants." That case was against Kansas City for personal injury charged to have resulted to the plaintiff by

reason of the city's negligence. There is a statute (section 9801, R. S. 1909) declaring that, where a person is liable with the city, and the latter is sued for negligence, it is given the right to require the plaintiff to make such person a party defendant, and that, when so required, the plaintiff shall not further prosecute his suit against the city, unless he makes such person a party. Notwithstanding this statute, the plaintiff, after other defendants had been made parties, executed a written agreement with them that, in consideration of \$200 paid to her by them, she would not prosecute the action against them. She reserved the right to continue the prosecution against the city. In these circumstances the city took the position that, by reason of the statute disabling the plaintiff from further prosecuting an action until those jointly liable to the action were made parties, the release of those parties was in the face of the statute, and hence the city was not liable. There were other questions decisive of the case, but on this point the court, per Roy, Commissioner, said:

"Without deciding the point, we are inclined to hold that the instrument by which plaintiff agreed not to further pursue the other defendants would bar her under section 9801, Revised Statutes 1909, from any judgment against the city, if it had been a fact that any cause of action then existed against any of the other defendants."

From this statement it is manifest that the question we are now considering was in no way concerned or considered. We decided at last term that, in the condition contemplated by the statute, the city would be discharged. The statute was then attacked as being in conflict with the Constitution, and we transferred the case to the Supreme Court for decision.

The foregoing considerations make it necessary to rule that defendants were not released by the paper in evidence, and the demurrer to the evidence was properly overruled.

[6] We pass to the next question presented. If one with malice and without probable cause institutes an ordinary civil suit against another, the latter may maintain an action for malicious prosecution, and there need not be a seizure of the person or property. *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; *Brady v. Ervin*, 48 Mo. 553; 19 Am. & Eng. Ency. of Law, 652. For the greater reason one may maintain an action against another for instituting bankruptcy proceedings against him, maliciously and without probable cause, even though his property is not seized. Proceedings in bankruptcy are drastic, and their effect is much more disastrous to the defendant than an ordinary civil suit.

It destroys his credit and, for the time, ends his business life. *Wilkinson v. Goodfellow Shoe Co. (C. C.)* 141 Fed. 218; *Stewart v. Sonneborn*, 98 U. S. 187, 201, 25 L. Ed. 116; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

[7] The evidence must show both malice and a want of probable cause for the prosecution of the proceedings, and we think there was enough in the present case to submit to the jury.

[8] Defendants submitted an instruction to the effect that if they, in good faith, advised with counsel and placed all matters before such counsel which could be reasonably known, and the advice received was that plaintiff had committed acts of bankruptcy, then the prosecution was not malicious. But there was interlined in said instruction, over the protest of defendants, that advising with counsel must have been "without malice." If the advice, to be protective, must be sought by him who has no malice, there is nothing for the act of taking the advice to destroy, and so the decisions that advice negatives or disproves malice would be rendered useless. The instruction, as amended, in effect reads that, if defendant without malice took the advice of counsel, then there was no malice in the prosecution of the bankruptcy proceedings. This requires a reversal of the judgment.

[9] Probable cause will justify the institution of proceedings against another, even though it is done in malice. If malice and probable cause both exist, the institution of the action is justified, for it takes the presence of the former and the absence of the latter to sustain an action for malicious prosecution. Hence it is often said that it makes no difference how great the hatred and malice; if there is probable cause, no action lies. *Sharpe v. Johnston*, 59 Mo. 557; *Sparling v. Conway*, 75 Mo. 510; *Stubbs v. Mulholland*, 168 Mo. loc. cit. 74, 67 S. W. 650; *Warren v. Flood*, 72 Mo. App. 188.

[10] Advice of counsel, asked in good faith, in instances where the proceedings are dismissed, negatives malice. *Sharpe v. Johnston*, 76 Mo. 660, 674; *Stubbs v. Mulholland*, 168 Mo. loc. cit. 76, 77, 67 S. W. 650; *Sparling v. Conway*, supra. The error requires a reversal of the judgment.

The great number of instructions given for either side create much confusion. They should be materially lessened on retrial. The great number makes it impracticable, within reasonable limits, to analyze each objection. We can only suggest that the parties go over them and on retrial endeavor to cure what may be considered well-founded objections.

The judgment is reversed, and the cause remanded. All concur.

**DODT v. PRUDENTIAL INS. CO. OF AMERICA. (No. 13880.)**

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

**1. INSURANCE (§ 579\*)—LIFE INSURANCE—PAYMENT—EFFECT.**

A payment or tender under a life policy of a sum less than the full amount due does not deprive the beneficiary of the right to sue for the entire amount, and where a payment of a sum less than due under a policy was made at a time the beneficiary had not commenced or threatened any litigation, or had not made any demand for payment, and the payment was not made by way of compromise, the payment did not deprive the beneficiary of the right to sue for the full amount due on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1417, 1419; Dec. Dig. § 579.\*]

**2. INSURANCE (§ 264\*) — LIFE INSURANCE — "MISREPRESENTATION"—WARRANTIES.**

The word "misrepresentation," in Rev. St. 1909, § 6937, declaring that no misrepresentation made in obtaining a life policy shall be deemed material, or render the policy void, unless the matter actually contributed to the event on which the policy is to become due, includes warranties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 558, 559, 562-566; Dec. Dig. § 264.\*]

For other definitions, see Words and Phrases, First and Second Series, Misrepresentation.]

**3. INSURANCE (§ 291\*) — LIFE INSURANCE — MISREPRESENTATION.**

A life policy binding insurer to pay, in case of insured's death six months after the date of the policy, a specified sum, and one-half thereof in case of his death within the six months, and limiting liability to a return of the premiums paid if insured was not in sound health at the date of the policy, is governed by Rev. St. 1909, § 6937, providing that no misrepresentation in obtaining a life policy shall render the policy void, unless the matter misrepresented shall have contributed to the event on which the policy is to become due, and insurer cannot defeat a recovery on the ground of insured's misrepresentations as to his health, unless the condition of his health at the time of the issuance of the policy contributed to his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.\*]

**4. TRIAL (§ 203\*)—INSTRUCTIONS—ISSUES.**

An instruction given at the request of plaintiff, which does not purport to be on the merits of the case, but which simply gives a correct measure of damages in case a verdict is returned for him, is not defective for not embracing all the issues and covering the defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

**5. APPEAL AND ERROR (§ 1004\*)—INSURANCE (§ 668\*)—RECORD—LIFE INSURANCE.**

Where, in an action on a life policy, the evidence clearly showed that insurer had no intention of paying more than the premiums paid and interest, and intended to resist any claim the beneficiary might make for any amount in excess thereof, and also showed the value of the services of the beneficiary's attorney in an action on the policy, the allowance for damages for vexatious refusal to pay and for counsel fees was for

the jury, within Rev. St. 1909, § 7068, and may not be disturbed by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004; Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by Mary Dodt against the Prudential Insurance Company of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Fordyce, Holliday & White, of St. Louis, for appellant. James J. O'Donohoe, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff instituted this action before a Justice of the peace, filing a statement in which she claimed that under a policy issued by the defendant company, of date September 5, 1910, it had insured Joseph Dodt, her husband, promising to pay in case of his death six months after the date of the policy, the sum of \$153, or, if he died within six months after the date of the policy, only one-half of the face of the policy, to-wit, \$76.50. Averring that the insured died on or about February 23, 1911; that plaintiff was his wife and is now his widow; that he was insured and carried this policy in the defendant company at the date of his death and had complied with all the conditions and provisions of the policy to be performed by him; that after his death plaintiff had notified defendant thereof and furnished it with due proofs of death and demanded payment of one-half the face of the policy, but that defendant had vexatiously refused to pay it and disclaimed all liability thereunder, judgment is prayed for \$76.50, less \$3.90, and interest thereon at six per cent. per annum, together with 10 per cent. thereon as damages, and a reasonable attorney's fee for vexatious refusal to pay the amount of the policy and for costs. From a judgment in favor of plaintiff before the justice, defendant took an appeal to the circuit court, where the case was tried before the court and a jury.

There was no question as to the issue of the policy, its date and amount, nor as to the fact of the death of the insured within six months of the date of the policy, nor to the fact that plaintiff is his widow. The defense relied upon rests upon one of the provisions in the policy called "first preliminary provision," which reads:

"The company's liability under this policy shall be limited to a return of the premiums paid hereon if the insured die before the date hereof, or if on said date the insured be not in sound health."

It is in evidence that shortly after the death of the insured an agent of the defendant company called upon plaintiff and represented to her that he had ascertained that her husband was not in good health at

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the time the policy was issued to him, and that under this provision of the policy the company's only liability was for the return of the premiums paid thereon; that these amounted to \$3.90, which amount the agent paid plaintiff by check, taking her receipt therefor as in release of all claims under the policy.

The testimony of plaintiff was to the effect that her husband had died of heart disease, he being confined to his bed from December 24, 1910, to the time of his death. The testimony on the part of defendant was to the effect that the insured had not been "in good health" for sometime prior to the issuing of the policy. Under what particular form of ill health the insured was suffering was not in evidence, and there is no evidence in the case that his condition of health at the time the policy was issued to him was of such a character that it actually contributed to his death.

[1] If the receipt or release, in part relied upon, is valid, then plaintiff has no case. The effect of the payment of \$3.90 depends upon the question as to whether this policy, as interpreted by its terms and under our law, is one calling for the payment of one-half the face of the policy, as claimed, to-wit, the sum of \$76.50, or merely for the return of the premiums paid and interest, which it appears amounted to \$3.90. Some effort is made on the part of defendant's counsel to show that this \$3.90 was paid and received by way of compromise of a disputed claim. The evidence, however, does not bear out this contention, and so the jury must have found. It is very specific, to the effect that defendant's agent went to plaintiff and told her that he had ascertained that her husband was not in good health at the time he took out the policy and that under the terms of the policy all that she could recover would be \$3.90. Plaintiff says that at the time she was in much distress and relied upon what defendant's agent told her and on the faith of that had accepted the money and signed the release, further testifying that this agent had told her that in point of fact the company owed her nothing but that they would pay her this \$3.90 "out of pity." This latter statement, however, is denied by the agent. However that may be, it cannot be said that this was paid by way of compromise, or to settle then pending litigation. There is no evidence that at that time plaintiff had either commenced or threatened any litigation, or in fact had made any demand on the company for the payment of any sum. If in point of fact it was not true that under the contract \$3.90 only was due upon it and that the full face of the policy was due, then it is the well settled law of this state that the payment or tender under the policy of a sum less than the full amount of the sum due, does not deprive the beneficiary of a right to prosecute a suit for the entire amount. *Head v. New York*

*Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827, *Biddlecom v. General Accident Assur. Co.*, 167 Mo. App. 581, 152 S. W. 103, and *Harms v. Fidelity & Casualty Co. of New York*, 172 Mo. App. 241, 157 S. W. 1046, are ample authority for this. These cases contain such a full discussion of the proposition that it is unnecessary to cite others.

[2] That brings us to the real contention of learned counsel for appellant and to which they direct the consideration of the court. That is, whether in the light of section 6937, Revised Statutes 1909, the company can limit its liability to a return of the premiums paid on the policy if at the date thereof the insured was not "in sound health." Section 6937 of our statute provides:

"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

This section of our statute has frequently been before our courts, both the Supreme Court and the Courts of Appeals and its meaning is so well settled that it does not seem to call for further discussion.

Our Supreme Court, in *Jenkins v. Covenant Mut. Life Ins. Co.*, 171 Mo. 375, loc. cit. 382, 71 S. W. 688, has ruled that the word "misrepresentation," as used in that section includes warranties. This was reiterated in *Mathews v. Modern Woodmen of America*, 236 Mo. 326, loc. cit. 347, 139 S. W. 151, Ann. Cas. 1912D, 483. That same rule of interpretation has been followed and enforced by our Courts of Appeals in many cases, as see *Metropolitan Life Ins. Co. v. Stiewing*, 173 Mo. App. 108, 155 S. W. 900; *Coscarella v. Metropolitan Life Ins. Co.*, 175 Mo. App. 130, 157 S. W. 873; *Roedel v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 584, 160 S. W. 44; *Buchholz v. Metropolitan Life Ins. Co.*, 177 Mo. App. 683, 160 S. W. 573.

[3] But it is said by learned counsel for appellant that this condition in this policy presents a new phase of this question, or presents the question of the construction and application of section 6937 in a new and different light, counsel claiming that this condition in the policy before us is written under and in compliance with section 6973. We accept the statement of counsel that this provision was inserted in good faith, and in an attempt to obey and comply with the law, but we can come to no conclusion other than that its effect, if sustained, would be a successful evasion of the provisions of section 6937 of our statute. We hold that it is no more effective than the attempts made by insurance companies to evade the section of our statutes which eliminates suicide as a defense by providing that in cases of suicide a less amount than the face of the policy shall be paid. All such attempts have proved abortive.

tive when brought before the courts. We have reviewed the authorities so fully on this proposition in the case of *Applegate v. Travelers' Ins. Co.*, 153 Mo. App. 63, 132 S. W. 2, that it is unnecessary to enter into a discussion of it or of citation of authorities here. As noted in the *Applegate Case*, Mr. Justice Harlan, speaking for the Supreme Court of the United States, followed the decision of our court in *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557, and of our Supreme Court in *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948. See *Whitfield v. Aetna Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895.

In like manner our court, in *Williams v. Bankers' & Merchants' T. M. F. Ins. Co.*, 73 Mo. App. 607, condemned an attempt to evade what is now section 7020, R. S. 1909, the valued policy law of our state.

Our conclusion upon this branch of the case is, that notwithstanding this first clause the provision of the contract in the policy of the defendant company, the nonforfeiture clause of our statute governs, and that unless it appeared by the evidence and to the satisfaction of the jury, that the condition of health of the insured was such at the time of taking out the insurance that it contributed to his death, then defendant is liable. That question was submitted to the jury in this case in the strongest possible language by instructions given at the instance of defendant. Thus by one instruction the jury were told that under the terms of the policy the company's liability was limited to the return of the premiums paid thereon, if the insured was not in sound health on the date of the policy, and if the jury believed and found from the evidence that at the date of the issue of the policy the insured was not in sound health and that he died on a subsequent day, and that on that day premiums amounting to \$3.90 had been paid under said policy, and that thereafter plaintiff made claim for the proceeds of the policy but that defendant denied liability on the policy, other than for the return of the premiums because the insured was not in sound health on the date of the issue of the policy, and that defendant thereafter paid the sum of \$3.90 to plaintiff and plaintiff accepted it, their verdict must be for defendant. The jury were further told, at the instance of defendant, that if they believed from the evidence that after the death of the insured, plaintiff made claim upon the policy of insurance and that thereupon a controversy in good faith arose and existed between plaintiff and defendant as to defendant's liability under the policy, and that thereafter defendant in good faith paid to plaintiff the sum of \$3.90 and plaintiff accepted that sum in compromise of the controversy and in discharge of any liability under the policy, their verdict must be for defendant. At the instance of defend-

ant the court further instructed the jury that the burden of proof was on plaintiff to establish by a preponderance of the evidence the facts necessary to a verdict in her favor under these instructions but that if plaintiff had not so established her case, or if the evidence was evenly balanced so that the jury were in doubt and unable to say on which side is the preponderance, or if the preponderance is in favor of defendant, in either of these cases their verdict must be for defendant. Surely defendant has no cause whatever to complain of these instructions. We recite them without in any manner indorsing them as correct propositions of law.

[4] Complaint is made that the instruction given at the instance of plaintiff is fatally defective in that it does not embrace all the issues and does not cover the defense put up. That instruction did not purport to be on the merits of the case in any way whatever; it was simply a direction, and a correct one, on the measure of damages in case there was a verdict returned for plaintiff, so that the rule invoked by counsel for defendant does not apply.

[5] Complaint is made of the allowance for damages for vexatious refusal to pay. That is so much a question for the jury, both as to amount of counsel fee and as to the fact of the delay being vexatious and so bringing it within the provisions of section 7068, that we do not think it a case for our interference. Beyond doubt the company defendant had no intention whatever of paying more than the premiums and interest on them and intended resisting any claim that plaintiff might make for any amount above that. There was evidence as to the value of the services of an attorney in the case, from which the jury were warranted in awarding the amount which they did. The verdict credited defendant with the \$3.90 and interest thereon, which had been paid her by defendant, so we cannot say it is excessive or evidences prejudice. We discover no reversible error.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

#### STEPHENS v. CITY OF EL DORADO SPRINGS. (No. 1313.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

##### 1. CONTINUANCE (§ 33\*)—GROUNDS—ABSENCE OF WITNESSES—DEPOSITIONS.

Where the deposition of a witness absent on account of illness would have been admissible, and there was no showing that it could not have been taken for use at the trial, and plaintiff admitted that the two other absent witnesses, if present, would testify as set out in the application, there was no error in denying a continuance.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 113; Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—42

## 2. CONTINUANCE (§ 35\*)—ABSENT WITNESSES—APPLICATION—OBJECTION—WAIVER.

Where an application for a continuance was based on the absence of three witnesses, plaintiff by admitting that two of the witnesses, if present, would testify as set out in the application, did not deprive himself of a right to question the sufficiency of the application so far as it related to the other witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 115; Dec. Dig. § 35.\*]

## 3. MUNICIPAL CORPORATIONS (§ 821\*) — DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

In action for injury to a pedestrian in a fall on a sidewalk at night by striking his foot against an obstruction, the existence of which he well knew, evidence held to require submission of plaintiff's contributory negligence, if any, to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

## 4. APPEAL AND ERROR (§ 928\*)—REVIEW—REFUSAL OF INSTRUCTION.

In determining alleged error in the refusal to give instructions embodying defendant's theory, the appellate court must accept as true the evidence most favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.\*]

## 5. APPEAL AND ERROR (§ 883\*)—ADHERENCE TO THEORY BELOW—RULINGS ON INSTRUCTIONS.

Where, in an action for injuries to a pedestrian by a defect in a sidewalk, defendant pleaded a general denial, but at the trial was permitted without objection to take advantage of plaintiff's testimony as tending to prove contributory negligence, plaintiff could not successfully contend on appeal that there was no error in the refusal to give defendant's instructions on contributory negligence, on the ground that such defense was not pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.\*]

## 6. TRIAL (§ 203\*)—INSTRUCTIONS—DEFENSES—PRESENTATION TO JURY.

Where, in an action for injuries to a pedestrian by a defect in a sidewalk, the question of plaintiff's care was the decisive and only seriously contested question, defendant was entitled to have such question affirmatively presented to the jury by proper requested instructions, and it was not sufficient that the court merely refer to the care plaintiff was observing, in other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

## 7. MUNICIPAL CORPORATIONS (§ 822\*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In action against the city for injuries to a pedestrian by a defect in the city sidewalk, of which he had knowledge, a requested charge that where a person knows of a confronting danger, and fails to use reasonable care to avoid injury thereby, his conduct is careless, because it is out of harmony with ordinary prudence and loads him with the entire responsibility for the consequences, notwithstanding the negligence of another may have aided in producing them, so that, if plaintiff knew of the defective condition of the sidewalk and failed to use reasonable care to avoid falling on it, he could not recover, was proper, and should have been given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

## 8. MUNICIPAL CORPORATIONS (§ 822\*) — DEFECTIVE SIDEWALKS—INJURIES—CARE REQUIRED—INSTRUCTIONS.

On an issue of plaintiff's due care in using a sidewalk at night which he knew was defective, a requested charge that, if the circumstances demanded it, a person using such walk "must grope or feel his way" until he passes the defective place, should have been qualified by adding "or has reason to and does believe as the result of the exercise of ordinary care that he has passed it," and by omitting the word "grope."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.\*]

Appeal from Circuit Court, St. Clair County; C. A. Calvird, Judge.

Action by W. A. Stephens against the City of El Dorado Springs. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. N. Banister, of El Dorado Springs, and Mann, Todd & Mann, of Springfield, for appellant. J. C. Hargus, of Osceola, J. A. Gilbreath, of Clinton, and Scott & Bowker, of Nevada, Mo., for respondent.

ROBERTSON, P. J. This action originated in Cedar county and was taken on a change of venue to St. Clair county, where a jury trial resulted in a verdict for plaintiff, and defendant has appealed.

Plaintiff, while passing at night along one of the defendant city's sidewalks, constructed of flagstone, caught his foot on the end of a stone therein raised about six inches above the general level of the walk where it crossed a gully and fell receiving the injuries for which he sued. The defendant does not on this appeal question that there was ample testimony from which the jury was justified in finding it guilty of negligence. This walk had been plaintiff's usual route between his home and place of business for a long time, and consequently he was perfectly familiar with the defect. Appellant does not complain of the amount of the verdict. The two points urged are that the trial court erred in overruling its application for a continuance and in refusing requested instructions, one of them a direction to find for defendant.

[1] The application for a continuance was on the grounds of the absence of three witnesses, residents of defendant city, and one of them, Dr. Hill, being the physician who rendered the first aid to the plaintiff after his injury. The application sets out that the witnesses were absent "on account of their own sickness or sickness of members of their family, as shown by certificates of physicians" thereto attached. The record does not disclose these certificates, but the respondent in his brief concedes that Dr. Hill was sick. The respondent admitted that the two witnesses, other than Dr. Hill, would, if present at the trial, testify as set out in the application. The court then overruled the application as to Dr. Hill. There was no reversible error committed in so doing. The deposition

of Dr. Hill would have been admissible under the third, fourth, and fifth paragraphs of section 6411, R. S. 1909, and there was no showing that it could not have been taken for use at the trial. *Harris v. Powell*, 56 Mo. App. 24, *Smith v. Smith*, 132 Mo. 681, 34 S. W. 471. The case was lodged in the St. Clair county circuit court a month before the trial.

[2] The fact that the plaintiff may have seen fit to make the admissions concerning the other two witnesses does not deprive him of his right to stand on the question as to the sufficiency of the application so far as it related to Dr. Hill. Appellant insists that the real reason for not making the admission as to Dr. Hill was that respondent thought the doctor was disqualified as a witness; but the record does not disclose this to be a reason for not making the admission, and we must sustain the court's action here on any proper ground that the record justifies.

[3] The appellant concedes here that while the plaintiff knew of the defect in the walk he was not guilty, as a matter of law, of contributory negligence in using it, but contends that we should declare as a matter of law that he did not exercise ordinary care in his use of it. In arguing this proposition the defendant has relied very materially on testimony of the plaintiff that may be construed most unfavorable to him, while we must, in view of the verdict, adopt the most favorable construction, and in so doing we find we must rule against appellant on its contention that the trial court erred in refusing to direct a verdict for it. That the respondent could have avoided the accident is beyond controversy, but the question we have is: Should we declare as a matter of law that the plaintiff was not exercising such care as an ordinarily prudent person would use under the same or similar circumstances? At the place where he fell it was dark, and he says he was proceeding carefully, as he had always done in passing over the walk at night, and that he thought he had passed this defect. There was no testimony by the witnesses as to the surroundings, that there was any particular thing there, except the defect itself, to indicate the exact location of this rise in the walk, or whereby he could fix its location. The gully was there, but there is no evidence to what, if any, extent it could be seen the night of the accident. The jury was exhibited photographs, but they are not reproduced in the record, and we cannot know what they disclose. In the case of *Ryan v. Kansas City*, 232 Mo. 471, 483, 134 S. W. 566, 985, cited by appellant, it is said that the duty of exercising ordinary and usual care does not "mean that the pedestrian must keep his eyes riveted upon the sidewalk at each step of the progress." In another case cited by appellant, *Border v. City of Sedalia*, 161 Mo. App. 633, 638, 144 S. W. 161, 162, we find the following rule announced:

"If the danger was of a nature to threaten plaintiff with injury if he attempted to use that way at night, despite the care he might exercise, his use of the crossing should be denominated negligence in law, since an ordinarily careful and prudent person would not voluntarily and unnecessarily subject himself to risks of that kind. On the other hand, if the danger was of a less degree and was one that could be overcome by the exercise of reasonable care, the issue of whether or not plaintiff was negligent would be one of fact for the jury to determine."

All of the cases relied on by appellant have been read by us, as well as the cases therein cited; but we can see no reason for further commenting on them, as we are convinced this is a proper case for a jury, and that in so holding we are following the decisions of the Supreme Court and are not in conflict with any decision of the other courts of appeal. *Delvin v. St. Louis*, 252 Mo. 203, 158 S. W. 346; *Gibbs v. Monett*, 163 Mo. App. 105, 111, 145 S. W. 841; *Graney v. St. Louis*, 141 Mo. 180, 184, 42 S. W. 941; *Alexander v. St. Joseph*, 170 Mo. App. 376, 156 S. W. 729.

The defendant requested and was refused five instructions, besides its demurrer to the evidence (refused instruction numbered 1), hypothetically submitting, in a specific manner, the question of plaintiff's negligence. The refused instruction, numbered 2 in the abstract of record, is as follows:

"The court instructs the jury that where a person knows of a confronting danger, and fails to use reasonable care to avoid being injured thereby, the law calls his conduct careless, because it is out of harmony with ordinary prudence and loads it with the entire responsibility for the consequences, notwithstanding the negligence of another may have aided in producing them. Therefore if you find and believe from the evidence that plaintiff knew of the defective condition of the sidewalk and failed to use reasonable care to avoid falling on it, your verdict should be for defendant."

[4] In determining the effect of the failure of the court to give some of defendant's refused instructions, embodying the theory therein contained as to this defense, we must accept as true the testimony most favorable to it, as we did above in plaintiff's behalf when passing on defendant's demurrer to his testimony. In one place of the plaintiff's testimony he has this to say about his conduct in passing over the walk on the night of the accident:

"I was going along carefully as I had before. I don't remember that I thought about whether it would be dangerous to go along there or not. I walked along at an ordinary gait, about the same as I did in the daytime, knowing all the time the bad place was there and that it was dark so I could not see it."

There was other similar testimony which, with the above quoted, the defendant had a right to have considered by the jury under proper instructions.

[5] Only one instruction was given in behalf of plaintiff, and in it was the requirement that the jury should find that the plaintiff "was in the exercise of ordinary care at the time" of the accident. The instructions given for defendant, two in num-

ber, contained the same general language and defined "ordinary care" as "such care as an ordinarily prudent person would use under the same or similar circumstances." The respondent seeks to justify the refusal of defendant's instructions on the ground that contributory negligence was not pleaded. The defendant, in the course of the trial, announced that it relied on the general denial in its answer, and it thereafter introduced what evidence there is here as to the negligence of plaintiff without objection from the plaintiff. Evidently the plaintiff conceded that defendant has the right to take advantage of plaintiff's testimony tending to prove his negligence. *Engleking v. Railroad*, 187 Mo. 158, 164, 86 S. W. 89; *Benjamin v. Railroad*, 245 Mo. 598, 614, 151 S. W. 91; *Wallower v. Webb City*, 171 Mo. App. 214, 221, 156 S. W. 48.

[8, 7] In view of the fact that in this case the question of the extent of care which plaintiff exercised in passing over the sidewalk in question was the decisive and the only seriously contested point, it was but fair that the defendant have such requested instructions given in its behalf, when as here not unreasonable in numbers, as properly and fully submitted its defense. The "mere reference to the care that plaintiff was observing was not all that the defendants were entitled to in the way of an instruction on the question of contributory negligence," nor did the instructions given "entirely cover the point." *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 436, 81 S. W. 1142, 1148. It matters not whether we call the negligence aimed at by defendant's refused instructions "contributory negligence," or whether we say they apply to conduct that would disprove the theory of plaintiff that he was exercising ordinary care, since he must prove this, at least when the defect is known to him, to make his *prima facie* case. *Woodson v. Met. St. Ry. Co.*, 224 Mo. 685, 702, 123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039; *Ryan v. Kansas City*, 232 Mo. 471, 479, 134 S. W. 566, 985. Plaintiff's negligence was an issue upon which the defendant was entitled to a fair submission to the jury of its contentions relative thereto. This the court refused to do, and we must hold reversible error was thus committed.

[8] While we have quoted the defendant's refused instruction numbered 2, as a proper one to give, and referred to others, we suggest that an instruction similar to defendant's refused instruction numbered 6 should not be given in its present form. It concludes by stating that "if the circumstances demand it, such person must grope or feel his way, until he passes the defective place." This should be qualified, under the facts developed in this trial, by adding after the words, "until he passes the defective place," the qualification "or has reason to and does believe, as the result of the exercise of ordinary care, that he has passed it." He was

not required to feel his way under all circumstances, until it was clear to a certainty that he had passed the defect, if in the exercise of ordinary care he had a right to and did believe he had passed it. The instruction would be simpler and less likely to confuse the jury if the word "grope" is omitted.

The plaintiff cannot rely on forgetfulness or oversight of the defect to relieve him from the duty of exercising ordinary care. *Wheat v. City of St. Louis*, 179 Mo. 572, 580, 78 S. W. 790, 64 L. R. A. 292.

In view of a retrial, we suggest that a fuller and clearer showing be made of the surroundings at the place of the alleged defect, and that if plaintiff makes a case for the jury the defendant be given such fair and reasonable instructions as it may request, having due regard to the facts, ignoring such questions of law as are herein discussed that may not be applicable to the case made on the next trial.

The judgment is reversed and the cause remanded.

STURGIS and FARRINGTON, JJ., concur.

STURGIS, J. I concur in the opinion herein, and more particularly because the answer contains a good plea of contributory negligence unless attacked before trial.

The answer, touching this question, is as follows:

"And defendant says that plaintiff having knowledge of the actual condition of said sidewalk at the time of his alleged injury, and of any unsafe or dangerous condition of the same, voluntarily assumed all risk of injury incident to using the same; and that whatever injuries plaintiff received in passing over said sidewalk were the direct result of his own negligence and carelessness contributing thereto as the proximate cause thereof."

It is said that this is not a sufficient plea of contributory negligence. We are cited to *Ramp v. Railroad*, 133 Mo. App. 700, 114 S. W. 59, *Cain v. Wintersteen*, 144 Mo. App. 1, 128 S. W. 274, and *Borders v. Met. St. R. Co.*, 168 Mo. App. 172, 153 S. W. 72, as sustaining this contention. In the *Borders* Case, supra, the answer is not set out, and it is merely said not to raise this issue under the holding in the *Ramp* Case, supra. In both the *Ramp* and *Cain* Cases, supra, the answers are different than here, and in each charge in effect that plaintiff's injuries were due solely to his own negligence; while here, the answer plainly charges that plaintiff's negligence contributed to his injury. An answer more objectionable in this respect than this one is held good in *Harmon v. Railroad*, 163 Mo. App. 442, 449, 143 S. W. 1114, and in *Peterson v. Railroad*, 211 Mo. 493, 519, 111 S. W. 37. I think we ought to hold in this case, as we did in *Wallower v. Webb City*, 171 Mo. App. 214, 222, 156 S. W. 48, that such an answer is sufficient to raise this issue unless attacked by a motion to make same more specific. It is distinctly held in *Conrad v.*

De Montcourt, 138 Mo. 311, 325, 89 S. W. 805, 808, that:

"A general charge of negligence is good as a basis for proof unless objected to at a proper time, before trial."

The same ruling is made in *Johnson v. Met. St. R. Co.*, 104 Mo. App. 588, 591, 78 S. W. 275, and cases there cited. There was no objection made to the plea of contributory negligence on plaintiff's part as contained in this answer, except by objection to the evidence during the trial. That is not a proper way to challenge the sufficiency of the plea.

### CORBY SUPPLY CO. v. THOMPSON.

(No. 13807.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

#### 1. SALES (§ 162\*)—DELIVERY—WHEAT CONSTITUTES—"BILL OF LADING."

A bill of lading represents the goods for which it is given, and its delivery passes the title as effectually as an actual delivery of the goods; hence, a buyer who accepted a bill of lading for goods sold at a time when the goods had been received by the initial carrier, although the bill of lading did not show that fact, accepted the goods, and cannot rescind the contract for delay in delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 376, 381-385; Dec. Dig. § 162.\*]

For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

#### 2. SALES (§ 404\*)—REMEDIES OF SELLER—DELAY.

When time of performance is made an essential element of a contract of sale, it is regarded in the nature of a warranty, and, in case of failure of the seller to deliver on time, the buyer may either rescind the contract, or receive the goods and recover from the seller the damages for delay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1146; Dec. Dig. § 404.\*]

Appeal from St. Louis Circuit Court; W. B. Homer, Judge.

Action by the Corby Supply Company against John W. Thompson. From a judgment for plaintiff, defendant appeals. Affirmed.

Henderson, Marshall & Becker, of St. Louis, for appellant. Bland & Cave and Davis Biggs, all of St. Louis, for respondent.

**NORTONI, J.** This is a suit for the purchase price of certain metallic pipe sold by plaintiff to defendant. The finding and judgment were for plaintiff, and defendant prosecutes the appeal. A jury was waived and a trial had before the court.

It appears plaintiff is engaged in the railway supply business in the city of St. Louis, and the metal pipe involved here was furnished on his account by the American Spiral Pipe Works of Chicago, Ill. Defendant desired the pipe to be used at Glynn, La., and interviewed plaintiff thereabout on December 26th. The evidence tends to prove that plaintiff sold defendant the 500 feet of

18-inch metal pipe in 80-foot lengths on terms of immediate delivery f. o. b. Chicago, to be shipped to Glynn, La., for the price of \$750. The pipe was not promptly shipped, and defendant kept after plaintiff thereabout while plaintiff urged the American Spiral Pipe Works of Chicago by telegram and telephone until it was finally loaded on cars on the Chicago Belt Railway on January 5th. However, this is conceded not to have been a delivery to defendant, for it seems the agreement contemplated the Illinois Central Railroad Company as the initial carrier, and the pipe was not delivered to that company until January 7th. On the morning of January 7th, plaintiff delivered a bill of lading for the pipe to defendant, duly signed by the agent of the Illinois Central Railroad Company. This bill of lading was dated Chicago, January 5th, and stamped in red ink on its face was the following:

"It is expressly understood and agreed that this bill of lading is issued at the request of and for the convenience of the shipper, and that said freight has not yet been received by this railroad company and that no obligation in respect to said freight is assumed by this railroad company, nor shall this bill of lading be in force until said freight is received by this railroad company."

However, no objection was made on the part of defendant to the fact that the pipe was not delivered to the Chicago Belt Railway Company until January 5th, and the only objection interposed to the bill of lading was that it failed to recite the rate of freight to be 58 cents per 100 pounds. This objection being raised against it, plaintiff returned the bill of lading to the American Spiral Pipe Works of Chicago and requested the insertion of the freight rate at 58 cents. A few days thereafter the bill of lading was returned to plaintiff, but with the freight rate of 88 cents specified therein, for it appears such was the rate, and, on the 11th of January, plaintiff delivered the bill of lading a second time to defendant with an explanation concerning the rate. Defendant thereupon accepted the bill of lading so delivered to it on January 11th, and, it appears, retained it throughout—that is, it was never returned nor tendered to plaintiff thereafter. By a stipulation in the record it is agreed that the pipe was actually delivered on the car of the Illinois Central Railroad Company at Chicago on January 7th, though the bill of lading was dated two days before, while it was in the custody of the Chicago Belt Railway Company. It appears that considerable delay in the shipment occurred after delivery of the pipe to the Illinois Central Railroad Company, for it did not pass through East St. Louis, en route to Louisiana, until January 16th. On January 16th defendant learned that the pipe had passed through East St. Louis on that day, and thereupon notified plaintiff that he proposed to rescind the contract and reject

the goods on account of the delay. Plaintiff declined to accede to this, and insisted that he had made the delivery to defendant without objection whatever thereabout on his part. Defendant proceeded and purchased pipe elsewhere and on the arrival of the consignment involved here in Louisiana, he refused to receive it, but thereafter, in order to save demurrage and diminish the damage, he unloaded and stored the pipe in Louisiana, but placed it at plaintiff's disposal. Plaintiff declined to further treat with the pipe as its property, and insisted that defendant should pay the price therefor.

[1] In his answer, defendant pleads a rescission of the sale and rejection of the goods because of plaintiff's failure to deliver the pipe on the cars of the Illinois Central Railroad Company at Chicago immediately, as it agreed, and for a further defense interposed a cross-bill or counterclaim for damages, but it seems the cross-bill was wholly abandoned at the trial, for no evidence whatever was introduced tending to prove the amount of damages, if any, defendant suffered. On scrutinizing the record, it appears the court found the issue for plaintiff, on the theory that, though plaintiff had breached its contract for immediate delivery, defendant had nevertheless waived the breach and its right of rescission on that ground, through accepting and retaining the goods and the bill of lading therefor without objection, and rejected the counterclaim for damages, because no proof whatever was made with respect thereto. On the facts in the record, the judgment appears to be a proper one, for no one can doubt that delivery of the pipe to the Illinois Central Railroad Company at Chicago on January 7th was a delivery to defendant, if accepted by him. The contract of purchase called for a delivery f. o. b. Chicago, and the Illinois Central Railroad Company is conceded to have been the initial carrier selected by defendant to receive the goods. Such being true, the delivery on January 7th to the Illinois Central Railroad Company was a delivery to defendant's agent. See *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672. Even if such delivery to the agent railroad company was late, it will suffice, if defendant subsequently ratified the act, as he did, through thereafter accepting the bill of lading. Though it be true, as argued, that the delivery of the bill of lading of date January 5th to defendant on January 7th, which recited, among other things, that the Illinois Central Railroad Company had not yet received physical possession of the goods, did not for that reason constitute a complete vesting of the title in defendant and a delivery to him, for the reason the goods were then in possession of the Chicago Belt Railway Company and not on the cars of the initial carrier—the Illinois Central Railroad Company—stipulated for, the subsequent delivery and acceptance of the bill of lading

to defendant on January 11th certainly concluded that matter, for then, according to the stipulation in the record, the pipe was in the custody of the Illinois Central Railroad Company, on its car, and had been for four days theretofore, that is, since January 7th. The agreed statement or stipulation of facts sets that matter at rest beyond question. On January 11th defendant received and accepted the bill of lading for the goods which were then and had been since January 7th in possession of defendant's agent, the Illinois Central Railroad Company. No one can doubt that the delivery and acceptance of the bill of lading in such circumstances amounts to a delivery and acceptance of the goods. A bill of lading represents the goods for which it is given, and its delivery passes the title as effectually as an actual delivery of the goods. *Smelting Co. v. Lead Works*, 102 Mo. App. 158, 76 S. W. 668; *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; *Benjamin on Sales* (8th Ed.) § 813. Without objection whatever, defendant accepted the bill of lading on January 11th with full knowledge of the delay then accrued. Obviously, such is to be regarded as an acceptance of the goods then in possession of its agent. Having thus accepted the goods and retained the indicia of title, that is, the bill of lading, throughout, it was certainly competent for the court to find, as it did, that defendant elected to waive his right to rescind and affirmed the sale. See *Kessler v. Perrong*, 22 Pa. Super. Ct. 578.

[2] The rule is that, when time of performance is made an essential element of the contract of sale, such stipulation is regarded as being in the nature of a warranty that the goods will be delivered in the time agreed and, in case of failure of the vendor to so deliver, the vendee has the option either to rescind the contract and to refuse to accept the goods, or to receive them and recover from the vendor his damages. See *Wall v. Ice & Coal Co.*, 112 Mo. App. 659, 87 S. W. 574; *Redlands Orange, etc., Ass'n v. Gorman*, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718. Here, though it appears defendant waived his right of rescission and accepted the goods, no one can doubt that it was competent for him to counterclaim for damages under the rule above stated, because of plaintiff's breach. But, as before said, no evidence whatever was introduced tending to prove damages, if any, accruing to defendant on that account. Obviously then, the court did not err in denying the right of recovery on the counterclaim.

What has been said sufficiently disposes of all of the questions raised in the case, and it is unnecessary to take up the instructions and discuss them separately.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

**COLLEY v. NATIONAL LIVE STOCK INS. CO. (No. 1395.)**

(Springfield Court of Appeals, Missouri, Dec. 12, 1914. Rehearing Denied Dec. 31, 1914.)

**1. PLEADING (§ 291\*)—VERIFICATION.**

A contract of insurance based on an application providing that the insurance shall not be in force until the application is accepted is not within the rule in Rev. St. 1909, § 1985, requiring a plea of non est factum to be under oath.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864, 865, 866½-879; Dec. Dig. § 291.\*]

**2. TRIAL (§ 98\*)—RECEPTION OF EVIDENCE—OBJECTIONS.**

The court is not required to rule on objections to evidence as not within the issues, until it is offered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193, 249; Dec. Dig. § 98.\*]

**3. ESTOPPEL (§ 110\*)—PLEADING.**

Evidence of an estoppel in pais is not admissible unless the estoppel is specially pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.\*]

**4. APPEAL AND ERROR (§ 204\*)—PRESENTATION OF GROUNDS OF REVIEW—PLEADING.**

Objections to testimony as being evidence of estoppel in pais not pleaded cannot be urged for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.\*]

**5. INSURANCE (§ 138\*)—VALIDITY OF CONTRACT.**

One unable to read, who signs an application for insurance upon false representations of the insurer's agent as to its contents, is not bound by his signature.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. § 138.\*]

**6. INSURANCE (§ 334\*)—BREACH OF CONDITIONS.**

The assured's obligation to perform the terms of a policy requiring him to call a veterinary and to notify the insurer of the sickness of the insured animal does not arise until there is substantial reason for believing the animal is sick.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 847-852, 854, 855; Dec. Dig. § 334.\*]

**7. INSURANCE (§ 665\*)—ACTIONS ON POLICIES—EVIDENCE.**

The jury may infer that the insured animal died from some disease common to the species from the fact that the animal was found dead with no external mark of violence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1557, 1707-1728; Dec. Dig. § 665.\*]

**8. INSURANCE (§ 666\*)—PAYMENT—DAMAGES FOR REFUSAL.**

The jury may find that the insurer's refusal to pay was vexatious from the failure to establish the grounds on which the refusal was based.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.\*]

**9. INSURANCE (§ 675\*)—PAYMENT—DAMAGES FOR REFUSAL.**

After a refusal to pay, a demand is not necessary to the right to attorney's fees for the insurer's vexatious refusal to pay.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1805, 1806; Dec. Dig. § 675.\*]

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

Action by James W. Colley against the National Live Stock Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. S. Meyberg, of Indianapolis, Ind., and Charles L. Henson, of Mt. Vernon, for appellant. William B. Skinner, of Mt. Vernon, for respondent.

FARRINGTON, J. Plaintiff recovered judgment for the sum of \$507.50 on a policy of insurance and an attorney's fee of \$50 on account of defendant's vexatious refusal to pay.

The petition alleged that plaintiff was the owner of a jack, named Gregory, and that on January 29, 1913, the defendant by its policy insured said jack for a term of one year against "death by accident, disease, fire, lightning, cyclone, theft, or by reason of a broken leg when found necessary by attending veterinary to destroy the animal's life." It is also alleged that the jack died on January 23, 1914, and that before and after his death the plaintiff (respondent) performed all the terms and conditions of the policy and did all things required to be done by him, but that defendant declined to pay and its refusal to pay was vexatious.

The answer admits the issuance of the policy, but alleges that it was based upon an application therefor by the plaintiff to the defendant in which application the plaintiff warranted that he had paid \$1,000 for the jack, which was not true. The second defense was that the application to which the policy referred contained a promissory warranty that in case the animal should become sick the same would receive the care of a veterinary surgeon, and in this defendant charged that plaintiff failed. As a third defense defendant alleged that the policy makes an exception and does not include death where the animal becomes sick and the plaintiff fails to at once notify the defendant company of its sickness by telephone or telegraph. It is alleged that the animal became sick on January 20th, from which sickness he died on January 23d, and that plaintiff failed to give any notice whatsoever to defendant of the sickness.

The plaintiff for reply filed a general denial and a plea of non est factum, and "further replying, plaintiff denies that he executed the application, the copy of which is set out and referred to in defendant's said answer." The reply is sworn to.

It is admitted that the application was by express terms made a part of the policy, and that the policy was based entirely on the answers contained in the application, and that in the application which was signed by the plaintiff the question, "What amount did you pay for the animal?" is answered, "One

thousand dollars." The plaintiff admitted that the animal did not cost him \$1,000, but that \$700 was the purchase price, and that he paid \$52 freight and expense to transport the jack from north Missouri to his farm. He testified that he signed the paper while out in the field where the defendant's agent came to write the insurance. The agent had been soliciting him to place an insurance policy on this jack. The plaintiff testified that he did not have his glasses with him when he signed the application, and that the agent of the defendant made up the application, putting down the answers that he (the plaintiff) gave, and that when it was finished he signed it but could not read it. He further stated that he told the agent exactly what the jack cost him, and that the agent attempted to get him to answer that it cost him \$1,000 because of the original cost, the freight, and expense of fixing up the lot and the barn or stall for the jack, as well as the cost of this insurance, but plaintiff says he refused to say the jack cost him \$1,000 on account of this, but, on the other hand, told the agent the actual facts as to the purchase of the jack for \$700 and the expense of getting him there, \$52, making the total cost \$752, and that the agent then told him he could write him for \$500, as the company insured for two-thirds of the amount paid for the animal; that he then told the agent to fix up the application so that he would be insured; and that, relying upon the agent to fix it just as he (the plaintiff) had related the facts, he signed the application under the circumstances as before detailed.

When the plea of non est factum was made by the plaintiff, there was no motion filed by the defendant nor anything done to require the plaintiff to be more definite and specific in said plea.

[1] Nor is it at all certain that it was necessary to have sworn to the reply because the application provided that the insurance should not be in force until and unless the application should be accepted by the company. This would make the contract one that was to be executed by more than one party, and hence does not fall within the rule in section 1935, R. S. 1909, requiring a plea of non est factum to be under oath.

[2] In the abstract presented, the only reference made by any one to the failure of the plaintiff's reply to plead estoppel occurred during the statement of the case by plaintiff's attorney when he referred to what the evidence in this particular would disclose. Defendant objected to such statement for several reasons, one being that such a defense had not been pleaded. For a ruling, the court remarked, "Go ahead." The court was not required to pass upon the admissibility of evidence at that point in the trial and would naturally withhold a specific ruling on the question until the evidence was offered.

[3, 4] The testimony of the plaintiff went in without any objection having been made by the defendant as to it being evidence of a fraud or an estoppel which had not been specially pleaded. The only objection to this testimony interposed when this question was asked plaintiff: "What did you tell him? Tell the jury all that you told him about how you came to get the jack and the cost of it"—was, "We object to the question for the reason that it will throw no light on the issues in this case, and further that the witness has admitted signing the paper adopting it as his own, and that the question, if answered, would tend to deny a written instrument and would be the means of contradicting and varying the instrument and its terms by parol testimony." The objection was overruled. A motion was then made to strike out the testimony of the plaintiff hereinbefore detailed for the same reasons. Nowhere in the record do we find any objection to any testimony because the facts disclosed by such testimony should have been specially pleaded before they would work an estoppel on the defendant.

The reports of our state contain many decisions that an estoppel in pais must be specially pleaded, and that unless it is so pleaded evidence designed to establish such estoppel will be excluded. However, where the evidence is received without such objection, and the parties treat the case as though the estoppel had been specially pleaded, such objection cannot be urged for the first time in the appellate court. See *Price v. Hallett*, 138 Mo. 561, 38 S. W. 451; *McDonnell v. De Sota Sav. & Bldg. Ass'n*, 175 Mo. loc. cit. 274, 275, 75 S. W. 438, 97 Am. St. Rep. 592; *Wilcox v. Sovereign Camp W. O. W.*, 76 Mo. App. loc. cit. 580; *Strother v. De Witt*, 98 Mo. App. loc. cit. 299, 300, 71 S. W. 1129; *Ziekel v. Douglass*, 88 Mo. 382; *Kelly v. Thuey*, 143 Mo. loc. cit. 437, 45 S. W. 300. We find this rule laid down in *Bacon's Missouri Practice*, vol. 1, § 194, p. 233: "If no objection is made to evidence, the necessity of a special plea is waived." Therefore the point contended for by appellant in its brief and oral argument, that the plea of non est factum is not a sufficient plea under which evidence tending to establish an estoppel may be introduced, is not properly before us.

[5] The question whether plaintiff falsely stated in his application for insurance that the cost price of the jack was \$1,000 was properly submitted to the jury in the instructions, and the finding thereon in plaintiff's favor will not be disturbed.

Appellant cites authorities to the effect that an assured cannot escape the force and effect of statements made in his application for insurance by the mere claim that he signed the application without reading or having it read to him, and that unless some fraud, deceit, or misrepresentation has been practiced he is bound by his signature to the same. This is undoubtedly the law, and has been so de-

clared by this court in *Outcult Advertising Co. v. Barnes*, 178 Mo. App. 307, 162 S. W. 631, and in *England v. Houser*, 178 Mo. App. 70, 163 S. W. loc. cit. 893. But in both those cases the principle is recognized that, where the party signing was laboring under some disability or infirmity and was unable to read what he was signing and relied upon the other party's word as to what it contained, he is not bound where a fraud is practiced on him in procuring his signature to the instrument which was different from what it was represented to be. See *Paris Manufacturing Co. v. Carle*, 116 Mo. App. 581, 591, 92 S. W. 748.

[6] Defendant's second and third defenses, we think, are overcome by the testimony of the plaintiff with reference to any knowledge of the jack being sick prior to his death. It is admitted that plaintiff did not have a veterinary surgeon, nor did he wire to the defendant advising it of the sickness of the animal. The evidence shows that a veterinary came to plaintiff's place on January 21st to treat a mule, and that as he passed by the barn door he saw the jack Gregory, and plaintiff testified he said something about Gregory being a big jack, to which the veterinary replied:

"That jack always did look like there was something wrong with him." And I said, 'It is not, this is a good jack, and healthy too,' and I went up to see him and slapped him, and he galloped off."

The plaintiff says that he went with the man to feed the jack and saw that he was eating heartily. He further testified that the veterinary never did say that the jack was sick or that it ought to be treated. The veterinary made the remark above referred to as he was going to his buggy. Plaintiff also testified that he never knew the jack was sick or that anything was the matter with him until he was found dead in his stall on January 23d. If this was true, and the jury believed it, he could not have telegraphed or telephoned the insurance company advising them of the Jack's sickness prior to his death; neither was there any obligation on plaintiff to call a veterinary until there was some substantial reason for believing the animal was sick.

[7] It is also contended that plaintiff cannot recover in this case because he has not shown that the animal died from some of the causes mentioned in the insurance policy. See *Banta v. Continental Casualty Co.*, 134 Mo. App. 222, 113 S. W. 1140; and *Walton v. Phoenix Ins. Co.*, 162 Mo. App. 316, 141 S. W. 1138. The evidence disclosed in the record is that the jack was found dead and that there was no external mark or evidence of any violence. Under these circumstances, the jury could reasonably infer that the jack died from some disease common to that species.

[8, 9] Appellant further complains of that part of the judgment which allows \$50 as an attorney's fee, because, it argues, there was no evidence of vexatious refusal to pay upon which such issue should have been submitted to the jury. In the letter (referred to as "Exhibit C") written by the insurance company to the plaintiff prior to the commencement of this action, a refusal to pay was placed upon the grounds that plaintiff failed to give notice of the sickness of the animal—did not secure the services of a veterinary—that, although the veterinary informed him the jack was sick with spinal paralysis, the plaintiff refused to allow the veterinary to treat the animal; that plaintiff made false statements with reference to the cost of the animal; and that the jack was not registered as warranted. Some of these reasons we have already disposed of in the opinion; the others the defendant conceded at the trial could not be established. This is sufficient evidence from which the jury would be reasonably warranted in concluding that defendant vexatiously refused to pay the claim of the plaintiff. The letter was a positive refusal to pay; hence there was no further need for a demand. The questions as to the vexatious refusal to pay and the failure to make demand are discussed in the case of *Coscarella v. Insurance Co.*, 175 Mo. App. loc. cit. 139, 157 S. W. 873.

The judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

## TROLL v. DOUGHERTY & BUSH REAL ESTATE CO. (No. 13828.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

### 1. PRINCIPAL AND SURETY (§ 115\*)—DUTY OF PLEDGEE—RIGHTS OF SURETY.

It is the duty of a creditor holding collateral security to perform all acts necessary to make the collateral available; and if collateral is lost by the creditor's failure, a surety for the debt is discharged to the extent of the loss.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 244-268; Dec. Dig. § 115.\*]

### 2. PRINCIPAL AND SURETY (§ 129\*) — DISCHARGE OF SURETY — RELEASE OF COLLATERAL.

Where a surety for a debt, either expressly or impliedly, consents to release a part of the collateral security, he is not discharged.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 366-372; Dec. Dig. § 129.\*]

### 3. APPEAL AND ERROR (§ 1009\*)—REVIEW—EQUITY SUITS.

While the appellate courts will review the evidence in a suit in equity, they will defer to the finding of the chancellor, where the evidence is conflicting.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8970-8978; Dec. Dig. § 1009.\*]

#### 4. MORTGAGES (§ 292\*) — SALE OF LAND — MORTGAGOR AS SURETY—RELEASE OF LAND—EFFECT—SUFFICIENCY.

In a suit to recover a personal judgment against a mortgagor, who had sold the mortgaged land, evidence held to justify finding that the mortgagor consented to the release of portions of the property, and so was not discharged from liability as a surety.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 762-771, 790; Dec. Dig. § 292.\*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Harry Troll, as Public Administrator of the City of St. Louis, in charge of the estate of Hector A. Piednoir, Jr., deceased, against the Dougherty & Bush Real Estate Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

S. T. G. Smith, of St. Louis, for appellant.  
J. L. Hornsby, of St. Louis, for respondent.

REYNOLDS, P. J. This is a suit in equity by respondent, as public administrator in charge of the estate of one Hector A. Piednoir, deceased. The petition sets up that Piednoir in his lifetime held notes secured by a deed of trust on various properties, one note being for \$10,000, and 50 notes for \$200 each, aggregating \$10,000, all executed by appellant, all the notes representing but one indebtedness of \$10,000. During the lifetime of Piednoir the indebtedness had been reduced until, as it is claimed, it amounted to \$1,400 with accrued interest, and all the collaterals had been released except a deed of trust on a certain lot on Wyoming street and 57 notes executed by one Lila Drumm, and also a certain leasehold to a building on Chestnut street in the city of St. Louis. Averring that this \$1,400 and accrued interest still remains due and unpaid, plaintiff prays judgment for the debt and interest, for reasonable attorney's fee, and that the equity of redemption of defendant in these 57 notes, together with the deed of trust securing the same and covering the lot on Wyoming street, as well as the leasehold on Chestnut street, might be foreclosed and that the collaterals, or so much thereof as may be necessary, be sold to pay off and discharge the debt.

The answer challenges the claim of any remaining indebtedness, averring that one of the pieces of property pledged, consisting of parts of two lots in Temple Place, had been discharged from the lien of the deed of trust without the knowledge and consent of defendant and for the sum of \$2,500 (at the trial it appeared that this should have been \$2,000), when in point of fact the equity of the defendants in it was worth \$5,000, and judgment over is asked by the defendant for this difference.

The trial was before the court, as in equity, and resulted in a finding for plain-

tiff as prayed by it, save as to attorney's fees, the claim to which was not pressed, and a denial of the relief asked by defendant. From this defendant has appealed.

There are but two points that need be considered in the determination of this case. First, whether the evidence warranted the learned trial court in finding that the Temple Place property had been released with the consent of defendant and, second, if that consent had not been given, whether defendant had sustained any loss by the release of that property.

Turning to the evidence in the case, it appears that there had been a practical dissolution of the corporation defendant and a distribution of its assets among the two gentlemen, Messrs. Dougherty and Bush, who appear to have been practically the sole owners of its stock and to have composed the corporation, as well as of another allied one, called the Hampton-Russell Investment Company. It appears that on this dissolution Mr. Dougherty took over certain of the assets, including the properties which are here in controversy, all under various mortgages, the defendant company holding merely equities in them subject to two or more prior encumbrances. Being indebted to a Mr. Dowling and being pressed by Dowling for a payment of his indebtedness, Dougherty told Dowling that he had not the money to pay him, and telling him that he and Mr. Bush had divided up their interest and that he (Dougherty) had taken over the equities in a lot of property, he would turn that equity over to Dowling. Dowling figured on the value of the property, and finding it all under two or more deeds of trust, and that the only interest of the defendant corporation was in the equities, and figuring up the encumbrances, agreed that if Dougherty would straighten up some of the indebtedness, taxes, etc., he would take it. Dougherty told him he could not do anything of the kind; that he (Dowling) would have to take it just as it was. Dougherty explained to Dowling that the properties were tied up in the blanket deed of trust which was held by Piednoir, and if he took the properties subject to this encumbrance, he (Dowling) would have to work his way out of it the best he could, and if he sold any of the property which Dougherty was transferring to him, he (Dowling) could get a release of the property so sold from the Piednoir deed of trust; that "by making a right payment to Mr. Piednoir he would release"; that he (Dowling) would have to satisfy Mr. Piednoir before he would give a release to any of the property. Dowling finally agreed to take the properties but objected to taking them in his own name as he did not wish to personally assume the encumbrances. Accordingly the Temple Place with other prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erties, but not the leasehold nor the Wyoming street lot, were deeded over to his wife by the Hampton-Russell Investment Company, the subsidiary company of the defendant corporation, above referred to, by a deed of warranty, subject, however, to taxes and "all encumbrances of record," title to the equities in the properties being in the Hampton-Russell Investment Company by mesne conveyances from the defendant company. The indebtedness of defendant to Piednoir originally was \$10,000, evidenced by a \$10,000 note as well as by 50 notes for \$200 each, the latter payable monthly. Mr. Hornsby was the agent and attorney for Piednoir in the collection of this indebtedness during the latter's lifetime and from time to time Dowling paid off several of these collateral notes to Hornsby as such agent, and as he paid off any of the notes he secured releases from Piednoir on various pieces of property that he, more accurately his wife, had thus acquired and which Piednoir held. That is, he and Hornsby or Piednoir agreed upon the price which should be paid for the release of these separate pieces of property. It does not appear that either Dougherty or Bush were consulted or had anything to do with these releases, or the terms upon which they were made. As Dougherty would sell any of these pieces in which he held equities of the Hampton-Russell Investment Company, he would procure a release from Piednoir for that piece, paying him what was agreed upon apparently between Piednoir, or Hornsby, as his representative, and Dowling. It is in evidence that both Dougherty and Bush knew of Dowling obtaining these releases from time to time and had never made any objection to them; on the contrary, when informed from time to time of what had been done with reference to them, Dougherty and Bush appeared satisfied and told Dowling that he was "doing fine in getting rid of the stuff and reducing the indebtedness." It does not appear from any evidence that Dougherty or Bush suggested that they were to be consulted in the matter of releases, or that they were to have anything to do with that, or that they ever set any amount that was to be paid on any particular piece of property for its release or set any terms which Dowling would be authorized to make with Piednoir or with his representative in obtaining the release of any particular piece; the whole matter of releases was apparently left to Dowling and Piednoir; what Dougherty said when negotiating the matter with Dowling was that he (Dowling) would be able to get along all right with Piednoir and Hornsby as his agent, and that Hornsby would treat Dowling all right in the matter of releases. Having acquired the equities in these properties, it appears that Dowling negotiated for a trade of this Temple Place property for some other property in the city of St. Louis, and to do so it was necessary to

have it released from the Piednoir deed of trust. It appears that both Dougherty and Bush knew of this but neither of them said anything to Hornsby about it or made any suggestion to Dowling. When Dowling was ready to close this trade and had arranged with Mr. Hornsby for the release of the Temple Place property from the lien of this deed of trust, he went to Mr. Dougherty and obtained from him certain of the collateral notes which had been paid and which were covered by this deed of trust, the notes being in the possession of Dougherty, and which it was necessary to present to the recorder of deeds in order to have the release entered of record. He then told Dougherty that he had obtained the release from Hornsby and needed these notes to get the deed of trust released. Dougherty gave him all of the notes which he held except one, which appears to have been lost, and said at the time he gave them to Dowling that he was "glad he got along with it that way." With these notes as well as those which were in possession of Hornsby in hand, Dowling had this Temple Place property released from the deed of trust. Hornsby, as agent for Piednoir, received \$2,000 from Dowling and gave a release of the Temple Place property, crediting the \$2,000 on the indebtedness, thus cutting the principal down to about \$1,400. It appears from the testimony of Hornsby that after he had made the negotiation with Dowling for the release of this property and had received the \$2,000 for that release and had turned over the release to Dowling, that Mr. Bush, one of the officers and joint owner with Dougherty in the defendant corporation, came to him and asked him if Dowling was about to procure the release of this property. Hornsby told him that he had already released it to him, but testified that he did not remember telling him the amount for which he had released it. Bush says he did not tell him, nor did he ask him what the amount was; all that Bush said at the time, according to Hornsby, was that Dowling had promised him that he would let him know before he closed the deal about the Temple Place property. He expressed no dissatisfaction with the fact of the release. He complained that the negotiation had been carried on and consummated by Dowling without Dowling first having conferred with him about the matter, as he said Dowling had promised to do. Dowling on his part denied that he had any such arrangement with Bush but said that the whole matter of obtaining releases on such terms as he could secure from Piednoir or his representative had been turned over to him by Dougherty and by Bush when he took over the equities which were in the name of the defendant corporation in this Temple Place and other property along with the other property.

So much for the matter of consent.

Turning to the question of the value of the equity, in the Temple Place lots, we find testimony that this value did not exceed \$7,000 or \$7,750; other testimony was to the effect that it was worth not to exceed \$5,000. There were two prior deeds of trust on this Temple Place property, each for \$4,800. There were also \$6,300 unpaid on the \$10,000 (the Piednoir) indebtedness, and Dowling paid off \$600 on this before he secured the release of the Temple Place property. That is, there were \$5,700 due on the whole debt, for which Piednoir held the Temple Place property, the Wyoming street property and the leasehold, as well as 57 of the notes and perhaps other pieces of property. When the \$2,000 were paid for the release of the Temple Place property, Piednoir still had the Wyoming street property, the leasehold and the collateral notes. The highest value put upon the Temple Place property was \$7,750. Dowling had tried in vain to sell them for \$7,000 each. So the evidence places the equity as worth from \$3,250 to \$2,500.

[1, 2] There can be no question of the principles which must govern cases of this kind. On the kindred question of the discharge of a surety by the acts of the creditor, it is said by an accepted authority (1 Brandt on Suretyship & Guaranty [3d Ed.] § 480) that:

"If the creditor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. \* \* \* Upon obtaining such a lien the creditor becomes a trustee for all parties concerned, and is bound to apply the property to the purposes of the trust. \* \* \* The surety is entitled, upon paying the debt, to subrogation to all the securities which the creditor may have at any time acquired for the payment thereof, and it results as a corollary from this proposition, that if this right is rendered unavailing by the act of the creditor, the surety is discharged to the extent that he is injured." It is further said by this author that the mere silence of the surety when he knows that the creditor is about to release securities, will not prevent his discharge, "as in such case he is not called upon to speak. But where such release is made at the instance and request of the surety, he is not thereby discharged."

One of the authorities cited for this, Polak v. Everett, Law Rep. 1 Q. B. Div. 669, states the rule somewhat differently, following what was held in Freeman v. Cooke, 2 Ex. 654, where it was said:

"That if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise, there is a duty to speak, his silence would preclude him as much as if he proposed the act himself."

In Pence v. Gale, 20 Minn. 257 (Gil. 231), it is held that where the owner of a promissory note who holds collateral security for it, gives a release at the surety's instance and with his consent the surety is not discharged. So too in Brown v. Abbott, 110 Ill. 162, where it is held that when a party consents

to the doing of the act which would not have been done but for his assent thereto, the person so assenting will not be permitted to make the doing of it a matter of personal advantage to himself.

The settled law of our state, in line with that recognized all over the country by all respectable authorities, is, that it is the duty of the party holding a collateral as security to carefully and faithfully perform all acts necessary to make the collateral available and that this is a duty owing to the surety and failing in it by which the collateral is lost, the surety will be discharged to the extent he is thereby injured. National Exchange Bank v. Kilpatric, 204 Mo. 119, 102 S. W. 499, 120 Am. St. Rep. 689. The rule running through all the authorities being that if the surety consents to the release of part of the property, he will not be discharged by the release of that part of it, the question here is, whether this defendant, or its representative did consent to the release of this Temple Place property. It is not necessary that the consent should be in express terms; it may be implied here as in all other cases as well by acts and course of conduct as by express words.

[3, 4] Applying these principles to this case, we cannot but conclude with the learned trial judge that in turning over the equities of the defendant to Dowling, and that is all that defendant had in these various pieces of property, and referring him to Piednoir or to his agent as the parties who would do the right thing by him with respect to releases as well as by the other acts in evidence to which we referred, Dougherty and defendant, through him, left the terms of the release so entirely a matter to be settled between Dowling and Piednoir and his agent and had in so many prior instances connected with releases of the property conveyed to Dowling, ratified or acknowledged this as the proper manner of transacting the business, that it cannot now be claimed that the defendant is entitled to be discharged from any part of this liability by reason of the release of the Temple Place property from under the deed of trust. Considering the course of conduct of the parties in this matter, it would be inequitable and unfair to now hold that the release of this Temple Place property was without authority and unauthorized. That is undoubtedly the view taken by the learned trial court of this matter.

It is hardly necessary to remark that in suits of this kind, that is in equity, heard before the court as chancellor, the appellate court is not bound by the finding of the chancellor on the facts but may draw its own conclusion from the facts in evidence as presented by the record. When, however, the evidence, is conflicting, and there is substantial evidence to support the finding, appellate courts yield very greatly to the conclusion on that reached by the chancellor. New England Loan & Trust Co. v. Browne, 177

Mo. 412, loc. cit. 423 et seq., 76 S. W. 954. It must be said that an examination of the evidence in this case does not present an unchallenged state of facts, one way or the other, either on the question of consent or of value; in short, it is conflicting. As in all cases, the weight to be given it depends very largely upon the appearance and manner of the witnesses who gave it. That was a matter peculiarly under the observation of the chancellor, who saw and heard the witnesses. We do not think, on a careful consideration of the evidence and applying to it the principles of law to which we have referred, that we would be justified in setting aside the action of the trial court. As this disposes of the case, it is unnecessary to pass upon the question of the value of the equity in the Temple Place property, further than to say that there is substantial evidence to show that defendant sustained no loss by its release for \$2,000. That being so, even if the release of that piece of property was not authorized, defendant not being damaged, is not in a position to complain. Jones on Collateral Securities (3d Ed.) § 515a; National Exchange Bank v. Kilpatrick, supra.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

# MADDUX v. ST. LOUIS UNION TRUST CO. (No. 13878.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

## 1. BROKERS (§ 61\*)—COMPENSATION—FAILURE TO COMPLETE CONTRACT—DEFECT IN PRINCIPAL'S TITLE.

An owner of land, who contracted in writing to pay a specified commission to a broker for procuring a sale of her land, is liable for the commission, where the broker procures a purchaser ready, willing, and able to buy, but the purchase was not completed because of a defect in the title, especially where the brokerage contract required the owner to furnish an abstract showing clear title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. § 61.\*]

## 2. BROKERS (§ 65\*)—COMMISSIONS—REPRESENTING ADVERSE INTEREST.

Where the broker has represented another without the consent of his principal, he forfeits his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

## 3. BROKERS (§ 84\*)—COMPENSATION—REPRESENTING ADVERSE INTEREST—FRAUD.

The rule that a broker forfeits his commission if he represents adverse interests is based on fraud, and such conduct, therefore, may not be presumed, but must be found from facts constituting substantial evidence on the issue.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

## 4. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—SUFFICIENCY OF EVIDENCE—BAD FAITH OF BROKER.

In an action for a broker's commission, evidence held not sufficient to go to the jury on

the question whether the broker had forfeited his right to commission by representing adverse interests in the transaction.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

Appeal from St. Louis Circuit Court; Irvin V. Barth, Judge.

Action by G. A. Maddux against the St. Louis Union Trust Company, executor of Matilda J. Childress, deceased. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Charles B. Stark and C. F. Schneider, both of St. Louis, for appellant. Henry B. Davis, Charles Erd, and Carlisle Durfee, all of St. Louis, for respondent.

NORTONI, J. This is a suit by a real estate agent for his commissions. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

It appears that plaintiff is a real estate agent doing business at Nashville, Tenn. The suit was originally instituted against Matilda J. Childress and her husband, Thomas B. Childress, for commissions said to have been earned by the agent in finding a purchaser who was ready and able and willing to buy certain real estate owned by Matilda J. Childress in Nashville. After the suit was instituted and before the trial, both defendants departed this life at St. Louis, Mo., where they resided. The real estate was owned by Matilda J. Childress alone and, as before said, situate at Nashville. Her husband, Thomas B. Childress, was therefore but a nominal party defendant. As to him the suit abated at his death, but it was revived against the estate of Matilda J. Childress and the present defendant, St. Louis Union Trust Company, as administrator of her estate, substituted as a party defendant in her stead.

[1] It appears that Matilda J. Childress desired to sell her property situate on Cherry street in Nashville, Tenn., at the price of \$50,000. Plaintiff came to St. Louis on May 28, 1909, visited Mrs. Childress and her husband, and arranged with them to represent her in making the sale for a commission of \$1,000. A written contract was entered into by Mrs. Childress and her husband on that date, whereby plaintiff was authorized to sell the property for \$50,000; however, it was agreed in the contract of agency that Mrs. Childress would borrow \$22,000 on the property from the Northwestern Mutual Life Insurance Company at 5 per cent. interest, which loan the purchaser should assume, and also pay to Mrs. Childress \$18,000 in cash and give a second mortgage on the property to Mrs. Childress for \$10,000, to be represented by two separate notes at 6 per cent. interest. It was further stipulated, too, that Mrs. Childress would furnish an abstract showing good title to the property which

should be delivered to the purchaser. On the following day, May 29, 1909, plaintiff effected a sale of the property to Mrs. Annie Simon of Nashville, Tenn., who appears to have been a lady of means and amply able to buy. Mrs. Simon agreed in writing to take the property at the price of \$50,000 and on the terms prescribed in plaintiff's contract of agency, provided the title thereto was found to be good. The case concedes that Mrs. Childress and her husband executed the contract of agency to plaintiff above stated, and that he effected a sale of the property through finding a purchaser in the person of Mrs. Simon, who was ready and able and willing to buy on the terms prescribed. But it appears the sale was not finally consummated in point of fact, for the reason that the title to a portion of the property was found to be defective and the owners failed to correct it. So much appears from the written contract in evidence and admissions and stipulations of fact introduced at the trial. It is agreed, too, that plaintiff expended, by and with the authority of Mrs. Childress and her husband, \$49.75 in procuring an abstract of title to the property, and that this amount has not been repaid to him, though it was expended for the use and at the instance of the Childresses. There can be no doubt that these facts are sufficient to authorize a recovery for plaintiff, unless some sufficient and valid reason apart therefrom appears to defeat his right. See *Hayden v. Grillo*, 35 Mo. App. 647. Here the owner of the property, plaintiff's principal, agreed in writing to furnish a good and sufficient title, but aside from this the obligation to do so rested upon her in so far as the plaintiff's right to recover his commissions is concerned, for he fully performed on finding a purchaser ready and able and willing to buy on the terms prescribed in his commission of authority. See *Christensen v. Wooley*, 41 Mo. App. 53, 61; *Collins v. Fowler*, 8 Mo. App. 588.

[2] But the court referred the case to the jury as if there were evidence tending to prove that plaintiff performed a dual agency and thus forfeited his right to recover because, forsooth, he represented both the seller and the purchaser at the same time. The jury found the issue for defendant on this theory. Obviously one may not, with entire fidelity, serve two masters, representing adverse interests in ordinary commercial transactions at the same time, and because of this the salutary rule obtains that if a dual agency appears, without the consent of the principal, the agent forfeits his commission and may not recover. See *Corder v. O'Neill*, 207 Mo. 632, 645-647, 106 S. W. 10; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Neuman v. Friedman*, 156 Mo. App. 142, 136 S. W. 251.

[3] But the doctrine proceeds on the ground of fraud and bad faith. Obviously, therefore, such conduct on the part of an agent

may not be presumed, but must be found from the facts of the case, and such facts must be sufficient to constitute substantial evidence on the issue thus made.

[4] After reading all of the evidence introduced at the trial several times, we are persuaded that it is wholly insufficient to support the finding of bad faith, in that plaintiff represented both the purchaser and the seller of the property at the time. There is no admission nor stipulation tending to show that plaintiff represented Mrs. Simon in any way, but, on the contrary, it appears he represented the Childresses in making the sale. The only evidence said to suggest that plaintiff occupied a position of dual agency is that of Mrs. Simon, and we copy it in full. Indeed, Mrs. Simon is the only witness who testified in the case, and her evidence in full is as follows:

"Q. Mrs. Simon, please state your full name, age, and present place of residence. A. Annie Simon; 56 years; 112 Vauxhall street, Nashville, Tenn. Q. If you at any time endeavored to purchase the property owned by defendants, Matilda J. and Thos. B. Childress, on Cherry street in the city of Nashville, state with whom your negotiations were conducted. A. With Mr. Maddux. Q. Did your negotiations in reference to this property result in a contract on your part to buy same? A. Yes, sir; I did contract to buy it. Q. Examine Exhibit A to the deposition of Gus A. Maddux and state if that paper was signed by you and if it is the contract referred to by you? A. Yes, sir. Q. State if your acceptance of this contract was in good faith, and if you were at that time willing and able to purchase the property described in the contract on the terms and conditions therein set out, if good title to same was made to you? A. I was. Q. Were you then and are you now financially able to pay for this property upon the conditions mentioned in this contract? A. I was in position then, but I think I could arrange it now even. Q. State whether Mr. Maddux was in any way employed by you, or was to be in any manner compensated by you for his services in connection with the purchase and sale of this property? A. I did not agree to compensate him anything."

#### Cross-examination:

"Q. Mrs. Simon, did you represent yourself in this matter? A. Did I represent myself? Yes, sir. Q. Were you going to buy this with your own money? A. Well, part of it, and part the Northwestern Mutual Life Insurance Company were to loan me. Q. How much were the Northwestern Mutual Life Insurance Company to loan you? A. \$22,000. Q. How much were you to pay yourself? A. The balance, \$28,000. Q. Were you at that time financially able to do that? A. Yes, sir. Q. Nobody had any interest in the transaction except yourself? A. No, sir. Q. How did you happen to go to Mr. Maddux; had he attended to other business for you? A. No, sir. You mean in regard to this property? Q. I mean had he been your agent in any other matters? A. I went to his office. I gave him other property to rent, but he never succeeded in renting it. Q. Then he had acted as your agent in other matters? A. Well, he tried to, but didn't succeed. Q. But nevertheless he had charge of a portion of your property in an endeavor to rent it, and to that extent acted as your agent, to the extent of trying to rent the property? A. Yes, sir. Q. When did that agency cease, Mrs. Simon? A. I just can't remember. When the Riddle lease terminated, I got him to rent it; and when he couldn't, then that ended it; that's all. Q.

When was that in point of time, if you remember, that he couldn't rent it? A. It is over three years ago. I think it is about three years. Q. In regard to the purchase of the property of the defendants, did you approach Mr. Maddux about it, or did he come to you? A. I came to him. Q. For what purpose did you go to him? A. I wished to buy some centrally located property as an investment, and I asked him if he had anything that he thought would suit me. Q. You knew he was going to make the trip to St. Louis on the 28th, that is, start on the 27th of May last year, didn't you? A. I knew he made the trip, but don't know the date. Q. Is the trip you refer to the one in which he went to St. Louis to get the promise from the defendants to sell the property? A. Well, he had corresponded with them long before in regard to this property, and this was the final arrangement. To be the final arrangement of my purchase of the property. Q. Then this was the trip that you speak of that was to close up the deal? A. Yes, sir. Q. Now, you had authorized him to make an offer for the property in question, of \$45,000, did you not? A. I don't remember that. I know it was to be \$50,000. Q. Have you no recollection of telling Mr. Maddux to offer the defendants \$45,000 for the property, but if he couldn't get it for that, he might increase the offer more? A. Not at that time. Q. When did you make that statement to him? A. That was in the correspondence between them. Q. Mrs. Simon, I am speaking now exclusively of conversations between you and Mr. Maddux without reference to the correspondence between Mr. Maddux and Mr. Childress? A. I am speaking now of the time when he went to St. Louis in regard to the \$50,000. Q. You had instructed him prior to his going to St. Louis to offer the defendants \$50,000 for the property, providing, of course, always that the title was good? Is that your answer? A. That was at the time he first offered the property for sale to me. Q. You had instructed him prior to his going to St. Louis to offer to the defendants \$50,000 for the property? A. I did not. That was during the correspondence, but when he went there it was to close the sale and get their signatures. Q. At what figure was he to close the sale? A. \$50,000. Q. Now was any other sum mentioned immediately prior to his going to St. Louis than \$50,000? A. No, sir. Q. Was that when he left Nashville to go to St. Louis that he had your authority to offer \$50,000 for the property, provided, of course, the title was to your satisfaction? A. Well, Mr. Childress positively refused to take any less before Mr. Maddux went to St. Louis—he would not take any less, he wanted \$50,000—and so I just accepted to the terms he asked for. Q. So that he went to St. Louis to offer them \$50,000 for this property? A. I suppose so. Q. When he went to St. Louis you had authorized him to go to St. Louis, and you had authorized him to offer \$50,000 for the property? A. I had. Q. Upon his return from St. Louis you attached your signature to the acceptance of the offer which is marked 'Exhibit A' to this deposition? A. Yes, sir."

#### Redirect examination:

"Q. You stated in your cross-examination that when Mr. Maddux went to St. Louis he was authorized by you to make certain offers. I want to ask if you had ever given Mr. Maddux any written authority of any kind or had employed him in any way to buy this property for you? A. Yes; I authorized him to make the trade there. I didn't authorize him to buy it for me; I don't think for myself. Q. Were you making an offer through Mr. Maddux for this property? A. Yes, sir. Q. Did you expect to buy the property yourself through Mr. Maddux, or have Mr. Maddux buy for you? A. I can't understand that? He acted as my agent in the matter?—no. Q. Was Mr. Maddux your agent

in this deal or the Childress' agent? A. He was their agent, of course. Q. You have stated, I believe, that you did not promise to pay him any compensation for services in this matter? A. Yes, sir. I did not expect to pay him anything. Q. Did you sign any paper of any kind agreeing to purchase at any price the property described in Exhibit A to this deposition until you signed an acceptance of the offer on May 29th? A. No; I did not. This was the only paper. Q. Then your only contract in reference to the purchase of this property was an acceptance of the authority given by Matilda J. and Thos. B. Childress in reference to the purchase of this property? A. It was. Q. Have you had considerable experience in the purchase of real estate? A. Well, I have had some. Q. Do you, or not, own considerable rental property in the city of Nashville? A. I own several houses here. Q. What do you know of the custom in the city of Nashville with reference to compensation to real estate agents in a case of sale of property, as to who pays the agent? A. I think there is a custom that the one that sells pays the commission, and I think I have had some experience, and that I am somewhat of an expert in the case. Q. State whether or not you were anxious to purchase this property, and what propositions, if any, were made to defendants on your behalf in reference to waiting and giving them time to perfect the title to the premises. A. I was very anxious to get the property. I went to Mr. Maddux and asked him to write to the defendants to try and have it perfected. Now, Mr. Maddux can say what answer they gave him. I was willing to wait, but they haven't done anything towards it."

#### Recross examination.

"Q. Mrs. Simon, why were you anxious to close this deal? A. Because I thought it was a good investment. Q. Didn't you think it was a bargain? A. Yes, I thought it was a bargain and good investment."

Mrs. Simon repeats several times that plaintiff did not represent her, but on the contrary represented the Childresses, and it is clear that his mission to St. Louis on May 28, 1909, was not to beat down the price of the property, but rather to obtain the written authority, including the terms of sale, so that no controversy might arise thereafter. The mere fact that plaintiff had represented Mrs. Simon in connection with renting one of her buildings some three years before is insufficient to justify an inference that he represented her as an agent in purchasing this property, especially in view of her positive statement to the contrary. Fraud and bad faith in dealing is to be shown in the facts and circumstances in evidence, and may not be presumed nor will it suffice to determine it alone on conjecture and suspicion. There must be substantial evidence tending to prove it in order to sustain a finding of bad faith. Obviously the court erred in submitting this question to the jury, for there is no substantial evidence in the record tending to prove that plaintiff represented Mrs. Simon as her agent at the time.

The judgment should therefore be reversed and the cause remanded, with direction to the trial court to enter judgment for plaintiff for \$1,000, the amount of the commission stipulated for in the contract, and \$49.75, the amount paid out for the abstract of title, together with 6 per cent. interest on the

entire amount from the date of the institution of this suit. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

J. W. JENKINS SONS MUSIC CO. v. SAGE  
(CHICAGO, R. I. & P. R. CO., Garnishee).  
(No. 11215.)

(Kansas City Court of Appeals. Missouri.  
Nov. 2, 1914. Rehearing Denied Nov. 23,  
1914.)

1. GARNISHMENT (§ 82\*)—VENUE—STATUTES.

Under Laws 1911, p. 141, §§ 1, 2, providing that no wages shall be garnished before personal service on the defendant, unless as to cities of over 100,000, the suit is brought in the city where defendant resides or the debt is contracted and the cause of action accrues, and that the petitioner's statement and the writ or summons of garnishment shall affirmatively show where defendant resides and where the cause of action accrues, a garnishment proceeding, in which there was no personal service on defendant, based on a cause of action which accrued in one of such cities, should be brought therein.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 148; Dec. Dig. § 82.\*]

2. GARNISHMENT (§ 82\*)—STATEMENT—RESIDENCE OF DEFENDANT.

Under such provisions, a contract filed as a statement before a justice of the peace, in an action where there had been no personal service on defendant, giving the name of the defendant, as purchaser, recited as "of Dwight, county of Morris, state of Kansas," in the absence of any showing as to what the summons contained, would be treated as though defendant did not reside in the city and county in which the cause of action accrued.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 148; Dec. Dig. § 82.\*]

3. JUSTICES OF THE PEACE (§ 141\*)—APPEAL—JURISDICTION OF CIRCUIT COURT—DISMISSAL OF CASE.

Judgment was rendered against a garnishee in a justice's court, on appearance, though the justice had no jurisdiction of the cause of action against the principal defendant, and the garnishee appealed, but filed no notice of appeal. In the circuit court, the plaintiff moved to dismiss the appeal because of want of a notice of appeal, and the garnishee moved to dismiss the case, because the justice had no jurisdiction and the circuit court could have none. *Held*, that the garnishee need not give notice of appeal to raise the question of want of jurisdiction, and that the case would be dismissed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476; Dec. Dig. § 141.\*]

Appeal from Circuit Court, Jackson County; Kimbrough Stone, Judge.

Action by the J. W. Jenkins Sons Music Company against M. V. Sage, and the Chicago, Rock Island & Pacific Railroad Company, garnishee. Judgment against the garnishee in justice's court, and from the denial of jurisdiction on appeal plaintiff appeals. Affirmed.

Stubenrauch & Hartz, of Kansas City, for appellant. Sebree, Conrad & Wendorff, of Kansas City, and Paul E. Walker, of Topeka, Kan., for respondent.

ELLISON, P. J. This action was begun before a justice of the peace at the city of Independence and is on a contract for the purchase of a piano whereby a balance of \$63 is claimed. No service was had upon the defendant, but the railway company was summoned as garnishee on the claim that it owed defendant certain money. The company answered admitting it owed defendant \$84.

Judgment was rendered against the company as garnishee, and it appealed to the circuit court. In the latter court plaintiff moved to dismiss the appeal for the reason that no notice of appeal was given; and the garnishee moved to dismiss the case, or strike it from the docket, on the ground that the justice of the peace, and consequently the circuit court, had no jurisdiction of the case. The trial court overruled the motion to dismiss the appeal and sustained the motion denying jurisdiction. There was no service on defendant or appearance by him. Plaintiff's action and garnishment is founded on the contract for the piano which was filed with the justice as plaintiff's statement of his cause of action. It recites that the contract was made in Kansas and that it was to be governed by the laws of that state. It also provided that installment payments on the contract were due and payable at plaintiff's place of business in Kansas City, Mo. These facts appeared upon the face of the proceedings before the justice, and the question is: Had he jurisdiction under the provisions of the following statute (Laws 1911, p. 141):

"Section 1. No wages shall be attached or garnished before personal service is had or obtained upon the defendant, unless the suit be brought in the county where the defendant resides, or in the county where the debt is contracted and the cause of action arose or accrued, and in cities over one hundred thousand inhabitants in the 'city' where the defendant resides or the debt is contracted and the cause of action accrued: Provided, the petition or statement filed in the cause and the writ or summons of attachment or garnishment shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose.

"Sec. 2. Wages earned out of this state, and payable out of this state, shall be exempt from attachment or garnishment in all cases where the cause of action arose or accrued out of this state, unless the defendant in the attachment or garnishment suit is personally served with process; and if the writ of attachment or garnishment is not personally served on the defendant, the court issuing the writ of attachment or garnishment shall not entertain jurisdiction of the cause, but shall dismiss the suit at the cost of the plaintiff. In all actions commenced in this state in which it is sought to garnish or attach wages, the petition or statement filed in such cause and the summons or writ of garnishment or attachment shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose."

[1] As there was no personal service on the defendant, his wages cannot be attached or garnished unless the suit is brought in

the county or city where the defendant resides, or in the county or city where the debt was contracted and the cause of action accrued. Here, it is conceded the cause of action accrued in the city of Kansas City (35 Cyc. 548; *Durham v. Spense*, L. R. 6 Exch. 46), and the action, under the specific direction of the statute, should have been brought in that city.

[2] It will be observed that the statute requires that the plaintiff shall affirmatively show in his statement and in the writ of summons the place where the defendant resides and where the debt is contracted and where the cause of action arose. The contract, which is plaintiff's statement, in giving the name of the defendant as purchaser does recite that he is party of the second part "of Dwight of the county of Morris, state of Kansas." If that be allowed to be sufficient so far as the statement is concerned, there is no showing what the summons contained. Plaintiff has omitted that writ from his record altogether. We must therefore treat the case, for present purposes, as though defendant did not reside in Kansas City or Jackson county.

[3] It was not necessary in the state of the record that the garnishee should have given notice of appeal in order to raise the question of jurisdiction.

It follows the trial court correctly ruled that the justice court and it on appeal, had no jurisdiction, and the judgment is affirmed. All concur.

# HOLT v. HAMILTON-BROWN SHOE CO. (No. 13879.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Dec. 22, 1914.)

## 1. MASTER AND SERVANT (§ 286\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a workman's suit for injuries by the employer's negligence in requiring him to work about an unguarded rip saw, in violation of Rev. St. 1909, § 7828, the question whether the saw could have been safely and securely guarded was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

## 2. NEGLIGENCE (§ 136\*)—QUESTIONS FOR JURY.

Contributory negligence is for the jury where the question is one about which reasonable minds may differ.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

## 3. MASTER AND SERVANT (§ 289\*)—ACTIONS FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Where a workman using an unguarded rip saw detached the power and waited the usual time for it to stop, and in the dim light thought it had done so, whereupon he reached for a strip beyond the saw, and at the instant the electric light diminished so as to render him unable to see, and in drawing his hand back it came in contact with the still moving

saw, his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

## 4. NEGLIGENCE (§ 4\*)—"ORDINARY CARE."

"Ordinary care" is such care as an ordinarily prudent person would be expected to exercise in the circumstances of the case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

## 5. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT—TRIAL—INSTRUCTIONS.

An instruction, submitting the matter of the employer's omission of care to furnish adequate light in the place in which a rip saw was used, was not erroneous as not supported by the evidence because the injured workman testified that the light was ample for the task of ripping, where he also testified that, after detaching the power and waiting the usual time for the saw to stop, he did not discern that it was moving because of the dim light.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Action by Thomas N. Holt against the Hamilton-Brown Shoe Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Holland, Rutledge & Lashly, of St. Louis, for appellant. Leahy, Saunders & Barth, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages on account of personal injury received through the negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff lost a finger by means of a rip saw installed in defendant's basement, and sues under the statute requiring dangerous machinery to be guarded.

[1] It appears plaintiff was a carpenter in defendant's employ, and among other things worked about a rip saw in the basement. The rip saw was installed in a table about 4 feet wide and 12 feet long and propelled by motive power attached. The table and rip saw stood in the basement of defendant's building, which was more or less dark. It appears that the basement was lighted by two small windows about 40 feet distant from the work table and one incandescent electric light suspended from the ceiling some 3 or 4 feet from the saw. The evidence tends to prove that the light was poor, but plaintiff said it was sufficient to enable him to see when operating the saw. At the time of his injury and immediately before, plaintiff had been using the saw to rip a number of strips, and finished that task in so far as the ripping was concerned. Thereupon he pulled the lever through which the power was disconnected and waited for a minute and a half or two minutes for the saw to

stop. The saw, it is said, was circular in character and about 14 inches in diameter. It was installed about the center of the top of the table, and as much as 5 inches of it protruded above the top. When in operation, of course, it revolved rapidly, and the evidence is that it usually stopped and became stationary about a minute or a minute and a half after the power was disconnected. After disconnecting the power, plaintiff says he waited the usual length of time for the saw to stop, looked at it, and, in the dim light, thought it had done so, whereupon he reached beyond to take up from the table the strip which he had ripped off, and at the instant the incandescent light diminished so as to render him unable to see the saw, and, in drawing his hand backward with the strip, it came in contact with the teeth of the saw still in motion and severed his finger.

The petition describes the situation of the saw in the basement, the poor light afforded, and proceeds to charge that defendant was negligent in requiring plaintiff to work about the unguarded rip saw in a basement so insufficiently lighted. Of course, the gravamen of the charge pertains to the violation of the statutory duty with respect of such matters, but the insufficient light is interwoven therewith as if to augment the negligent conduct of defendant. The statute declared upon is as follows:

"The belting, shafting, machines, machinery, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments." Section 7828, R. S. 1909.

There is an abundance of evidence in the record tending to prove that defendant could have installed a guard, known as a "scissor hinge," over the saw, which would have prevented the injury complained of, and yet not have interfered with its efficiency as a rip saw. No such guard was installed, and, indeed, no guard whatever, for that matter, was provided therefor. It is argued the judgment should be reversed because it is said defendant may not be regarded as having violated the statute for that the evidence does not affirmatively disclose the saw could have been "safely and securely guarded" so as to have prevented injury whatever. But, obviously, such is a question for the jury. It is said that any guard to be installed about the saw must leave an unguarded space between the table and the guard above it through which the strip of timber on which the ripping is done should pass, and so much at least as is unguarded entails some risk of injury. But be this as it may, the evidence is that the saw could have been sufficiently and securely guarded so as to have prevented the injury in the instant case, and we regard this as sufficient. Of course, if such a guard

were installed and it appeared plaintiff tucked his fingers beneath the guard and against the saw as suggested in the hypotheses advanced in the argument, another question would arise. Suffice to say, no such question appears in the case, and the jury found the fact to be that the saw could have been safely and securely guarded so as to prevent the injury complained of.

[2-4] But it is argued plaintiff must be declared negligent as a matter of law, for it appears he placed his finger against the teeth of the saw immediately before him. It is true the question concerning this matter is not entirely free from doubt. But if it be one about which reasonable minds may differ, then it is for the jury. See *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770. No one can doubt that the duty devolved upon plaintiff to exercise ordinary care for his own safety while working about the saw, and the question is to be considered with reference to the conduct of an ordinarily prudent man under the same or similar circumstances. It is true plaintiff was familiar with the saw and had operated it frequently before. He admits that he knew it was dangerous and liable to sever a finger permitted to come in contact with it. But he says, too, the saw always theretofore stopped revolving a minute or a minute and a half after the power was disconnected; that on this occasion, having completed the task of sawing, he pulled the lever, disconnected the power, and waited for a minute and a half or two minutes for the saw to stop. The basement was poorly lighted: the two small windows were some 40 feet away and only one incandescent light had been furnished by defendant at the working place. This light, it is said, hung some 3 or 4 feet distant from the saw. Plaintiff says, after waiting a minute and a half or two minutes, he looked at the saw to discern if it were still moving, but because of the poor light was led to believe it had stopped, and thereupon immediately reached forward to pick up the strip from the working table. Simultaneously with reaching forward, the glow of the one incandescent light, which was under defendant's control, suddenly diminished so as to envelop the situation in almost complete darkness for an instant, and as he drew his hand back with the strip he came in contact with the saw, still revolving. We cannot say on these facts, as a matter of law, that no ordinarily prudent man would have done likewise under the same circumstances. Although the case is similar to, it is not identical in principle with, *Kelley v. Calumet Woolen Co.*, 177 Mass. 128, 53 N. E. 182, for there the plaintiff actually groped in the dark amid dangers which beset the place. In other words, in that case the darkness came upon the scene first, and after the incandescent light had gone out plaintiff groped with his hands in the dark in an endeavor to reach the shipper in order to stop the ma-

chine with his left hand, and in this wise was injured through permitting his right hand to come in contact with and be crushed by the quadrant gear. There the machinery was known by the injured party to be in operation and moving at full blast. Upon the going out of the light, he voluntarily put forward his hand in a place of known danger and received his injury. Here the situation was different. The light was normal but dim at the time plaintiff looked at the saw after waiting a sufficient period for it to stop, and, as he says, it appeared to be motionless. Ordinary care would require him to wait a sufficient length of time for the saw to stop, and this he says he did according to the usual course. The light was dim, though normal, at the time—that is, such light as had prevailed all the while—and with its aid plaintiff appears to have made such an observation as an ordinarily prudent person might in the circumstances which prevailed. It is true the saw had not entirely stopped at the time, but it appeared to him as though it had, and thereupon he put forward his hand to pick up the strip beyond it. Simultaneously with this movement, the incandescent light flickered out, and he withdrew his hand with the strip; but in the darkness of the instant brought his finger in contact with the moving saw. There is a principle in the law of negligence available to plaintiff here which proceeds to alleviate the consequence of one's conduct under the stress of shock or surprise produced by the act of defendant at the time. At most, one may not be held to account for more than "ordinary care," and that is such care as an ordinarily prudent person would be expected to exercise in the circumstances of the case. Such care and the conduct of a party in judgment is to be considered with reference to the particular circumstances which obtain at the time, and, if it appear that some change of conditions is suddenly thrust upon him tending to disconcert the senses for the moment, it is competent to reckon with this fact along with the others. In this view, an act which might ordinarily be regarded negligent as a conclusion of law is frequently mitigated or excused in a measure so as to render it a matter for the jury if it appears to have been occasioned under sudden shock or surprise. See *Dutzi v. Geisel*, 23 Mo. App. 676. Here the light suddenly went out simultaneously with plaintiff's reach for the strip, and no doubt this fact tended to disconcert him for the time so as to remove the possibility of deliberation on the best course to pursue. Having advanced his hand to take up the strip, he did so in the dark and withdrew it to the hurt complained of. No doubt, as counsel has well said, the injury came because, forsooth, the body could not respond as quickly as the senses could perceive. We believe the question of plaintiff's contributory negligence was one for the jury.

[5] Plaintiff's second instruction submits the case to the jury as for a violation of the statute and treats conjunctively therewith the matter of insufficient light in the basement. The theory of the instruction is that defendant was remiss in its duty not only in failing to guard the saw but in furnishing plaintiff such unguarded saw with which to work in the poorly lighted basement. The jury were directed thereby, and a verdict for plaintiff was authorized if he could not by the exercise of "ordinary care at the time see that said saw was still revolving, and further believed from the evidence that the defendant failed to use ordinary care to safely and securely guard said saw, and failed to use ordinary care to furnish reasonably adequate light in the place in which said saw was located." It is said that so much of the instruction as submits the matter of defendant's omission of care to furnish an adequate light is erroneous because plaintiff testified as he did that the light, though poor, was sufficient for him to perform the task of ripping the strips. It is argued that this portion of the instruction is not supported by the evidence because plaintiff so testified. But we are not persuaded the judgment should be reversed because of this, for, though plaintiff testified as above stated, he testified, too, that upon looking at the saw, after waiting a minute and a half or two minutes for it to stop, he did not discern it was moving because of the insufficient light. The matter of the sudden diminishing of the light at the time of the injury counts more particularly on the question of contributory negligence and is not to be considered here for the reason it does not appear such occurred through defendant's fault. But no one can doubt that the obligation of ordinary care resting on defendant required it to furnish an adequate light to enable plaintiff to see while operating the saw in ripping the strips and until it had ceased its motion after the power was detached, and this, too, independent of and apart from the sudden diminishing of the light which presently occurred. It may be that, while he was bended over the table feeding the saw in the usual fashion, the light was ample for the task; but, when the ripping process was completed and he stood erect beside the table, as the saw gradually lessened its speed, it would seem the obligation to furnish adequate light continued so that he might see whether it stopped or not. As to this feature of the case, the evidence, apart from that concerning the sudden darkness, amply supports the instruction, and we regard it well enough. However, the finding with respect to the light at that time is by the conjunction "and" required in addition to the finding of facts under the statute which affixes liability on defendant. At most, such matter complained of is but the finding of an additional fact of negligence in conjunction with the liability on the statute and not

as a separate predicate of liability entirely. This being true, defendant may not complain.

There are other questions suggested in the brief, but we do not regard them as possessing sufficient merit to warrant discussion in the opinion. The arguments concerning them have been considered and are overruled.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

ROGERS v. STAG MINING CO. et al.  
(No. 1385.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914. Rehearing Denied Dec. 31, 1914.)

1. CORPORATIONS (§ 216\*) — LIABILITY OF STOCKHOLDERS—LAW GOVERNING.

While the liability of stockholders for unpaid obligations of the corporation is contractual, the laws of the state authorizing the corporation to be formed enter into and become a part of the contract, and the liability imposed must be determined by the laws of such state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. § 216.\*]

2. CORPORATIONS (§ 239\*) — LIABILITY OF STOCKHOLDERS—STATUTORY AND CONSTITUTIONAL PROVISIONS — "DUES" — "CONTRACTED" — "ACCURED."

Under Const. art. 12, § 9, providing that dues from private corporations shall be secured by such means as may be prescribed by law, but that no stockholder shall be individually liable in any amount above the amount of stock owned by him, Rev. St. 1909, § 3004, providing that if an execution shall be issued against a corporation and there cannot be found any property whereon to levy it may be issued against any of the stockholders to the extent of the unpaid balance of the stock owned by them, and section 3006, providing that if any corporation dissolves leaving debts unpaid a suit may be maintained against the stockholders without joining the corporation, stockholders are liable on judgments against the corporation for torts as well as judgments on contract; especially in view of the use of the word "dues," which, prior to the adoption of the Constitution, had been construed to include tort damages as well as contract debts, and the omission of the words "contracted" or "accrued," which, when applied to debts, at least in penal statutes, limits them to those arising on contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 919-922; Dec. Dig. § 239.\*]

For other definitions, see Words and Phrases, First and Second Series, Dues; Accrue; Contracted.]

3. CORPORATIONS (§ 232\*) — LIABILITY OF STOCKHOLDERS — PAYMENT FOR STOCK IN PROPERTY.

Rev. St. 1909, § 8339, as amended by Acts 1911, p. 148, requiring the articles of agreement of corporations to state, among other facts, that the authorized capital stock has been paid in money or property of the full value thereof, and providing that, if any part of the capital stock is paid in property, an itemized description of the property setting out the cash value of the items shall be given, and that no stock shall be issued unless actually paid for at its par value in cash or in property of a cash value equal to the par value, does not preclude a judgment creditor of the corporation, seeking

to enforce the liability of stockholders, from showing that property received in payment of stock was not of the value stated in the articles of agreement; especially in view of Const. art. 12, § 8, and Rev. St. 1909, § 2981, prohibiting the issuance of stock or bonds except for money, labor, or property actually received.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.\*]

4. CORPORATIONS (§ 232\*) — LIABILITY OF STOCKHOLDERS — PAYMENT FOR STOCK IN PROPERTY.

Rev. St. 1909, §§ 2975, 3340, requiring a copy of articles of incorporation to be filed with the Secretary of State and recorded in the county where the corporation is located, does not give such notice to all the world of the facts stated in the articles of incorporation as to prevent one seeking to enforce a judgment for wrongful death against the stockholders from showing that property received in payment for stock was not of the value stated in the articles of incorporation, within the rule that a person dealing with a corporation, knowing that it has accepted certain property in full payment of stock, is estopped to claim that the stock is not fully paid up.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.\*]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Suit by Ada Rogers against the Stag Mining Company and others. From a judgment for defendants on demurrer, plaintiff appeals. Reversed and remanded, with directions.

Frank H. Lee, Ray Bond, and R. H. Davis, all of Joplin, for appellant. Walden & Andrews, of Joplin, and H. W. Currey and Geo. V. Farris, both of Webb City, for respondents.

STURGIS, J. This is a suit to enforce against defendants Yoder and Larkin, as original stockholders in the defendant Stag Mining Company, a corporation, the collection of an unsatisfied judgment against that corporation. A demurrer to the petition was sustained.

The material facts admitted by the demurrer are these: That the defendant Stag Mining Company is a Missouri corporation having a capital stock of \$48,000; that plaintiff obtained a judgment against it for negligence resulting in the death of her husband; that an execution was issued thereon and returned not satisfied, the defendant corporation being insolvent; that defendants Yoder and Larkin are two of the three original incorporators of said company and have been and are large stockholders therein; that the entire capital stock of said corporation, as stated and set forth in the articles of incorporation, was paid up in property, to wit, a mining plant and lease, therein described and valued at the entire capital stock, but, in fact, not worth over \$1,000, as the defendant stockholders well knew.

Two questions are thereby presented for our consideration: First, whether a judg-

ment creditor can avail himself of the remedy provided against stockholders for failure to pay their stock subscriptions when the judgment arises from tort. Second, whether, under our present statute (Acts of 1911, p. 149), the capital stock being paid in property at a fixed valuation and so stated in the articles of incorporation, a judgment creditor can show that the property is not of the value fixed, and thereby that the stock subscription is not fully paid. It is just to remark that we are much assisted in the proper solution of these propositions by the able and exhaustive briefs of counsel for either side wherein the authorities pro and con are ably and exhaustively collected, discussed, and distinguished.

[1] As to the first of these propositions, it will be found that most of the authorities agree that the proper solution depends largely on the intent and wording of the constitutional and statutory provisions of the various states imposing liability on the stockholders for unpaid obligations of the corporation. We may grant that such obligations are contractual and grow out of the stockholders' voluntary subscription of stock. Yet the laws of the state authorizing the corporation to be formed and to exist enter into and become a part of that contract, and the liability imposed must be determined by the laws of such state.

[2] An early and leading case on this subject, and one cited in many of the authorities hereinafter referred to, is *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214, which arose under the statute of 1845, making stockholders liable for the "debts" of the corporation "then existing" and thereafter "contracted" for failure to publish an annual notice showing "the existing debts of the corporation." The demand sued for grew out of a tort of the corporation. It will be first noted that this statute does not deal with unpaid stock subscription, but imposed a penalty on the stockholders for failure to publish the required notice. The court held this statute to be penal and not remedial, and this, as we shall see, is an important distinction. The court further held that the statute then under consideration, being strictly construed, by its terms imposed a liability for a limited kind of demands only, to wit, those arising from contract and not for tort. In discussing this matter, the court said:

"The question, however, here is: What class of demands is embraced within the words 'debts contracted'? Our Legislature did not go the length which others have in fixing the liabilities of the stockholders of these manufacturing corporations. They did not enact, as in many other states it is enacted, that the stockholders should be responsible for every liability established against the corporation, and which its assets turned out insufficient to meet. Such statutes as these, creating a general and determined liability not dependent on circumstances, becoming as it were a part of the very essence of the charter, may reasonably admit of a very different construction from a law which seems to recognize the general principle

of individual irresponsibility subject to a very limited exception, and only ventures to hold out such responsibility as a penalty for a failure on the part of its managers to perform certain acts directed in the law and supposed to furnish some advantages to the public."

The court then distinguishes that case from *Carver v. Braintree Mfg. Co.*, 2 Story, 432, Fed. Cas. No. 2,485, holding that the stockholders' liability extends to tort debts, largely because of a different wording of the Massachusetts statute making it a remedial one. The *Cable v. McCune* Case, *supra*, was followed in *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126, construing in a similar manner a then statute of this state imposing on the directors of a corporation liability, with some limitations, for debts "existing and contracted" in excess of the capital stock of the corporation. The court again remarked:

"It is very clear, from the language and obvious purpose of the section, that the debts, which must exceed in amount the capital stock paid in to subject the directors to liability, must be debts voluntarily created by them or under their authority. \* \* \* The language of the section seems to apply only to one kind of liabilities of the corporation, and to make the directors liable to pay the same debts which constitute debts of the company, in excess of the capital stock paid in, and no other. The claim of the plaintiffs is not a debt voluntarily created by the directors or under their authority, and is excluded by its character from the number of those for which the directors may be personally liable."

Since these decisions we have adopted a new Constitution and new statutes, and it is important to note the new provisions. Section 9, art. 12, of our Constitution, reads:

"Stockholders, Extent of Liability.—Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her."

The statute particularly invoked in this suit, enacted to carry out this provision of the Constitution, provides:

"If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned: Provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice, in writing, to the person sought to be charged; and, upon such motion, such court may order execution to issue accordingly; and provided further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned." R. S. 1909, § 3004.

Section 3006, R. S. 1909, provides that if any corporation dissolves, leaving "debts unpaid," a suit may be maintained against the stockholders without joining the corporation, and, in case of judgment being paid by one or more stockholder defendants, he, or they, shall have an action for contribution against the other stockholders.

The case of *Carver v. Braintree Mfg. Co.*,

2 Story, 432, Fed. Cas. No. 2,485, written by one of our most eminent jurists, which is cited and distinguished in the Cable v. McCune Case, supra, construed a statute providing that "every person who shall become a member of any manufacturing corporation \* \* \* shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation," as is pointed out in Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038, and Justice Story, holding this to be a remedial statute, construes the word "debts" as equivalent to the word "dues," and the word "contracted" as equivalent to the word "incurred," and thus construed to be broad enough to include demands based on torts. Other courts, including those of Massachusetts, have since held that this is a strained construction put on these words and in construing similar statutes have declined to follow that case.

Our Supreme Court, in the Cable v. McCune Case, supra, cited and followed the case of Heacock v. Sherman, 14 Wend. 58, a New York case, which construed a statute making the stockholders liable "for all debts contracted by the said corporation" to the amount of the stock he may hold "at the time the debt accrued," and that any person having "any demand" might sue such stockholders individually. That court said that the word "demand" was broad enough to include damages arising from tort, but that the whole statute shows that only "debts contracted" were intended to be included, and that it did not cover damages arising for tort. So that both the cases thus cited by our Supreme Court hold that the word "dues" and "demands" are broad enough to include damages for torts and should be so held unless restricted by other words and the context. Our Supreme Court also said, in the case just cited, that it did not perceive any reason for a distinction in the kinds of liabilities imposed on stockholders; and it is apparent that the court held that only contract debts were included in the statute then construed, because the same was penal and so limited the liability by its terms.

Is it not reasonable to suppose, therefore, that the framers of the new Constitution had in mind these decisions of our Supreme Court, and chose the very word "dues," which it was held would include tort damages as well as contract debts, and omitted all limiting words such as "contracted" or "accrued," which, when applied to "debts," at least in penal statutes, limits the same to those arising ex contractu? This constitutional provision is mandatory on the Legislature, and we do not think the Legislature has in any manner narrowed the "dues," which, by the Constitution, are to be secured by the individual liability of the stockholders by the statutory provisions above quoted. The statute most in point broadly provides that,

when judgments cannot be collected by execution, the return of any execution against a corporation unsatisfied gives a basis for an order for execution against the stockholders to the amount unpaid on their stock. This certainly makes no distinction between judgments founded on torts and those founded on contract. The word "any" covers the whole field of executions on judgments. Nor do we think the word "debts," used in section 3006, supra, in reference to the liability of stockholders of dissolved corporations, having no restrictive words limiting same to those arising ex contractu, ought to be so construed, although this section is not here specially involved.

There are a number of decisions supporting these views in construing similar constitutional and statutory provisions of other states. The case of Rider v. Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513, arose under a constitutional provision almost exactly like ours, except that the liability of a stockholder is for an amount equal to his stock over and above any amount unpaid thereon. The court held this provision to be remedial and not penal, and that the word "dues" includes judgments for torts. The court concedes that where the liability is imposed as a penalty for the omission to perform some act required by statute, as was the case in Cable v. McCune, supra, the weight of the authorities is the other way.

This case is followed in Flenniken v. Marshall, 43 S. C. 80, 20 S. E. 788, 28 L. R. A. 402, arising under an identical constitutional provision, and it is there held that the constitutional provision requiring the "dues" of a corporation to be secured by stockholders' liability is mandatory, and that the statutes enacted to carry out this provision, though using the word "debts," will be held to have used it in a broad sense to include damages for torts as well as debts by contract.

In Powell v. Oregonian Ry. Co. (C. C.) 36 Fed. 726, 2 L. R. A. 270, it was held that a statute making a stockholder liable for the "indebtedness" of the corporation to the amount of unpaid stock is remedial and broad enough to cover a judgment founded on tort.

Henley v. Myers, 76 Kan. 723, 93 Pac. 168, 173, 17 L. R. A. (N. S.) 779, is a well-considered case arising under a constitutional provision using the word "dues" and very similar to ours and a statute enacted thereunder imposing on stockholders liability "to the creditors" for any unpaid subscriptions, and, in addition thereto, an amount equal to the par value of the stock owned by them, such liability "to be considered as asset of the corporation in the event of insolvency." The court noted the apparent conflict in the authorities and said:

"Manifestly the question whether a stockholder must respond to a demand of the character here involved (tort) depends upon the language of the constitutional or statutory provisions in

virtue of which the liability is asserted. The decisions for the most part turn upon the force to be given to the word 'debt.' While the statute under consideration does not use that word, much the same effect is produced by its employment of the term 'creditors' to describe those for whose benefit the remedy is furnished. (Citing cases.) \* \* \* Nearly all of these cases are controlled by one or the other of these two reasons: (1) That the statute to be construed is penal, the stockholder's liability being incurred only as a penalty for some act or omission of the directors, and on that account a strict construction is required. (2) That the statute uses some expression beyond the mere word 'debt'—for instance, 'debt contracted'—indicating that only contractual obligations are within its purview. Neither of these reasons can have any application here. The statute quoted is clearly remedial, and, beyond the bare use of the word 'creditors,' there is nothing in its language to suggest a limitation of its benefits to any particular class of claimants; indeed, the clause making the double liability an asset of the corporation tends strongly against such restriction."

The court then cites and approves the opinions of the Supreme Court of Ohio in *Rider v. Fritchey*, supra, and of South Carolina in *Flenniken v. Marshall*, supra. It also distinguishes the case of *Ward v. Joslin*, 105 Fed. 224, 44 C. C. A. 456, affirmed in 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093, cited by these respondents, because of the different reading of the statute there involved and because this federal case involves a claim based on an ultra vires act of the corporation. On rehearing, the court in the *Henley Case*, supra, put its decision on the broad ground that the statutes of Kansas, two sections of which are very similar to our sections 3004 and 3006, supra, while using the terms "debts," and "creditors," must be interpreted under the constitutional mandate that "dues of corporations shall be secured," etc., and be held to include judgments founded on tort. See, also, *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668.

There is much authority for holding that where the liability imposed on stockholders, as here, goes no further than to enforce unpaid stock subscriptions, the remedy is remedial, the amount collected is an asset of the corporation and inures to the benefit of all judgment creditors whether based on tort or contract. *Thompson, Corporations*, vol. 4, § 4845, states the rule as to the liability of stockholders for unpaid stock subscriptions in the following language:

"It ought to be conceded that, in actions to enforce the stockholder's statutory liability for any amount due on his stock subscription, the term 'debt' or 'indebtedness' should include a judgment against a corporation in an action for tort."

The rule is stated thus in 10 Cyc. 684:

"A judgment against a corporation is certainly a debt of the corporation without reference to the question whether it was founded upon a tort or upon a contract. Hence where it is sought merely to subject what remains unpaid by the shareholder in respect of his shares, it is clear that any demand against the corporation which has been reduced to a judgment will

be available as a basis of such a proceeding without reference to the nature of the original claim. If it is merged in the judgment it becomes a 'debt of record,' in the language of the common law; and upon this point there will be no difference of judicial opinion."

See, also, *In re Putman* (D. C.) 198 Fed. 464.

The defendants have cited a number of cases, some of which have been noted, as holding a contrary view. *Bohn v. Brown*, 33 Mich. 257; *Tilley v. Coykendall*, 85 Misc. Rep. 164, 71 N. Y. Supp. 457; *Ward v. Joslin*, 105 Fed. 224, 44 C. C. A. 456; *Doyle v. Kimball*, 23 Misc. Rep. 431, 52 N. Y. Supp. 195; *Schrader v. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564; *Brown v. Trail* (O. C.) 89 Fed. 641; *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; *Child v. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Savage v. Shaw*, 195 Mass. 571, 81 N. E. 303, 122 Am. St. Rep. 272, 12 Ann. Cas. 806; *Avery & Son v. McClure*, 94 Miss. 172, 47 South. 901, 22 L. R. A. (N. S.) 256, 19 Ann. Cas. 134; *Old Colony Boot & Shoe Co. v. Adams Co.*, 183 Mass. 557, 67 N. E. 870, 871; *Esmond v. Bullard*, 16 Hun (N. Y.) 65, 68. Several of these cases are discussed and distinguished in the cases heretofore cited in this opinion. Space forbids that we should discuss and distinguish each one separately. A reading of the cases will show that many of them are founded on statutes which are penal and impose on the stockholder a liability over and above his stock subscription for some dereliction of the corporation or its officers. Most of them will be found to be based on statutes which, by the use of certain terms, show that the same is intended to embrace only a certain kind of liability and in favor of contract creditors. In many of them the amount collected from the stockholders is not an asset of the corporation, but goes directly or indirectly to a designated class of creditors. This point is therefore ruled in favor of the plaintiff.

[3] The second point for our consideration must also be ruled in favor of the appellant. We do not think our laws contemplate or permit a corporation to be formed with a fictitious capital stock merely by designating in the articles of incorporation that the capital stock consists of property of a named valuation. Section 8, art. 12, of our Constitution, reads:

"No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Provision is then made for the method of increasing the stock or bonded indebtedness of corporations.

Section 2981, R. S. 1909, provides:

"The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received, \* \* \* but the shares of stock or bonds arising from such increase shall only be disposed of for money paid, labor done or money or property

actually received. All fictitious issues or increases of stock or of bonds of any corporation shall be void."

Under these constitutional and statutory provisions, our courts have in numerous cases held that corporations have no power to accept property at a fictitious value in payment of its capital stock and thereby release stockholders from paying creditors the difference between the value of the stock and the amount actually paid whether in money or property at a fair valuation. Our laws have never favored the formation of corporations with a large capital stock on paper but paid for in property at a valuation which gives it little or no real assets. We have steadily adhered to the doctrine that the capital stock of the corporation is a trust fund which must be honestly paid in and administered by those in control. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Van Cleve v. Berkey*, 143 Mo. 109, 130, 44 S. W. 743, 42 L. R. A. 593, and cases cited. The court there added:

"In short, that it is the duty of the stockholder and not of the creditor to see that it is so paid. Hence, the inquiry in a case between the creditor and a stockholder, when property has been paid in for the capital stock of a corporation, is not whether the stockholder believed or had reason to believe that the property was equal in value to the par value of the capital stock, but whether, in point of fact, it was equivalent."

We have serious doubts whether, under the mandatory provision of our Constitution, the Legislature has power to provide that the capital stock of a corporation may be paid in property at a fixed valuation regardless of its real value. *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 635, 69 Am. St. Rep. 668; *Security Trust Co. v. Ford*, 75 Ohio St. 322, 79 N. E. 474, 476, 8 L. R. A. (N. S.) 263. We certainly should not impute to it an intention to do so unless forced thereto by the plain provisions of some legislative act. The Acts of 1911, p. 148, amending section 3339, R. S. 1909, which is claimed to accomplish this result, provides:

"The articles of agreement shall set out:  
\* \* \* The number of shares into which it is divided, and the par value thereof; that fifty per cent. of the authorized capital stock thereof has been in good faith subscribed and actually paid up in lawful money of the United States or in property of the full value thereof, and is in the custody of the persons named as the first board of directors or managers; \* \* \* provided, that if any part of the capital stock is paid in property, the articles of agreement must give an itemized description of such property, setting out the cash value of each item thereof, and such itemization shall show: (a) If such property be real estate, the exact description by metes and bounds and location of such real estate, and the actual cash value of each tract; (b) if such property be personal property, such itemization shall give the location of each class of personal property and the actual cash value of each class of such personal property. No stock shall be issued by the corporation, except such as is actually paid for at its par value, in cash, or in property of a cash value equal to the par value of the stock. All stock of the corporation, not subscribed and

paid for at the time of its organization, may be sold at its par value by said corporation and the officers of said corporation shall, upon the completion of the sale of each one-fourth of the unsubscribed stock thereof, report to the secretary of state the amount of stock sold and whether the same has been sold for cash or for property and the value and itemization thereof, as provided herein for the articles of agreement, and such report shall be sworn to by all of the officers and directors of such corporation before some officer of this state having a seal." The italics are ours, of course.

We fail to see anything in this amendment indicating an intention to permit property to be taken at a fictitious value merely because described in, and the value at which it is taken set forth in, the articles of incorporation. It reads to the contrary. It is more likely that the Legislature, knowing the proneness of stockholders to pay for their stock in property at an inflated valuation, required that when so paid the property and value should be given, so as to more effectually hold them to their liability for overvaluation. *Trust Co. v. McMillan*, 188 Mo. 547, 567, 87 S. W. 933, 107 Am. St. Rep. 335.

[4] Defendants contend that as our statutes, sections 2975 and 3340, R. S. 1909, provide that a copy of the articles of incorporation shall be filed with the Secretary of State and recorded in the county where the corporation is located, such record gives constructive notice to all the world of the fact that the stock is fully paid in property of the value given. Defendants then rely on a line of cases holding that where a person deals with a corporation, knowing that it has accepted certain property in full payment of stock, he is estopped to claim that the stock is not fully paid up. *Berry v. Rood*, 168 Mo. 316, 334, 67 S. W. 644; *Trust Co. v. McMillan*, 188 Mo. 547, 567, 87 S. W. 933, 107 Am. St. Rep. 335. We do not find any statutory provision making these records notice to the world of the facts therein stated as is usual in the various recording acts. It is by virtue of statutes that such records are made constructive notice taking the place of the actual notice underlying the doctrine of the cases cited. We do not see how such records could give notice that the value stated and sworn to is a fictitious one. Much actual investigation would have to be made to obtain that knowledge. *Security Trust Co. v. Ford*, 75 Ohio St. 322, 79 N. E. 474, 477, 8 L. R. A. (N. S.) 263. It is said in *Trust Co. v. McMillan*, supra, that persons dealing with corporations have a right to assume, in the absence of actual knowledge to the contrary, that the stock is fully paid for in money or money's worth. Estoppel is based on actual knowledge of the fact, or such lack of knowledge as comes from closed eyes and is equivalent to actual knowledge, or constructive knowledge made so by law. We also find that it is provided in the Acts of 1911, above referred to, that the stock of a corporation may be sold for property after

the articles are recorded and a report then made to the Secretary of State; so that, in such case, there would be no record, outside of the report to the Secretary of State, showing the property or its value. We think it would be extremely harsh to apply this doctrine of estoppel to a widow, whose claim arises from defendants' negligence resulting in her husband's death.

The case will therefore be reversed and remanded, with directions to set aside the judgment on demurrer and overrule the same and proceed in accordance with this opinion.

ROBERTSON, P. J., and FARRINGTON, J., concur.

# LANDRETH MACHINERY CO. v. RONEY et al. (No. 1206.)

(Springfield Court of Appeals. Missouri.  
Dec. 12, 1914.)

## 1. MECHANICS' LIENS (§ 139\*)—STATEMENT—SUFFICIENCY.

A mechanic's lien statement which listed the articles for which the lien was claimed under their trade-names, accompanied by a statement that they were used in the mill upon which the lien was claimed, was sufficient.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 234-236; Dec. Dig. § 139.\*]

## 2. MECHANICS' LIENS (§ 50\*)—AMOUNT OF CLAIM—DELIVERY CHARGES.

A mechanic's lien claimant is not entitled to a lien for express charges and car fare, where there was no evidence that those charges became a part of the charges for items sold to be used in the structure, or that the buyer agreed to pay the delivery charges.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 47; Dec. Dig. § 50.\*]

## 3. MECHANICS' LIENS (§ 157\*)—STATEMENT—INCLUSION OF IMPROPER ITEMS.

The inclusion of such charges in the lien statement does not render the statement void; since the claimant might become entitled to a lien therefor on proof connecting them with the other items.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268-274; Dec. Dig. § 157.\*]

## 4. MECHANICS' LIENS (§§ 45, 157\*)—STATEMENT—AMOUNT OF CLAIM.

In a statement for a mechanic's lien against a mine mill, an item for wrench, tape, and asbestos wicking should be disallowed, but its presence does not make the statement void.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 48, 268-274; Dec. Dig. §§ 45, 157.\*]

## 5. FIXTURES (§ 15\*)—IMPROVEMENTS BY TENANT—MINE MILL.

Under a mining lease giving the lessee the right to erect a mill and other necessary buildings on the premises, and to remove them at or before the termination of the lease, the mill is personal property.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 23-29; Dec. Dig. § 15.\*]

## 6. MECHANICS' LIENS (§ 198\*)—PRIORITY—UNRECORDED CONDITIONAL SALE.

A contract whereby a mine mill was sold to a lessee to be erected on the leased premises, the title to the mill to remain in the seller until a certain sum had been paid out of the

profits of the mine, and then to be the joint property of both parties, where the mill was personal property under the terms of the lease, is one for the conditional sale of personal property, which is not valid against a mechanic's lien creditor, unless recorded as required by Rev. St. 1900, § 2880.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348-355; Dec. Dig. § 198.\*]

## 7. APPEAL AND ERROR (§ 671\*)—QUESTIONS PRESENTED—RECORD.

The effect of a bill of sale by the owner of a mine mill to the claimant of a mechanic's lien cannot be considered on appeal from a judgment allowing the lien, where the abstract of record does not show that the bill was admitted in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action to enforce a mechanic's lien by the Landreth Machinery Company against Thomas J. Roney, administrator of John Dermott, deceased, and others. Judgment for the plaintiff, and defendant Roney appeals. Judgment affirmed conditionally on plaintiff's remission of a portion of the amount of the debt; otherwise reversed and remanded.

Howard Gray, of Carthage, and M. R. Live-ly, of Webb City, for appellant. H. S. Miller, of Joplin, for respondent.

ROBERTSON, P. J. Plaintiff brought this action against H. D. Cornell, H. M. Cornell, and Thomas J. Roney, as administrator of the estate of John Dermott, deceased, to enforce a mechanic's lien on account of certain machinery and supplies alleged to have been sold by plaintiff to the Cornells to be, and which were, used in, and became a part of, a certain mining plant or mill in Jasper county. The parties waived a jury, and, upon a trial, judgment was entered against the Cornells for the amount of plaintiff's claim—\$456.81—with interest, and establishing a lien upon the mining plant and the leasehold interest of the Cornells in the premises upon which the plant was located. The defendant administrator, to protect his claim to the mill, has appealed.

H. D. Cornell owned a mining lease on the premises where the mill was located when the purchases were made from plaintiff, and, while the owner thereof, on July 10, 1911, entered into a written agreement with John Dermott, as follows:

"This agreement made and entered into by and between John Dermott, party of first part, of Webb City, Mo., and H. M. Cornell, agent, of Carthage, Mo., for H. D. Cornell of second part, witnesseth: The said party of the first part (Dermott) agrees to furnish said Cornell, of second part, one complete mining mill plant bought from M. R. Lively, agent, agrees to give him (Cornell) permission to move said plant and mining machinery onto a mining lease now owned by said second party on ten acres of land now known as the Sampson Lease, near Knight's Station, in Jasper county,

Mo. It is further agreed and understood that said plant and mining machinery and houses shall remain the property of said first party until the amount, \$5,000, paid for said mining plant, together with all money advanced by said first party for moving said plant and developing said lease by said Dermott to H. M. Cornell, agent for second party, from the first money received from the profits of said mine, then each one of first and second parties becomes equal owners (but not partners in said mining) in plant and leases. It is further agreed that no partnership exists now or hereafter between first and second parties mentioned and until the full amount has been paid as above stated and receipts have been passed between said first and second parties showing the amounts received and paid in full."

This contract was not filed or recorded in the office of the recorder of deeds. The plant was moved and re-erection completed in the first part of December, 1911, and the Cornells remained in the possession thereof until after this account accrued. The items here involved were sold and delivered in August and September of 1912, and the lien statement was filed and this action commenced December 21st following.

The lien statement alleges that the account sets forth the work and labor done and material furnished to be used in, and which were used for, the repairing, remodeling, and construction of the plant, and then follows an itemized statement of which the following quoted therefrom is sufficient to illustrate:

Aug. 1, 1912.	6 2 in. jlg faucets .....	\$ 6 00
	2 1 1/2 in. do.....	1 50
	2 1 in. C. stopcocks.....	1 20
	1 box 14-16 in. crescent rivets....	85
	Express prepaid .....	45
" 2, "	15 in. iron body globe valve with yoke .....	10 80
"	Car fare .....	25

The account has included in it items, separately stated, for car fare amounting to \$3.20 and for express \$5.55.

[1] When the lien statement was offered in evidence, appellant objected thereto on account of the items for car fare and express, and because it was said to be so indefinite and uncertain as to be insufficient as a lien statement, "in that it does not show the nature of the items, and contains a long list of nonlienable mingled with the other items thereof," not designating what was claimed to be the nonlienable items. The objection was overruled, and appellant excepted. The description of the items in the statement taken in connection with the allegations therein that they were used in the mill was sufficient. *Lumber Co. v. Capron*, 145 Mo. App. 497, 501, 122 S. W. 1085, and *Same v. Watson*, 158 Mo. App. 179, 184, 138 S. W. 690. In the latter case it is held that trade abbreviations may be explained by parol. The account is fully itemized and sufficiently clear to meet the requirements of the statute.

[2] The appellant requested, and was refused, a declaration of law "that the plaintiff is not entitled to recover in this case

for any of the items of car fare or express charges." This instruction should have been given, for the reason that these items, standing alone and of themselves, do not disclose that they became a part of other items that entered into the mining plant by becoming a part of the sale price thereof. *Price v. Merritt*, 55 Mo. App. 640, 645. The court, therefore, should have given this declaration of law, as there was no testimony offered tending to prove that the Cornells agreed to pay the express charges on any of these items, or that they agreed to pay the car fare for their delivery, if such is the fact.

[3] The appellant urges here that the lien statement is void, for the reason that there is included in it this small amount for which no lien should have been allowed. We must overrule this contention, because the items are not commingled with the items for which a lien may be given. They are items that may become a lien if the proof properly connects them with and makes them a part of such items. Under these circumstances their bare presence in the statement does not destroy it. *Johnson v. Barnes*, 23 Mo. App. 546, 549; *Price v. Merritt*, 55 Mo. App. 640, 643; *Uhrich v. Osborn*, 106 Mo. App. 492, 494, 81 S. W. 228; *Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110.

[4] Appellant here for the first time calls attention to items of wrench, tape, and asbestos wicking, amounting in the aggregate to \$1.65, in the lien statement, and also to two items of levers. The first item mentioned should not have been allowed, but, on the authorities above cited, they do not affect the lien statement. As to the levers, parts of machinery being sometimes so designated, there being no specific objection in the trial court to these items, we cannot, in the face of the trial court's finding, say they did not enter into and become a part of the mill or machinery. It appears that at the trial of the case there was no serious contention made by defendant against any of the items, except the car fare and express. Evidently these other items have been noticed since; but, as it is clear that some of them are not proper items, they should be eliminated.

[5] The respondent submits here that the contract between the Cornells and Mr. Dermott, not having been filed or recorded in the office of the recorder of deeds, is void, as to it, under section 2889, R. S. 1909. Appellant asserts that the mill is not personal property. The provisions of the lease concerning the machinery placed thereon are as follows:

"The party of the second part shall have the right to erect and maintain all necessary buildings, scales, and machinery on said land for the purpose of mining, dressing, crushing, cleaning, rendering, and weighing and preparing for market all ores and minerals and other valuable substances, and for no other purpose whatsoever, with the right and privilege of removing all such machinery, buildings, structures, appurtenances, and scales at the expiration of this lease or at such time as second party may de-

termine to abandon the mining of said land herein described."

The mill, under this lease, was personal property. *Richardson v. Koch*, 81 Mo. 264; *Springfield Foundry & Machine Co. v. Cole*, 130 Mo. 1, 31 S. W. 922; *Progress Press Brick & Machine Co. v. Gratiot Brick & Quarry Co.*, 151 Mo. 517, 52 S. W. 401, 74 Am. St. Rep. 557; *Millis v. Scottish Union & National Insurance Co.*, 95 Mo. App. 211, 218, 68 S. W. 1066.

[6] The contract by which the Cornells held this property, not having been filed or recorded, was, by virtue of said section 2889, void as to plaintiff, even though it may have had actual notice thereof. *Collins v. Wilhoit*, 108 Mo. 451, 459, 18 S. W. 839; *Oyler v. Renfro*, 86 Mo. App. 321, 325. The appellant cites us to the case of *Gilbert Book Co. v. Sheridan*, 114 Mo. App. 332, 89 S. W. 555, to sustain the proposition that the contract between Cornells and Mr. Dermott does not come within the terms of that section; but the cases are not similar. In the *Gilbert Book Co.* case the decision (114 Mo. App. 342, 89 S. W. 555) was based on the theory that the transaction there involved was in the category of ordinary everyday loans of property. In the case at bar the Cornells were given the absolute and unconditional possession of the mill to move upon a lease owned by them, there to be possessed and occupied as theirs in operating a mine on their own leased premises; thus putting it within the power of these parties to create a false impression as to their financial worth, and making it possible to defeat the claim which plaintiff had a right to believe it had to a lien for material furnished to go into the mill, if we hold the transaction not covered by the statute. We think to hold otherwise would be to wholly disregard the spirit and purpose of the statute. We therefore hold that, at the time plaintiff sold and delivered the items contained in the statement, the Cornells, as to plaintiff, had the sole and unconditional ownership in the mill. There is no complaint made here on the extent of the interest in the mill covered by the judgment; neither was there any such point made in the trial court.

[7] Appellant makes reference to a bill of sale of the items involved here, which it is said plaintiff took from the Cornells, but, as it was not offered in evidence, so far as the abstract of record shows, we cannot consider it.

The judgment will be affirmed if the respondent, within ten days after this opinion is filed, remits the amounts charged in the lien statement as car fare, express, wrench, tape, etc., amounting to \$10.40; otherwise the judgment will be reversed, and the cause remanded.

STURGIS and FARRINGTON, JJ., concur.

**BARRON v. H. D. WILLIAMS COOPERAGE CO. et al. (No. 1339.)**

(Springfield Court of Appeals. Missouri. Dec. 12, 1914. Rehearing Denied Dec. 31, 1914.)

**1. APPEAL AND ERROR (§ 1180\*)—REVERSAL—EFFECT AS TO PERSONS NOT APPEARING.**

In a suit to quiet title, in which nonresident defendants were brought in by publication, but did not appear, the reversal of a judgment for plaintiff at the instance of appearing defendants will not leave the judgment binding as to nonappearing, nonresident defendants, because they did not appear.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4626-4631, 4658, 4659; Dec. Dig. § 1180.\*]

**2. APPEARANCE (§ 8\*)—WHAT CONSTITUTES—RECITAL OF CLERK OF COURT—NONRESIDENT DEFENDANT.**

The recital of the clerk of court in an order entered as to a motion for a new trial, filed by an attorney for some of the defendants in a suit to quiet title, that the motion was filed for those defendants and "other defendants," would not enter the appearance of defendants brought in by publication, where all the papers and proceedings, including the decree, disclosed that such nonresident defendants never appeared.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 23-41; Dec. Dig. § 8.\*]

**3. ESTOPPEL (§ 33\*)—DEED—FUTURE ACQUIRED TITLE.**

If a general warranty deed conveying a fee-simple title is made by a grantor when he has no title, or defective title, a subsequently acquired title will inure to the benefit of the grantee in the deed.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 99-107; Dec. Dig. § 38.\*]

**4. ESTOPPEL (§ 30\*)—FUTURE ACQUIRED TITLE—CONSENT DECREE.**

Where a consent decree in a suit involving title to land expressly provides that the title to the lands conveyed to one of the parties is not warranted, a superior title thereafter acquired by the other party and its representative will not inure to the benefit of the grantee in the consent decree.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 108, 109; Dec. Dig. § 39.\*]

**5. INJUNCTION (§ 36\*)—DEFENSES—FRAUD OF AGENT.**

A defendant in a suit to enjoin the cutting of timber may not show that plaintiff, when he acquired title to the timber, was agent for another, and that such acquisition was a fraud on his principal.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 82-84; Dec. Dig. § 36.\*]

**6. VENDOR AND PURCHASER (§ 228\*) — BONA FIDE PURCHASERS—NOTICE—FUTURE ACQUIRED TITLE—SUPERIOR TITLE.**

An agent of a corporation, knowing of a consent decree, given by his principal, whereby all timber rights in lands were transferred to defendant corporation, is not estopped to acquire a superior title to the land, not based on the consent decree, and deed the land to his principal, reserving the timber for himself, and oust defendant corporation of its title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 495-501; Dec. Dig. § 228.\*]

# 7. INJUNCTION (§ 52\*)—CUTTING TIMBER—REMEDY AT LAW.

Under Rev. St. 1909, § 2534, giving a remedy by injunction to one whose property is threatened with irreparable injury and where there is no adequate remedy at law, an injunction lies to prevent the cutting of timber, under a claim of right, where it is shown that the timber threatened to be cut was of very slow growth, and that it would require great expense to keep an account of timber defendants saw fit to cut.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.\*]

# 8. EVIDENCE (§ 471\*)—OPINION EVIDENCE.

A question to a witness as to who were the sole heirs of a person named called for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

# 9. APPEAL AND ERROR (§ 1050\*)—PREJUDICIAL ERROR—OPINION EVIDENCE—EQUITY SUIT.

In an injunction suit, where a witness had already testified that a person had died, and left surviving two brothers and a sister, none of whom left any children surviving them, the statement of the witness as to who were the sole heirs of such person at a stated time was not prejudicial error, as in an equity case the admission or exclusion of evidence is rarely reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Suit by William N. Barron against the H. D. Williams Cooperage Company and George W. Kinnard. From a decree for complainant, defendants appeal. Affirmed.

Douglas W. Robert, of St. Louis, and Whaley & Ing, of Poplar Bluff, for appellants. Arthur T. Brewster and E. R. Lentz, both of Poplar Bluff, for respondent.

**FARRINGTON, J.** This is an appeal by the defendants from a decree rendered on May 2, 1914, in the circuit court of Butler county, whereby defendants were perpetually enjoined from cutting certain white oak timber on lands located in said county. As to defendant H. D. Williams the bill was dismissed.

It is necessary to give a brief history of the relationship of the parties and their relations with reference to the land on which the timber in dispute grows in order that appellants' theory as to the errors assigned may be made plain.

The plaintiff is a resident of Butler county, and is the general agent, manager, and attorney of the Brooklyn Cooperage Company and of the Great Western Land Company, two corporations. From the record it appears that he had a free hand in managing their properties in Missouri. The defendant cooperage company (appellant) is a corporation engaged in the manufacture of products made from white oak timber. George W. Kinnard was an agent in the employ of the H. D. Williams Cooperage Company, and H.

D. Williams was an owner of considerable stock and an officer in said company.

Some years prior to the institution of this suit, there was a controversy between the Brooklyn Cooperage Company and Charles R. Heike and Arthur Donner over the right of the H. D. Williams Cooperage Company and H. D. Williams to cut the white oak timber on the land owned by the Brooklyn Cooperage Company and Heike and Donner. The Brooklyn Cooperage Company and Heike and Donner instituted a suit in the United States District Court for the Eastern District of Missouri, seeking to enjoin H. D. Williams and the H. D. Williams Cooperage Company from cutting the white oak timber on the land involved in the case now before us as well as that on other lands. An answer was filed by the defendants in that suit setting up certain claims and rights to the timber. While that suit was pending, a compromise was reached between the parties and a consent decree was entered by the court giving the defendants therein the right to cut all the white oak timber (on the land involved in the case before us) having a stump diameter of 18 inches and above for a period of time ending April 13, 1915. This consent decree was entered in accordance with a certain contract of settlement between the parties, referred to in the evidence as exhibits A and B, the same being set up in an answer of the Great Western Land Company and the Brooklyn Cooperage Company to a complaint seeking an injunction filed in the United States District Court for the Eastern District of Missouri by the H. D. Williams Cooperage Company. After that decree was entered, the Brooklyn Cooperage Company and Heike and Donner conveyed all the interest they had in the lands to the Great Western Land Company. As stated, Barron was the agent, officer, and attorney of the Brooklyn Cooperage Company and of the Great Western Land Company, and was thoroughly conversant and familiar with all the dealings between the parties, and had been the attorney of said companies in their pleadings leading up to the decree, and knew of the agreed settlement, the contract, and the decree entered carrying out such compromise. After that settlement was made and such consent decree entered, a suit was brought against the Great Western Land Company, the successor to the title of the Brooklyn Cooperage Company, and the H. D. Williams Cooperage Company and H. D. Williams by Margaret A. Weirman and Laura Weirman Burnes, and another suit was brought by Mary J. Hirston against the Great Western Land Company. The plaintiffs in those two suits set up a claim to the title to the land alleged to be paramount to that of the defendants therein. Those suits were dismissed by the plaintiff therein, and they executed deeds conveying their interests in the land to the plaintiff in

our case, William N. Barron. It is shown that for the Weirman interest plaintiff (Barron) paid \$3,100, and for the Harston interest \$2,500, and this money was paid out of the funds of the two corporations (the Brooklyn Cooperage Company and the Great Western Land Company) by Barron, their managing agent. He then deeded the land to the two corporations just mentioned, conveying all the title he had acquired, excepting and reserving all the white oak timber on said land. One corporation paid \$2,700 for the land, the other, \$2,200, and Barron personally paid \$400 and \$300 respectively for the timber rights which he reserved to himself.

The plaintiff, now claiming title through the deeds conveying the land subsequent to the consent decree entered in the United States District Court, made after a compromise agreement between the parties, seeks in this action to restrain the defendants herein from interfering with the timber, notwithstanding any rights they acquired under the consent decree of the United States District Court.

The defendants claim: First, that the title acquired by Barron from the Weirmans and Mary J. Harston was not paramount to the title owned by the Brooklyn Cooperage Company and the Great Western Land Company and Heike and Donner, and, for that reason, that he has no right to interfere with them in exercising their rights acquired under the consent decree. Second, that Barron's title, if any, was acquired by him as agent, attorney, or trustee for the Great Western Land Company and the Brooklyn Cooperage Company, and that said corporations owned whatever he bought, and that they cannot, nor can he, being their agent and attorney, interfere with the defendants by reason of such consent decree, even if they did acquire a paramount title to the title they claimed to own when the consent decree was entered. Third, that, as Barron claimed in the bill in this case, the white oak timber was the chief value of the land, and it appearing that the entire purchase price of \$5,600 of which he and his corporations paid \$4,900 and he personally only \$700, and that he reserved the timber rights which he says is the chief value of the land, he is guilty of defrauding his own companies, and therefore does not come into equity with clean hands. Fourth, that the owner of only the timber growing on land, with the title of the land in some one else, cannot maintain a bill to enjoin trespass, or threatened trespass, against one cutting or about to cut the timber. Fifth, that the court erred in the admission of certain testimony.

Whether plaintiff has title to the timber is, of course, a vital question in determining whether he can maintain this action. It will only be necessary to discuss the alleged flaw in his title. Without going

into detail it can be generally stated as follows: Plaintiff has a title running through conveyances from the United States down to a deed made to I. W. G. Weirman in 1870, and from the Weirman heirs to the plaintiff, and from the United States down to one Johnson in 1885, and from his grantees, through Mary J. Harston, to the plaintiff. In 1890 a suit was brought by the F. G. Oxley Stave Company and others against Butler county and a large number of other defendants for the purpose of setting aside and canceling many deeds to lands comprising a large tract in said county, including the land on which the timber grows with which we are concerned in this appeal. Among some 100 defendants in that case was J. W. G. Weirman and also the grantor in the deed to Mary J. Harston. It is uncontroverted that the order of publication was void as it described no lands. That action was brought against 100 or more defendants who were claiming some interest in the land. The petition therein also set out by name some 50 to 75 persons who are alleged to be nonresidents of Missouri, among which number is found the names of the grantors of the Weirman and Harston titles. A publication was made giving notice of the suit to these nonresidents. Some of the defendants in that suit, who were served in Missouri and whose names appear, filed answers. Others who were served failed to answer. And none of the nonresidents named in the bill entered their appearance and filed answer. All of the pleadings and proceedings leading up to the decree, and including it and the appeal therefrom, disclose that none of the nonresident defendants, and especially the ones through whom the Weirman and Harston titles run, entered their appearance. A judgment was entered by the circuit court in St. Louis, where the case was tried after a change of venue, in favor of the plaintiffs therein, decreeing and divesting all right, title, and interest in the land out of the defendants. Certain of the defendants therein, by name, filed motions for a new trial which were overruled. The case was appealed to the Supreme Court (121 Mo. 614, 26 S. W. 367), where the judgment was reversed and the cause remanded.

[1, 2] The defendants herein contend that the grantors of the plaintiff were barred by that decree of the circuit court which was reversed by the Supreme Court, for the reason that the order of reversal would only operate as to those defendants who actually appealed. This might be true, if it were shown that such grantors ever entered their appearance and became bound by the decree of the circuit court at St. Louis. But defendants contend that there was an appearance in the suit begun in 1890 by the F. G. Oxley Stave Company and others, because the order entered by the clerk, as to one of the motions for a new trial, filed by an at-

torney for some of the defendants therein who did answer, naming them, recited that the motion was filed for those defendants "and other defendants," and defendants argue that thereby all the nonresident defendants, who, according to the decree therein, had defaulted, did enter their appearance; and that as such motion was overruled, and only certain named defendants appealed, and "other defendants" did not appeal, from the order of the court overruling such motion, therefore the grantors in this chain of title are bound by the decree of the circuit court.

As to the Weirman title it will be noted that the publication and suit was brought against J. W. G. Weirman and not J. W. G. Weirman, to whom the land had been previously deeded. But aside from that, we are unable to agree with defendants' contention that Weirman or Johnson entered their appearance merely on account of the recitation that "other defendants" had filed a motion for a new trial, and this, because all the papers and proceedings, including the solemn declaration in the decree itself, disclose that neither Weirman nor Johnson ever entered an appearance in that case. They are therefore driven to the extremity of having us hold that that solemn entry, "and other defendants," contained in the clerk's entry on the motion for a new trial brings into court those parties, whereas every other record shows them to have been absent.

It is held in the case of Mullins v. Rieger, 169 Mo. 521, 70 S. W. 4, 92 Am. St. Rep. 651, that a general answer by the defendants, without naming them, cannot be made to include defendants who have not been duly brought into court by process and who have not specially entered their appearance. There were other defendants in our cases who were personally served. The only entry on which defendants can insist that Weirman and Johnson entered their appearance is the minute entry by the clerk, made when the motions for new trial were filed by some of the defendants who were named therein. Besides, the case of F. G. Oxley Stave Co. v. Butler County and others, when it reached the Supreme Court, was reversed and remanded as to the appealing defendants.

Appellants cite the case of Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412; Rector & Kennerly v. Circuit Court for St. Louis County, 1 Mo. 607; Schell v. Leland, 45 Mo. loc. cit. 293; and Louthan v. Caldwell, 52 Mo. 121. Those cases do not sustain the appellants' contention, as an examination of them shows there was an appearance actually entered by the parties in filing certain motions, and in some of the cases it is specifically pointed out that the motions were separately filed. These cases are far from being authority that a minute made by the clerk, under the facts with reference to the pleadings and

proceedings as have been detailed in this case, would, by the recital therein of "and other defendants," enter the appearance of nonresident, defaulting defendants. We must therefore hold that, so far as this record is concerned, the plaintiff has established title to the trees that he seeks to enjoin the defendants from cutting.

Appellants' second contention is that the consent decree entered in the United States District Court did so bind the Brooklyn Cooperage Company, the Great Western Land Company, Heike, and Donner, and their privies and representatives, as to make any paramount title that they acquired inure to the benefit of the appellants herein.

[3] It is well-settled law that if a general warranty deed conveying a fee-simple title is made by a grantor when he in fact has no title, or has a defective title, and he subsequently acquires good title, the subsequently acquired title will inure to the benefit of the grantee in such deed. It is also well-settled that the grantor in an instrument, other than one carrying a covenant of warranty, will not, on the acquisition by him of a paramount title, be estopped from setting it up as against his grantee in a deed made prior to the acquisition of the paramount title. See *White v. Davis*, 50 Mo. 333; *Gibson v. Chouteau's Heirs*, 39 Mo. loc. cit. 566; and *Wilson v. Fisher*, 172 Mo. loc. cit. 21, 23, 72 S. W. 635.

[4] It is therefore necessary to look to the consent decree which was entered by the United States District Court. If such decree can be construed so as to warrant title in the timber to the appellants, then the Brooklyn Cooperage Company and the Great Western Land Company when they acquired the Weirman and Harston titles, would do so for the benefit of the appellants. On an examination, however, of the memoranda of compromise entered into between the parties leading up to the consent decree, we find the following provision (in Exhibit B):

"With regard to the lands to be selected by H. D. Williams Cooperage Company, the complainants do not warrant the title to said land or the timber thereon, but the defendants and each of them shall and will protect and save harmless the complainants and each of them and their assigns from all claims by third persons for damages in excess of one and  $\frac{50}{100}$  dollars (\$1.50) per cord, arising out of cutting done by the H. D. Williams Cooperage Company on the lands selected by it."

And there is nothing in the decree that would indicate that the title to the timber which the appellants were permitted to cut was warranted to be in the Brooklyn Cooperage Company and Heike and Donner. This provision in the agreement on which the consent decree was entered disclosed that there was no warranty whatever made by the complainants in that suit as to the title of the land on which the timber was growing. We can, therefore, see no reason why the Brooklyn Cooperage Company and Heike and

Donner or their grantees and representatives would not be permitted to buy the title to the land and enforce their rights under such acquired title, if it was the paramount title. Certainly the Weirman heirs and Mary J. Harston could have enforced such rights, and as the plaintiff, either for himself or his principals bought the rights of those people, and there being no warranty out that would estop them, they or their privies would be entitled to set up such title against the appellants.

[5, 6] The proof, however, shows that the timber was bought by the plaintiff himself, and whether he was guilty of a fraud on the corporations he represented in making them pay \$4,900 for the land without the timber, when he paid only \$700 for the timber, which his bill alleges is the chief value of the land, is not a question that can be taken advantage of by the defendants in this case; that is a matter between the principal and the agent. The subject-matter involved in the litigation settled by the consent decree was the rights of the parties as they existed on that date, and not the rights as they exist in this suit, because the subject-matter determining the rights in this suit depends upon the title acquired from the Weirmans and Mary J. Harston. And while the plaintiff in this case was the attorney and agent and general manager of those corporations and knew that the H. D. Williams Cooperage Company was given privileges under the consent decree, still he is not, in his claim for the timber, basing his right on any title or any claim that his principals owned when the consent decree was entered. He, therefore, was not estopped, because neither the subject-matter nor the parties were involved in the suit terminating in the consent decree. It is said in the case of *State ex rel. Kane v. Johnson*, 123 Mo. loc. cit. 55, 27 S. W. 402:

"The mere fact that he employed attorneys to defend that suit, who participated in its trial and the examination of witnesses, ought not to estop him from now asserting his rights, as he claims nothing by, through, or under them."

Barron, the plaintiff, having acquired rights in this timber, not through his principals, but from an outstanding title, would not be estopped from enforcing the rights he acquired because his principals had been estopped on an entirely different source of title.

The foregoing discussion disposes of appellants' third contention.

[7] We cannot agree with appellants' contention that injunction will not lie in this case. Section 2534, R. S. 1909, expressly gives the remedy of injunction to one whose property, real or personal, is threatened with irreparable injury, and to prevent the doing of any legal wrong when, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages. The evidence in this case shows that the appellants were cutting this timber owned by the plaintiff and were threatening to cut it under the

terms of the consent decree. It is also shown in evidence that this character of timber is of very slow growth, and also that it would require great expense to the plaintiff to watch the timber and keep an account of such as the defendants saw fit to cut. It is held in the case of *Palmer v. Crislie*, 92 Mo. App. loc. cit. 513, as follows:

"The law of to-day does not require that a person in plaintiff's situation shall submit to the stripping of his timberland of its forest trees, and then attempt to make his loss good by action for damages. The nature of the property involved and the inconvenience of suing for continuous trespasses, as charged in this case, constitute a basis for equitable relief, long recognized in this state, under the statute governing the use of the writ of injunction."

It is held that injunction is available to restrain repeated and continuous trespasses, even though the wrong may not be irreparable and the wrongdoer may be solvent. See *Turner v. Stewart*, 78 Mo. 480; *Sillis v. Good-year*, 80 Mo. App. loc. cit. 132; *Lytle v. James*, 98 Mo. App. loc. cit. 341, 73 S. W. 287; and *Hobart-Lee Tie Co. v. Stone*, 135 Mo. App. 438, 117 S. W. 604. The case of *Powell v. Canaday*, 95 Mo. App. 713, 69 S. W. 686, cited by appellants, is not helpful here, as it clearly appears in the opinion that plaintiff in that suit was basing his right to an injunction merely on an alleged possession. The opinion expressly states that he failed to show any paper title to the land, and his evidence fell far short of establishing a title by possession; hence the temporary restraining order was dissolved.

[8, 9] Appellants complain of the overruling of an objection to a question put to Fred Dewey, in a deposition, as follows: "State who were the sole heirs of William S. Dewey, April 9, 1883." The objection was that the question called for a conclusion. The court overruled the objection by stating that, "He does state the relations, and I think it is competent." The question was asked after the deponent had testified that William S. Dewey died on May 16, 1881, and that he left two brothers and a sister surviving him, none of whom left any children surviving them. In plaintiff's proof of title, William S. Dewey was one of the persons through whom plaintiff sought to show his chain, and the deed made by Richard S. and Henry A. Dewey and Harriet D. Rogers dated December 3, 1885, to James J. Johnson, conveying all the interest they had in and to the land therein described, conveyed the interest that the grantors therein acquired as the brothers and sister and heirs at law of William S. Dewey. The question called for a conclusion, but, under the circumstances detailed, the action of the court could not be held to be reversible error. In an equity case the admission or exclusion of evidence is rarely reversible error on appeal. *Hanson v. Neal*, 215 Mo. 256, 114 S. W. 1073.

The plaintiff showed title to the timber from beginning with deeds from Butler coun-

ty in 1899. The defendants claim rights to the timber through a deed from Butler county in 1899. There is nothing in this record divesting the title out of the grantees and their line beginning with the deed of 1899. We therefore hold that the decree rendered by the trial court should be affirmed and it is so ordered.

ROBERTSON, P. J., and STURGIS, J., concur.

STATE ex rel. AHRENS v. RASSIEUR,  
Circuit Judge. (No. 14423.)  
(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

1. HABEAS CORPUS (§ 112\*)—JURISDICTION—CUSTODY OF INFANT—JUDGMENT.

Habeas corpus proceedings between a father and grandparents for the custody of a child are not within Rev. St. 1909, § 2510, for preserving jurisdiction over the subject-matter in similar proceedings between husband and wife, and a clause in the order remanding the child, by which the court assumes to retain jurisdiction over the cause, is coram non judge.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 101; Dec. Dig. § 112.\*]

2. HABEAS CORPUS (§ 112\*)—JURISDICTION—APPEAL.

A clause in the judgment in habeas corpus, by which the court assumes to retain jurisdiction over the cause, is not within the scope of the issues.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 101; Dec. Dig. § 112.\*]

Application by the State, on the relation of Henry Ahrens, Sr., for a writ of prohibition against Leo S. Rassieur, Judge of the Circuit Court of the City of St. Louis. Alternative writ made permanent.

Albert C. Davis, of St. Louis, for relator. Marion C. Early, of St. Louis, for respondent.

REYNOLDS, P. J. At the April term, 1911, of the circuit court of the city of St. Louis, one Lee H. Mallalieu filed a petition for a writ of habeas corpus for the possession of his daughter Jessalee, then about two years old and in the custody of Henry Ahrens, Sr., her grandfather, and Alvina Ahrens, her grandmother, her mother being dead. The prayer or demand for relief in the petition is:

"Wherefore, your petitioner prays that a writ of habeas corpus may be issued to bring the said Jessalee Mallalieu before the court that she may be released from the restraint and keeping of the said Henry Ahrens, Sr., and Alvina Ahrens, his wife, and that the care, custody and control of said child be awarded to your petitioner."

The return of Ahrens and his wife to the writ concludes thus:

"Respondents having fully made return ask to be discharged of the writ aforesaid and that the said Jessalee Mallalieu be restored to their care, custody and control as heretofore."

The cause was duly assigned to Division No. 9 of the circuit court, then presided over

by the Honorable Leo S. Rassieur, respondent here. At the hearing of the case on this petition and return it appeared that the child had been committed to the custody of the grandparents at the request of their daughter, then about to die, and with the assent of the father, the petitioner for the writ. At the conclusion of the hearing and on the last day of the April, 1911, term of the circuit court, the court denied the prayer of the petitioner, holding that the best interests of the child would be conserved by leaving her in the custody of her grandparents. It however granted to the petitioner, Mallalieu, the right to visit and have the custody of the child at certain stated intervals. The court further embodied as part of its judgment this:

"And the court doth retain jurisdiction of this cause, for the purpose of making such other and further orders, from time to time, with reference to the custody of the child aforesaid, as in the judgment of the court, the best interest and welfare of the said child may require."

Nothing further transpired in the cause until June 27th, 1914, when at the June term of the circuit court, apparently on the ex parte application of Mallalieu, the petitioner in the original cause, and without any notice to the respondents in that cause, the judge then presiding in Division No. 9 of the court entered an order transferring the cause to Division No. 4 of the court, that being the division to which the Honorable Leo S. Rassieur had in the meantime been assigned and over which he was then presiding. Thereafter and in this Division No. 4, a motion was filed by Mallalieu, entitled in the original case, praying the court to make an order altering and amending the decree theretofore made by the court in Division No. 9, on June 3d, 1911, as above stated, as to the custody of the child, and to give Mallalieu exclusive custody of his daughter, free from any interference or control of the grandparents. The Honorable Circuit Judge, then presiding in Division No. 4, passed this motion until July 14th, 1914, announcing his determination then to hear and determine the motion upon the merits. It was to prohibit that judge from entertaining jurisdiction of the cause that the present action was brought, a petition being filed in our court in vacation, upon which an alternative writ was issued prohibiting the Honorable Circuit Judge from further proceeding, or to show cause to the contrary. To this alternative writ the Honorable Circuit Judge made a return setting up what had been done in the matter and justifying his right to proceed in it under that part of the original order in the case by which it is claimed jurisdiction over the cause had been retained. On the coming in of this return the relator here prayed that the alternative writ be made permanent.

There is no dispute as to the facts, a question purely of law being presented and argued. That question turns on the validity of

that part of the order entered in the habeas corpus proceeding which we have quoted above.

[1] The relator here contends that this part of the order was without authority and beyond the jurisdiction of the court; that in the habeas corpus proceeding which was before the court, its attempt to retain jurisdiction for the purpose of making further orders in it was *coram non jndice*; that the proceeding under the petition for habeas corpus having passed into judgment, the cause was at an end. The contention of the respondent as to the right to retain jurisdiction over the proceeding seems to rest chiefly upon section 2510, Revised Statutes 1909. That section provides:

"In all cases where it shall appear from the evidence in any proceedings in habeas corpus, instituted between husband and wife for the custody of their children under the age of fourteen years, that by reason of insanity, drunkenness, cruelty, or other cause, the party against whom the complaint is brought is unfit to have the care and government of the child or children in controversy, it shall be lawful for the court hearing said cause to award the custody of the same to the complainant or other guardian, as shall be deemed best in the premises, and to make such other orders touching the custody and control of such child or children as the court may deem proper; and the order or decree of court touching said custody shall be valid and remain in force during any period within the minority of said child or children, which shall be fixed by said court; and any person at any time violating said order or decree may be dealt with summarily for contempt."

This section appears in article 6, chapter 22, Revised Statutes 1909, the article being our statutory provision for proceedings under the writ of habeas corpus. It first appeared in our law in 1873, the title of the act being, "An Act to Provide for the Custody of Minor Children in Proceedings in Habeas Corpus Between Husband and Wife." Acts 1873, p. 53. It is obvious that this section has no application here. This is not a proceeding in habeas corpus "between husband and wife." It is said in argument that in drafting this section the General Assembly had in mind the welfare of the child and that although the precise words refer only to the husband and wife, it would seem a harsh construction to say that the lawmakers did not intend the statute to extend to those who stand in the position of parents, whether husband and wife or not. It is further said that the order was made in conformity with early practice in the circuit court of the city of St. Louis. We cannot assume that the General Assembly, the law-making power, in so specifically confining this exception to cases arising between husband and wife, expressing that idea both in the entitling clause and in the body of the act, intended to extend it to any other cases. There is no room here for judicial construction which would have the effect of extending it. To indulge in such construction would not be a judicial act but legislative

and beyond the power of the court. Nor can long usage, if that is a fact, and of this we have no information beyond the claim of counsel, make the law otherwise than as enacted. From this it necessarily follows that in attempting to preserve jurisdiction over the subject-matter, that is the custody of this child in the habeas corpus proceeding between the father and the grandparents, the action of the court finds no support in section 2510.

[2] Over and above this, the clause in the order assuming to retain jurisdiction over the cause, is not within the scope of the issues in this habeas corpus proceeding. We have set out the prayer of the petition and the conclusion of the return. These make the issue. This is an action at law. When the court had determined the issue involved, that is, to whom the custody of the child should then be committed, that was the end of that case. Unless acting under section 5316, Revised Statutes 1909, in correcting errors as to the time or place of imprisonment, or under section 2510, where the action is between husband and wife, or under other sections specially providing for the writ, the only order or judgment within the power of the court in proceedings in habeas corpus, such as here before us, is one either discharging the person found to be illegally and unlawfully held and restrained, or to remand him, that is, refuse a discharge. Any order outside of that is *coram non jndice* and void. That is the rule applied by our Supreme Court even in a suit in equity. See *State ex rel. McManus v. Muench*, 217 Mo. 124, 117 S. W. 25. The original order made by the court awarding the custody of this infant, a child then under 14 years of age, in fact at that time about 2 years of age, was a judgment which finally determined the question of custody on the facts and issues then before the court.

No appeal lies from the decision in habeas corpus discharging or remanding the petitioner. Herein lies the reason why the decision must be confined to those matters alone. If the judgment in a proceeding such as here involved, attempts to go outside of this and embraces matters outside of the issue, matters which may be the subject of appeal, it is outside of any issue which can lawfully be presented in a proceeding by habeas corpus as here presented. So said our Supreme Court in *Ferguson v. Ferguson*, 36 Mo. 197, citing *Howe v. State*, 9 Mo. 690, in support of the proposition that there is no appeal from a decision in habeas corpus. See also *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672. Judge Holmes has said in the *Ferguson Case*, *supra*, 36 Mo. loc. cit. 201:

"In this respect, the decision is not of the nature of a final judgment. It concerns only the present actual condition of things, and the order of the court is at once executed and accomplished beyond recall; and in reference to any

new state of facts existing afterwards, the parties have the same remedies as before, whether by writ of habeas corpus, or other proceeding, in any court of competent jurisdiction; and the courts are always open to them."

The Ferguson Case was decided in 1865 and before the enactment of the law of 1873 (section 2510, Revised Statutes 1909). If that section had then been in force, it might have been held to apply on the facts in that case, an action between husband and wife. When the action is not between husband and wife, the law as to habeas corpus is now as it then was. *Ferguson v. Ferguson* has always been recognized as authority on the subject of the jurisdiction of the courts in habeas corpus, as see *Weir v. Marley*, supra. It is referred to as authority in *State ex rel. Barker v. Wurdeman*, 254 Mo. 561, loc. cit. 569, 163 S. W. 849.

Whether the provision in the original order allowing the father to have the custody of the child at certain times, was within the power of the court in that proceeding, it not being a proceeding under the divorce law or one between husband and wife, is not here raised and not considered. We express no opinion whatever upon that phase of this decree in the habeas corpus proceeding.

Nor is it important to here pass upon the question of the regularity of the proceeding by which, on an ex parte application, the cause purported to be transferred from one division of the circuit court of the city of St. Louis to another. That element disappears from the case and is not important, when we determine, as we here do, that the court, in either division, in attempting to open up the cause, was without jurisdiction and beyond its authority.

For that reason and on that ground, the alternative writ heretofore entered in this cause is made permanent, and the Honorable Judge of the circuit court of the city of St. Louis, respondent here, prohibited from exercising further jurisdiction in the matter of *Jessalee Mallalieu* wherein *Lee H. Mallalieu* was petitioner and *Henry Ahrens, Sr.*, and *Alvina Ahrens*, his wife, were respondents; no costs herein to be taxed against the respondent judge.

NORTONI and ALLEN, JJ., concur.

LONG v. SHAFER et al. (No. 1401.)  
(Springfield Court of Appeals. Missouri.  
Dec. 12, 1914.)

1. BILLS AND NOTES (§ 453\*)—ORIGINAL PARTIES—"HOLDER IN DUE COURSE."

The payee of a note to whom it has been delivered at the inception of the transaction, is not one to whom it has been "negotiated," and, hence, is not a "holder in due course" as defined by Rev. St. 1909, § 10022, and is subject to equities under section 10028, providing that in the hands of any holder, other than a holder in

due course, a negotiable instrument is subject to the same defenses as if nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1344-1351; Dec. Dig. § 453.\*]

For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

2. BILLS AND NOTES (§ 451\*)—VALIDITY—NEGOTIABILITY.

Negotiability is not necessary to the validity of a note, and the fact that it is negotiable in form, as between the maker and payee, does not deprive the former of any defense thereto that he would otherwise have.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1342, 1343, 1365, 1366; Dec. Dig. § 451.\*]

3. EVIDENCE (§ 423\*)—PAROL EVIDENCE.

In a suit on a note as between the original parties, parol evidence is admissible to show that persons signing ostensibly as makers were in fact sureties, and that the payee's release of collateral security without the consent of such accommodation makers or sureties released them pro tanto to the extent of the value of the lien so discharged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.\*]

Sturgis, J., dissenting.

Appeal from Circuit Court, Texas County;  
L. B. Woodside, Judge.

Action by Edwin Long against David Shafer and others. Judgment for defendants, and plaintiff appeals. Affirmed and case certified to Supreme Court, because of conflict with the St. Louis and Kansas City Courts of Appeals.

This is an action on a promissory note for \$4,000 bearing interest at the rate of 8 per cent. per annum dated at Rolla, Mo., March 10, 1910, payable one year after date to Edwin Long, signed by Peter T. Mason, David Shafer, Z. T. Denison, J. W. Cantrell, and Willis Murphy. As security for the payment of this note Peter T. Mason executed a deed of trust on land in Texas county, Mo., of value sufficient to pay the note and interest that might accumulate thereon. The parties signing the note all resided in Texas county. The payee resided at Rolla, in Phelps county.

In 1912 Peter T. Mason negotiated a sale of 57 acres of the land covered by the deed of trust to one Helton, and at Mason's request, and without the knowledge of the other signers of the note, Long executed to Mason a deed releasing the 57 acres from the lien of the deed of trust. Mason thereafter made a warranty deed conveying the 57 acres to Helton, for which he received \$2,000, of which he paid Long \$595.16, which was credited on the note. After the suit was commenced, Long had his deed of trust on the land, not released, foreclosed by sale by the trustee. The net proceeds of this sale, \$3,444.50, was placed as a credit on the note, and a supplemental petition filed stating these facts. Mason having removed from the state before the action was brought, no

service of process was had upon him, and plaintiff dismissed his action as to him. To the supplemental petition the other four defendants filed a joint answer, in which, after admitting that they severally signed the note, for an affirmative defense alleged in substance that they were not parties to and did not receive any part of the money loaned and that it all went to Mason; that they signed the note as accommodation makers; and set up the release of the 57 acres of land by Long from the lien of the deed of trust without their knowledge or consent, the sale of the 57 acres so released to Helton for \$2,000, the receipt of the purchase price by Mason, and the appropriation of it all except the sum of \$595.16 to purposes other than the payment of the note; also, that, had the proceeds of said sale, \$2,000, been credited on the note, the same would have been fully paid; and that they would not have signed the note had not Mason executed the deed of trust to secure the same. The plaintiff's demurrer to this affirmative plea, on the ground that it stated no legal or equitable defense to plaintiff's cause of action, was, by the court, overruled. A jury was waived and the cause tried by the court.

Plaintiff introduced the note sued on and rested.

Defendants, over the objection of plaintiff, read in evidence the trust deed to Long securing the payment of the note sued on, Long's deed of release of 57 acres of the land described in the deed of trust, and Mason's warranty deed of the 57 acres to Helton. These deeds were all properly acknowledged and were duly recorded.

Plaintiff duly objected to the introduction of any evidence, objected to the deeds as evidence, objected to the testimony of the four defendants that they signed the note as *sureties*—all for the reason that the answer set up no legal or equitable defense to the action, and that oral evidence was inadmissible to show that defendants signed the note as sureties, and that defendants could not show by parol evidence that their obligation to pay the note was not absolute; which objections were overruled and exceptions saved. At the close of the case plaintiff demurred to defendants' evidence which was overruled and exceptions saved.

The court found the issues for the defendants. No declarations of law were asked or given, except as above noted. Plaintiff has appealed.

Holmes & Holmes and C. O. Bland, all of Rolla, for appellant. Hiett & Scott and Lamar, Lamar & Lamar, all of Houston, for respondents.

FARRINGTON, J. (after stating the facts as above). The issue in this court is made clear by the following language appearing in the brief of learned counsel for appellant:

"We concede that, under the law as it existed prior to the adoption of the uniform Negotiable Instruments Act in 1905, it was competent to show by parol evidence that one who signed a negotiable instrument ostensibly as a maker signed as a surety and that the holder had knowledge of the fact, and that upon proof of these facts, and proof that the holder had extended the time of payment for a consideration moving from the principal, without the assent of the surety, he was thereby discharged from all liability on the instrument; also that if the holder held any property of the principal to secure the note, or other security for its payment, and, without the assent of the surety, gave up such property or released the other security, the surety was discharged to the extent of the property surrendered or the security released.

"We further concede that if these special defenses are available to a surety under the uniform Negotiable Instruments Act, then the judgment was for the right party and should be affirmed.

"Our contention is that both of these defenses have been abrogated by the uniform Negotiable Instruments Law, and that if one signs a negotiable instrument as an accommodation maker, without consideration, and wishes to be secured, he must take the security to himself, or by express contract with the payee agree that the latter shall take and hold the security for his protection."

It is stated in the briefs for both sides that the uniform Negotiable Instruments Act was not intended to make new law, but that, with few exceptions, it is a codification of the rules of the law merchant as declared by the best and most authoritative decisions. Counsel for appellant also state that they do not contend that extrinsic evidence is not admissible in actions between the parties to a negotiable instrument to show want of consideration, fraud, mistake, illegality, or duress, or to explain an ambiguity, when such explanation is not inconsistent with the written terms.

Appellant contends that where the act speaks it controls, and that prior conflicting adjudications must be held for naught, citing *Mechanics' & Farmers' Sav. Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439, and *First Nat. Bank of Shawano v. Miller*, 139 Wis. 126, 120 N. W. 820, 131 Am. St. Rep. 1040. Also, that an examination of the act will reveal that the word "surety" is nowhere mentioned in it, and that the liability of makers and indorsers of these instruments is classified as "primary" and "secondary"; and that the obligation of makers and accommodation makers of negotiable notes is primary and absolute, citing sections 10161 and 10080, R. S. 1909. Furthermore, that section 10089, R. S. 1909, prescribes the only methods by which a maker can be discharged, whether he be in fact a principal or an accommodation maker. Appellant contends that sections 10000, 10089 and 10161, R. S. 1909, when read together, leave no opening whereby parol evidence can be admitted as against a holder for value to modify the absolute liability incurred by the signing of the note as makers. Also, that since

Long paid full value for the note he is a holder for value.

[1] Long is not a holder in due course because the instrument was not negotiated to him. There is no call for a lengthy discussion about this because the statute (section 10022, R. S. 1909) is explicit. Now section 10028 provides that "in the hands of any holder other than the holder in due course, a negotiable instrument is subject to the same defenses as if it was nonnegotiable." Hence this case is lifted bodily out of the governing power of the uniform Negotiable Instruments Act.

Section 10001 defines when an instrument is negotiated, and does not include the handing over of a promissory note by the maker to the payee. The act, in sections 10022, 10027 and 10028, makes a distinction between a holder and a holder in due course. To shut off the defense here set up, the holder must bring himself within the terms of sections 10027 and 10028; the note must have been negotiated to him. The maker handing his note to the payee is not a negotiation of the instrument, and such payee is a holder other than in due course, and thus falls within the terms of section 10028.

[2] This leaves the case to be controlled by the common law or law merchant (section 10165), and appellant has conceded that if the common law is to govern, the defense set up here is permissible. See Fullerton Lumber Co. v. Snouffer, 139 Iowa, 176, 117 N. W. 50. As said in the case just cited:

"Negotiability is not necessary to the validity of a promissory note, and the mere fact that it is negotiable in form does not, as between the maker and payee, deprive the former of any defense thereto that he would otherwise have."

See, also, Crawford's Annotated Neg. Instr. Law (2d Ed.) § 54, and section 97, followed by a footnote, in which it is said: "In an act designed to be uniform in the various states, no more can be done than fix the rights of holders in due course." Also Ogden, Negotiable Instruments, § 142, p. 132; Daniel on Negotiable Instruments (6th Ed.) vol. 2, § 1312, p. 1478; Stone v. Goldberg & Lewis, 6 Ala. App. 249, 60 South. 744; Goldberg & Lewis v. Stone, 10 Ala. App. 485, 65 South. 454; Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136. In the case last cited this language appears:

"There is no reason that we can conceive why the Legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this state for many years. All of the quotations \* \* \* show that it had enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note in all actions between themselves."

[3] It is therefore clear that defendants had the right to show by parol that they were sureties only on the note. And, since the Negotiable Instruments Law does not govern the case and the rules of the common

law are to be looked to, there is but one conclusion to be drawn from the Missouri decisions, which is that the release of the collateral security on the part of the payee in the note without the consent of the accommodation makers released the latter pro tanto, to the extent of the value of the lien so discharged. *Ferguson v. Turner*, 7 Mo. 497; *Lakenan v. Trust Co.*, 147 Mo. App. 48, 126 S. W. 547; 27 Am. & Eng. Ency. Law, pp. 516, 517. The following cases hold that parol evidence is admissible to show who is principal and who is surety on a note: *Garratt v. Ferguson's Adm'rs*, 9 Mo. 125; *Mechanics' Bank v. Wright*, 53 Mo. 153; *Hardester v. Tate*, 85 Mo. App. 624; *Reynolds v. Schade*, 131 Mo. App. 1, 109 S. W. 629.

Appellant cites *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514, and *Citizens' Bank v. Douglass*, 178 Mo. App. 664, 161 S. W. 601, as authority for his contention that parol evidence is inadmissible to show that the defendants signed the note as sureties or accommodation makers. These cases discuss the question as to whether, under the Negotiable Instruments Law, a surety is discharged by an extension of time given the principal debtor, holding that he is not discharged. See, also, *Vanderford v. Farmers' & Mechanics' Natl. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, and note; *Richards v. Market Exchange Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99, and note; *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997; *Bradley Engineering & Manufacturing Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525.

In the case of *Lane v. Hyder*, supra, the action was between the payee in the note and a comaker who attempted to defend on the theory that he was only a surety on the note and that plaintiff, without his consent or knowledge, extended the time of payment. It was held that under the Negotiable Instruments Law the surety was primarily liable on the note, and that under section 10089, R. S. 1909, providing how negotiable instruments may be discharged, an extension of time of payment does not discharge the surety. That case is a direct authority in favor of the contention made by the appellant in our case. The case of *Citizens' Bank v. Douglass* only incidentally passes on the question and approvingly cites *Lane v. Hyder*; but an entirely different question was up for decision in the *Douglass* Case than that presented in the *Hyder* Case and different from that presented in this case. There may be some nice distinction between the effect, so far as a surety or accommodation maker is concerned, of an extension of time by the holder and a release of collateral security by the holder; but the principle that would hold or release

an accommodation maker in the one case ought to hold or release him in the other. See section 10000, R. S. 1909.

The cases last cited and those referred to therein as authorities, holding that under the Negotiable Instruments Law a person primarily liable, such as a surety or accommodation maker, is not discharged by an extension of time for payment without their knowledge or consent, have not escaped criticism. Witness, 31 L. R. A. (N. S.) 150, note:

"So few cases have passed upon the question that this doctrine cannot be said to be firmly established, especially in view of the fact that it is contrary to the previously well-settled doctrine relating to the discharge of a surety. It is doubtful if the intention of the framers of the Negotiable Instrument Act was thus to change and overturn so well settled a principle of law, neither inequitable nor unjust in its application."

It should be said of the *Hyder and Douglass Cases* that at no place in the opinions does it appear that the attention of the court was ever called to sections 10001, 10022, 10027, and 10028, R. S. 1909. We believe that had such sections been noticed by the court in the *Hyder Case* the result would have been different.

The following cases, and many others cited, discussing this phase of the Negotiable Instruments Act and holding that an accommodation maker is barred from showing such fact, appear to be suits by indorsees and not the original payees: *National Citizens' Bank of New York v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Security Trust & Safe Deposit Co. v. Duross* (Del. Super.) 86 Atl. 209; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254; *Tatum v. Commercial Bank & Trust Co. (Ala.)* 64 South. 561; *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220; *Woods v. Finley*, 153 N. C. 497, 69 S. E. 502.

The case of *Spencer & Co. v. Brown* (Sup.) 143 N. Y. Supp. 994, clearly holds (citing New York cases) that in support of a defense of "accommodation paper" or "want of consideration," as between the payee and maker the latter may show by parol evidence the real agreement between the parties at the time of the execution; and this is the rule we adhere to.

The doctrine we follow does not impair or burden negotiable instruments. It only holds that a note as between the original parties is like any other simple contract. Because on its face it is drawn so that if necessary it will pass as negotiable paper does not require that it take on that character before it is negotiated as "negotiation" is defined in section 10001. There is no reason for the luggage to be dropped on this contract any more than on any other, until it has sailed forth on the high seas of negotiation—until it has come into the hands of a holder in due course as provided by section 10022 (particularly the fourth subdivision thereof). In his hands,

section 10027 provides for dropping the luggage, but in the hands of the holder other than in due course commercial paper is subject to the equities existing between the original parties. To hold otherwise is to deny parties, as between themselves, the right to contract concerning matters in no wise unlawful, and to accomplish this result will require express and not mere implied enactment. In Missouri, for many years prior to the enactment of the uniform Negotiable Instruments Law, as between the original parties to a note, a surety or accommodation maker could, by parol evidence, show the contract that was made and that he was a surety or accommodation maker, although the face of the note did not disclose such fact. We, therefore, quote with approval the following language from the case of *Sutherland v. Mead*, 80 App. Div. loc. cit. 109, 80 N. Y. Supp. loc. cit. 508, 509:

"We are not to impute to the Legislature an intent to change a rule of law which has existed in uniform course of enforcement for over three-quarters of a century, without a clear and unequivocal expression so to do."

That case was dealing with the Negotiable Instruments Law, and it follows the act in defining a holder for value and a holder in due course. It will be observed by reading the Negotiable Instruments Act that there is a distinction between a holder or holder for value and a holder in due course. In all the circumstances enumerated in the act, under which equities can be set up against the enforcement of negotiable paper, such as fraud, failure of consideration, etc., in every instance it uses the term holder in due course. For example, where fraud is charged, the holder in due course must show that he had no knowledge of the fraud when he acquired the instrument. The same is true as to failure of consideration. In other words, the act clearly shows that it is dealing principally with paper that has been negotiated, and the determining element is whether the holder is one in due course.

That the act does make a distinction between the liability of a maker and an accommodation maker is shown by section 10019. To hold the accommodation maker liable under that section the holder must be one in due course. To hold that an accommodation maker is primarily and absolutely liable in all cases and that the equities and facts cannot be set up as between the original parties will lead to absurdity. For instance, if A signs a note payable to himself and gets B to sign it as an accommodation maker, then A could sue B, and B, under the primary absolute rule, would be prevented from showing that he signed the note with A as an accommodation maker only, and section 10019 requires that such a note must have been negotiated or fallen into the hands of a holder in due course before absolute liability is fastened on him.

In the discussions of this question in all

the opinions we have seen we find none taking into account the language contained in our section 10028. Such a provision is either not in the acts of other states where the decisions have been rendered, or, as is true of all the opinions under our act thus far, it has been ignored. If it is to be read out of the Negotiable Instruments Act, then there may be some good reason for a different view; but so long as that section remains in the act, and so long as a great number of decisions in this state stand as the law that it is not varying the terms of a note, such as is presented in this case, to show by parol evidence that a signer was an accommodation maker or a surety, we can see no escape from the conclusion we have reached.

Appellant has conceded that if the defense sought to be set up is available to defendants as accommodation makers, the judgment is for the right party and should be affirmed, and we have upheld that defense. The judgment is affirmed. However, as a conflict exists between our decision and that of the Kansas City and St. Louis Courts of Appeal in the Hyder and Douglass Cases, this cause is certified to the Supreme Court for final determination.

ROBERTSON, P. J., concurs.

STURGIS, J. I dissent from the majority opinion herein. The release of an accommodation maker of a note by reason of the surrender by the payee of security held by him is placed on the same ground as a release of such a maker by reason of the payee making a binding agreement for an extension of time. Both the plain reading of the Negotiable Instrument Act and the great weight of authority is against the proposition that, as between the original parties to a negotiable note, an accommodation maker is discharged by reason of the payee, knowing him to be such, making a valid agreement without his consent to extend the time of payment.

It will be noticed that the Negotiable Instrument Act dispenses with many of the terms and distinctions theretofore used and applied in the law relating to negotiable paper. The word "surety" is nowhere used. Section 10161 of this act, R. S. 1909, divides the parties liable on a bill or note into two classes, to wit, those primarily liable and those secondarily liable. A person primarily liable is one "who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." By section 10000, an accommodation party is defined to be "one who has signed the instrument as a maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person," and such a maker is made primarily liable, i. e., under section 10161, "absolutely required to pay the same." The payee's knowledge that one or more makers

are accommodation makers makes no difference, for it is expressly provided by section 10000, supra, defining an accommodation maker, that: "Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." A holder for value is defined by section 9997, and there is no doubt but that the original payee of a note is a holder for value where the instrument represents a valid indebtedness. Section 10030 provides that: "The maker of a negotiable instrument (which includes an accommodation maker), by making it, engages that he will pay it according to its tenor." Section 10040, provides that: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument," and no one doubts but that this includes an accommodation maker as well as the real maker. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280. By section 10048, presentment must be made to all persons primarily liable. By section 10054, where a note is dishonored by nonpayment, a cause of action accrues to the holder against all parties secondarily liable.

It will thus be seen that should parol evidence be admitted to show that one who is primarily liable according to the terms of the instrument is in reality only secondarily liable many complications will arise. It seems plain that, by the force of these statutes, an accommodation maker is a maker, a person primarily liable and "absolutely required to pay the same," one who "engages to pay it according to its tenor." This is true as between the original payee and all those signing as makers, and it does not matter that such payee knew when he took the note that one or more of the parties in fact signed as accommodation makers. As stated by the Supreme Court of Massachusetts in *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525:

"It (Negotiable Instrument Act [Rev. Laws 1902, c. 73]) determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise, is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute. Sections 77, 208. The act makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. The fact that one is an accommodation maker gives rise to a duty no less or greater or different to the holder for value than that imposed upon a maker who received value. This is expressly provided by the act, even though such holder knew at the time \* \* \* that the maker was an accommodation maker."

In the present case, the note reads that: "We promise to pay," etc., and is signed by all the defendants. Our laws make all such contracts joint and several, and the contract of these parties is the same as if it read:

"We jointly and each of us severally agree to pay," etc. There are many cases holding that a party cannot vary the terms of such a written contract by parol evidence regardless of the Negotiable Instrument Act; and certainly the Legislature has power to say that such shall be its force and effect. *Earle v. Enos* (C. C.) 130 Fed. 467; *First Nat. Bank v. Asel*, 154 Mo. App. 228, 134 S. W. 110; *Willard v. Crook*, 21 App. D. C. 237; *Gerli v. Nat. Mill Supply Co.*, 78 N. J. Law, 1, 73 Atl. 252. A strong argument in favor of the rule here contended for is found in the fact that section 10089, making provision for the discharge of those primarily liable on a note, does not include an extension of time by the holder; while section 10090 does so provide in case of one secondarily liable.

All these provisions of the Negotiable Instrument Act, which are now in force in most of the states, have received careful attention and construction by many of the courts of last resort; and the majority opinion here is not only in conflict with the decisions of both the other Courts of Appeals in this state, but with the decisions generally. In 3 R. C. L. 506, it is stated:

"Under the Negotiable Instruments Law it may be regarded as well settled that the accommodation maker or acceptor is primarily liable and is not discharged by any extension of time given to the indorser, drawer, or comaker, for whose benefit he became a party to the instrument, without regard to whether the party suing on the instrument is a party thereto as a payee, and had knowledge of the relation subsisting between the accommodation maker and the principal debtor."

See cases there cited. In the late case of *Cowan v. Ramsey* (Ariz.) 140 Pac. 501, the court announces the rule here contended for, quoting from the Massachusetts case, *supra*, and says:

"The rule expressed in the above quotation is that adopted by all the courts that have had occasion to pass upon the Negotiable Instrument Law (citing cases from seven states), except the lone case of *Fullerton Lumber Co. v. Snouffer*, 139 Iowa, 176, 117 N. W. 50."

In the leading cases of *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 36 Atl. 47, 10 L. R. A. (N. S.) 129, *Cellers v. Meachem* (Lyons), 49 Or. 186, 89 Pac. 426,

10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997, and *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99, and the notes thereto, the cases are collected and discussed, and the rule here contended for is announced as being the law in all the states. So, too, in the note to the Massachusetts case, *supra*, Ann. Cas. 1913C, 525, 528, the authorities are collected and it is shown that this is the well-established rule. See, also, *Chambers v. McLean*, 24 Pa. Super. Ct. 567, and *Willard v. Crook*, 21 App. D. C. 237.

The case of *Spencer & Co. v. Brown* (Sup.) 143 N. Y. Supp. 994, is cited in the majority opinion as supporting the contrary rule adopted in that opinion, but that case will be found to deal with the question of "want of consideration." That case does not purport to be, and I think is not, in conflict with the case of *Nat. Citizens' Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422, where it is held that "the maker is liable primarily, notwithstanding the knowledge of the holder that she was an accommodation maker only."

It is highly important that, as the Legislatures of the various states have adopted uniform laws on the subject of negotiable instruments, the courts should give a uniform construction to the same, and that this state should keep in line on this question.

Most, if not all, of the cases cited deal with the question of the release of an accommodation maker because of the holder making an agreement for the extension of time; and the majority opinion has not discussed, nor will I do so, whether or not a discharge by reason of the holder releasing securities held should be placed on a different basis, as being a subject not treated of by the Negotiable Instrument Act, and the further question of defendants' equitable rights against the holder, conceding that all the parties to this note are makers and primarily and absolutely bound to its payment, because of his surrendering or appropriating to the payment of another note the security held by him from one of the makers of this note. See on this point *Woods v. Finley*, 153 N. C. 497, 69 S. E. 502.

**CARTWRIGHT et al. v. CANODE.**  
(No. 2326.)

(Supreme Court of Texas. Dec. 16, 1914.)

**1. INTOXICATING LIQUORS (§ 257\*)—UNLAWFUL SEIZURE—LIABILITY OF THIRD PERSONS.**

Defendants, who voluntarily participated in a raid upon plaintiff's hotel and assisted Rangers in forcibly breaking and entering his store-room, and carrying away his stock of liquors, knowing the invalidity of the search and seizure warrant under which the Rangers purported to act, and that the seizure was unlawful, even though commanded or requested to do so by such Rangers, were liable to plaintiff in damages.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 896; Dec. Dig. § 257.\*]

**2. TRIAL (§ 139\*)—QUESTION FOR JURY.**

When the evidence is such that reasonable men may fairly differ upon questions of fact, its determination thereof is for the jury; and it is only where the facts are such that all reasonable men must draw the same conclusion that it is a question of law for the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

**3. APPEAL AND ERROR (§ 989\*)—VERDICT—CONCLUSIVENESS.**

In passing upon the question whether there was evidence to sustain a verdict for plaintiff, the Supreme Court must reject all evidence favorable to defendant, and consider only that sustaining the verdict, and, if the jury might have reached such verdict on the evidence, the court on appeal cannot set it aside.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3897; Dec. Dig. § 989.\*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by H. P. Canode against J. W. Cartwright and others. Judgment for plaintiff was affirmed by the Court of Civil Appeals (138 S. W. 792), and defendants bring error. Affirmed.

Madden, Trulove & Kimbrough and F. M. Ryburn, all of Amarillo, for plaintiffs in error. Reeder & Graham, of Amarillo, N. A. Stedman, of Austin, and F. A. Williams, of Galveston, for defendant in error.

BROWN, C. J. We copy from the opinion of the Court of Civil Appeals the following statement of the case:

"Appellee, H. B. Canode, instituted this suit in the district court of Potter county against appellants, J. W. Cartwright, S. P. Vinyard, W. A. Askew, R. H. McAlpine, W. D. Twitchell, Howard Trigg, W. H. Caviness, and W. H. Lewis, to recover damages for the alleged wrongful acts of appellants in breaking into a private storeroom in appellee's hotel known as the Amarillo Hotel, on September 10, 1908, and taking therefrom wines, whiskies, beer, etc., and transporting the same through the streets of Amarillo for a distance of about three blocks, thus publishing appellee's hotel as a blind tiger and causing his guests to leave, and to otherwise injure his business. Appellee itemized his damages as follows: Value of stock of liquors seized and carried away, \$1,500; loss of patronage occasioned by the disturbance at the hotel at the time of the raid, \$500; injury to his business caused by the notoriety given the occurrence in carrying away the goods saved, \$25,000; exemplary damages, \$25,000.

"Appellants pleaded the general denial, and specially denied that there was any concerted action or agreement between them to do the acts complained of by appellee, and that, if any act was done by them as alleged, it was so done at the request and under the direction of known officers of the law, viz., E. Putnam and O. J. Rountree, special officers known as Texas Rangers, who are acting under and by virtue of a 'search and seizure writ duly issued and legal upon its face.' A return of the goods seized was also alleged.

"A trial was had before a jury, and a verdict returned in appellee's favor against all of the defendants for the sum of \$1,600 as actual damages, and judgment was rendered in accordance therewith.

"At the time of the occurrences under review the city of Amarillo was operating under a published local option law, and it is undisputed that the Rangers named in the special plea of appellants in due form sued out a warrant on its face authorizing a search of appellee's premises and a seizure of intoxicating liquors, as provided by section 2 of the act approved April 5, 1907. See General Laws 1907, p. 157. It is also undisputed that, with this warrant in hand, and acting by virtue thereof, said Rangers forcibly broke open a storeroom in appellee's hotel and seized one or more dray loads of wines, whisky, beer, and perhaps other intoxicating liquors found therein. Appellee did not sue either of the Rangers so acting, but specially alleged that the defendants advised and agreed to the issuance of the warrant and to the seizure made. The proof, however, affords little or no warrant for this allegation. On the contrary, we think the record only supports the conclusion that, after the forcible entrance and seizure stated, appellants, without malice and in good faith, and at the request of said Rangers, assisted in removing the intoxicating liquors mentioned into drays, and thereafter accompanied the conveyances to a place where they were temporarily deposited. It is also undisputed that the liquors were later returned without injury, and the court peremptorily instructed the jury not to find damage because of a retention of the property."

The defendants below, the plaintiffs in error here, claimed that they were not liable for damages, because they were summoned to aid Rangers under a writ which the Rangers had secured in accordance with the statutes enacted by the Legislature empowering them to do so. The plaintiffs in error defended upon the ground that they were summoned by officers who held the process before stated, and that they acted in obedience to that summons. Before the trial of the case, the statute under which process was issued had been declared unconstitutional, and the trial court held that the plaintiffs in error were liable for damages occasioned by the acts of the Rangers and themselves under said writ of seizure. The Court of Civil Appeals of the Second District affirmed the judgment, holding that, the statute having been declared void, the plaintiffs in error could not protect themselves by reason of authority given in it to sue out the writ, and because they had acted upon authority and summons of officers authorized to do so.

The trial court charged the jury as follows:

"(4) If you find and believe from the testimony that the defendants, or any one or more of them, did the acts of trespass complained of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in plaintiff's petition, and you further find that he, or they, did not do it voluntarily, but did it at the command or request of the said O. J. Rountree, or either of his fellow Rangers, Putnam and Jones, with no malicious intent on his or their part to humiliate, harass, or injure the plaintiff, but did so under the honest belief at the time that the said Rangers were acting under proper and legal warrant of authority to do the acts that were done, you will find a verdict in favor of such defendant or defendants as you may believe from the evidence so acted, and in favor of the plaintiff against the defendant or defendants as the testimony may show acted otherwise in regard to the alleged trespasses.

"(5) If you find for the plaintiff for actual damages, then you will find for him such amount as will fairly and reasonably compensate him for the actual injuries sustained by reason of the breaking into his private storeroom and the seizure and removal of his goods, wares, and merchandise from his possession, and for such humiliation and mental anguish, if any, as he may have suffered by reason of the trespass and seizure, and for such damage, if any, as he may have sustained to his business and reputation as a hotel keeper. And if you find and believe from the testimony that the trespasses, etc., were willfully or maliciously done, or done for the purpose or with the intent to humiliate, harass, or injure the plaintiff, then you may give such additional damages as you may see proper as vindictive or punitive damages.

"The goods in question having been returned to plaintiff, and no proof having been submitted as to any damage done them, or any damage done the plaintiff on account of their detention, you will not consider these as items of damage in making up your verdict.

"You are further charged that, in case you find for plaintiff, but fail to find that he has sustained any material damage, you will, in such case, return a verdict in his favor for nominal damages, which means any insignificant sum. In this connection you are also charged that you cannot find vindictive or punitive damages for plaintiff where you fail to find actual damages."

The defendants below requested the court to give a peremptory charge to find for the defendants, which was refused; also to give in the charge to the jury special charge No. 1, as contained in the assignments, which was by the court refused.

The plaintiff in error presents the following grounds of error:

"The trial court erred in overruling defendants' motion for a new trial and in refusing to set aside the verdict and judgment and grant defendants a new trial, because the verdict is contrary to the law and the evidence, in that the undisputed evidence shows that the defendants did the acts complained of at the request of known officers of the law, in ignorance of the invalidity of the writ of search and seizure under which said officers were acting; that the acts of defendants were mere servile and ministerial acts, committed at the request and under the direction of State Rangers, acting under a writ valid on its face and issued by an officer authorized to issue writs of that character; that there was no evidence adduced upon the trial that plaintiff suffered any damages, his goods having been returned to him, and that, if he is entitled to any damages, it is merely nominal damages; that the legal wrong, if any, was committed by the Rangers at the time the room was broken into; and that any acts committed by defendants subsequent to that time were merely ministerial acts performed under the direction and at the request of known officers of the law."

It is unnecessary to consider the issue made by the assignments of error upon the liability for plaintiffs in error aiding an officer, at his command, in the execution of an invalid writ. That issue was not submitted to the jury in the charge, but the court, in effect, told the jury that the defendants would not be liable for such acts:

"The search and seizure warrant issued by Justice of the Peace J. W. S. Holman and read in evidence before you was and is void in law, and will furnish no protection in a suit for damages growing out of a search of premises or seizure and removal of goods made thereunder by State Ranger O. J. Rountree and his fellow Rangers, Putnam and Jones, or any other person or persons voluntarily acting with or assisting said Rangers, or to any person or persons knowing the invalidity of said writ or that the invasion of the premises or that the seizure and removal of goods therefrom was unlawful and wrongful, who acted with or assisted such Rangers, even though they may have been commanded or requested so to do by said Rangers. Therefore, if you believe and find from a preponderance of the evidence, that O. J. Rountree and his fellow Rangers, Putnam and Jones, or either one or more of them, on or about the time and at the place alleged by plaintiff, did, without plaintiff's consent, enter upon his premises and forcibly open the door of his storeroom, and then and there did, without plaintiff's consent, seize and carry away the goods, wares, and merchandise, as alleged by him, and you further believe and find, from a preponderance of the testimony, that the defendants, J. W. Cartwright, S. P. Vinyard, W. A. Askew, R. H. McAlpine, W. D. Twitchell, Howard Trigg, W. H. Caviness, and W. H. Lewis, or any one or more of them, voluntarily acted with, aided, or otherwise assisted the said Rountree and his fellow Rangers in forcibly breaking and entering plaintiff's private storeroom, or if they or any of them voluntarily acted with, aided, or otherwise assisted the said Rangers in seizing and carrying away the plaintiff's goods, wares, and merchandise, as alleged by him, or if the said named defendants, or any one or more of them, knew of the invalidity of said search and seizure warrant, or knew that the forcible entrance of said private storeroom, or knew that the seizure and carrying away of said goods, wares, and merchandise, were wrongful and unlawful, and, so knowing, they, or either of them, acted with, aided, or otherwise assisted the said Rountree and his said associate Rangers in seizing and carrying away said goods, wares, and merchandise, such defendants would be liable for the injuries done the plaintiff, even though he or they may have been commanded or requested so to do by the said Rangers, and if you so find and believe, in either event, you will find for the plaintiff and against such defendants, as the evidence may implicate, and assess his damages as hereinafter directed."

[1] It is urged upon this court that there was no evidence to justify the finding that either of the defendants voluntarily participated in the seizure of the goods. It cannot be doubted that the charge of the court stated the law correctly, if the evidence was sufficient to justify the submission of the issue.

[2] This court cannot reverse a judgment because the preponderance of the evidence is against the jury's conclusion.

The rule by which this court must be governed is well stated thus:

"When a given state of facts is such that reasonable men may fairly differ upon the question

as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the courts."

That authority is sustained by courts generally. *Baltimore & Ohio R. R. Co. v. Emma Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *F. B. Choate v. San Antonio & Arkansas Pass Ry. Co.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 319.

[3] In passing upon this question, we must reject all evidence favorable to the plaintiffs in error, and consider only the facts and circumstances which tend to sustain the verdict, and if the jury, in an honest and impartial effort to arrive at the truth, might have reached the conclusion embodied in this verdict, this court cannot set it aside. In considering this question, we must take into account all of the facts and circumstances attending the transaction. We can have no doubt that there had been general talk of a "raid" to be made on "the blind tiger" at the hotel. Rangers had arrived in the town and procured a writ in terms authorizing the seizure. There was a gathering of men at the hotel, the defendants being among them, and they aided in loading the barrels onto a wagon, and the crowd followed the wagon. A jury might conclude from the facts that the defendants volunteered to aid in the raid, and that it had the legal authority to discard the evidence explanatory of defendants' conduct, which they must have done in this instance. This court must pass upon that issue as if the evidence favorable to defendants had not been before the jury. The facts are of such nature that one reading the record might not get their full force, as would one seeing and hearing the witnesses.

We are of the opinion that there is in the record sufficient evidence to sustain the verdict, and the judgments of the Court of Civil Appeals and district court are affirmed.

#### THOMAS v. FIN & FEATHER CLUB. (No. 2323.)

(Supreme Court of Texas. Dec. 16, 1914.)

#### 1. WATERS AND WATER COURSES (§ 156\*)— WRITTEN AGREEMENT—EASEMENT APPURTENANT.

Where an owner of land on which was a small lake allowed a fishing club to construct a dam, the effect of which was to overflow a slough, and a subsequent owner, by written agreement, gave to the club the exclusive fishing rights in the slough, reserving a fishing right to himself, the club had an "easement appurtenant" to the land, to which the title of the last owner's grantee was subject.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.\*]

#### 2. WATERS AND WATER COURSES (§ 156\*)— LAKES AND DAMS—INJURY TO PROPERTY— LIABILITY.

Where a fishing club, with the consent of the owner of the land on which it was located,

had dammed the water of a small lake so that it overflowed a slough, and the owner of the land under the slough, having a reserved fishing right, had used it and made improvements for fishing, the club, owning the dam, had no right to change the conditions by cutting it and drawing the water from the lake, so as to cause damage to the property and rights of such owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.\*]

#### 3. WATERS AND WATER COURSES (§ 158½\*)— INJURY TO PROPERTY—MEASURE OF DAMAGES.

In such case the owner could not recover for the cost of improvements to enable him to sell fishing rights in the slough to others, or for the fish which had left its waters or were prevented from entering them, but could only recover the difference in market value of his land before and after the dam was cut.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 189; Dec. Dig. § 158½.\*]

#### 4. WATERS AND WATER COURSES (§ 156\*)— AGREEMENT—TERMINATION.

A written agreement between an owner of a slough, covered with water by building a dam and a club granting to the club exclusive fishing rights in the waters of the slough, except those reserved to himself terminable by either, was terminated by the club's action in cutting the dam.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by W. L. Thomas against the Fin & Feather Club. Judgment for plaintiff was reversed by the Court of Civil Appeals (138 S. W. 150), and plaintiff brings error. Reversed and remanded.

Leake & Henry, of Dallas, for plaintiff in error. Carden, Starling, Carden, Hemphill & Wallace, Word & Charlton, and Walter Seay, all of Dallas, for defendant in error.

BROWN, C. J. The parties plaintiff and defendant have failed to inform the court whether the dam of the club was constructed across a creek or slough or embraced a depression in the land and constructed so as to cause the water to cover that depression. It does not appear whether the land owned by Thomas bordered on the lake at any point other than the slough on which he claims to have had a lake which existed prior to the construction of the dam. We must therefore dispose of this case with reference to the effect upon Thomas's rights and interests connected with the slough and the lake of the club only so far as it affected that right. In the year 1894 J. H. Gaston owned a tract of land in Dallas county, which embraced the land owned by the plaintiff in error, Thomas, on which a small lake existed. In that year, the Fin & Feather Club, with the consent or acquiescence of Gaston, constructed a dam, the effect of which was to raise the water so

as to affect the existing lake, and also to overflow and embrace the slough in which Thomas claimed a right to fish. In fact, Gaston's right embraced all of the land about which there is controversy in this suit. In 1904 Gaston sold and conveyed to Bateman the land, including all that is here in controversy. At that time the dam had been erected, and the water of the lake covered the same ground that it did when Thomas bought the land from Bateman. By oral agreement Bateman had the right of fishing in the lake. On the 20th day of April, 1904, Bateman and wife entered into a written agreement with the fishing club by which the right of Bateman in the waters of the lake were expressed as follows:

"State of Texas, County of Dallas.

"This agreement this day entered into by and between Fin & Feather Club and Marvin K. Bateman and his wife Luci Belle Bateman, and W. H. Steele, witnesseth:

"1. The said Marvin K. Bateman and his wife, Luci Belle Bateman, and W. H. Steele, have and do hereby grant and convey unto the Fin & Feather Club for the benefit of the members thereof, and upon consideration hereinafter stated, the exclusive rights and privileges of fishing and hunting in the slough or branch known as Gaston slough, which runs into the open lake of the Fin & Feather Club, from a point where said slough or branch enters the grounds and waters of said club, up and along said slough or branch to the spring on our premises acquired from John H. Gaston et al., April 9, 1904, Thos. Freeman survey, covering a distance of about a half mile. The members of said Fin & Feather Club under this grant shall severally enjoy the rights and privileges herein granted to said club, and said privileges shall be exclusively enjoyed by the membership of said club, and no one else shall be permitted to exercise such rights and privileges: Provided, however, that said Bateman and Steele shall reserve the rights for themselves and guests to fish and hunt in and on said slough on their premises at pleasure and without paying to the club any fee or charge on account of such guests. Such guests must be accompanied by either Mr. Steele or Mr. Bateman.

"2. In consideration of the grant of the rights and privileges made by said Bateman and his wife and said Steele to the Fin & Feather Club hereby grants to said Marvin K. Bateman and W. H. Steele all the rights and privileges of membership in the Fin & Feather Club, free of cost to them save and except the right of being a stockholder or director in said club, and participating in the corporate action and proceedings of said club. That is to say, the said Bateman and Steele shall enjoy the fishing and hunting privileges of the club and the privileges of the clubhouse and grounds the same as any other member, and for the exercise of such privileges the said Bateman and Steele shall pay no dues, and are required to hold no stock. Such privileges, however, are to be exercised under the rules and regulations of the club, as applicable to general membership.

"3. It is agreed on the part of the said Marvin K. Bateman and his said wife and W. H. Steele, and on the part of the Fin & Feather Club that the grant of privileges on the part of each to the other herein made shall be determinable by either party at pleasure upon giving thirty days' written notice to the other party. And the said Bateman and Steele agree that they will diligently endeavor to prevent poachers from fishing and hunting in and on said slough, and that said club shall also have

the right to prevent poaching and that all parties thereto shall co-operate to this end.

"In witness whereof the parties hereto have signed their respective names hereunto, the said Fin & Feather Club acting by and through its duly authorized president, C. F. Carter, this 20th day of April, 1904.

"[Signed] Fin & Feather Club.

"By C. F. Carter, President.

"M. K. Bateman.

"Luci Belle Bateman.

"W. H. Steele."

Duly acknowledged on the 20th day of April, 1904 before J. H. Jackson, a notary public, Dallas, Texas, and also J. L. Ross, notary public Dallas, Texas, and duly recorded in volume 323, page 528, Deed Records, Dallas County, Texas.

The agreement was acknowledged according to law by Bateman and wife and recorded. The evidence discloses no disagreement between the club and Gaston or Bateman. On the 8th day of September, 1908, Bateman sold the land to Thomas, at which time the club's dam was in existence as it was originally constructed, and the water of the lake occupied the same position as it did when the dam was cut so as to drain the lake as hereinafter stated. Thomas made some improvements about the lake, making arrangements for fishing and sold fishing rights in the waters of the bayou. He made arrangements to use it as a source of profit to him, and was engaged in so doing over the objection of the club when a cut in the dam was made, which reduced the water below its former level so that it destroyed the value of the bayou as a fishing point. The effect of the draining of the lake was to take from this bayou and from a part of the land the water which had been supplied by the lake of the club, and left that part of the land, or some of it, in an unprofitable condition, being boggy and unavailable for any practical use. Thomas brought this action to recover from the defendant club the damages occasioned to him from injury to his property by this drainage of the lake. He alleged the destruction of his fishing right out of which he had prepared to derive a revenue, also the value of the fish which he had lost through a device constructed and put into the lake by the club, and other injuries before stated. The judgment of the district court was reversed and judgment entered by the Court of Civil Appeals. This application presents to this court for revision and correction errors of law charged to have been committed at the trial.

The question of prescription is not involved in this case, because it is shown beyond doubt or controversy that there was a positive verbal agreement on the part of the club with Gaston, and a written contract with Bateman. Therefore we will not discuss the question as to whether the prescriptive right, if it had existed in the fishing club, would have given a reciprocal right in Thomas to require the maintenance of the dam.

The fishing club constructed its dam in such manner as to cause the water which it im-

pounded to raise the level of the water in the bayou in which Thomas's lake was formed and existed, and this condition was maintained by consent of all the parties for a number of years. In fact, it was observed by all until the act of the club by which it drained off the water, thereby lowering the water in Thomas's lake and bayou, and, as he claims, causing great injury and damage to his property.

[1, 2] We regard it as a well-settled proposition that when by consent or otherwise, water is thus impounded by artificial means as by a dam, in such way as to affect adjoining lands, and after the parties owning adjacent lands have adjusted their improvements and uses of their lands to the condition caused by the lake, as in this instance, the owners of the dam have no right to change the conditions by drawing the water from the lake in such a manner as to cause damage to the property of the adjacent landowner. *Belknap v. Trimble et al.*, 3 Paige (N. Y.) 577; *Matthewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349; *Village of Pewaukee v. F. X. Savoy*, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859; *Kray v. Muggil*, 84 Minn. 90, 86 N. W. 882, 54 L. R. A. 473, 87 Am. St. Rep. 332, and note. Many cases could be added.

The agreement between Bateman and wife and the fishing club with regard to the use of the lake was appurtenant to the land, and vested in the club an easement to which Thomas's title was subject as it was in the hands of Bateman. Neither party had exercised the power reserved in the contract to annul the privilege of fishing in the lake and membership of the club, which were secured by the said contract. Therefore we must consider this case as if the action were brought by Bateman and wife, since Thomas took the estate with all its incumbrances and limitations.

[3] It is difficult for us to understand upon what ground the damages were recovered. But we are of the opinion that the Court of Civil Appeals erred in holding that Thomas had no right to require the club to maintain its dam at its proper stage. It is therefore necessary for this court to reverse the judgment of the Court of Civil Appeals in that respect, for we have no doubt that landowners, under the circumstances of this case, have the right in law to have the conditions created by the construction of the dam maintained in so far as it was necessary to the preservation or protection of rights which accrued by the erection of the dam, and the continuance of which depends upon the maintenance of the dam. Thomas had the right to recover from the fishing club the damage occasioned to him through the drawing off of the water from the lake. The damages must be confined to the proximate result of the action of the club in lowering the level of the water.

In this we do not have reference to any claims for vindictive damages, if the facts should justify any such claim, nor to any claim for damages which Thomas may have against the club because of their depriving him, if they did so, of any fish that would have naturally remained in the waters of his lake.

We do not find any evidence of damage done to Thomas by the drawing off of the water from the lake, except in general terms he says it reduced the market value of his property, and some other general expressions of that kind. But it does not appear in what manner that was done, except that he alleges that the lake was a valuable part of his property right, and the act of the club complained of affected its salable value.

The question which lies at the bottom of this matter is, What was the effect of the agreement between Bateman and the club? It did not give the club the right to destroy the lake of Bateman, by discharging the water from its own lake and thereby changing existing conditions. But that contract did give to the club the exclusive right of fishing in that water and the right to exclude from the water, for the purpose of fishing or other amusement, any persons except those named in the contract. The contract gave to Bateman and Steele the privilege of membership of the club without the payment of dues, and with the right to fish and hunt in any part of the club's ground. It also gave to the club the exclusive right to control that part of the lake which was formed by elevating its water level so as to raise the water in the bayou in question. Bateman, and Thomas through Bateman, had the right to fish in that portion of the water or in any part of the lake of the club, and they had the right to invite their friends and persons visiting them to join them in such sport. But they were expressly excluded from selling any fishing or hunting rights in said water. Therefore Thomas is not entitled to recover any damages he may have sustained in making improvements to enable him to sell to others rights to fish and hunt in any part of the lake. Having no such right, he could not lawfully have made the profit he claims. Therefore that it not an element of damage for which he can recover. The agreement between Bateman and the club had not been revoked or set aside by either party to this action, but was annulled by the action of the club in draining the lake. And we must determine this case as if there was no question, and there is none, of the binding force of that agreement upon the parties.

This court is unable to determine the basis upon which the damages were assessed, but under the agreement between Bateman and the club, the latter had full control and ownership of all the fish in the lake, and we are of the opinion that the facts do not show that Thomas is entitled to recover anything for fish which may have been induced to

leave his waters or prevented from entering, if such was the case.

[4] We are of opinion that the Court of Civil Appeals erred in rendering judgment against the plaintiff, Thomas, and we reverse that portion of the judgment of said court and remand the case to the district court for trial under the following instructions as to the measure of damages in case Thomas shall recover:

The plaintiff is entitled to recover the difference in the value of his land as it existed before the dam was cut and its value as it is since the cutting of the dam. In determining that issue, the jury may consider any decrease in the market price of the land, also the value to Thomas of the right to take fish from that portion of the lake which covered his land, as well as the right to use that part of the lake for profit or for pleasure. But he is not entitled to compensation for any supposed number of fish which may have been prevented from entering his part of the lake. At the time that act is charged to have been done, the club had the right to control that portion of the lake and to take fish from it. Either party had the right to terminate the contract between Bateman and the club, and the cutting of the dam by the club operated to put an end to that agreement.

Judgment of the Court of Civil Appeals is reversed, and cause is remanded.

**HAWKINS, J. (concurring).** The report of the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District in this case may be found in 138 S. W. 150. It contains a fuller statement of the pleadings, physical conditions, issues, etc.

The question of the right of plaintiff to recover was submitted to the jury upon the single issue of a "prescriptive right" in the club to maintain the lake on plaintiff's land, though the charge injected into that issue an element of estoppel, based on evidence to the effect that such maintenance of the lake had caused sediment to fill the channel of an ancient slough therein, said charge being predicated upon the theory that, as such maintenance unquestionably began as a trespass and continued for 10 years, it gave the club such prescriptive right, unless the Gaston agreement and the Bateman contract with the club each rendered such maintenance not "adverse" to the landowner, thereby, together preventing such maintenance from ripening into said prescriptive right; and, further, that if the club had acquired such prescriptive right, Thomas, as owner of the land formerly owned in turn by Gaston and Bateman, had a reciprocal right to require the club to maintain such lake on his land.

This issue as to the existence of such prescriptive right divided the Court of Civil Appeals, the majority holding against plaintiff thereon, reversing the judgment of the district court in his favor, and rendering judgment against him. Under these circumstances I desire to state my views upon that

issue somewhat more fully than they are reflected in the terse, yet comprehensive, treatment given it in the foregoing opinion by Chief Justice BROWN.

Could the club, prior to the cutting of its dam and the draining of plaintiff's portion of said lake, have successfully asserted, as against Thomas, a prescriptive right to maintain said lake on a portion of his land? That depends upon whether the club's maintenance thereof was or was not, for 10 years, "adverse" to the owners of said Thomas tract. *Railway Co. v. Wilson*, 83 Tex. 155, 18 S. W. 325. Gaston bought that tract in 1894. While he owned it the club built upon its own land a dam which backed water up, filling Gaston's part of the slough, spreading the waters, and creating on his land a lake of four or five acres. There is no controversy but that, in originally flowing Gaston's land, the club acted without authority or permission from Gaston, or that maintenance by the club of said lake on the Thomas tract for more than 10 years continued to be "adverse" to the owners of that tract, unless the Gaston agreement and the Bateman contract, in turn, and the course of conduct by and between the club and the landowners, thereunder, respectively, rendered such maintenance not "adverse" to said owners. Said agreement and said contract were substantially alike in so far as they severally bear upon the issue of a "prescriptive right" in the club. Gaston, while owning said land, and after said lake had been formed thereon, orally agreed with the club that it might use his portion of said lake for hunting and fishing, so he would not be annoyed by anybody coming through, but that he might use his part of the lake, for himself, for fishing and hunting, and, accordingly turned over to the club control of the lake on his land. Gaston sold said land to Bateman in April, 1904, and Bateman sold it, in September, 1908, to Thomas. Plaintiff's portion of the lake was drained early in 1909. The Bateman contract gave to the club, for its members, "exclusive rights and privileges of fishing and hunting in the slough, or branch, known as Gaston slough, which runs into the open lake of the Fin & Feather Club," but provided that "Bateman and Steele shall reserve the rights for themselves and guests to fish and hunt in and on said slough on their premises at pleasure, without paying to the club any fee or charge on account of such guests," and stipulated that "said Bateman and Steele shall enjoy the fishing and hunting privileges of the club and the privileges of the clubhouse and grounds," without being required to hold stock or pay dues. Neither the Gaston agreement nor the Bateman contract, in express terms, specifically authorized or permitted the club to so flood any portion of the Thomas land, or to maintain a lake thereon, and the provision in said

contract "that the grant of privileges each to the other herein made shall be determinable by either party at pleasure upon giving thirty days' written notice to the other party" strongly suggests that said contract was not intended to extend or secure to the club such authority or permission; nevertheless, as the lake had then been formed upon said land, the effect of said agreement and of said contract, as a matter of law, was to place Gaston and Bateman, in turn, in the attitude of acquiescing in and consenting to the maintenance of said lake, over said slough, and as said lake then stood on said land, at least to such extent as to prevent such maintenance thereof from being "adverse" to the owners of said land, while such agreement and such contract, respectively, were in force. In other words, the Bateman contract primarily was merely a fishing and hunting privilege contract, with semireciprocal features, and that may have been, and, it seems to me, probably was, the ultimate intention and purpose of the parties thereto in making it; nevertheless, as a matter of law, its necessary and further effects were to create and continue an acquiescence and consent upon Bateman's part to the maintenance of the lake on his land, substantially as it then stood, and also to operate as a clear recognition by the club of Bateman's right, as owner of the land, to use such portion of the lake for the designated purpose of fishing and hunting by himself and Steele and their guests, all so long as such contract might remain in force. The Gaston agreement evidenced a like acquiescence, consent, and recognition of rights upon the part of each party to it. Consequently the legal effect of the Gaston agreement and of said Bateman contract was to stop the running of time in the matter of "adverse" maintenance of the lake, thus rendering such further maintenance thereof not "adverse" to the owners of the land, the agreement or the contract remaining operative, thereby removing the basis for such prescriptive right, and putting that issue definitely out of this case. And with it, of course, goes the issue as to the reciprocal right of Thomas to require the club to maintain his portion of said lake. To this extent I concur in the views of the majority of the Court of Civil Appeals, and, in so doing, am in accord with the foregoing opinion of our Chief Justice upon that point.

It follows that plaintiff's right to recover damages must rest solely upon the ground stated in said foregoing opinion, resulting from the status which had grown up between the club and the owners of the Thomas tract, in which, I think, should be in-

cluded and specifically here mentioned the fact that the club's maintenance of the lake on the Thomas tract had caused the ancient slough therein to become filled with sediment, thereby destroying the valuable fishing preserve which existed upon that tract before the club erected its dam which caused the formation of said lake thereon.

That portion of said opinion which refers to the adjustment by Thomas of improvements upon his land adjacent to his lake, and to adjustment by him of the uses of his land to conditions created by the formation and maintenance of the lake, states the rule correctly, as an abstract proposition, but, inasmuch as the only adjustment by Thomas of his improvements or uses, so far as the evidence discloses, seems to have been made with a view to sale by him of fishing and hunting privileges in his portion of said lake—the very thing which the Bateman contract inhibited—I do not think such adaptation and improvements come within the rule so announced, and am consequently unable to see that said rule applies to the facts of this case, except as related to the filling of the slough with sediment. Plaintiff testified: "I don't know that there is any damage outside of this five acres covered by the water." Clearly the effect of the Bateman contract was to prevent him, while it was in force, from selling privileges to fish in or hunt on his part of the slough, which, by fair implication, meant his part of the lake; and, since said contract was appurtenant to the land, and seems to have been of record when Thomas bought it, Thomas was likewise bound and restricted by its terms, and so cannot recover damages from loss of sales of such privileges. Moreover, this record shows that at the close of the evidence, plaintiff, by his attorneys, in open court, abandoned his claim for all such damages. For both reasons it was error for the trial court to submit to the jury that element of damages. Several witnesses, other than the plaintiff, testified specifically to the amount of damage done to plaintiff's tract of land by draining off his portion of the lake.

I find in the Bateman contract nothing relating to "amusement," other than fishing and hunting, nothing giving the club "the exclusive right to control" plaintiff's portion of the lake, or "full control and ownership of all the fish in the lake," and nothing giving to Bateman or Steele "the right to invite their friends and persons visiting them to join them" in fishing or hunting on the premises owned by the club.

I concur in the order made.

**ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. GRIFFIN. (No. 2585.)**

(Supreme Court of Texas. Dec. 16, 1914.)

**1. CONSTITUTIONAL LAW (§ 48\*)—CONSTITUTIONALITY OF STATUTE—PRESUMPTIONS.**

A law will be recognized as valid, if, by reasonably fair construction, it appears that the Legislature was empowered to enact it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**2. MASTER AND SERVANT (§ 20\*)—RELATION.**

Where a contract of employment is for an indefinite time, either party may end it at will without cause or notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 19; Dec. Dig. § 20.\*]

**3. CONSTITUTIONAL LAW (§ 89\*)—"LIBERTY OF CONTRACT."**

The impairment of a corporation's right to discharge employes at will without cause by the Blacklisting Law (Rev. St. 1911, art. 594) is violative of its constitutional right of liberty of contract, which right includes the corresponding right to accept a contract proposed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89.\*]

For other definitions, see Words and Phrases, Second Series, Liberty of Contract.]

**4. CONSTITUTIONAL LAW (§ 238\*)—EQUAL PROTECTION OF LAWS.**

The impairment of a corporation's right to discharge employes without cause by the Blacklisting Law is a denial of the equal protection of the laws secured by Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-690, 695, 706-708; Dec. Dig. § 238.\*]

**5. CONSTITUTIONAL LAW (§ 90\*)—"LIBERTY OF SPEECH."**

The "liberty to speak" or write secured by Const. art. 1, § 8, includes the corresponding right to be silent, and this right is infringed by the provisions of the Blacklisting Law for compelling a corporation to give a discharged employe a statement of the cause of discharge.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. § 90.\*]

For other definitions, see Words and Phrases, First and Second Series, Liberty of Speech and the Press.]

**6. MASTER AND SERVANT (§ 11\*)—RELATION—STATUTORY REGULATIONS—POLICE POWER.**

The impairment of a corporation's right to discharge employes by the Blacklisting Law cannot be sustained as an exercise of the police power to deal with the real needs of the people in their health, safety, comfort, or convenience.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 11.\*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Thomas A. Griffin against the St. Louis Southwestern Railway Company of Texas. Judgment (154 S. W. 583) for plaintiff, and defendant brings error. Reversed.

E. B. Perkins and Daniel Upthegrove, both of Dallas, for plaintiff in error. W. H. Clark and W. T. Strange, both of Dallas, for defendant in error.

BROWN, C. J. We copy from the opinion of Justice Moursund the following statement of the facts found by the Court of

Civil Appeals of the Fourth District (154 S. W. 583):

"Thomas A. Griffin, appellee, sued the St. Louis Southwestern Railway Company of Texas, appellant, to recover damages for its alleged failure and refusal to issue to him a true statement of the reasons why he was discharged by appellant, he having made demand for such statement under chapter 89, p. 160, General Laws of Texas of 1909, commonly known as the 'Blacklisting Law.' On May 9, 1910, appellee was employed as a section foreman by appellant, and on July 18, 1910, was discharged, whereupon he made his demand for a statement in writing as to the cause of his discharge. Appellant issued a service letter, as follows: 'This is to certify that Thomas A. Griffin has been employed in the capacity of section foreman at Renner on the St. Louis Southwestern Railway Company of Texas from May 9, 1910, to July 18, 1910. Discharged for not distributing work properly and inability to surface and line track. Previous record. March 25, 1910, to April 1, 1910, assistant extra gang foreman. Resigned. Service satisfactory.'

"Appellee alleged that this statement was false and malicious; that he previously had several years' experience on section work and as section foreman, performing and directing said work, was capable, experienced, and skilled therein; that he could and did distribute his work properly, and could and did surface and line track; that the real cause of his discharge was on account of a personal difference which he had on July 10, 1910, with appellant's general roadmaster, J. J. Hughes.

"Appellant attacked the constitutionality of the Blacklisting Law, both by demurrer and plea, and alleged that it in good faith attempted to comply with said statute, and that the reasons stated in said service letter were the true reasons for appellee's discharge; that its assistant roadmaster, in making the report on which said letter was based, acted in good faith in an effort to perform his duty to appellant, and it would not be liable for a mistake in judgment made by its roadmaster. Appellant further alleged that it did not make such letter public, but furnished it to appellee in compliance with said statute, at his request, and without any malice, ill will, or evil intent towards appellee; that it had the right to exercise and act upon its own judgment as to the competency of those employed as section foremen, and if a mistake should be made in the discharge of such employe it would not be liable to him; that it was required by law to keep its track in proper condition for the operation of its trains; that it was necessary to employ careful and competent section foremen to keep the track in proper repair; that other railroad companies had a like interest in keeping their tracks and roadbed in repair; and that such communication was privileged, and, there being no malice, ill will, or evil intent shown, plaintiff could not recover.

"Defendant's exceptions were overruled, and upon trial the jury found that the statement furnished was false, and awarded plaintiff \$500 damages. Judgment was entered for said amount, from which defendants appealed."

There is no conflict in the evidence to the fact of the employment and discharge of Griffin. The question presented to this court is the validity of a statute enacted by the Legislature as stated above, from which we copy the following provisions:

"Art. 594. Discrimination.—Either or any of the following acts shall constitute discrimination against persons seeking employment: \* \* \* (3) Where any corporation, or receiver of the same, doing business in this state, or any agent

or employé of such corporation or receiver, shall have discharged an employé, and such employé demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent or employé thereof fails to furnish a true statement of the same to such discharged employé, within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation or receiver shall fail, within ten days after written demand for the same, to furnish to any employé voluntarily leaving the service of such corporation or receiver, a statement in writing that such employé did leave such service voluntarily, or where any corporation or receiver of the same, doing business within this state, shall fail to show in any statement under the provision of this title the number of years and months during which such employé was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory in each such capacity or not, or where any such corporation or receiver shall fail within ten days after written demand for the same to furnish to any such employé a true copy of the statement originally given to such employé for his use in case he shall have lost or is otherwise deprived of the use of the said original statement." R. S. 1911, vol. 1, art. 594, § 3.

The act gives no right of action to the employé for failure to furnish the "true statement," but provides that the state may sue for and recover a penalty of \$1,000 for each failure to comply with the law.

[1] For the purpose of testing the correctness of the judgment of the Court of Civil Appeals in holding the act of the Legislature valid, we must assume that the evidence was sufficient to sustain the claim that the statement of discharge furnished did not state a cause which was true in fact; but this does not concede that the statement of discharge furnished did not state truly the cause which operated upon the mind of the officer who discharged Griffin. We will first consider the validity of the statute relied upon by defendant in error, and if, by reasonably fair construction, it appears that the Legislature was empowered to enact the law, this court will recognize it as valid; that is, a serious doubt of the power must be resolved in favor of the validity of the law. *Lewis' Sutherland on Statutory Construction*, § 82, states the rule thus:

"Every presumption is in favor of the validity of an act of the Legislature, and all doubts are resolved in support of the act. 'In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity, and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution. The Legislature is a co-ordinate department of the government, invested with high and responsible duties, and it must be presumed that it has considered and discussed the constitutionality of all measures passed by it.' The unconstitutionality must be clear or the act will be sustained."

It is true that all legislative power is by the Constitution vested in the Legislature, and the judicial department cannot frame laws, nor change, nor mold them by construction. It is likewise true that the judi-

cial power of the state is vested in the courts which are charged with the duty of enforcing the laws and with the duty to annul any law enacted by the Legislature which is clearly in violation of the constitutional rights of any person, natural or corporate, and with the same purpose with which the courts refrain from trespassing upon the privileges of the legislative power, they will, when necessary, exercise their power to prevent the destruction or impairment of rights vested in citizens or corporate bodies, by the unauthorized action of the Legislature.

[2-4] The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him. The liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed. When Griffin entered the service of the railroad company for an indefinite time, the law reserved to him the right to quit the service at any time without cause or notice to the employer. The railroad company had the corresponding right to discharge him at any time without cause or notice. The rights of the parties were mutual. *E. L. & R. R. Ry. Co. v. Scott*, 72 Tex. 75, 10 S. W. 102, 13 Am. St. Rep. 758. In the case cited, the court said:

"It is very generally if not uniformly held, when the term of service is left to the discretion of either party, or the term left indefinite or determinable by either party, that either may put an end to it at will, and so without cause. *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Pa. 431; *Wood's Master and Servant*, §§ 133, 136, and citations."

If the servant could quit without notice and the master could discharge him at will without notice, the effect of the statute in question would be to preserve the servant's unqualified right to leave the service without cause or notice, but to deny to the corporation the corresponding right to discharge without cause or notice.

The requirement that the corporation give to the discharged employé, on his demand, a statement of the "true cause" for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else, how could the "true cause" be given? The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of its liberty of contract and a denial of the equal protection of the law, in violation of this provision of the fourteenth amendment to the constitution of the United States:

"Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

But the statute did not stop at the destruction of the corporation's right to discharge the employé without cause, but provided that in case the statement of cause should

be refused, or if the cause stated was not the "true cause," the state might recover from the corporation a penalty of \$1,000.

But the Legislature did not stop with that provision, for under the construction placed on the law by the Court of Civil Appeals the discharged employé could recover damages by proving that the cause stated was not true. The proof in this case was that the person who discharged Griffin acted upon the report of another who has oversight of Griffin's work, and there was no controversy that he acted upon that report, but Griffin was permitted to prove that he was capable and did good work, which denied to the employer the right to determine the efficiency of the servant.

In *St. L. S. W. Ry. Co. of Texas v. Hixon*, 104 Tex. 267, 137 S. W. 343, this court held that the law required a true statement of the fact which operated upon the mind of the officer or agent who discharged the employé, but did not require that the fact stated must have been true. Under this most favorable construction, the law is no less in violation of the constitutional right of equal protection of the law as secured by the fourteenth amendment to the Constitution of the United States.

[5] The eighth section of article 1 of the Constitution of this state is in this comprehensive and clear language:

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

The liberty to write or speak includes the corresponding right to be silent, and also the liberty to decline to write. *Railway Co. v. Brown*, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346; *Wallace v. Railway Co.*, 94 Ga. 732, 22 S. E. 579. To say that one can be compelled at the instance of another party to do what he has the constitutional liberty to do or not is a contradiction that is not susceptible of reconciliation. In *Wallace v. Railway Co.*, cited above, the Georgia court tersely and clearly covers the entire ground thus:

"A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employes, and which subject them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred."

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We find no authority to the contrary, and argument could not add force to the reasoning of those courts. The cases cited are sufficient to require this court to declare the law in question void, but we believe that we should point out other grounds which demand the judgment of this court in support of our conclusion.

The act of the Legislature under consideration violates that provision of the Constitution by many harsh requirements. We will point out some of them. This statute declares the corporation to be guilty of discrimination against the employé in the following instances; but we do not exhaust the harsh features of the law:

First. It confers upon the employé a right to recover damages if the corporation, upon his demand, should fail to give to him a statement of the "true cause" of his discharge, "or why his relationship to such company ceased." The corporation has the constitutional right to discharge without cause, and the Legislature cannot destroy this right of contract.

Second. Where the employing corporation by any means, directly or indirectly, shall communicate to any other person or corporation any information in regard to the said employé who may seek employment of such person or corporation, and upon demand of such employé, shall fail within 10 days thereafter to deliver to him a complete copy of such communication, if any written, and if not a true statement of it, whether it was done by sign or other means, if not in writing, and shall also give the names and addresses of all persons or corporations to whom such communication shall have been made. This is not a part of any proceeding at law, not even the act of an officer.

Third. When any such corporation shall have discharged an employé and such employé demands a statement in writing of the cause of his discharge, the corporation or its officers are required within 10 days after the demand, to give a true statement of the cause for so discharging the employé. If the employé voluntarily leaves the service of the corporation, he may demand in writing from such corporation a statement that he did voluntarily leave such employment. The corporation is required in making a statement of the departure of his employé, whether voluntary or otherwise, to give the number of years and months during which the employé was in the service of the corporation, and state every capacity or position in which he was employed and whether his services were satisfactory in each capacity or not. And if the employé should lose or destroy his statement, then he has the right to demand of the corporation to make a true copy of the original statement and furnish it to him. We have found no precedent for this palpable disregard of the rights of corporations under the Constitution of the state.

Fourth. If any corporation or receiver doing business in this state, etc., shall have received any request, notice, or communication, if in writing or otherwise, from any person, etc., preventing or calculated to prevent the employment of such person seeking employment, and if such corporation or agent shall fail to furnish such person seeking employment a true statement of such request, notice, or communication, etc., if otherwise than in writing make a true statement thereof, and a true interpretation of its meaning, the names and addresses of all such persons or corporations making such inquiry.

Fifth. When any corporation doing business in this state shall have discharged any employé and has failed to give such employé a true statement of the causes of his discharge, within 10 days after demand is made therefor, and shall thereafter furnish any other person or corporation, etc., unless it be at the request of the latter, the corporation is charged with discrimination.

Sixth. Wherein a corporation, etc., doing business in this state, shall discriminate against any person seeking employment on account of his having participated in a strike.

The effect of the foregoing section of the statute is to deny to a corporation the right to refuse employment to a man who had participated in a strike on a railroad. This is a clear invasion of the constitutional right of an individual or corporation to determine for himself, or itself, the matter of employing or discharging any person already employed, and the Legislature has no power to prescribe terms by which such employer shall be governed, either in employing or discharging a servant.

The soundness or justice of the reason which prompts refusal or discharge of an employé does not affect the question of the constitutional right to exercise that authority. It may be that the party is acting upon what is a mere "whim," i. e., without any foundation in fact or right; but nevertheless his constitutional right to deny or terminate employment exists, and the Legislature cannot, for any reason, make such action a crime on the part of the person or corporation exercising that constitutional power. *Gillespie v. State of Illinois*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; *Penn. Ry. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

Seventh. Where any corporation or receiver doing business in this state shall give any information or communication in regard to any person who is making application for employment to the effect that such person had participated in a strike.

A failure to comply with any one of the demands above is characterized as a discrimination and is by law made a criminal offense, for which the state may recover \$1,000, and under the decision of the Court of Civil Appeals the employé may also recover

damages limited only by the capacity of the jury to calculate the amount.

The second, third, fourth, and fifth grounds of liability under the statute, each is in violation of the natural right to speak or be silent, or the liberty of contract secured by the Constitution of this state and of the United States. Of the great number of cases which have settled these questions adversely to the provisions of the act of the Texas Legislature, we have cited sufficiently, because there is no conflict on the question.

The second and fourth grounds, as above stated, are most remarkable, for they invest the discharged employé with inquisitorial authority as has not been intrusted to any officer, and would not be enforced if granted to any officer, except it be in a legal proceeding.

There being no suit pending in court, a private person in his own interest is empowered to demand, of a corporation which has discharged him, to disclose to him that corporation's private correspondence, even the conversation which may have occurred between its agents or officers and other people. Originality in devising these provisions surely must be accorded to the Legislature of Texas. We have found nothing like them elsewhere. In the conflict between labor and capital, the Legislature has the limitation of its authority in the Constitution of the United States and the state, and the courts have no authority, save to keep both parties within the limits of their constitutional rights.

[6] Beyond controversy, the act of the Legislature is void, unless it can be sustained as an exercise of the police power. To test the validity of the law as an exercise of that power, we will first ascertain the scope of the power as exercised by state Legislatures. We find no more thorough treatment than is embodied in *Railway Co. v. Dallas*, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850. In that case the city of Dallas sought to compel the railroad company to reconstruct its crossings upon streets so as to conform to the ordinances of the city. In support of a judgment in accordance with the claim of the city, the police power was invoked, and Judge Williams, for the court, in his usual logical and forcible style, said:

"The power of the Legislature to regulate the use of property and the carrying on of business so as to protect the health, safety, and comfort of citizens is recognized by all of the authorities, and its use is not to be defeated by the mere fact that loss or expense may be imposed upon the owners of the property or business. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [24 L. Ed. 1036]. The numerous cases on the subject of nuisances in this court and elsewhere are but instances of the use of this power. So the decisive question, as we have said before, is whether or not the action of the city is sustained by the existence of facts affecting the public welfare sufficient to justify such an application of the police power, and the answer to this question determines the one made by respondent as to whether or not the action of the city constitutes due process of law.

"The power is not an arbitrary one, but has

its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience, as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation. But, as the citizen cannot be deprived of his property without due process of law, and as a deprivation by force of the police power fulfills this requirement only when the power is exercised for the purpose of accomplishing and in a manner appropriate to the accomplishment of the purpose for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of a power rests, and into the manner of its exercise; and if there has been an invasion of property rights, under the guise of this power, without justifying occasion, or in any unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures.

"It is therefore not true, as urged by plaintiff, that the judgment of the legislative body concludes all inquiry as to the existence of facts essential to support the assertion of such a power as that now in question. If this were true, it would always be within legislative power to disregard the constitutional provisions giving protection to the individual. The authorities are practically in accord upon the subject. A few quotations will indicate the scope of the inquiry as far as it can be abstractly defined. In *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 20 [49 L. Ed. 169], the law is thus stated by the Supreme Court of the United States: 'It may be admitted that every intentment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.'

"In *Lawton v. Steele*, 152 U. S. 133-137, 14 Sup. Ct. 499, 38 L. Ed. 385-388, Mr. Justice Brown, speaking for the court, said upon this subject: 'To justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the court.'

We have quoted thus freely, because by so doing the question is fully presented by

Judge Williams in his usual forcible manner, and by the Supreme Court of the United States. There can be no pretense that the act under examination deals with "the real needs of the people in their health, safety, comfort, or convenience."

To add cases as authority would be useless, for this is a fundamental principle of free government and gains no force by the repetition of it by different courts. The subject of legislation in this statute and its various provisions, as stated above, are purely personal as between the employé and the corporation, and do not directly affect the public, in health, safety, comfort, convenience, or otherwise.

The act is in violation of the Constitution of this state and of the United States, and is void.

It is ordered that the judgment of the district court and of the Court of Civil Appeals be, and the same are, reversed; and it is ordered that judgment be entered for the plaintiff in error.

HAWKINS, J. From such careful study and consideration as I have been able to give to the constitutional questions which are here involved I am not now prepared to express an opinion in this case, but, later on, will prepare and file same.

#### POST v. STATE. (No. 2725.)

(Supreme Court of Texas. Dec. 16, 1914.)

##### 1. PUBLIC LANDS (§ 175\*)—RESURVEY—CONCLUSIVENESS.

A resurvey of public lands under Rev. St. 1911, arts. 5347-5349, is not conclusive against the state as to the location of a prior state grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 555-570; Dec. Dig. § 175.\*]

##### 2. APPEAL AND ERROR (§ 987)—DISPOSITION OF CASE ON APPEAL—JURISDICTION OF COURT OF CIVIL APPEALS.

Where the trial judge rested his judgment for plaintiff on the ground that the state was conclusively bound by a resurvey, and found on proper evidence that a part of the land in controversy, but not defining the amount, was within the original field notes of the surveys relied on by plaintiff, the Court of Civil Appeals, deciding that the resurvey was not conclusive, could only set aside the judgment and remand the case for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*]

##### 3. APPEAL AND ERROR (§ 987\*)—DISPOSITION OF CASE ON APPEAL—JURISDICTION OF COURT OF APPEALS.

Where the evidence is without conflict, the Court of Civil Appeals may render the proper judgment; but where there is any conflict on a material issue, it may not substitute its findings for those of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*]

Action by C. W. Post against the State of Texas. There was a judgment of the Supreme Court (169 S. W. 407) rendered in

response to questions certified by the Court of Civil Appeals, and plaintiff petitions for writ of error. Judgments of the district court and the Court of Civil Appeals (169 S. W. 401) reversed, and cause remanded.

Gregory, Batts & Brooks, of Austin, for plaintiff in error. B. F. Looney, Atty. Gen., and G. B. Smedley, Asst. Atty. Gen., for the State.

**PHILLIPS, J.** The suit was a controversy between the state and the plaintiff in error, Post, over certain lands held by the latter, claimed by the state to be vacant and sought by it to be recovered. The trial resulted in a judgment in Post's favor. On the appeal the honorable Court of Civil Appeals affirmed this judgment on the original hearing; but on motion for rehearing reversed it, and rendered judgment for the state for all of the land. 169 S. W. 401. With the state contending that the land was not included in the several surveys owned by Post as determined by their original field notes, a principal question in the case was whether a resurvey of Post's lands by the state surveyor under the act of 1887 (articles 5347, 5348, and 5349, R. S. 1911) which, according to its corrected field notes, placed the land in dispute within the lines of the original patents, was binding upon the state. After the Court of Civil Appeals' decision on rehearing, it certified that question to this court, to which answer was made that the resurvey was not effectual to give Post any land which the original surveys did not, according to their field notes, include. 169 S. W. 407. The case is now here on Post's petition for writ of error, to which the state has filed an answer.

[1] Adhering to our ruling on the certified question, the Court of Civil Appeals correctly decided that the resurvey was not binding upon the state; but it was without authority to render the judgment.

[2] While the trial court rested its judgment upon a holding that the state was concluded by the resurvey, it found, as a fact, that a part of the land in suit—not defining the amount—is embraced within the original field notes of the surveys. If it is, the state is not entitled to recover that part of the land. The Court of Civil Appeals found differently from the trial court upon this question, and upon such finding rendered the judgment.

[3] The province of determining questions of fact is in the trial court. The Court of Civil Appeals has the power to set aside its finding and remand the cause for a new trial. Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence upon a material issue, it has no authority to substitute its findings of fact for those of the trial court. *Choate v. Railway Co.*, 91 Tex. 406, 44 S. W. 69.

There is evidence in the record, whether correct or not, which supports the trial court's finding of fact that the original field notes of the surveys include a part of the land in controversy. The case should, therefore, have been only remanded.

The judgments of the district court and the Court of Civil Appeals are reversed, and the case is remanded for the settlement of this issue.

**HAWKINS, J.**, being disqualified, did not participate in the decision.

#### WAITS v. STATE. (No. 3342.)

(Court of Criminal Appeals of Texas. Dec. 2, 1914.)

#### INTOXICATING LIQUORS (§ 236\*)—OFFENSES—BUSINESS OF SELLING INTOXICANTS.

In a prosecution for engaging in the business of selling intoxicating liquors in prohibition territory, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Andrew Waits was convicted of unlawfully engaging in the business or occupation of selling intoxicants in prohibition territory, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** Appellant was convicted for unlawfully engaging in the business or occupation of selling intoxicating liquors in prohibition territory.

The sole question in the case is whether or not the evidence is sufficient to sustain the verdict. We have carefully read the evidence. It shows that prohibition had been, some time before the offense is alleged to have been committed, and was at the time, in force in Cherokee county. The uncontradicted testimony shows that appellant, within the course of a few months, made three separate and distinct sales of whisky (two of them to one party and one to another); that during the latter part of the period wherein he was charged with the commission of the offense, and before the indictment was filed herein, in the course of 2½ months, he received five shipments of whisky through one of the express companies (4 quarts 3 distinct times, 2½ at another, and 6 at another). No complaint whatever is made of the court's charge. The evidence was sufficient under the law and the charge to convince the jury beyond a reasonable doubt that he was guilty, and the court below was also of that opinion, and in our opinion it is sufficient. Hence this court cannot disturb the verdict.

The judgment is affirmed.

**GOLDSTEIN v. STATE. (No. 8350.)**

(Court of Criminal Appeals of Texas. Nov. 25, 1914. Rehearing Denied Dec. 23, 1914.)

**1. WITNESSES (§ 35\*)—COMPETENCY—DETERMINATION—TIME.**

Whether a witness is competent, so as to justify the introduction of his testimony given on a former trial, depends on his status at the time the testimony is offered, and not at the time it was given.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 77, 78; Dec. Dig. § 35.\*]

**2. WITNESSES (§ 48\*)—COMPETENCY—CONVICTS—INCARCERATION IN FOREIGN STATE—"ANY OTHER JURISDICTION."**

Code Cr. Proc. 1911, art. 788, subd. 3, provides that all persons who have been, or may be, convicted of a felony in Texas or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted, are incompetent to testify as witnesses in a civil action. *Held*, that the words "or in any other jurisdiction" include convictions had in other states of the federal Union.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 100-115; Dec. Dig. § 48.\*]

**3. WITNESSES (§ 78\*)—COMPETENCY—CONVICTION OF FELONY—FOREIGN STATE—BEST EVIDENCE.**

The best evidence of the conviction in a foreign state of one offered as a witness is a copy of the indictment and final judgment of conviction, properly certified to, together with a copy of the laws of that state showing that the acts constitute a felony under the laws of that state.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 195-200; Dec. Dig. § 78.\*]

**4. WITNESSES (§ 78\*)—COMPETENCY—CONVICTION OF FELONY IN FOREIGN STATE.**

Evidence that a witness who had testified against accused in a prior trial was, at the time of the subsequent trial, incarcerated in a penitentiary in a foreign state, without proof of the offense of which he had been convicted, nor whether such offense was a felony, was insufficient to show that the witness was disqualified so as to prevent the introduction of his testimony given at the former trial.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 195-200; Dec. Dig. § 78.\*]

**5. RECEIVING STOLEN GOODS (§ 1\*)—NATURE OF OFFENSE—EMBEZZLEMENT.**

The owner of certain personal property went to a bathing beach, and, before going in, deposited the property with the bathhouse keeper. R. in some way obtained possession of the check, presented it to the keeper, and obtained the property, and the next day part of it was found in accused's possession, concealed in a safety deposit vault. *Held*, that the evidence showed pure theft on the part of R., and did not raise the issue of embezzlement.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

**6. RECEIVING STOLEN GOODS (§ 8\*) — EVIDENCE—THEFT.**

In a prosecution for receiving stolen goods, all evidence which would have been admissible on a trial of the thief to show that he was guilty of theft was admissible to show that the goods delivered to accused were stolen goods; the state being also required to prove that accused, at the time he received the goods, knew

that they were stolen, and, with such knowledge, concealed them.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. §§ 15-18; Dec. Dig. § 8.\*]

Appeal from Criminal District Court, Dallas County; W. L. Crawford, Jr., Judge.

Dave Goldstein was convicted of receiving and concealing stolen property, and he appeals. Affirmed.

W. W. Nelms, of Dallas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of receiving and concealing stolen property, and his punishment assessed at two years' confinement in the state penitentiary.

This is the second appeal in this case, the opinion on the former appeal being found reported in 166 S. W. 149. On this trial the witness Claude Rice, who testified on the former trial, and the person whom the state's evidence would show was guilty of the theft of the property, and was the person from whom appellant received it, was not in attendance on court. It is not insisted by appellant that the evidence does not amply show that the witness is no longer a resident of Texas, but is a resident of the state of California; and, under the holding of this court that the testimony of a witness shown to be beyond the jurisdiction of the court may be reproduced on the trial, the court properly admitted the evidence, unless such evidence is rendered inadmissible by reason of the fact that the letters received from Claude Rice and the testimony of Frank Barrett showing that the witness Rice is now confined in the penitentiary in California under a judgment of conviction in that state renders him incompetent as a witness.

[1] Appellant contends that it is not the status of the witness at the time he gave the testimony, but his status as a citizen at the time the testimony is offered in evidence, which governs in regard to whether or not such testimony is admissible in evidence. The question is one of far-reaching effect, and one to which we have given much research and study, and we have arrived at the conclusion that Judge Stayton, in the case of *Webster v. Mann*, 56 Tex. 124, 42 Am. Rep. 688, correctly states the rule to be:

"The facts and law existing at the time of the trial, and not at the time of the taking of a deposition, must be looked to ordinarily to determine the competency of the evidence."

Many authorities could be cited in support of this rule, but, as it has never been questioned in this state, so far as we have been able to ascertain, we do not deem it necessary. So, the question to be determined is: Had Claude Rice been in attendance on the trial of this case, would he, under the record before us, have been a competent or an incompetent witness, and, when that is decided, the question of whether or not the

court erred in permitting his testimony to be reproduced will be determined.

Frank Barrett testified that Claude Rice, at the date of this trial, was in the California penitentiary. He does not testify as to the nature of the offense he had been convicted; in fact, his testimony as a whole shows that he personally had never been in California, and that his information was gathered wholly from letters he and others had received from Claude Rice and other sources of information. The witness testified that Rice was convicted at Stockton, Cal., but, as before stated, does not say of what offense he was convicted. The record further discloses that several letters received from Rice, one from Stockton, Cal., and the others from San Quentin, Cal., dated, respectively, June 4th, June 17th, and July 4th, were introduced in evidence; but the record shows the contents of the letters were not admitted. The envelopes in which the letters were received, one of them postmarked, "Stockton, Cal., June 5, 1914," the others being stamped, "San Quentin, Cal., June 18, 1914," and "San Quentin, Cal., July 6, 1914," were also introduced in evidence. So, if we go by the recitals of the record, the only evidence of the fact that Rice is in the penitentiary in California is the evidence of Frank Barrett, who testified that the witness, at the date of the trial was in the penitentiary in California, and that he had been convicted at Stockton, Cal., and we are left in the dark as to what offense he had been convicted, and in the dark as to whether he had been convicted of a felony or misdemeanor; in fact, no information is obtainable from the record of what offense Rice was convicted. But, if we go to the contents of the letters received from Rice, which accompany the record, but the record states, were not admitted in evidence, do we receive any more information? In the letter dated June 4th, at the time he began to write, he merely says:

"Well, I have crawled up a stump. I am going to cop a plea; don't know for sure what time I will get—not over five, though."

Later in the letter he adds:

"I just went over and got my time. Frank, I got ten years; that is some time."

The second letter is dated San Quentin, Cal., June 17th, and in it shows that he had reached the penitentiary and was working in the jute mill, he stating that he would get 3½ years off for good behavior, and would only have to stay 6 years and 6 months, and would get out December 7, 1920. The letter dated at San Quentin, Cal., July 7th merely shows that he is still in the penitentiary, and in none of those letters, and nowhere else in the record, is it disclosed of what offense he was charged or convicted, but all that is shown is that, upon a plea of guilty to some unnamed offense, he was sentenced to 10 years' confinement in the penitentiary in the state of California, and was at the

time of the trial confined therein, and that he would not be liberated before December 7, 1920. Had Rice been in attendance on court at Dallas on the trial of this case, and such facts only shown, would they have rendered him incompetent as a witness? Under the laws of this state, felonies and misdemeanors have as a dividing line the fact, if the punishment is by imprisonment in the penitentiary it is a felony, if an offense is not punishable by imprisonment in the penitentiary it is a misdemeanor; but this is not true in all jurisdictions.

The question of whether a conviction for a felony in another state will render a person incompetent as a witness in this state is governed by statute. If we had no statute on the question, such a conviction would not render one incompetent as a witness. As said in the case of *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 30 L. Ed. 429:

"At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 [8 Sup. Ct. 1870], 32 L. Ed. 239; *Com. v. Green*, 17 Mass. 515; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400 [33 Am. Rep. 632]; *Story, Conf. L. § 92*; 1 *Greenl. Ev. § 376*. It follows that the conviction of Martin in North Carolina did not make him incompetent to testify on the trial of this case."

See, also, *Huntington v. Attrill*, 146 U. S. 673, 13 Sup. Ct. 224, 36 L. Ed. 1130; *United States v. Insley*, 54 Fed. 223, 4 C. C. A. 296.

This is held to be the rule in our state in civil cases. In *Missouri Ry. v. De Bord*, 21 Tex. Civ. App. 702, 53 S. W. 593, the court says:

"The contention of that defendant that the court erred in allowing the depositions of John W. Lackey to be read in evidence, because he had been convicted of theft of cattle and sentenced to the penitentiary by a court of competent jurisdiction in the Indian Territory, and in refusing to allow the authenticated copy of the indictment, conviction, and sentence to be read in evidence for the purpose of discrediting his testimony, cannot be sustained; this being a civil action"—citing authorities.

[2] But our Code of Criminal Procedure, in subdivision 3 of article 788, provides that:

"All persons who have been or may be convicted of a felony in this state, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted" are incompetent to testify as a witness in a criminal action.

This provision of the Code, in so far as we have been able to ascertain, first came before this court for construction in the case of *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210. At that time our present senior justice, Judge Davidson, was representing the state as its Assistant Attorney General before this court, and he filed an able and exhaustive brief, contending that the words "or in any

other jurisdiction" had no reference to convictions had in other states, and that the common-law rule was in force in this state in criminal as well as civil cases; he showing such rule to be:

"A judgment of criminal conviction had in one state cannot be used to show or prove a witness incompetent in another state, where the witness has been convicted of an infamous crime in the former"—citing, among other authorities, *Commonwealth v. Green*, 17 Mass. 515; *Campbell v. State*, 23 Ala. 44; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; 1 Greenl. Ev. (13th Ed.) § 376, note 2, and section 506; 1 Bishop, *Crim. Law*, § 109; also section 976, and note; Wharton, *Crim. Ev.* § 363, note, and section 489.

The court, in overruling this contention, says:

"Leaving out of view any statutory provision upon the subject, the position of the Assistant Attorney General is sustained by very high, if not the great, weight of authority," and "we would incline to the view contended for by the Assistant Attorney General, were we called upon to decide the question without being controlled by statutory enactment."

They then hold that the words "or in any other jurisdiction" in the Code, embraces within its terms judgments of convictions had in other states in the Union. However, they also discuss at some length what is necessary to be shown to render a judgment of conviction in another state sufficient to render a person incompetent as a witness in the courts of this state, and these rules have been adhered to in this court since the rendition of that opinion, and we do not deem it necessary to discuss the question at length again, but merely to restate the rule as therein announced. A judgment of conviction for a felony in a foreign state will render a person an incompetent witness in a criminal action in this state when the following facts are shown: That the person has been finally convicted of an offense in a foreign state; that the offense of which he was convicted was a felony under the laws of the state in which he was convicted, and such an offense would be a felony under the laws of this state if committed within its bounds.

[3] The best evidence of such a state of case would be a copy of the indictment and final judgment of conviction properly certified to, together with a copy of the laws of that state showing that such acts constitute a felony under the laws of such state. Having before us a copy of the indictment, we would judicially know whether or not such an offense was a felony under the laws of this state. In saying this would be the best evidence, we would not be understood as saying that other legitimate evidence could not be adduced to prove such facts, or that they could not be proven by secondary evidence, if no objection was made.

[4] However, in this case the evidence does not show nor tend to show, of what offense appellant was convicted in California, nor

whether or not the offense of which he was convicted was a felony under the laws of that state, and certainly, without any evidence of what the offense consisted, we cannot know whether or not such an offense is a felony under the laws of this state. This being the state of the record, the court did not err in permitting the evidence of Claude Rice at the former trial to be reproduced as it is manifest by the record that he is permanently beyond the jurisdiction of the court.

[5] The evidence, and all the evidence, would show that Claude Rice obtained the possession of the property under circumstances that would constitute theft, and not embezzlement, and those bills which complain of the introduction of the evidence of Rice and Barrett, because their evidence would show that Rice was guilty of embezzlement, present no error. There must have been a trust relation existing between Rice and the person from whom he obtained the goods before the evidence would suggest a case of embezzlement. The person in possession, nor the owner of the goods, did not know Rice, and he obtained possession of the goods without their knowledge or consent. The owner had gone in bathing and deposited his valuables with the bathhouse keeper, and Rice, in some way not disclosed, had obtained possession of the check given for the goods to the owner. He took this check and presented it to the bathhouse keeper, and obtained the watch, diamonds, rings, and at once proceeded to appropriate them to his own use. The next day the jewelry was delivered into the possession of appellant, who concealed it in his safety deposit vault. Such evidence does not raise the issue of embezzlement by Rice, but theft pure and simple.

[6] All evidence which would have been admissible on the trial of Rice to show that he was guilty of theft was admissible on this trial to show that the goods delivered to appellant were stolen goods, and the court did not err in so holding. Of course, the evidence would have to go further, and show that appellant, at the time he received the goods, knew they were stolen goods, and, with this knowledge, concealed them. This it did apparently to the satisfaction of the jury.

There was no objection made to the charge at the time it was submitted to appellant's counsel for inspection. No special charges were requested, and, the court having very fairly and fully submitted the issues made by the testimony, and in a way not complained of by appellant, the judgment is affirmed.

Ex parte KELLETT. (No. 3349.)  
(Court of Criminal Appeals of Texas. Dec. 2, 1914.)

BAIL (§ 43\*)—RIGHT TO ADMISSION TO BAIL.  
Where it appeared with reasonable certainty that accused killed deceased, and that the

evidence would raise no question of self-defense or of the lesser degrees of homicide, it was proper to refuse accused admission to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 153-164; Dec. Dig. § 43.\*]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Ex parte application by Jack Kellett for a writ of habeas corpus to procure his admission to bail. From an order denying bail, he appeals. Affirmed.

Kahn & Williams, of Houston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Relator has appealed from the order of the district judge denying him bail on a habeas corpus hearing. He has been indicted for murder. One ground of his application is based on his claim that confinement will endanger his life. The evidence is insufficient to show this. In fact, the relator's attorneys practically, if not actually, conceded this when the case was submitted. We have carefully read and studied the evidence. We think it shows with reasonable certainty that appellant killed the deceased, and that no other did; that if he did, the offense is murder. We think no question of self-defense or any less grade of offense than murder is raised. We therefore, cannot disturb the judgment of the lower court refusing bail. We will not discuss the evidence. What little we have said about our conclusions from the evidence must not be used on any trial against appellant, and is not intended for such use or purpose.

The judgment denying bail is affirmed.

#### RENTERIA v. STATE. (No. 3344.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### CRIMINAL LAW (§§ 1092, 1099\*)—APPEAL—BILLS OF EXCEPTION.

Where bills of exception and the statement of fact were filed after the 20 days authorized by the statute in a county court case, they were too late and the matters therein will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2866-2880, 2919; Dec. Dig. §§ 1092, 1099.\*]

Appeal from Hays County Court; J. R. Wilhelm, Judge.

Tiburcio Renteria was convicted of violating the local option law, and he appeals. Affirmed.

Barber & Johnson, of San Marcos, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law.

The record shows appellant was granted 30 days, which time was extended, in which to file bills of exception and statement of facts.

All these matters were filed far beyond the 20 days authorized by the statute, and under the decisions of this court construing the statute with reference to time of filing statement of facts and bills of exception in county court cases, this comes too late. Therefore, these matters will not be revised. These eliminated, there is nothing requiring revision or investigation, and in the attitude of the record the judgment will be affirmed.

#### MARTIN v. STATE. (No. 3341.)

(Court of Criminal Appeals of Texas. Dec. 2, 1914.)

#### GAMING (§ 62\*)—"RAFFLE"—WHAT CONSTITUTES.

For the owner of a buggy to sell cigars for a dollar apiece, at the same time allowing purchasers to draw numbers, one of which would entitle the holder to the vehicle, constitutes the offense of raffling, for a "raffle" is a game of perfect chance in which every participant is equal with every other in the proportion of his risk and prospect of gain.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 119; Dec. Dig. § 62.\*]

For other definitions, see Words and Phrases, First and Second Series, Raffle.]

Appeal from Franklin County Court; J. J. Walker, Judge.

W. R. Martin was convicted of raffling, and he appeals. Affirmed.

R. T. Wilkinson, of Mount Vernon, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of raffling, from which conviction he prosecutes this appeal, contending that the evidence does not show him guilty of that offense. The evidence shows that appellant was a druggist and owned a buggy he desired to dispose of. The defendant himself testified:

"I owned a buggy that I wanted to dispose of, and I disposed of it in the following manner: I wrote down the numbers from one to seventy, inclusively and consecutively on a card, each card was placed in an envelope, separately and sealed up. When I did this I selected a number between one and seventy, I have forgotten now what number it was, and sealed it up in an envelope. This envelope I placed on a cardboard and sealed a piece of paper over it. I took some cigars and sold a cigar to a party, and when he paid me a dollar I gave him a cigar and one of these envelopes containing a number. When I placed the number on the cardboard I gave it to Mr. Ross Smith, who took it to his drug store and kept it until he broke the seal. When I gave a person an envelope with a number in it, they would break open the envelope and find out the number, and I would then write their name down on a book and the number opposite their name on the book. After all the tickets were sold Ross Smith broke the seal on the cardboard and discovered the number under it, and the person holding the corresponding number was to get the buggy."

Not only was this appellant's testimony, but all the testimony shows these facts to be true, and appellant contends that they do

not show he was guilty of raffing. In the case of *Stearnes v. State*, 21 Tex. 699, the Supreme Court, speaking through Judge Roberts, held:

"The raffle \* \* \* is a game of perfect chance; in which every participant is equal with every other, in the proportion of his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances, in proportion to his risk, whether they be developed with dice, or some other instrument, is not material. The successful party takes the whole prize, and all the rest lose."

This court, in the case of *Riseln v. State*, 44 Tex. Cr. R. 413, 71 S. W. 974, approves the rule stated in the *Stearnes Case*, and under both those decisions appellant's own testimony renders him guilty of raffing, and the judgment is affirmed.

### WADE v. STATE. (No. 3346.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### 1. WITNESSES (§ 268\*)—EXAMINATION—CROSS-EXAMINATION—SCOPE.

Where the state's witness in a prosecution for unlawfully selling intoxicants in prohibition territory fixed the time of sale as about the time another purchased a parcel of land, the purchaser, having testified that the deed was made at a time within the period of limitations, may be cross-examined as to whether the actual purchase was not consummated some months before, at a time when prosecution for unlawful liquor sales would be barred by limitations.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

#### 2. CRIMINAL LAW (§ 346\*)—EVIDENCE—RELEVANCY.

Where another's purchase of a tract of land was fixed as the date of an unlawful sale of intoxicants, evidence that the actual sale occurred some months before the deed was made is admissible, where the prosecution would be barred by limitations if the sale was made at the time of the actual purchase.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 786; Dec. Dig. § 346.\*]

#### 3. WITNESSES (§ 379\*)—CROSS-EXAMINATION—SCOPE.

Where the state's witness testified that an unlawful sale of intoxicants was made at one time, he may be cross-examined as to contradictory statements of the time of sale made out of court; such statements tending to shake his credibility and lay a foundation for impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.\*]

#### 4. WITNESSES (§ 372\*)—CROSS-EXAMINATION—BIAS.

The state's witness in a prosecution for the unlawful sale of intoxicants may be cross-examined as to whether a relative of his who was an enemy of accused had not induced him to make the complaint; such evidence tending to show bias.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

Appeal from Nacogdoches County Court; E. B. Lewis, Judge.

Jonah Wade was convicted of unlawfully

selling intoxicants in prohibition territory, and he appeals. Reversed and remanded.

King & Seale, of Nacogdoches, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted for unlawfully making a sale of intoxicating liquors in prohibition territory—a misdemeanor—and the lowest punishment assessed against him.

[1] A proper complaint and information were filed against appellant January 19, 1914, alleging the sale of whisky on or about January 8, 1913. The only witness who testified to the sale could not definitely fix the date thereof, but stated that it was just after Mr. Russell had bought the place from Mr. Sparks on which he (the witness) was living; that he made a crop on that place that year for Mr. Sparks. He could not remember what year Russell bought that place from Sparks. The state introduced Russell, who swore that the deed from Sparks to him and his brother was executed on January 1, 1912. Appellant in cross-examination sought to show by Mr. Russell, and his testimony would have tended to show, so the bill states, that while the deed was dated January 1, 1912, the trade and bargain for the place was during the summer of 1911, and would tend to show that the sale occurred in 1911, and not in 1913. In other words, the testimony would have tended to show that the offense was clearly barred by the statute of limitation. In our opinion the court erred in refusing to permit this cross-examination of this witness.

[2] Appellant also sought to prove by said Sparks that he made the trade with Russell to sell him the said place in the summer of 1911, although the deed was dated January 1, 1912. The court refused to permit this testimony. We think this testimony was also admissible, and the court erred in excluding it.

[3] Appellant also asked said state's witness if he had not, the day before, told appellant's attorney and two other persons that the date of the purchase of said whisky by him from appellant was in the fall after Mr. Russell and his brother had purchased the Sparks place and before Christmas of that fall. This question was asked for the purpose of crossing the witness as to the time of the actual purchase by him of the whisky and was admissible therefor. If the witness had denied making such statement, it would have laid the predicate for impeaching him which appellant also sought to do. The court should have permitted this question to have been asked and answered by the witness.

[4] On cross-examination appellant asked said state's witness if Harvey Wade had not approached him and persuaded him to file the complaint in this case. Upon the state's

objecting to the question, appellant's attorney explained to the court that he expected to show that this witness would so testify, and then follow it up with testimony showing that said Harvey Wade was appellant's enemy; that he was related to and friendly to said state's witness; and that he had induced the state's witness to go before the grand jury and testify falsely against him. This question should have been permitted and the witness required to answer. It is always permissible to show the bias, prejudice, hostility, etc., of a witness against an appellant. Section 861, Branch's Crim. Law.

Some other questions are raised, unnecessary to pass upon because, we take it, they will not occur upon another trial.

Appellant contends that the evidence is insufficient to sustain the verdict, because it would show that the offense was barred; that the sale was made more than two years before the filing of the complaint and information. We do not pass upon that question. The evidence as introduced, without that which was excluded, would sustain the verdict on this point.

For the errors above noted, the judgment is reversed, and the cause remanded.

#### GOODE v. STATE. (No. 3347.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### 1. CRIMINAL LAW (§ 769\*)—MISDEMEANOR CASES—INSTRUCTIONS.

In a misdemeanor case, the court need not charge the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803-1806; Dec. Dig. § 769.\*]

#### 2. CRIMINAL LAW (§ 804\*)—TRIAL—CHARGE.

While in misdemeanor cases the court need not charge the jury, yet, if he does so, the charge should be submitted to counsel for inspection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1948-1957; Dec. Dig. § 804.\*]

#### 3. CRIMINAL LAW (§ 1163\*)—TRIAL—INSTRUCTIONS—ERRORS.

In a misdemeanor case, where the court charged the jury but did not submit the charge to counsel, errors assigned by counsel when he did see the charge will be considered on appeal, but a mere assignment of error complaining of the court's failure to submit the charge before it was given cannot be considered where no error therein was pointed out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.\*]

#### 4. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS.

The refusal of requested charges covered by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Franklin County Court; J. J. Walker, Judge.

Claude Goode was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

L. W. Davidson, of Mt. Vernon, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$100.

[1-3] There were no exceptions reserved to the evidence adduced on the trial of the case, and none to the charge of the court as given. Appellant on the motion for new trial raises the issue that the charge was not submitted to his counsel for inspection prior to the time it was read to the jury, and introduced evidence to prove that fact; and the evidence shows it to be a fact; but it further shows that appellant had it while the case was being argued, and during the time he was presenting his argument to the jury. In a misdemeanor case the court is not required to charge the jury; but, if he does do so, we think it would be the better practice to submit the charge to counsel for inspection, and in this case he should have done so. And as he did not do so, if, when appellant did see the charge, and had an opportunity to point out any error therein, if error there be, counsel for appellant had pointed out any error to the court, we would consider such assignments of error. But when the charge was given to appellant's counsel, he pointed out no error therein, nor in the motion for new trial does he point out any error, nor complain that the charge is erroneous in any respect, but only claims that the court erred in failing to submit the charge to him before reading it. Under such circumstances, as appellant did not even in the motion for new trial attempt to point out any error in the charge, the matter does not present reversible error.

[4] Appellant does complain of the failure of the court to give the special charges requested. The first two are fully covered by the charge of the court, while the third is a request for peremptory instructions. This the court did not err in refusing, for Miss Sanders swears positively she saw appellant with a pistol on the occasion alleged in the information.

The judgment is affirmed.

#### JONES v. STATE. (No. 3343.)

(Court of Criminal Appeals of Texas. Dec. 2, 1914.)

#### LARCENY (§ 55\*)—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for cattle theft, evidence held to support a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.\*]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Ben Jones was convicted of cattle theft, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of cattle theft, and his punishment assessed at two years' confinement in the penitentiary.

There were only two questions presented in the motion for new trial, and the only bill of exceptions reserved was to the action of the court overruling said motion. No exception was taken to the charge. There are two theories presented by the testimony: That for the state was to the effect that defendant either by himself, or in conjunction with his father, committed the theft. That for the defendant is that the witness Bud Henry committed the theft. Henry testified, for the state, that appellant employed him to assist him in taking the animal from appellant's house to Dialville, where the animal was sold. Upon reaching that point Henry proposed to sell the animal to Mr. Spivey. Spivey offered to purchase, provided Henry would let the value of the animal go on an indebtedness due from Henry to Spivey. This Henry declined; said he wanted the money with which, among other things, to purchase fertilizer. Appellant was with Henry at the time and heard this conversation. They left the store, but later returned. Appellant then offered to sell the animal to Spivey. Spivey offered to give \$9.50, instead of \$10 asked. Appellant agreed to take this. Spivey sold the animal to another gentleman in the town for \$10, took the check in his own name, collected the \$10, and paid appellant \$9.50, reserving 50 cents. Appellant and Henry then left town. Appellant says he gave Henry the \$9.50, out of which Henry paid him \$1 for his assistance. Appellant's testimony is to the effect that Henry had the animal, and came by his house with it and employed him, paying him \$1 to assist him (Henry) in carrying the animal to Dialville, where the sale occurred, and that when he received the \$9.50 he turned it over to Henry, who paid him \$1 for his services. Henry also testified that appellant employed him, and that, when he went to appellant's house with a view of assisting him in carrying the animal to Dialville, it was in the lot of appellant's father; that they carried it to Dialville, where it was sold. There is evidence rather tending to show that appellant knew the animal before it was carried to Dialville. It is unnecessary to go into further details.

The issue was squarely presented of appellant's connection with the taking, as well as the disposition, of the animal. Appellant's contention is that Henry stole the animal and he assisted him in driving it to Dialville. This, of course, would not make appellant guilty of theft, unless he was connected with the original taking. He denies taking the animal, and swore that Henry did. The tes-

timony is circumstantial showing his connection with the original taking inasmuch as Henry does not connect him directly with the original taking, but only with the possession at the time Henry became connected with it. Of course, some one may have taken it beforehand and turned it over to appellant, if Henry's testimony is correct as to finding appellant in possession. The court submitted these matters to the jury to the satisfaction, we suppose, of appellant, as there were no exceptions reserved to the charge. Among other things, the court instructed the jury they could not convict appellant, unless he was connected with the original taking as a principal. He also instructed the jury as to the relation of Henry to the transaction as that of an accomplice. While the evidence as to the taking is circumstantial, yet, in view of all the facts, we are of opinion that the verdict is warranted by the facts.

The sufficiency of the evidence being the only question presented, we are of opinion that we would not be justified in reversing the judgment for this reason; therefore it is affirmed.

#### BEACH v. STATE. (No. 3194.)

(Court of Criminal Appeals of Texas. Dec. 2, 1914. Concurring Opinion, Dec. 19, 1914.)

ELECTIONS (§ 328\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF INDICTMENT.

An indictment, charging that defendant, while acting as a precinct judge of an election, unlawfully made a false canvass of the votes cast in that precinct, in that he announced that a certain number of votes were cast for the several candidates for mayor, whereas in fact a different number of votes had been cast for each of them, if by "canvassing" was meant that defendant as one of the judges falsely called the ballots for tabulation, was insufficient, because not alleging the names of the voters so falsely called, and, if that could not be done, then that their names were unknown.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 355, 357-363; Dec. Dig. § 328.\*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

S. D. Beach was convicted of making a false canvass of votes, and he appeals. Reversed, and cause dismissed.

Jno. C. Scott and G. R. Scott, Boone & Pope, all of Corpus Christi, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. The indictment charges that an election was held in the city of Corpus Christi, at voting precinct No. 2, for the purpose of electing a mayor and four commissioners of the city of Corpus Christi, and that appellant was a judge of the election, and while acting as such he unlawfully and willfully made a false canvass of the votes cast at the election in said precinct No. 2, in this: "That the said S. D. Beach did as one of the counting judges at said election,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

read and announce 213 votes as being cast in said voting precinct No. 2 for Clark Pease for the office of mayor of the said city of Corpus Christi, 26 votes as being cast for H. R. Sutherland for the office of mayor of the said city of Corpus Christi, 17 votes as being cast for W. G. Blake for the office of mayor of the said city of Corpus Christi, whereas in truth and in fact there were cast at said election in said voting precinct No. 2 120 votes for said Clark Pease for the office of mayor," etc., 112 votes for Sutherland, and 22 votes for Blake for the office of mayor, which canvass it is alleged was falsely made by appellant. The indictment is attacked for various reasons. The writer is of the opinion that it is not sufficient to charge the offense. If by "canvassing" it is meant that appellant, as one of the judges, falsely called the ballots for tabulation, then the indictment should have alleged the names of the voters so falsely called, and if that could not be done, then that the names were unknown. Whether the ballot box could be opened or not for the ascertainment of the truth or falsity of the allegation against appellant, all voters whose names were not erroneously called were entitled to protection under the Constitution and laws of this state from having the secrecy of their votes uncovered. The Constitution protects by secrecy the ballot of all voters, and the Legislature, as well, protects the voters from having their ballots announced as found in the ballot boxes except in cases of contested elections. This was not a contested election, but a criminal prosecution. There is another reason why the names should be alleged; that is, that the defendant is entitled to be notified as to the basis of the allegations that he had falsely called names, in order that he might meet this on his trial. The indictment states nothing except conclusions, and notifies the defendant of nothing except that he had called over a certain number of names in favor of the different candidates, whereas in truth and in fact he had mis-called them so as to make the actual and truthful result different from that returned. It is hardly thought necessary to cite authorities on these questions. There are other questions suggested why the indictment is not sufficient, but in view of what is said we do not care to go further into those matters.

The state was permitted to introduce in evidence and open the ballot box containing the names of the voters at the election mentioned in the indictment. Various and sundry objections were urged to the introduction of this testimony. At this late date, in view of all the authorities, the Constitution and the statute, we are of opinion the court was clearly wrong, and the objections should have been sustained. Article 6, § 4, of the Constitution provides that voting shall be "by ballot." That, of course, means a secret bal-

The same section and article of the Con-

stitution provides that the Legislature may or shall enact suitable legislation to guard the purity of the ballot box. This is not only within the power of the Legislature, but it seems to be mandatory that it should be done. In accordance with these provisions of the Constitution the Legislature has enacted certain legislation with reference to the matter; among other things, that it is required that these boxes containing the votes shall be returned to the county clerk, who shall keep them 12 months, at the end of which time he "shall burn" the ballots. The Penal Code provides a heavy punishment against the clerk if he fails to destroy and burn these ballots at the end of the 12 months. There are other provisions of a kindred nature which we think unnecessary here, to quote. The statute further provides the ballot box shall *remain in the keeping* of the clerk for a term of 12 months, to be opened only within that time, and then only in case of contested elections. This was not a contest, and the 12 months had long since elapsed at the time of the trial since the election was held. It is inferable from the record that there had been a contest over the offices prior to the time of this indictment. Of course, that litigation could only have occurred within the 12 months. There is evidence set out in a bill of exceptions disclosing that the ballots had not been destroyed, but on the contrary had been passed from hand to hand until finally the box containing the ballots was locked in the death cell in the jail and the key turned over to the district clerk, and it was from this receptacle the ballot box was brought and opened on appellant's trial. It seems to be the well-settled rule under the decisions that when the 12 months have elapsed, the ballots cannot be used; they are legally destroyed, whether in fact they were actually destroyed or not. The rule is thus stated in 15 Cyc. 428:

"After the date when the statute requires that ballots shall be destroyed they have no legal existence, and are not admissible in evidence, no steps having been taken to have a lawful recount."

This question was passed upon in *State v. Bate*, 70 Wis. 409, 36 N. W. 17. That applies in cases where the ballots were permitted legally to be used, as in election contests. But whether the ballot box had been opened or not, and whether the criminal prosecution occurred within 12 months, would make no difference, so far as this case is concerned, because the statute has limited the opening of the ballot box to contested elections, and the authorities hold that these ballot boxes cannot be opened or the ballots used as evidence in criminal cases. See *State v. Taylor*, 220 Mo. 618, 119 S. W. 373; *Ex parte Arnold*, 128 Mo. 256, 30 S. W. 768, 1036, 33 L. R. A. 386, 49 Am. St. Rep. 557. In the *Taylor* Case, supra, there are quite a number of decisions collated. This question seems to

have been decided in *State v. Francis*, 88 Mo. 557. The Legislature by express authority of the Constitution is required to pass such regulations as may be deemed proper to guard the purity of the ballot box, and such incidental matters as that body may think necessary, right and proper. They have exercised their authority to the extent of authorizing ballot boxes to be opened within 12 months in contested election cases, but have not seen proper to go further. Their reasons for not making further provisions are unnecessary to discuss. That they have not done so settles the question, and in enacting legislation with reference to opening ballot boxes they imposed two conditions which are binding upon this court: First, ballot boxes cannot be opened except in election contest cases; and, second, this can only be done within 12 months; and to this may be added the third, that these ballots are required under criminal penalty to be burned at the end of 12 months, and if the clerk does not do so, he is subject to the punishment imposed in the Penal Code. In *Ex parte Brown*, 97 Cal. 83, 31 Pac. 840, these questions were discussed at length by the Supreme Court of that state. The court was met with the question and suggestion that the public was as much interested in preserving the integrity of the ballots and the ballot boxes and in detecting and punishing fraud as they were in contested elections. The proposition seems to carry the idea that, while the Legislature had limited the matter as indicated in the statute, yet on account of the general public welfare and interest, the courts should go further and enlarge the rule by permitting the ballot boxes to be gone into in criminal prosecutions. Quoting from that opinion we find this language:

"We are asked by counsel how the declared intention of the Legislature to punish frauds by election officers can be reconciled with an intention to prevent the use of the best means of proving such frauds. It might as well be asked how the plain injunction of the statute that the ballots must be destroyed at the end of one year can be reconciled with the law which authorizes a prosecution to be commenced at any time within three years. Both these questions may be answered in the same way. The different provisions are in neither case absolutely inconsistent, and if it is true that the preservation of the ballots as the law directs is an obstacle to the enforcement of the newly provided penalties for frauds of election officers, this result flows from the fact that the Legislature, in this instance, as in so many others, has failed in revising the old law to co-ordinate its different parts so as to bring them into perfect harmony with its new policy. This failure of provision, however, if indeed there was such failure, cannot be remedied by the courts, but must be left to the Legislature itself for amendment. If it is thought necessary to make the ballots available as evidence in criminal proceedings, the Legislature can do so under such limitations and restrictions as may be deemed essential to their integrity. The courts cannot open them for inspection without destroying all safeguards, except such as each particular judge who may order them into court shall see proper

to apply, nor without impairing in all cases, and possibly destroying in many, their value as evidence for the only purpose for which the law has directed their preservation."

From the *Francis Case*, *supra*, this quotation is made:

"But it is asked, Has the Constitution deprived the state of Missouri of the right to inspect the ballots, when she seeks to expel an intruder from office? Shall she not be permitted to have the ballots opened, when necessary to convict illegal voters? The Constitution names one class of cases in which they may be inspected, and, unless the supposed cases belong to that class, the state has no more right than an individual suitor to an inspection of the ballots. She is as much bound by the Constitution as any citizen, and if she has chosen, by her organic law, to tie her hands in this matter, it is not in our power to release her from restrictions she has imposed upon herself."

These cases deal not only with the proposition that the Legislature limits the use of the ballot only to election contests and within 12 months, but is augmented further by the proposition of secrecy enjoined by the Constitution through "the ballot," and it is only when the Legislature expressly authorizes the uncovering of this secrecy for such purpose as that body may deem proper that that secrecy can be removed. The voter has a right to have his vote protected against inspection, unless in guarding the purity of the ballot box the Legislature may provide means or methods for necessary occasions to uncover such secrecy. In the *Arnold Case*, *supra*, the Missouri court, as did the California court in *Ex parte Brown*, among other reasons, places it upon the same principle which prevents disclosures of confidential and privileged communications. The court said:

"There are, doubtless, many instances in which the evidence of a husband would convict the wife, or the wife's would settle the guilt of her husband, and yet the law, in its wisdom, seals his or her mouth. Likewise the testimony of an attorney, priest, or physician may establish beyond all doubt the guilt of the client, penitent, or patient in a given case, and yet it is excluded. These exceptions are based upon the peace of society, but in the estimation of the people of Missouri good government itself is dependent upon absolute inviolability of the ballot, except in a 'contested election,' and then only under such safeguards as would insure both the secrecy of the ballot and absolute verification of the election as held by the people. These two considerations governed the convention in framing, and the people in adopting, the Constitution."

In one of the cases the grand jury sought to use the testimony by opening up the ballots. This the court held could not be done, and that such testimony could not be used in criminal cases. In fact, following the legislative authority, the court holds that the ballot box can only be opened and used in contested election cases and cannot be used in criminal cases. The Legislature has not so provided. We are not without ample authority holding the same views in Texas, for in the case of *Clary v. Hurst*, 104 Tex. 423, 138 S. W. 566, the Supreme Court of this state announces the same rule in an able and ex-

haustive opinion delivered by Justice Ramsey. That opinion is in line with the authorities, upholds the Constitution, and adheres to the statute. It is there held that the statute limits and restricts the opening of the ballot box and use of the ballots to contested election cases, and that this must occur within 12 months. The objection, therefore, urged by appellant to the introduction of the ballot box and the ballots before the jury, should have been sustained.

There are other interesting questions in the case, but they are somewhat corollary to the main proposition, and we deem it unnecessary to discuss them. But we will call attention to the fact that the judges and other officers who assisted appellant in holding the election were used as witnesses and testified to conversations they had among themselves in regard to the manner of appellant calling the names of the ballots for the benefit of the tabulating clerks of the election; but they said nothing to him about it, nor did the assistant counting judges say anything, so far as we understand this record. but they testified that appellant may have heard what they had to say about it. If the other counting judges, whose business it was to see a proper count made, permitted appellant to do so, believing he was doing wrong, and then sign, as all the officers did, the returns showing that appellant had miscounted, they would evidently be in the attitude of accomplices, for all those who signed the tally sheets, returns, etc., showing incorrect and fraudulent count of the vote, signed the same as being correct. The law charged them with the duty of seeing that the count was correct, vote correctly recorded, and correct returns made. On the trial they testified in effect what was fraudulent counting. We call attention to this in case of another trial.

For the errors discussed, the judgment is reversed, and the cause is dismissed.

HARPER, J. I concur in the reversal of the case on account of defect in the indictment; but, the ballot box having been opened in a contest of the election, if the ballots inspected in this contest of the election show the court that a crime had been committed, the trial court could order the ballots preserved as evidence, and under such circumstances, the ballot box having been opened under the provisions of the statute, the ballots were properly admitted, and I will write my views in full later on.

PRENDERGAST, P. J. I concur in the opinion as to the insufficiency of the indictment, but express no opinion on any other question.

HARPER, J. In this case. I wish only to state my nonconcurrence in that part of the

opinion which holds that the ballots were improperly admitted in evidence. By the record it is disclosed that there was a contest filed over the office of mayor, and the ballot boxes opened in the trial of that case. This the statute specifically authorizes to be done. The statute (article 3028) only provides for the burning of the ballots after 12 months, in case *no contest* is instituted. In this case we know a contest was instituted; therefore the clerk would not be authorized to destroy the ballots during the pendency of that contest. And if in the trial of the contested election case the ballot boxes were opened, and by the ballots it was made manifest to the trial judge that a crime had been committed by some one, we think it his duty, as he apparently did in this instance, to have the evidence preserved to be used in a prosecution of whoever may have had a guilty participancy in the wrongful calling of the ballots and certifying to an improper return. The evidence (the ballots) having come into his possession in a legal way, the ballot box having been opened in the trial of the contested election case, the veil of the *secrecy of the ballot* having already been legally torn aside, it was not improper to use the ballots in the trial of this case. We agree that if no contest had been instituted and the ballot box opened on the trial of that cause, the judge would have no authority to have had them opened in this trial. But no such question is before us, but a case where the ballot box had been opened under the specific authority and direction of the law; and, it having been done legally, it was legitimate and proper to make use of them in the trial of this case.

SHAMBLIN v. STATE. (No. 3312.)  
(Court of Criminal Appeals of Texas. Dec. 2, 1914.)

1. HOMICIDE (§ 234\*)—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

In a prosecution for murder, evidence held sufficient to sustain a verdict finding that accused was the one who did the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. § 234.\*]

2. CRIMINAL LAW (§ 1159\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

In reviewing the sufficiency of the evidence to sustain the verdict in a criminal case, it is not necessary to consider evidence which might tend to weaken the state's evidence or the conclusions from it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

3. CRIMINAL LAW (§ 656\*)—RECEPTION OF EVIDENCE—QUESTIONS BY COURT TO WITNESS.

Where, in a prosecution for killing deceased by shooting through a window, the shot striking deceased in the back while sitting at the table near the window, it was sought to introduce by the wife his res gestæ statement that it was accused who shot him, questions asked by the court in the presence of the jury, to determine the admissibility of the evidence as to whether room was lighted, the position of

accused, and the time of the statement, were not leading, or calculated to impress the jury that the court thought deceased saw the assailant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

#### 4. CRIMINAL LAW (§ 364\*)—EVIDENCE—RES GESTÆ.

In a prosecution for murder committed by shooting at deceased through a window, while he was sitting in a lighted room near the window, his statement that accused was the assailant, made within two minutes after being shot, was admissible as *res gestæ*, where there was evidence that he had his face toward the window immediately after he was shot, and deceased's statement to a witness, a very few minutes after the shooting, that accused did it, in answer to a question from witness, is also admissible as *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.\*]

Appeal from District Court, Limestone County; H. B. Daviss, Judge.

W. A. (Andy) Shamblin was convicted of murder, and he appeals. Judgment reformed as to sentence and affirmed.

A. B. Rennolds, of Mexia, and Wm. Kennedy and W. T. Jackson, both of Groesbeck, for appellant. C. E. Lane, Asst. Atty. Gen., Callicutt & Johnson, of Corsicana, and M. Herring, of Groesbeck, for the State.

PRENDERGAST, P. J. Appellant was convicted of murder, and his punishment assessed at 10 years in the penitentiary.

Appellant earnestly contends that the evidence is insufficient to sustain the conviction. This presents the most serious question. The statement of facts embraces 124 typewritten pages. Of course, we could not undertake to give in detail all the evidence shown by this statement. In passing on this question we will give succinctly the substance of facts which the evidence was sufficient to establish, not undertaking, except in special instances, to give the specific testimony of any witness.

[1] The deceased, Ben Wells, was about 57 years old. He had lived in the immediate neighborhood, and on the place where he was killed, together, some 50 years. He had been married three times. When killed, he was living with his third wife. He had two daughters by a former wife. One of them, Lily, had married appellant some three years before the killing. Another, Alice, an unmarried young lady 17 or 18 years of age, was living with him, as well as his then wife and some of their small children. Deceased was assassinated on Sunday night, December 28, 1913, about or just before 7 o'clock, while he was sitting in his home, at his fireside, with his family. The fatal shot was fired by the assassin through a glass window near which deceased was sitting, with his back quartering from it. The assassin was shown to have stood on tiptoe very near to the window, and the gun must have been

almost against it, for the wadding from the cartridge and some of the glass from the window pane, with the shot, entered the back of deceased just to the left of the backbone, tearing away the left side of the backbone and almost severing it. Instantly upon the shot being fired, deceased put his head against the window facing of the window through which the shot was fired. Deceased sat close to the window. A lamp was in the room where the light from it shone through said window. The position of deceased at the time he was shot and instantly thereafter was such that the jury and lower court could conclude that he could have seen, and did see, the assassin through the window. Immediately after the gun was fired the assassin fled in the dark of the night. Deceased's wife immediately sprang to him. He said, "Oh mamma!" repeating it several times. She then ran to the door and screamed three times. Then went back to him, and some one in the room said to telephone for a doctor. She rang the phone and called Jim Wells over it, deceased's brother, told him some one had shot deceased, and to phone for a doctor to come quick. She then went to her husband, who then said, "Andy Shamblin done this." Jim Wells at once called the doctor over the phone, and he himself at once went to deceased. He lived near him. It was only about two minutes from the time the shot was fired until deceased said to his wife, "Andy Shamblin done this." It could have been but a very few minutes after the shot was fired before Jim Wells reached his brother. Jim Wells asked him, "Ben, who did this?" He said, "Andy Shamblin." Jim Wells asked him, "Can't you be mistaken?" and he said, "No; it was Andy Shamblin." Deceased died from the effects of the shot a few hours thereafter. "Andy" Shamblin is appellant.

Some year or two before the killing appellant had bought from deceased a small piece of land, only some half mile from deceased. Appellant got mad at deceased about the execution and acknowledgment of the deed to him. Appellant lived on this place purchased from deceased only a short time. During this time deceased, from what he saw and heard, came to the conclusion that the appellant was unduly infatuated with and that an undue intimacy existed between appellant and his said young daughter, Alice. Deceased thereupon became incensed towards appellant because thereof. For about a year or more before the killing deceased did what he could to prevent Alice and appellant from associating together or being together. He forbade appellant on that account coming to his home. He also forbade Alice going to appellant's home, and tried to enforce his directions in these particulars. Something like a year, or perhaps less, before the killing, appellant and deceased talked over this matter and there was then some-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

what of a reconciliation between them. This did not last long, for appellant, in his cross-examination of Jim Wells, established that, while there was a kind of a reconciliation between them, the deceased thereafter became more convinced of the improper relations between appellant and Alice than he had been before; Jim Wells stating that deceased said "that after Andy promised to do it no more it only grew worse"; that deceased also talked to his daughter Alice about it several times, and he saw that he couldn't stop it, and "it only grew worse, and then he forbade Andy coming to his house." Alice also testified that her father had accused her of this and that she told appellant thereof. It was also shown that deceased's wife talked to appellant, and told him the young people over the country were talking about it—the relationship between him and Alice, and that the deceased didn't want anybody talking about his daughter; that she also talked to Alice about the relationship and talk over the neighborhood between Alice and appellant; that when she talked to Alice about it and was telling her what it would lead to, she said Alice got mad, "and said it was none of mine and her papa's business what she did." It was also unquestionably shown that the deceased concluded, because he could not break up what he claimed was the relationship between Alice and appellant, to sell the little farm where he lived; and in the community in which he had lived for the last 50 years and buy a place in Franklin county 200 miles distant to move to, so as to keep Alice and appellant apart, and break up the relationship between them; that the very next morning after he was killed the night before he was going to move and had made all his arrangements for that purpose, and take Alice with him. Appellant knew all this. From time to time, for a year or more before the killing, appellant is shown to have made declarations showing his hostility to and some threats against deceased particularly about deceased's suspicions and claimed relationship between him and Alice. Just a week or two before the killing deceased sent word to appellant's wife Lily, by his brother, Jim Wells, that he wanted her to come to see him and spend the day before he removed; that Jim Wells saw appellant at his (Jim Wells') store and told appellant the word deceased had requested him to communicate to Lily, and asked appellant if he would not tell Lily, so as to save him (Jim Wells) the trip himself to deliver the message; that in that conversation at that time appellant tried to tell him of the trouble between him and deceased and said to Jim Wells, "The more I see of him [deceased] or think of him the more I hate him." There is no question but that the testimony in this case was amply sufficient to show that appellant had the motive to kill deceased, and that no other had such motive.

The evidence further shows that for some time prior to the Sunday of the night on which deceased was killed there had been considerable rain, and that the country was muddy and wet. It also showed that it rained that Sunday morning; that the rain ceased about or before noon that day, and that it had not rained from that time on for some time, and not until after the tracking and other evidence to which we will now call attention. Very soon after the shooting officers who lived several miles away were phoned about it, and as soon as they could went to the scene. They reached deceased before he died. The night of the killing was a very dark night. No attempt was made that night to track the assassin, but early the next morning the officers and others did attempt to track him. They found where he had stood very close to the window on his tiptoes when he fired the shot; that in leaving his foot slipped at that place, but did not at that immediate place make a track that could be measured and identified. He immediately stepped upon Bermuda grass, and, while his tracks made no such impression on the grass that they could be identified and measured, yet he could be tracked thereby to the yard fence over which he went; that search was made around the whole yard, and no other track could be found leaving it, except this one from the window. As soon as he got over the yard fence he crossed a place where his tracks could be seen, identified, and measured. We will not undertake to give the details of the evidence establishing this tracking and the identity of the tracks. It is sufficient to show that it established that these tracks were identified, measured, and showed that they were made after the rain ceased on Sunday, between that time and the Monday morning following. It is clear that the party making the tracks went a zigzag route, so as to avoid going to or any nearer to the houses of the neighbors than was possible. It was a thickly settled neighborhood. In other words, that he took such a circuitous and zigzag route as would avoid going to every house where he had to pass, and that he went across grass patches and places of that kind as much as possible, so as to avoid making distinct tracks, when he could. That these tracks, however, were traced in this zigzag route from the house of deceased to appellant's, or to within 20 steps of appellant's house, there can be no question. When they got within this distance of appellant's house they went across another grass plat, where no distinct tracks were made which could be identified. These tracks were measured by the officers. All the testimony shows that a part of the time the tracks showed that the party was running; the other times, walking. The route taken, the objects encountered and then avoided, would lead inevitably to the conclusion that they were made at night, and that they must have

been made on that Sunday night. It is true that a part of the tracking, from deceased's to appellant's, only was found the next morning. The officers nor others did not attempt to trace the tracks from deceased's entirely to appellant's at first. Some of the tracks were not discovered till Tuesday morning, and they were not traced all the way until Thursday morning. The testimony also showed that these same tracks were traced from about half way from appellant's to deceased's house, going from the direction of appellant's to deceased's and they were traced practically clear up to deceased's house. The distance on an air line between appellant's and deceased's was shown by actual measurement to be 1.8 miles. The distance traveled in said zigzag manner from deceased's to appellant's was shown by actual measurement to have been 2.59 miles. The witnesses in testifying on the trial, had before them a map drawn to scale showing these distances, and the route taken by these tracks for the distance found, going from towards appellant's to deceased's house, and the complete route from deceased's house back to appellant's, and this was all explained and illustrated by the several witnesses, in testifying on the trial, very much better than can be shown in any statement of facts. Appellant at no time after the killing went to the home of the deceased. The next morning when the officers went to his home they told him that they knew he was kinfolks of deceased, and thought he could tell them something about the killing. They found him and his father together in his lot. When the officers said this to him, his father said, "Yes, I knew what you were up to when I saw you coming," and "I told the children last night that I knew somebody would lay it on Andy." One of the officers then asked appellant where he was at the time of the shooting, and he said he was out at the lot getting ready to go, and his wife heard it over the telephone. The officers asked him why he didn't go to deceased's, and he said he didn't know; that he was at the lot getting ready to go, and decided it was best not to go. He said his wife heard it over the telephone while he was getting ready to go. He didn't then tell the officers how he had heard of the killing. The officers thereupon told appellant that they wanted his gun and ammunition. He went into the house, got his double-barrel shotgun and several cartridges, and brought them to the officers. The officer testified that one barrel of the gun had been recently fired. The officers took charge of the gun and of the cartridges. Some of them were produced, identified, and introduced in evidence on the trial. One of them was unloaded on the examining trial of the case, and found to be loaded with Lomo buckshot. Nearly halfway between deceased's and appellant's house, on the route the officers found these tracks, going from de-

ceased's, they also found an empty shotgun shell, which was shown not to have been wet or rained upon. It corresponded exactly with the other shells they got from appellant. The doctor and the officer probed the wound of the deceased immediately after he died, and found not only the wadding and a part of the glass of the window in the wound, but also found Lomo buckshot therein, which corresponded exactly with the shot taken out of one of the cartridges delivered by appellant to the officers. On the morning they arrested appellant they found in his house a pair of his shoes which had fresh mud all over them. They were identified unquestionably as his shoes, and were introduced in evidence on the trial. The measurements of the tracks found by the officers and others corresponded with these shoes of appellant. Said tracks were unquestionably shown to have been made by some one who was pigeon-toed. The testimony showed that appellant was pigeon-toed, and that no other person in that country was known to be pigeon-toed.

[2] As stated, we have not attempted to give all the testimony nor detail it except in some instances. Appellant's defense was alibi. The court properly submitted this to the jury, and the jury found against him. We have not stated the evidence in various particulars which might tend in some measure to weaken the state's evidence or the conclusions from it which we have given above. This, as we understand, is not necessary when the insufficiency of the evidence is attacked as not sustaining the verdict. All these matters were for the jury. They passed upon all of them, and the question this court determines is whether from the evidence the jury were justified in finding the verdict they did. The fact that the jury might have been justified in believing appellant's contentions and acquitting him, when the jury had all the evidence before them, cannot militate against the verdict, when the evidence was sufficient to sustain it. In our opinion, the evidence was sufficient to justify the jury to believe that appellant and no other killed the deceased, and excluded any reasonable hypothesis that any other killed him. In other words, it met the requisites of circumstantial evidence which was aptly charged by the court. Therefore we cannot disturb the verdict of the jury.

[3] Appellant made no complaint of the charge of the court. He has only four bills of exceptions. These are about the same subject-matter and can be stated together, which we do. In one it is shown that while Mrs. Wells, deceased's widow, was on the stand, she was about to relate the statement made by her husband within about two minutes from the time he was shot, which statement was "Andy Shamblin done this," to which appellant objected. The trial judge thereupon, for the purpose of satisfying himself whether or not the statement was res

gestæ, asked the witness, in the presence and hearing of the jury, these questions:

"Q. Was there a light in the house? A. Yes, sir; there was a light setting on the dresser, between him and the wall. Q. Was Mr. Wells setting with his back to the window? A. Yes, sir; kinder sideways. Q. Do you know which way his face was turned when he was shot? A. Yes, sir; toward the east. Q. What direction would that be from the window? Was it from the window, or quartering from the window? A. It was quartering from it; when he was shot his head went against the window facing. Q. What direction was the window from where he was shot? A. North. Q. He dropped his head back? A. Yes, sir. Q. Could you say whether he turned to one side or the other? A. No, sir; I don't think he did. Q. How long after the shot was fired before he made the statement you started to relate? A. Just about two minutes, he said Andy Shamblin done this, and I ran to the telephone and then back to him, and he fainted."

The court thereupon overruled appellant's objections, and permitted the witness to so testify. Appellant's objections were—

"that said question was leading, and said action of the court was calculated to and did lead the jury to believe that the court thought that the deceased saw the person who shot him, and was very prejudicial and injurious to his rights."

The court in allowing this bill qualified it by stating, among other things, as follows:

"(1) As shown by the bill itself, this questioning of Mrs. Wells was done by me for the purpose of determining the character of testimony; that is, whether it was *res gestæ* or not. (2) From this examination, as well as from all the other evidence relating to the same matter, it is, was and is manifest that the statement of deceased was *res gestæ* evidence, and was admissible as such. It is equally manifest that said statement of deceased was the statement of a fact within the knowledge of deceased, which was *res gestæ* of the transaction. It cannot be disputed that the evidence disclosed that at the time of the shooting deceased was sitting with his back quartering toward the window north, with his face quartering east, with his left eye toward direction from which shot came, that when he was shot he fell with his head against the window facing from which the shot that killed him came. Why might he not have seen who shot him? Who can dispute that he did see? The court had a right to know all this, to determine the admissibility of the testimony, and the jury had a right to know it, to enable them to judge of the weight of the testimony."

In our opinion, the questions were not leading, and the court, under the circumstances did not err in asking them; nor could the jury be misled by the court's action, as claimed by appellant.

[4] The next bill is to the said evidence of Mrs. Wells that the deceased made the statement to her as shown, "Andy Shamblin done this." His objection to this was that it was deceased's supposition, conclusion, and opinion with reference to who shot him, was hearsay, and not binding on him.

The next bill is to said testimony of this witness because, in effect, it did not come within the doctrine of a dying statement. It is sufficient as to this to say that it was not offered nor admitted as such. It was offered and admitted as *res gestæ*.

The next bill shows that while the state's witness J. E. Wells was on the stand he testified: "I asked Ben (deceased) who did this, and he said Andy Shamblin;" and "I then asked him, 'Can't you be mistaken?' and he said, 'No; it was Andy Shamblin.'"

In approving these three last bills, the court explained and qualified them as follows:

"(1) The testimony referred to in this bill was admissible as *res gestæ* of the transaction. As I view it, in the light of all the other testimony relating to the particular matter, it was the statement of a fact which was within the knowledge of deceased. (2) Any careful perusal of the statement of facts will convince any candid seeker for the truth of the transaction that deceased might have seen and known who shot him. It is manifest that he could have, and I think he did see, by the light which shone out of the window through which he was shot, or by the flash of the gun in the involuntary and lightening like glance, which he could and must have cast in the direction from which shot came, who shot him. His face was quartering from, facing east, the window was north of him, the light shone out that window, the shot came from outside through the window, deceased fell toward with his face on window facing, and his left eye toward this window. See testimony of Mrs. Wells, the wife of deceased, and the only other eyewitness to shooting. (3) When Jim Wells was on the witness stand testifying, he narrated the statement that deceased told him, very shortly after he got to him, that defendant Shamblin had shot him. Defendant's counsel neither objected to this testimony nor moved to exclude it. Defendant's counsel vigorously cross-examined Jim Wells, endeavoring to prove a slightly different verbiage to the statement made by deceased. And as a feature of their defense, defendant's counsel introduced as their witnesses and offered the testimony of Miss Lily (Alice) Wells (daughter of deceased), Tom Flemming, and others, and proved slightly different statements made to them by deceased from those statements made by deceased to Mrs. Wells and to Jim Wells, but all to the same effect, to wit, that defendant shot him, all of which will be seen by perusal of statements of facts. (4) Certainly defendant cannot blow hot and cold upon the same testimony; that is, cannot be justified in complaining at one version, and yet permitted to rely upon and urge another. If there was error in admitting Mrs. Wells' testimony as to this *res gestæ* evidence—which I do not concede—then such error was rendered harmless by defendant's counsel voluntarily offering another version of the same testimony."

Appellant accepted each of these bills with the said explanation and qualification, and is bound thereby.

In discussing the admission of *res gestæ*, this court, through Presiding Judge White, said: "It is indispensable, to a correct understanding of every transaction, that every act attending it, verbal as well as physical, by whomsoever it may be committed, be placed before the court for its enlightenment. This rule as to *res gestæ* overrides all other rules known to the law governing the admissibility of testimony." *Cook v. State*, 22 Tex. App. 526, 3 S. W. 749. Even the declarations of the wife, if *res gestæ*, are admissible against her husband when on trial, even though she does not testify at all in the case. *Cook v. State*, *supra*; *Robbins v.*

State, 166 S. W. 529. See, also, *Wilson v. State*, 49 Tex. Cr. R. 58, 90 S. W. 312; *Kennedy v. State*, 79 S. W. 817, 65 L. R. A. 316. Declarations made by a person who is incompetent to testify are admissible as *res gestæ*. Section 343, Branch's Crim. Law, and cases cited by him. "The fact that the statement is wholly or partially the opinion or conclusion of the declarant does not of necessity render it inadmissible if it is a part of the *res gestæ*. Especially if the statement, though on its face might be a conclusion, is made as a statement of fact." 11 Ency. Ev. p. 318. "It is not necessary that the declaration be a statement of fact to be admissible; a mere exclamation may constitute part of the *res gestæ*, \* \* \* although it does not directly state a fact." 11 Ency. Ev. p. 320. In this connection, see, also, 3 Wig. on Ev. § 1751, and 1 Wig. on Ev. §§ 656-658. The rules as to what are *res gestæ* statements, and when admissible, are so stated, and the many cases of this court, establishing and sustaining them, by Mr. Branch in section 339 of his Criminal Law, that a mere reference thereto is sufficient. This court in the last few years and up to the present time has so frequently discussed and stated these rules, citing the authorities, that we regard it as entirely unnecessary to again state and discuss them. We merely cite a few of them. *Rainer v. State*, 148 S. W. 735; *Ward v. State*, 159 S. W. 272; *Renn v. State*, 64 Tex. Cr. R. 63, 143 S. W. 168; *Girtman v. State*, 164 S. W. 1010, and the authorities cited in those decisions.

In our opinion, the evidence objected to was *res gestæ*, and admitted in compliance with all the rules on the subject established by the authorities.

Sentence of the court in this case was for a specific 10 years, as found by the verdict of the jury. The judgment will here be reformed in accordance with the recent statute, and so reformed will be affirmed.

### BASKINS v. STATE. (No. 3324.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### 1. CRIMINAL LAW (§ 205\*)—CRIMINAL PROSECUTION — COMMENCEMENT — COMPLAINT — WARRANT OF ARREST.

Though Const. art. 1, § 10, and Code Cr. Proc. 1911, arts. 4, 447, provide that no person shall be tried and convicted of a felony except on the indictment of the grand jury, an indictment is not necessary to the commencement of a criminal prosecution which may be initiated by the filing of a complaint with a justice of the peace charging accused with the commission of a felony, the issuance of a warrant of arrest thereon, and the arrest of accused thereunder by a proper officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 410, 412½; Dec. Dig. § 205.\*]

#### 2. HUSBAND AND WIFE (§ 302\*)—ABANDONMENT — SEDUCTION — "COMMENCEMENT OF PROSECUTION."

The filing of a complaint for seduction before a justice of the peace, the issuance of a warrant, and accused's arrest thereunder, constituted the commencement of a prosecution against him for seduction within Pen. Code 1911, art. 1450, declaring that if, after the commencement of a prosecution for seduction, defendant shall marry the complainant, and thereafter abandon her, etc., he shall be guilty of a felony.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1100; Dec. Dig. § 302.\*]

For other definitions, see Words and Phrases, First and Second Series, Commencement of Prosecution.]

#### 3. SEDUCTION (§ 36\*) — DEFENSES — OFFER OF MARRIAGE.

Offer of marriage, in order to constitute a defense to seduction, must be made before accused pleads to the indictment for seduction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 62; Dec. Dig. § 36.\*]

#### 4. INDICTMENT AND INFORMATION (§ 119\*)—SURPLUSAGE.

Where an indictment for wife abandonment after marriage in order to escape prosecution for seduction alleged that a complaint had been filed in a justice court of M. county, the further words, "precinct No. — of" are surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311-314; Dec. Dig. § 119.\*]

#### 5. CRIMINAL LAW (§ 400\*)—BEST EVIDENCE—RECORDS.

In a prosecution for wife abandonment after marriage to escape prosecution for seduction, the complaint and warrant, or properly certified copies thereof, on which accused was arrested for the seduction constituted the best evidence of the institution of such a prosecution, prior to the marriage, and, such documents not having been shown to have been lost or destroyed, it was error to permit oral proof thereof by the district attorney who drew the complaint and the justice of the peace who filed the same and issued the warrant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

#### 6. CRIMINAL LAW (§ 400\*)—BEST EVIDENCE—PAROL PROOF.

Accused having abandoned his wife, whom he married to stop prosecution for seduction, the state could prove by parol that a complaint for seduction was prepared by the district attorney, furnished to the wife's father, delivered to a justice of the peace, and that he issued a warrant thereon under which accused was arrested, as bearing on the pendency of the prosecution for seduction at the time of the marriage, and this regardless of the fact that the justice did not put his file mark on the complaint or docket the case, and decline to have anything further to do with it, and made the warrant returnable before another justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

#### 7. HUSBAND AND WIFE (§ 313\*)—ABANDONMENT—EVIDENCE.

In a prosecution for abandonment of a wife and marriage to avoid prosecution for seduction, evidence of the justice before whom the seduction prosecution was instituted that he was justice of precinct No. 7 in M. county, Tex., was admissible.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. § 313.\*]

**8. HUSBAND AND WIFE (§ 313\*)—ABANDONMENT—TREATMENT OF WIFE—EVIDENCE.**

Where a wife was married to avoid a husband's prosecution for seduction and taken to the home of his parents, evidence as to the treatment she received from her husband's mother and other members of the family in his absence, of which he was informed, and that this was such as to force her to leave, was admissible in a prosecution against him for abandonment to show that she did not leave him voluntarily.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. § 313.\*]

**9. HUSBAND AND WIFE (§ 314\*)—ABANDONMENT — DEFENSES — ACTS JUSTIFYING DIVORCE.**

Where, in a prosecution for a wife abandonment after marriage to avoid prosecution for seduction, accused defended on the ground that the wife had been guilty of acts which would entitle him to a divorce, the court properly submitted such matters in general terms for finding, and refused to select certain facts showing or tending to show acts or outrages or cruelties, or abandonment or not, and tell the jury that they would or would not be sufficient to authorize a conviction or require acquittal, since such charge would be on the weight of the evidence.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1111; Dec. Dig. § 314.\*]

**10. HUSBAND AND WIFE (§ 304\*)—"ABANDONMENT"—ACTS CONSTITUTING.**

Temporary absence of the husband from his wife, with her consent, while at work, without an intention to abandon her, does not constitute an abandonment, but proof that he refused to furnish her a home, except with his parents and their family, and that they so abused her, with his knowledge, as to force her to leave, was sufficient to constitute abandonment.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1102; Dec. Dig. § 304.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Abandonment*.]

*Appeal from District Court, Coryell County; J. H. Arnold, Judge.*

Bob Baskins was convicted of wife abandonment after seduction, and he appeals. Reversed and remanded.

Mears & Watkins, of Gatesville, and Williams & Williams, of Waco, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of the offense of abandonment after seduction and marriage, under article 1450, P. C., which is:

"If any person, by promise of marriage, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, and if, after prosecution has begun, the parties marry each other, at any time before the defendant pleads to the indictment before a court of competent jurisdiction, and if the defendant within two years after said marriage, without the fault of his said wife, such fault amounting to acts committed by her after said marriage as would entitle him to a divorce under the laws of this state, shall abandon her or refuse to live with her, or shall be so cruel to her as to compel her to leave him, or shall be guilty of such outrages or cruelties towards her as to make their living together insupportable, thereby leaving her or forcing her to leave him and live apart from each other, shall be guilty of the offense of abandonment after seduction and marriage; and any person convicted of said

offense shall be confined in the penitentiary for a term not less than two nor more than ten years; and said marriage shall be no bar to the qualifications of said female to testify against the defendant; and the female so seduced and subsequently married and abandoned, as herein provided, shall be a competent witness against said defendant."

The gist of this offense, after the seduction and marriage is shown, is that if without the woman's fault such as would entitle him to a divorce: (1) He shall abandon her; (2) or refuse to live with her; (3) or shall be so cruel to her as to compel her to leave him; (4) or shall be guilty of such outrages or cruelty towards her as to make their living together insupportable, thereby leaving her; (5) or, under the same circumstances, forcing her to leave him, under these latter two, and live apart from each other—then he has committed this offense.

The indictment herein was filed in the lower court on July 22, 1914. After the necessary formal allegations of the organization of the grand jury, etc., it alleged that appellant, on or about May 31, 1913, in McLennan county, Tex., did unlawfully seduce Lois Bird, an unmarried woman under 25 years of age, and did then obtain carnal knowledge of her by means and in virtue of a promise of marriage to her, and that thereafter on or about September 29, 1913—

"a complaint was duly filed in the justice court of precinct No. — of McLennan county, Tex., charging him, the said Bob Baskins, in due form of law, with the offense of seducing her, the said Lois Bird, as aforesaid, and that thereafter, to wit, and after said prosecution was begun as aforesaid, and while he, the said Bob Baskins, was under legal arrest following the filing of said complaint, and before a proper grand jury of McLennan county, Tex., had been duly and legally organized and impaneled following said complaint, and before such grand jury could have acted upon the matters and things set forth in said complaint, and before such proper and legal grand jury could have returned an indictment charging him, the said Bob Baskins, with the offense of seducing her, the said Lois Bird, as aforesaid, and on the 30th day of September 1913, and before he, the said Bob Baskins, had pleaded to said indictment before a court of competent jurisdiction, he, the said Bob Baskins, did then and there make a proposal of marriage to her, the said Lois Bird, and the said Bob Baskins and the said Lois Bird did then and there marry each other; and that thereafter, to wit, on or about the 15th day of January, 1914, and without fault on the part of his said wife, the said Lois Bird Baskins, such fault amounting to acts committed by her, the said Lois Bird Baskins, after said marriage as would entitle him, the said Bob Baskins, to a divorce under the laws of the state of Texas, and in the county of Coryell and state of Texas, he, the said Bob Baskins, did then and there unlawfully abandon her, the said Lois Bird Baskins, and did then and there unlawfully refuse to live with her, the said Lois Bird Baskins, and did then and there thereafter live apart from her, the said Lois Bird Baskins; and that the said Bob Baskins, after said marriage, was guilty of such outrages and cruelties towards her, the said Lois Bird Baskins, as to make their living together insupportable, thereby leaving her and forcing her to leave him, and causing them to live apart from each other."

From this indictment it will be seen that it based this prosecution on four of the five grounds enumerated in the statute, to wit: That without her fault (1) he abandoned her; (2) he refused to live with her; (4) he was guilty of such outrages and cruelties towards her as to make their living together insupportable, thereby leaving her; and (5) he thereby forced her to leave him, causing them to live apart from each other.

Appellant made a motion to quash the indictment on five grounds: (1) That the filing of the complaint and issuing the warrant of arrest alleged is insufficient to amount to the beginning of the prosecution for seduction; (2) that a prosecution for a felony cannot begin, or is not begun, until an indictment has been preferred by a proper grand jury; (3) it fails to allege that an indictment had been preferred by a grand jury charging him with seduction before he married Lois Bird; (4) it fails to designate the particular court in which such prosecution was pending against him for the alleged seduction; (5) that the attempt to charge him with outrages and cruelties towards Lois Bird is vague and indefinite, and fails to set out the alleged acts of outrages or cruelty relied upon, and is insufficient to put him upon notice of what of said acts he is called upon to meet.

[1] These first three grounds present substantially the same question. It is true that our Constitution (article 1, § 10) and statute (C. C. P. arts. 4, 447), in effect, expressly provide that no person shall be finally tried and convicted of a felony, except upon indictment of a grand jury; yet neither nor all of these provisions undertake to say and do not say, that the filing of a complaint with a justice of the peace charging an accused with the commission of a felony and the issuance thereon of a warrant of arrest, and his arrest thereunder by the proper officer is not the beginning of a prosecution. On the contrary, we think our statutes do provide that the filing of such complaint and issuance of a warrant thereunder and arrest of an accused is a beginning of the prosecution. Article 26, P. C. is:

"A 'criminal action,' as used in this Code, means the whole, or any part, of the procedure which the law provides for bringing offenders to justice; and the terms 'prosecution,' 'criminal prosecution,' 'accusation,' and 'criminal accusation,' are used in the same sense."

Article 41, C. C. P., tells who are magistrates, and, after enumerating the judges of the superior courts, says that the justices of the peace, mayor, or recorder of an incorporated city or town is a magistrate. The next article says it is the duty of such magistrate, among other things, "to cause the arrest of offenders, by the use of lawful means, in order that they may be brought to punishment." It is made the duty of the peace officers (article 44, C. C. P.) to give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to

believe that there has been a violation of the penal laws, and to arrest offenders even without warrant, where authorized, in order that they may be taken before the proper magistrate or court and be brought to punishment. It is made the duty of the district and county attorneys, within their respective spheres, to receive complaints of the commission of crime before indictment and to prosecute such matters before magistrates. It is also made the duty of the magistrate—justice of the peace—to take such complaints and issue his warrant for the arrest of the party; and when such an accused is brought before him, it is his duty to examine into the truth of the accusation, to hear the testimony, reduce it to writing, and admit the party to bail binding him over to appear before the grand jury, or in certain events, discharge him from custody, if not shown to have committed an offense. Title 5, c. 3, C. C. P.

[2] So that we think it clear that the making and filing of a complaint before a justice of the peace charging an accused with a felony, the issuance of a warrant thereon by the magistrate, placing it in the hands of a peace officer, and the arrest of an accused thereunder, is the beginning of a prosecution under our law and under said article 1450, P. C. The fact that the statute prescribes that the marriage of the parties before "the defendant pleads to the indictment" must be considered with reference to what the law was aforesaid. Until within recent years (article 969, White's P. C. 1895), the statute permitted an accused to escape a merited conviction for seduction "if the parties marry each other at any time before the conviction of the defendant, or if the defendant in good faith offer to marry the female so seduced, no prosecution shall take place, or, if begun, it shall be dismissed." Under that article and the construction thereof by this court, an accused could experiment with the state and the seduced woman up to the very time when the verdict of the jury was brought in and received by the court.

[3] Article 1450, to avoid such an outrage upon the law and the seduced woman, now requires that, in order for the marriage of the parties to obliterate the offense of seduction, the accused must marry the woman before he even pleads to the indictment. He cannot wait until after the trial has all occurred and been concluded except the verdict of the jury.

[4] The fact that the indictment alleged that the complaint had been filed "in the justice court of (precinct No. — of) McLennan county, Tex.," omitting the number of the precinct, does not vitiate the indictment. The words "precinct No. — of," embraced in the parentheses above, could and should be regarded as surplusage. *Goodwin v. State*, 158 S. W. 275, and cases there collated. The indictment as to the other features follows and uses the language of the stat-

ute substantially, if not literally, and is sufficient.

[5] In the prosecution for this offense, and under the indictment herein, it was necessary for the state to prove that a prosecution for seduction of this girl by appellant had been begun by a complaint so charging, and that a warrant directing his arrest therefor was issued. The complaint itself and the warrant, or properly certified copies thereof, should be introduced to show this. The originals or certified copies were, of course, the best evidence of their contents. The state, it seems, on the trial had neither the originals nor such certified copy thereof. It undertook to prove them up, and, in effect, their contents, by Mr. McLellan, the district attorney, and the justice of the peace to whom the complaint was delivered and who issued the warrant. Appellant properly objected to this, and preserved his bills of exceptions thereto. The bills show that Mr. Bird, Lols' father, had Mr. McLellan to prepare a complaint against the accused; that he took it to Mr. Cosgrove, the justice of the peace, in McLennan county, Tex., where the offense of seduction was alleged to have been committed, and delivered it to the justice of the peace, who acted upon it by issuing a warrant for the arrest of the accused, and turned both the complaint and warrant over to the constable, with directions to return and file them before a justice of the peace at Waco, the county seat of McLennan county. Neither of these documents are shown to have been lost or destroyed. The court permitted Mr. McLellan, over defendant's objections, to testify that he wrote up the complaint "in due form of law charging this young man (appellant) with seducing the girl in McLennan county," etc. In our opinion this was error which must result in the reversal of the judgment. Section 335, Branch's Crim. Law, and cases there cited. This did not merely prove the existence of such written documents, but went further, as was necessary, and proved the substance of the contents so as to show they, in fact, charged him with seducing said girl, etc.

[6] As qualified by the court, appellant's bill as to the testimony of Mr. Cosgrove, the justice of the peace, presents no error. The state could prove, not the contents of the complaint or warrant, but the fact that a complaint was prepared by the district attorney, furnished to Mr. Bird, and delivered to Mr. Cosgrove, and that thereon he issued a warrant, and thereunder appellant was arrested, by oral testimony, on the theory that it had been, or would be, shown by the introduction of the original complaint and warrant, or properly certified copies thereof, that they charged him with seducing said girl, etc. The fact, if it be such, that the justice of the peace did not put his file mark on the complaint and did not docket the case on his docket, and refused or declined to

have anything further to do with the case, could make no difference. If necessary, the justice of the peace could have been forced to have put his file mark on the complaint, docket the case, and have an examining trial of the accused. Neither did the fact, if it be such, that the warrant was returnable before a justice of the peace at Waco make any difference. All these matters, if the complaint and warrant, or certified copies of them had been produced and introduced, or, if lost or destroyed; their contents proven, would show a prosecution against appellant, and, if for the offense of seduction of said girl and his actual arrest thereunder, that this resulted in his marrying the girl to avoid conviction for seducing her.

[7, 8] Neither did the court err in permitting the justice of the peace to testify that the precinct of which he was justice was No. 7 of McLennan county Tex. Neither did the court err in admitting the testimony of appellant's wife as to the treatment of her by his mother and other members of his family in his absence; the record and the qualification of his bills on this subject showing that all these facts were communicated to him by his wife, they tending to show such treatment of her as would amount to cruel treatment and require him to act thereon and to, if necessary, remove from his parents' home and live with her elsewhere, and as tending to show that she was forced to leave him because thereof and did not leave him voluntarily.

The charge of the court on the subject that appellant's wife was an accomplice as to the alleged seduction and requiring her testimony on that subject to be corroborated was substantially in accordance with the statute and the many decisions of this court.

Appellant contends that the evidence was insufficient to authorize the court to submit these questions to the jury whether or not: (1) He had abandoned his wife; (2) or refused to live with her; (3) or that he was guilty of such cruelty or outrages towards her as to make their living together insupportable, thereby forcing her to leave him and causing them to live apart, etc. As the case is to be reversed, it is the practice of this court not to discuss the testimony, and we will not do so in this case, but, in our opinion, the evidence was sufficient to authorize and require the court to submit these several issues to the jury for a finding. They were the only issues submitted which were alleged as a basis for conviction in the indictment. We will discuss these matters to some extent in discussing appellant's refused charges and his objections to the court's charge.

Appellant contends the evidence showed no seduction of the girl, but an agreement between her and appellant to the extent only that he would marry her if their sexual indulgence resulted in her becoming pregnant.

His testimony was to that effect so as to raise the question, but hers would show that he seduced her as denounced by the statute. She was amply corroborated by other facts and circumstances. The court, in an apt charge, to which there is no exception, correctly submitted this issue.

Appellant has further objections to the court's charge to this effect: (1) It fails succinctly to define the divorce law in respect to what would constitute abandonment and outrages or cruel treatment; (2) it does not instruct the jury what outrages and cruel treatment are necessary to meet the requirements of the statute that their living together is insupportable; (3) it did not affirmatively instruct the jury that appellant had the right to select their place of abode, and, if she declined to live there or left there, he could not be guilty of abandoning her. In connection with this last objection he requested, but the court refused to give, this special charge:

"The husband has the right to designate and fix the place of residence of the husband and wife, and, if he has done so, and the wife voluntarily leaves the same, and fails to return, the husband cannot be guilty of abandonment, so in this case, if you find that the defendant made arrangements for him and his wife to live with his father, and that such arrangements were consistent and in keeping with the husband at the time, and that the prosecutrix in this case voluntarily left said premises and failed to return thereto, and that she had a home there in the event she desired to return, then the husband could not be guilty of abandoning her, and that she did not have the right to require him to follow her up and live or visit at such place as she or her family might designate or think best."

No special charge was asked to cover the other objections or claimed omissions of the court's charge.

The court's charge, after properly submitting for a finding all other requisites of the offense, on the matters covered by the objections above, instructed and required the jury to find beyond a reasonable doubt:

"That he, the said Bob Baskins, did then and there unlawfully abandon her, the said Lois Bird Baskins, or that he did then and there unlawfully refuse to live with her, the said Lois Bird Baskins, or that he, the said defendant, was then and there guilty of such outrages and cruelties towards her, the said Lois Bird Baskins, as to make their living together insupportable thereby forcing her to leave him and causing them to live apart from each other, then, in the event you so find, you will convict the defendant of the offense of abandonment after seduction and marriage, and assess his punishment," etc.

Our divorce statute (R. S. § 4631) authorizes a divorce in favor of the husband when his "wife is guilty of excesses, cruel treatment or outrages toward" him, "if such ill treatment is of such a nature as to render their living together insupportable, or where she shall have voluntarily left his bed and board for \* \* \* three years with the intention of abandonment."

The statute does not specify what acts are "cruel treatment or outrages," further than to say they must be "such a nature as to ren-

der their living together insupportable." Nor does it define abandonment. The civil courts have not undertaken to define these matters particularly. In some cases they have held that certain acts are not such cruelties and outrages which entitle to divorce, and others are, and that those same acts under some circumstances would amount to cruelties, etc., and under other circumstances they would not. In other words, the effect of the civil decisions, largely, if not wholly, is to submit such matters to a jury for their finding, in general terms, and control them by the circumstances of each case as it arises. No decision of this court, so far as we can find, has undertaken to define such terms. Our statute says (article 10, P. C.):

"Words which have their meaning specially defined shall be understood in that sense, though it be contrary to their usual meaning; and all words used in this Code, except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed."

And article 58, C. C. P., says:

"All words and phrases used in this Code are to be taken and understood in their usual acceptance in common language, except where their meaning is particularly defined by law."

[8] It occurs to us it would be improper for the trial court to pick out certain facts showing, or tending to show, acts of outrages or cruelties, or abandonment or not, and tell the jury they would or would not be sufficient to authorize conviction or require acquittal; for such a charge would be on the weight of the evidence. Instead, the court should, as he did in this case, submit such matters in general terms for a finding.

We will try to illustrate these points by some of our other statutes and decisions thereunder.

Article 46, P. C., provides that, when a person does an act which would otherwise be criminal, laboring under a mistake of fact, he is guilty of no offense. The next article says that such mistake of fact must be such that the person so acting would have been excusable had his conjecture as to the fact been correct; "and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense." The trial judge, in *Watson v. State*, 13 Tex. App. 81, undertook to tell the jury what was and what was not proper care, under said articles. But this court, after quoting said two articles, said:

"We think the learned judge should have given in charge to the jury, substantially, the above articles, leaving the jury to determine from the evidence in the case whether or not, under all the facts and circumstances of that particular case, the mistake of the defendant, if he was mistaken, arose from a want of proper care on his part. The question as to proper care, we think, depends upon the facts in each particular case. No general rule can be prescribed in relation to it. What would be proper care in one case might be gross negligence in another. What would be proper care when con-

sidered with reference to one individual might not be when applied to another."

To the same effect is the decision in *Hailes v. State*, 15 Tex. App. 93.

Our statute (P. C. art. 1114), in defining "negligent homicide," says:

"If any person in the performance of a lawful act shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree."

Article 1117 says:

"The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances."

Under these articles, in *Morris v. State*, 35 Tex. Cr. R. 315, 33 S. W. 539, complaint was made that the trial judge failed to give his special charge, in effect, telling the jury what was and what was not negligence. This court said:

"There was no error on the part of the court in failing to further define 'negligence' than as given in the main charge. The charge of the court is in the following language: 'The degree of care and caution required to avoid danger is such as a man of ordinary prudence would have used under like circumstances.' This was in accordance with the language of the statute on the subject, and is in consonance with the ordinary definition of negligence."

If any person, under our law, by his negligence causes injury to another, he is liable in damages therefor. This is statutory where such negligence results in death. R. S. arts. 4694, 4695. In our state, when suits for damages first began to be brought because of such negligence, it was a question whether the trial courts could charge, as a matter of law, what was, and what was not, negligence, or whether it had to be left to the jury for them to determine, as a fact, what was, and what was not, negligence. In *T. & P. Ry. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272, these questions first came before our Supreme Court, wherein Chief Justice Roberts, for that court, elaborately and in his masterful way discussed and decided them. In that case he stated:

"The [trial] court determined, as a matter of law, that the fact of starting the train instantly, upon giving the signal of departure, was an act of negligence or misconduct on the part of defendant, and that the act of attempting to get on a train moving rapidly was negligence on the part of plaintiff; but, if the train was moving slowly, it would not be an act of negligence on the part of plaintiff."

He then states that it is only when the statute expressly tells what is, and what is not, negligence, as a matter of law, that the court can so tell the jury; that, when the statute is silent, then the jury must say what is and what is not negligence, saying:

"We are of opinion that the charge of the court is erroneous, in instructing the jury as if such laws did exist as applicable to this case, and in thereby relieving the jury from finding the fact of negligence, both as to plaintiff and as to defendant, in the matters mentioned, relating to each one respectively. It has long been the settled policy of the laws of this state to keep separate and distinct, and to de-

fine accurately, the respective functions of the judge and of the jury in the trial of cases, both civil and criminal. As early as 1853 the Legislature, in pursuance of this policy, enacted a law, that is still in force, which indicates a radical departure from the mode of proceeding in trials, as practiced in the courts of England and of many, if not most, of the American states wherein the common law prevails. It is as follows: The judge 'shall not in any case, civil or criminal, charge or comment on the weight of evidence. He shall so frame his charge as to submit questions of fact solely to the decision of the jury, deciding on and instruct them as to the law arising on the facts, distinctly separating the questions of law from questions of fact. He shall not charge or instruct the jury in any case, unless the charge shall have been by him first reduced to writing and signed, and every charge shall be given in the precise words in which it shall have been written.' *Pascal's Dig. art. 1464*. This is mandatory and peremptory. It leaves no discretion to the judge as to whether or not he shall 'charge or comment on the weight of evidence,' or as to whether or not he shall 'submit questions of fact solely to the jury.' It is a positive direction to a judge as to what he shall do in the trial of a case in his court, however different may be the mode of trying cases in the courts of other countries, of which he may be informed by law-writers or by precedents. This is our system of procedure. The judge is forbidden by law either to aid a jury, or to infringe upon their province in weighing the evidence or in deciding upon the facts, in every case submitted to them. It presupposes that the jury is as competent to find the facts as the judge is to declare the law. This admits of no exception, so far as his duty, enjoined by law, is concerned, whether the facts are plainly established by the evidence for one side or the other, or are complicated or doubtful."

This has been the settled law of our state ever since that decision.

[10] However, as this case is to be tried again, we think it would be proper for the court in his charge, in substance, to tell the jury that the temporary absence of appellant from his wife, with her consent, while at work, if he had no intention to abandon her, was not such an abandonment of her that that alone would authorize his conviction on that feature of the case. Also, as the evidence in appellant's behalf would tend to show she abandoned him without cause, we suggest the court, in a proper charge should tell the jury, if she did so, he would not be guilty; yet, if his treatment of her and that of his mother, which was brought to his attention, was such, under all the circumstances, as to amount to such cruelty, etc., as to render their living together then insupportable, and he thereby forced her to leave him, then it would be his abandoning her and not she him. The special charge of appellant copied above is not the law applicable to this case, and should not be given.

It is true our Supreme Court has held that, under certain circumstances, the husband can designate, in connection with the use and occupancy thereof by himself and wife, what property is the homestead, and what not; yet what they said and held in the cases cited by appellant (*Holliman v. Smith*, 39 Tex. 362; *Womble v. Womble*

[Civ. App.] 152 S. W. 473, and McGowan v. McGowan [Civ. App.] 50 S. W. 399) is not the law applicable herein.

Appellant in this case sought to take advantage of the "baby act," and claimed, because he was only 18 or 19 years old, he had to live with his parents, and the right to, in effect, require his wife to live there also, notwithstanding his mother and other members of his parents' family treated her in such a way as to make it unendurable for her to live there, and he made no effort or attempt to shield or protect her from such treatment. In fact, it is a reasonable inference from his conduct and treatment of her and failure and refusal to protect her and to provide for her, in connection with his mother's treatment of her, was part of his scheme to drive her away from him, and thereby abandon her, and leave her, and by such cruelties and outrages make their living together insupportable, thereby leaving her, and forcing her to leave him, under the very terms of the statute.

We are told in Holy Writ (Gen. ii, 23, 24) that:

Man's wife is bone of his bone and flesh of his flesh. "Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh."

Our Savior himself, referring to Genesis, above, said:

"From the beginning of the creation God made them male and female. For this cause shall a man leave his father and mother, and cleave to his wife; and they twain shall be one flesh; so then they are no more twain, but one flesh." Mark x, 6 to 8.

Appellant did not plead the "baby act" when he wooed and won this young lady for his bride; nor did he, when he, by his wiles and professions of love for and devotion to her, induced her to yield her person to him under a solemn promise and engagement to marry her; nor did he, when indulging his lustful passion, impregnating her, and causing her in due time to give birth to an innocent babe. It is too late now for him to attempt to shield himself by the "baby act." He had no right to designate his father and mother's home as his, and, under the circumstances shown in this record, to compel her to live there with him.

For the error above pointed out the judgment will be reversed, and the cause remanded.

### COLLINS v. STATE. (No. 8218.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### 1. INDICTMENT AND INFORMATION (§ 114\*)—SUFFICIENCY — PREVIOUS CONVICTIONS — "SAME OFFENSE."

Under Pen. Code 1911, art. 1618, authorizing additional punishment where accused has been previously convicted of the same offense, an information, alleging that accused had been convicted

of the "same offense," setting out two instances thereof did not properly charge the character of offense; the words "same offense," not meaning the identical offense, but one of like character.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 301-307; Dec. Dig. § 114.\*]

For other definitions, see Words and Phrases, First and Second Series, Same Offense.]

#### 2. INDICTMENT AND INFORMATION (§ 169\*)—EVIDENCE—ISSUES AND PROOF.

Where the information did not properly allege previous convictions so as to warrant the additional punishment authorized by Pen. Code 1911, art. 1618, the admission of the records of prior convictions was error.

[Ed. Note.—For other cases, see Indictment and Inf., Cent. Dig. §§ 320, 535; Dec. Dig. § 169.\*]

#### 3. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR —ISSUES AND PROOF.

Such error was not cured by withdrawing the incompetent evidence from the jury, and, in view of a punishment of \$200 and 10 days' imprisonment and the statutory penalty of not less than \$50 nor more than \$500, and imprisonment not to exceed six months, was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

#### 4. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—APPLICATION TO CASE.

In a prosecution for unlawfully practicing medicine, where the information alleged that defendant charged \$2 of the current money of the United States of America for his services, an instruction, authorizing a conviction if he charged any money of any sort for medical treatment, was not within the issues, which should have been confined to finding the money charged to be the current money of the United States.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

#### 5. PHYSICIANS AND SURGEONS (§ 6\*)—UNLAWFUL PRACTICE—PROSECUTION—EVIDENCE.

In a prosecution for unlawfully practicing medicine, evidence of the auditor of a newspaper that defendant had a credit on his books of \$247, in the absence of any showing that it had been placed there to pay for advertisements therein, or any other connection, was inadmissible.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.\*]

#### 6. PHYSICIANS AND SURGEONS (§ 6\*)—UNLAWFUL PRACTICE — PROSECUTION — EVIDENCE —ADVERTISEMENT.

In a prosecution for illegally practicing medicine, the admission of an advertisement which on its face was that of another person, and copies of the newspaper containing advertisement of an osteopathic infirmary and hospital, followed by the name of defendant as its physician and surgeon without a showing that defendant authorized the publication and was connected with the infirmary, did not make him responsible, and was inadmissible.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.\*]

#### 7. CRIMINAL LAW (§ 1033\*)—RECOGNIZANCE—EFFECT ON JURISDICTION OF LOWER COURT.

Defendant's recognizance, after conviction, did not oust the trial court of jurisdiction to determine his motion for a new trial, as it requires a notice of appeal to attach the jurisdiction of the Court of Criminal Appeals; and, even if defendant gave notice of an appeal, the

trial court had jurisdiction over the judgment until the end of the term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. § 1083.\*]

Appeal from El Paso County Court; J. M. Deaver, Special Judge.

Ira Collins was convicted of unlawfully practicing medicine, and he appeals. Reversed, and cause remanded.

See, also, 161 S. W. 115.

Denman, Franklin & McGown, of San Antonio, and Coldwell & Sweeney, of El Paso, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of unlawfully practicing medicine, under the second count in the information, which charges that he unlawfully practiced medicine on a human being without having first registered his license as required by law, showing his authority to practice medicine as set forth in the statute. It further charges that on or about the 7th day of May, 1913, appellant was convicted in El Paso county in the same court of the same offense herein charged against him, upon pleadings then legally pending in said court, of which the said court had jurisdiction, and that prior to the commission of the aforesaid offenses by the said Ira Collins, to wit, on the 8th day of January, 1914, in the county of El Paso, he was duly and legally convicted in said last-named court of the same offense hereinbefore charged against him, upon an information then legally pending in said court and of which the said court had jurisdiction. Many exceptions also were taken to the charge of the court, all of which seem to have been decided against him by the previous decisions of this court, and it is deemed unnecessary to discuss them. See *Singh v. State*, 146 S. W. 892, *Byrd v. State*, 162 S. W. 360, and *White v. State*, 157 S. W. 152.

[1] It is contended that the information is insufficient, alleging previous convictions so as to obtain the enhanced punishment authorized by the Penal Code, where the party has been previously convicted of similar offenses. This information charges that appellant has been before *convicted of the same offense*, setting out two instances where he has been previously convicted of the same offense. This does not properly charge this character of case as was decided by this court in *Kinney v. State*, 45 Tex. Cr. R. 500, 78 S. W. 228, 79 S. W. 570, and *Muckenfuss v. State*, 55 Tex. Cr. R. 216, 117 S. W. 853.

[2] This question was again raised when the state offered in evidence the records of prior convictions. The court permitted these judgments to go to the jury. However, the court instructed the jury in the charge not to consider the prior convictions. Without going into detail with reference to this question as variously presented, the appellant's

contentions are correct; the indictment was not sufficient in this respect.

[3] The court was in error in permitting the evidence to go before the jury to be considered by them. This error was not cured by withdrawing the illegal testimony in the charge. The court cannot permit illegal testimony material in nature to go before the jury and remain before them, and then undertake to cure that by withdrawing the evidence from their consideration. That this evidence was hurtful is found in the amount of the punishment assessed, which was a fine of \$200 and 10 days' imprisonment in the county jail. The punishment prescribed by the statute is not less than \$50, nor more than \$500, and by imprisonment in the county jail for any term not to exceed six months, and each day of such violation shall constitute a separate offense.

[4] Many exceptions were reserved to the charge at the proper time. We call attention to one of these, in which the jury was authorized to convict the defendant if, among other things, he charged any money of any sort for medical treatment, because the information had alleged that defendant charged *current money of the United States of America for his services*. Upon another trial the court should confine the findings of the jury to the allegations in the information. The information alleges appellant charged *\$2 current money of the United States of America for his services*. The evidence does not show what kind of money was paid. The witness said "\$2." If it was not current money of the United States, of course that allegation would not be met, and the court should have confined the jury to finding the money to be current money of the United States.

[5] Another bill of exceptions recites that the court permitted the introduction of the evidence of Mr. Veazey, the auditor of the El Paso Herald; that the defendant had a credit on the books of the Herald Publishing Company for \$247. As this is presented we think the objections were well taken. This matter should be connected up in some way to make it admissible. The fact that defendant had \$247 to his credit in the Herald Publishing Company did not prove, or tend to prove, so far as the matter is shown, any issue in this case. Possibly or probably it might be connected up so as to make it admissible. If the state was trying to show that he was publishing to the world through a newspaper that he was practicing medicine and this money was placed there to pay for such advertisements in that paper, it might be admissible, but it must be connected in some way so as to make it admissible.

[6] Another bill in the same connection shows the court admitted, over appellant's objections, an advertisement that on its face showed it was that of another person and

not the defendant, and copies of the "El Paso Daily Herald," containing advertisements of "the A. T. Still Osteopathic Infirmary, Ira W. Collins, Physician and Surgeon in Chief," and advertising said infirmary as a hospital, for the cure of diseased persons, to which action appellant urged objections. If Ira W. Collins authorized the publication, it would be admissible against him, but until that was shown in some way the mere fact that the A. T. Still Osteopathic Infirmary published his name with it would not make Collins responsible. If he was connected with that infirmary, and it was so shown, this evidence might be admissible to show that he was engaged in that particular character of practice of medicine, but unless it is connected in some way, the testimony would not be admissible.

[7] There is another question which is noticed. There is a motion made to dismiss the appeal. It is thus presented. When the verdict of the jury was returned, and before notice of appeal was given, appellant entered into recognizance in open court. Subsequently he moved for a new trial. The court declined to hear that motion because appellant had entered into recognizance thereby ousting the county court of jurisdiction. This is not correct. The recognizance does not oust the trial court of jurisdiction; it takes notice of appeal to do that. Without such notice the jurisdiction of this court does not attach. Under the statute and the authorities notice of appeal is requisite to attach the jurisdiction of this court; a recognizance would amount to nothing in ousting the lower court of jurisdiction and attaching jurisdiction to this court without notice of appeal. In the case of *Bundick v. State*, 59 Tex. Cr. R. 9, 127 S. W. 543, which was a felony, it is said:

"Where, after conviction of murder, a motion for new trial was overruled, notice of appeal was given, and an order allowed to file a statement of facts within 30 days, but during the term of the court at which the conviction was had the defendant filed a supplemental motion for new trial, alleging that one of the jurors who tried him was an ex-convict, which motion was overruled, and to which the defendant again excepted and gave notice of appeal, and the transcript in the case had not yet been made out and filed in the Court of Criminal Appeals." It was "held that the trial court having jurisdiction over its proceedings until the expiration of the term, had jurisdiction of the motion and the case."

The trial court was in error in refusing to hear the motion for new trial, which was filed in time, and the mere fact of entering into recognizance did not oust that court of its jurisdiction, and under the authority of the *Bundick Case*, supra, even if he had given notice of appeal, inasmuch as the trial court has jurisdiction over its judgments until the end of the term, that should have been set aside and an additional motion for new trial heard, after which another notice of appeal would have attached the jurisdiction

of this court. But in no event does the recognizance attach the jurisdiction of this court. The court should have heard the motion for new trial and passed upon it.

The judgment is reversed, and the cause remanded.

### GUERRERO v. STATE. (No. 3348.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### 1. WITNESSES (§ 800\*)—TESTIMONY AGAINST SELF.

A defendant in a criminal prosecution has the right not to testify therein.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1042, 1042½; Dec. Dig. § 800.\*]

#### 2. HOMICIDE (§ 166\*)—EVIDENCE—MOTIVE.

In a prosecution for murder, a conversation, wherein the father of the murdered girl told defendant that she had told him that defendant had said to her that if she would not run away with him he would kill her, and that if she told any of their "secrets" he would kill her, and wherein defendant asked if there was any proof as to that matter, and, when told that there was, said they would go to law about it, was admissible as tending to show his motive in killing deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

#### 3. CRIMINAL LAW (§ 406\*)—EVIDENCE—ADMISSIONS.

Defendant's statement, shortly after the shooting, made to one who asked why he had killed the girl, that "in Mexico they are killing lots of them—why can't I kill one?" was an admission that he killed the girl, and admissible to prove that fact.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

#### 4. CRIMINAL LAW (§ 1137\*)—APPEAL—PARTY ENTITLED TO ALLEGE ERROR.

In a prosecution for homicide, where a witness testified to an admission by defendant, defendant, who, on cross-examination, elicited the witness' question to him, "For God's sake what have you done?" could not complain of its admission, if harmful.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

#### 5. CRIMINAL LAW (§ 361\*)—TRIAL—CONDUCT OF DEFENDANT.

In a prosecution for murder, where the plea was insanity and where defendant, while the jury was in the box, would throw his head about, shake his hands, and shuffle his feet, evidence for the state that such conduct did not occur when defendant was not in view of the jury was admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 802, 808; Dec. Dig. § 361.\*]

#### 6. CRIMINAL LAW (§ 1166½\*)—TRIAL—CUSTODY OF ACCUSED.

In a prosecution for murder, where the sheriff on one occasion did not take the handcuffs off the accused until the jury were taking their seats, but it did not appear that the jury saw him take the handcuffs off accused, such custody or restraint of accused was not reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**7. CRIMINAL LAW (§ 311\*)—PRESUMPTIONS—SANITY.**

Every man is presumed to be sane until the contrary appears to the satisfaction of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 311.\*]

**8. CRIMINAL LAW (§ 331\*)—BURDEN OF PROOF—INSANITY.**

The burden of proof is on defendant setting up insanity as a defense to show that he was insane at the time of the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 331.\*]

**9. HOMICIDE (§ 309\*)—INSTRUCTIONS—MAN-SLAUGHTER.**

Where the only evidence as to why defendant killed deceased was, that he wanted her to run off with him and that she would not, that there were "secrets" between them which he did not wish her to disclose to her parents, and that he had threatened to kill her if she told them, and that she told her parents of the threats, and he feared she would disclose the "secrets," and her father questioned him about the matter, and some three hours afterwards defendant placed a pistol near her temple and fired, killing her instantly, there was no issue of manslaughter in the case; and hence no error in refusing to give a specially requested charge thereon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

**10. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

Where defendant admitted to a witness that he had killed the deceased, the court did not err in refusing a charge on circumstantial evidence, as it is only when the evidence is wholly circumstantial that such a charge is required.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

**11. CRIMINAL LAW (§ 721\*) — REMARKS OF PROSECUTOR — DEFENDANT'S FAILURE TO TESTIFY.**

In a prosecution for murder a district attorney's remarks as to what defendant said when the father of the murdered girl asked him why he had said to her that if she would not run away with him he would kill her and if she told what defendant said he would kill her, that defendant did not deny it, as he would if it had not been true, and that the jury knew he would have denied it, but instead he said they would go to law, were not objectionable as a reference to defendant's failure to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

**12. CRIMINAL LAW (§ 1092\*)—APPEAL—BILL OF EXCEPTIONS—TIME FOR FILING.**

A bill of exceptions, to authorize the Court of Criminal Appeals to consider it, should be filed during term time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

**13. CRIMINAL LAW (§ 854\*)—TRIAL—CONDUCT OF JURY—"SEPARATION."**

Where the jury room was upstairs over the district court room, and the stairway leading to it was seven or eight feet from the door of the courtroom, and when the jury came down the stairs and started to take their seats it was discovered that one was not present, though he was seen coming down the stairs, and his tardiness was only from half a minute to a minute and a half, and it was impossible for

him to have met any one, there was not a "separation" of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.\*]

For other definitions, see Words and Phrases, First and Second Series, Separation of Jury.]

Appeal from District Court, Hays County; Frank S. Roberts, Judge.

Benigno Guerrero was convicted of murder, and he appeals. Affirmed.

Louis T. Dugger, of San Marcos, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder, and his punishment assessed at death, from which judgment he prosecutes this appeal.

[1] No one saw the actual shooting, now living, other than appellant, and he, as he had a right not to do, did not testify in the case. Appellant had married Catarino Morales, and is charged with having killed a sister of his wife, Isabel Morales, a 15 year old girl.

[2] As tending to show a motive for the killing, the father of the two girls, Nicholas Morales, testified that on the day of the homicide he had a conversation with the defendant; that in this conversation he (the witness) told appellant that the girl Isabel had told him that he (defendant) had said to her, "If she (Isabel) would not run away with him he would kill her, and that if she gave away any of the secrets they had between them he would kill her;" when appellant asked if he had any proof in regard to the matter, and when told that the father had appellant replied, "Well, we will go to law about it." The girl was killed that evening in the field, while she was at work. This conversation was objected to, but the court did not err in admitting it as it clearly tended to show the motive of appellant in killing deceased.

[3, 4] Appellant also objected to a conversation had between appellant and Gregorio Valdez shortly after the shooting. Valdez says he heard of the shooting, and went to appellant's home and asked why he had killed the girl, when appellant replied, "In Mexico they are killing lots of them—why can't I kill one?" This was an admission that he killed the girl, and was admissible to prove that fact. It is not contended that he was under arrest at that time, in fact it is shown by all the testimony that he was not. However, when the testimony was admitted, appellant's counsel cross-examined the witness in regard to this statement, asked the following questions, and elicited the following answers thereto:

"Q. State exactly what words you used in that question? A. When I got to the house he was in bed, and I says: 'For God's sake, Guerrero, what have you done?' Q. Now, was this

answer about killing so many Mexicans in Mexico and about him having a right to kill one, was that the answer to that question, 'For God's sake what have you done?' A. That's what he said. That's all he said to him."

The state on its direct examination had not elicited the question propounded by appellant to the witness, but merely the statement of defendant, and if the question, "For God's sake, what have you done," was hurtful, it was elicited by appellant on cross-examination in answer to a direct question.

[5] The defendant's plea was insanity, and he introduced several witnesses to show that the relatives of his mother were insane, that on one occasion he himself attempted to commit suicide, and other facts and circumstances were introduced by defendant on this issue. The state introduced a number of witnesses who testified that appellant was sane. Among other things the record discloses that, while the trial was being conducted, and the jury was in the box, appellant "would throw his head about, shake his hands, and shuffle his feet." The state introduced witnesses who testified that when the court was at recess and the jury was not present appellant would cease to "throw his head about, shake his hands, and shuffle his feet." These antics in the presence of the jury were performed evidently to assist his plea of insanity, and there was no error in permitting the state to show that they did not take place when he was not in view of the jury.

[6] It is shown by one bill that on one occasion the sheriff did not take the handcuffs off the prisoner until the jury was being brought in and were taking their seats. There is nothing in the bill to show that the jury saw the sheriff take the handcuffs off of appellant. The court says it is usual and customary in bringing prisoners from the jail to the courtroom to handcuff them, but when in the courtroom they are taken off. Only in this one instance did the jury arrive in the courtroom before the handcuffs had been removed, and in this instance it is not disclosed that the jury saw that the prisoner was handcuffed. Prisoners should never be kept manacled while being tried, unless absolutely necessary, but the state of facts shown by this bill does not present error.

[7, 8] The only objection urged to the court's charge when presented to counsel for inspection was, "that those paragraphs presenting the issue of insanity were erroneous in that said charge is upon the weight of the evidence, in that it specifies that such testimony must be introduced before a jury can believe that the defendant was insane at the time of the alleged commission of the offense." We suppose this objection is leveled at that portion of the charge which informs the jury, "that every man is presumed to be sane until the contrary appears to the satisfaction of the jury." That is the law in this

state, and the court did not err in so instructing the jury. The burden of proof is on the defendant to show that he was insane at the time of the commission of the offense. In addition to this the court gave the special charge requested by appellant on this issue.

[9] The court did not err in refusing to give the special charge presenting the issue of manslaughter. The only evidence in this case which would indicate the reason appellant killed deceased was that he wanted her to run off with him and she would not do it; that there were "secrets" between the two he did not wish her to disclose to her parents, and had threatened to kill her if she did tell them; and that she told her parents about the threats, and he feared she would also disclose the "secrets." The girl's father had questioned him about this matter some three hours before the homicide, and the facts would show he went to her while she was at work in the field, placed the muzzle of a 45-caliber pistol near her temple, and bored a hole through her head, she dying instantly. There was no issue of manslaughter in the case.

[10] As appellant admitted to Gregorio Valdez he had killed the girl, the court did not err in refusing the charge on circumstantial evidence. It is only when the evidence is wholly circumstantial that such a charge is required.

The other special charges, in so far as they are the law of the case, are fully covered by the court's charge.

[11] In another bill the remarks of the district attorney are complained of. The bill shows that the district attorney made the following remarks:

"What did you say when the father of the murdered girl said: 'Benigno, why did you say to Isabel that if she did not run away with you you would kill her, and if she told what you said you would kill her?'" The district attorney then turned and faced defendant, leveled his finger at him and said: 'Did you deny it? No. You know if it had not been true that you would have denied it then.' And turning to the jury the district attorney continued: 'And you, gentlemen of the jury, know he would have denied it to his father-in-law, but, instead, defendant said, 'If you can prove it, go to the law.'"

These remarks, as the bill plainly shows, referred to the conversation had between appellant and the father of the girl at the noon hour, and could not be construed into referring to the failure of the defendant to testify.

[12, 13] The only other matter presented by the record that we deem it necessary to discuss is the one that contends that the jury was permitted to separate during the trial of the case. The bill presenting the evidence was not filed until long after the adjournment of court for the term. It should have been filed during term time to authorize us to consider it. But we have read the evidence heard. It appears that the jury room

is upstairs over the district court room, and that the stairway leading to the jury room is some seven or eight feet from the door of the district court room. That during a recess of the court the jury retired to their room in charge of an officer. The jury came down the stairs and started to take their seats, when it was discovered that only 11 were present. The sheriff started up the stairway after the other jurymen, when he was seen coming down. He explained that he was in the toilet when the other jurymen started downstairs, and he came on as soon as he got out of the closet. The time from the time the 11 jurors came downstairs to the time the last juror was coming down is estimated at from thirty seconds to a minute and a half. The record discloses it was impossible for him to have met any person. This in law would not be deemed a separation, and the court did not err in so holding. The judgment is affirmed.

#### SWILLEY v. STATE. (No. 3314.)

(Court of Criminal Appeals of Texas. Nov. 25, 1914. Rehearing Denied Dec. 23, 1914.)

##### 1. CRIMINAL LAW (§ 614\*)—SECOND CONTINUANCE—ABSENT WITNESSES—DILIGENCE.

That defendant caused a subpoena to issue is not a showing of diligence entitling him as a matter of right to a second continuance for absence of a witness; but it must be shown that the process was served and returned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.\*]

##### 2. CRIMINAL LAW (§ 614\*)—SECOND CONTINUANCE—ABSENT WITNESS—DILIGENCE.

It cannot avail defendant as diligence, as regards his right to a second continuance for absence of a witness, that a person was served with process issued by the state for such witness, if he was not such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.\*]

##### 3. CRIMINAL LAW (§ 614\*)—SECOND CONTINUANCE—ABSENT WITNESS—CONSENT OF DEFENDANT.

As regards right of defendant to a second continuance for absence of a witness, there must be an affirmative showing that he was not absent with defendant's consent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.\*]

##### 4. CRIMINAL LAW (§ 614\*)—SECOND CONTINUANCE—ABSENT WITNESS—CONSENT OF DEFENDANT.

Regarding a second continuance for absence of a witness, who had testified at the examining trial and habeas corpus hearing, the court could conclude one served with process as him, if him, was absent with consent of defendant's counsel, who told him he need not attend, if, as he claimed, he was not such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.\*]

##### 5. CRIMINAL LAW (§ 1175\*)—NEW TRIAL—FINDINGS.

Any inconsistency of an implied finding in finding, at the trial, an absent witness, and find-

ing on testimony of defendant's counsel, on the motion for new trial, that the person summoned was not such witness, cannot be complained of by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3179-3182; Dec. Dig. § 1175.\*]

Davidson, J., dissenting.

Appeal from District Court, Jasper County; A. E. Davis, Judge.

John Swilley was convicted of murder, and appeals. Affirmed.

See, also, 166 S. W. 733.

Bisland, Adams & Bruce and C. F. Stephens, all of Orange, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. This is the second appeal in this case. On this trial appellant was found guilty, and his punishment assessed at 10 years' confinement in the state penitentiary.

The only bills of exception in the record complain of the action of the court in overruling appellant's application for a continuance, which will hereinafter be discussed. The only other ground in the motion for a new trial alleges the insufficiency of the testimony to sustain the verdict. The evidence introduced in behalf of the state, if believed, fully supports the findings of the jury. The issues made by the testimony were fully and fairly submitted by the court in his charge, and submitted in a way not complained of by appellant. Appellant requested no special charges. So the only question to be decided is: Did the court err in overruling the application for a continuance?

[1-4] It appears from the record that this indictment was found by the grand jury of Orange county, and while the case was pending in that court a subpoena was issued by the state for a witness by the name of Albert Cram. This subpoena was returned, saying witness not found, as he was then in Morgan City, La. The venue of the case was changed to Jasper county, when a subpoena was again issued to Orange county for this witness; the return again stating him to be in Morgan City, La. The case was tried and resulted in a conviction, which judgment was by this court reversed; the opinion on the former appeal being reported in 166 S. W. 733. By reference to that opinion and to this record it is shown that appellant then sought a continuance on account of the absence of this witness, Albert Cram. So the application we are now considering is on account of the absence of this same witness. What diligence does the record disclose that appellant used to secure the attendance of this witness? The only showing made, in so far as diligence on his part is concerned, is that, after the term of court had begun at which his case was set for trial, he caused a subpoena to issue to Jefferson county for the witness. The motion does not show what

officer this subpoena issued for the witness was placed in the hands of, or that it was ever placed in the hands of any officer in Jefferson county. The subpoena is not in the record, and, if it was ever placed in the hands of any officer in Jefferson county, no return has ever been made thereon. The appellant does not now claim to know that the witness is in Jefferson county, or that he was in Jefferson county at the time he had the subpoena issued directed to such county. He does not claim in his application that any one had so informed him, or that he had ever seen said witness in said county; but he does state in his second application that he has been informed that the witness is in the state of Louisiana. So, in so far as the efforts made by the defendant to secure the attendance of this witness are concerned, the diligence used is wholly insufficient in law on a second application for the same witness. For he does not claim to know where the witness is located, or where he has been located at any time since the last term of the court, nor what efforts, if any, he has made to learn the whereabouts of the witness, that he might be summoned, or if out of the state his depositions might be taken. In the case of *Swofford v. State*, 8 Tex. App. 85, this court held:

"In subsequent applications, provided for by article 2988 of Paschal's Digest, however, we are of opinion that the application is not a matter of right, save in those cases only where it is shown affirmatively that such process as the law has provided and afforded had been served out, and not only served out, but actually served and returned into court. In such case, we apprehend, a party, even on a second application, would rightfully be entitled to a continuance. But suppose he has promptly availed himself of the process which the law grants, but that the process has not been served and returned. In such a case it seems equally clear to us that he is not entitled to the continuance as a matter of right; it then becomes a discretionary question with the court. The court will then inquire whether or not the defendant's affidavit, 'that he has a reasonable expectation of procuring the testimony at the next term of the court' (Pasc. Dig. art. 2988), is founded in truth and reason as well as in fact."

If the appellant since the last term of court had not succeeded in locating this witness, what assurance could he give or did he offer to give the court that he would do so by the next term of the court? Under such circumstances, we cannot hold that the court erred in the premises in so far as the diligence used by the defendant to secure the attendance of this witness is concerned. However, the record discloses that the state was anxious also to secure the attendance of this witness; that the witness Cram had testified for the state at the examining trial and habeas corpus hearing held at Orange, and was present in court when the venue was changed to Jasper, Tex. One of the reasons this case was reversed on the former appeal was because the defendant, while a witness, was compelled to state and prove what Cram

had testified to at the habeas corpus hearing, without showing that Cram was permanently beyond the jurisdiction of the court. The state had been seeking to secure the attendance of this witness, and had had process issued for him since the last term of the court, and the sheriff of Jefferson county had returned a subpoena showing that he had served the witness with process at Port Arthur, Tex., June 15th—just ten days before the trial. On the day the case was called for trial, the witness not appearing, an attachment was issued for him, which was returned with the statement that Cram had gone to Louisiana. Appellant's contention is that this diligence used by the state should, and does in law, inure to his benefit, and in the motion for a new trial sets up these facts as a reason why a new trial should be granted on account of the absence of this witness. The state contested this motion, and evidence was heard thereon. Mr. Adams, one of defendant's attorneys, was the first witness heard, and the state proved by him: That he was informed that the state had secured this witness to be served at Port Arthur, Tex. That two days before the cause was set for trial, having business at Port Arthur, he went there, and being desirous of conferring with the witness as to his testimony, when he got to Port Arthur he paid John Griffith \$5 to locate for him the witness who had been served by the state as Albert Cram, and also informed Deputy Sheriff Schmizer, who had made the return on the subpoena, that he desired to see the witness. That about 4 o'clock on the evening of June 23d (the cause being set for June 25th) Mr. Schmizer introduced him to the person he had served, and introduced him as Albert Cram. That John Griffith and J. F. Smith were present. Mr. Adams says he invited all the gentlemen to take a drink with him, and all did so except the deputy sheriff and the witness Cram; they remaining in front of the saloon. After those who desired had taken their drink, he (Adams) asked Griffith to tell Cram he desired to talk with him, and Griffith went and got Cram and brought him to him. That he then talked with the person who had been served with a subpoena some eight or ten minutes. That he claimed not to be Albert Cram, but said he was named Orrin Cram; that Albert was his brother, and he did not know where he was. That witness then asked if he should attend court, and he told him, if he was Albert Cram he should do so, but if in fact he was Orrin Cram he need not do so.

The deputy sheriff testified: That he introduced the witness he had served with subpoena to appellant's counsel, and that this person was known as Albert Cram in Port Arthur. That after the witness Cram had talked with appellant's counsel he saw Griffith and appellant's attorney in conversation after Cram had walked away, and, after Mr.

Adams left, Griffith remarked to him, "I will bet that Cram does not go to Jasper." And it appears that he did not go. Mr. Smith also testified that he was present when plaintiff's attorney was introduced to Cram, and that he took a drink with Mr. Adams and John Griffith, and as he walked away he saw Griffith go to Cram and tell him that Mr. Adams desired to see him, and Cram and Griffith went together to Adams; that some 30 minutes after this, and after the parties had separated, he again met Cram, and Cram had agreed to meet him at a certain time and place and go with him to Jasper; that this was the last he saw of him. The record further discloses that this witness Cram, whether he be Orrin or Albert, took the train for Louisiana instead of Jasper, Tex., after this conversation. If the person served was Orrin Cram, and not Albert Cram, and Albert Cram was not in fact found nor served with process, as hereinbefore shown, no sufficient diligence had been used by appellant to secure his attendance as a witness; this being the second application for a continuance on account of his absence. If the person served with process issued by the state was in fact Albert Cram, the court doubtless felt that but for the visit of appellant's counsel the witness would have been in attendance on court, and the witness was absent with at least the implied consent of counsel, and under such circumstances the court would not err in overruling the application for continuance, for on a second application the record must affirmatively show that the witness is not absent by consent. *Cocker v. State*, 31 Tex. 498; *Pullen v. State*, 11 Tex. App. 89; *Sargent v. State*, 35 Tex. Cr. R. 325, 33 S. W. 364.

[6] But appellant insists in this court that, as the court fined the witness Albert Cram \$500 for failure to attend court in obedience to the service of the subpoena, this is a finding that it was in fact Albert Cram who was served by the process issued by the state. The evidence adduced on the motion for new trial shows that, when the witnesses were called, the court asked those in attendance if they had seen Albert Cram, and appellant's counsel, Mr. Adams, answered that he had not. He explains this in his testimony, saying he made such answer at the instance of his co-counsel, as Cram had told him his name was Orrin, and he did not know where Albert was. He frankly admits now that perhaps he should have gone further and explained the matter fully to the court, instead of answering flatly, "No." Anyway, it was at this time the court entered the fine against Albert Cram, and he had at that time heard no testimony that the person summoned was not in fact Albert Cram. Later, however, on the motion for a new trial, he heard the testimony of Mr. Adams and the testimony of Mr. Schmizer and Mr. Smith, and a finding at that time that the

person served was Orrin Cram would present no contradictory findings, and this criticism by appellant of the court's qualification to the bill of exception presents nothing meritorious. It was but natural and proper for the court to enter a fine against the witness when the case was called for trial, as the process showed the witness to have been served, and he did not attend court. This entry was made June 25th.

The motion for a new trial, on which hearing was had, was not filed until five days later—June 30th, the state's contest being also filed on June 30th. If, on this hearing, the evidence convinced him that Albert Cram had not been served, but Orrin Cram had been served by mistake for Albert, there would be no inconsistency presented in his action. Especially should not appellant's attorney complain of this finding. Albert Cram had testified at the examining trial and habeas corpus hearing. Doubtless the court thought, under such circumstances, that defendant's attorney would know the witness, and, when he told the court that the man summoned at Port Arthur was not Albert Cram, the court should place reliance in such statement.

We are of the opinion the court did not err in overruling the motion for continuance, and refusing a new trial on account thereof in the light of the testimony heard on the motion for new trial.

The judgment is affirmed.

DAVIDSON, J. (dissenting). Appellant was convicted of murder and given ten years in the penitentiary.

When the case was called for trial, a second application for continuance was overruled. At the previous term the first application had been overruled, and on the trial appellant was convicted. On appeal that conviction was set aside and reversal occurred. The application was made on account of the absence of Albert Cram, who was alleged to reside in Jefferson county. Appellant issued process for him, which seems not to have been returned. The state issued process for the same witness. The return of the sheriff shows it was served upon Albert Cram. Albert Cram was a very material witness, and his testimony would flatly contradict the state's case on most material facts connected with the homicide. The diligence was sufficient for the reason it shows the witness was summoned in ample time to obtain his presence at the trial. If witness misled appellant as to what his testimony would be, diligence is ample. *Branch's Crim. Law*, § 256; *Richardson v. State*, 57 Tex. Cr. R. 285, 122 S. W. 560; *Adams v. State*, 10 Tex. App. 677; *Rankin v. State*, 57 Tex. Cr. R. 132, 122 S. W. 25.

Attachment issued also for the witness when he failed to appear. The bill of exceptions shows after witness was served Mr.

Adams, one of appellant's counsel, went to Port Arthur in Jefferson county, where the witness was summoned, and had a conversation with him. In this conversation the witness told Mr. Adams that his name was not Albert Cram, but Orrin Cram; that he was a brother of Albert Cram, and he did not know the whereabouts of Albert, his brother. It is also shown that during the investigation of this continuance, from the standpoint of the motion for new trial, while Mr. Adams was in Jefferson county he was introduced to a Mr. Cram as Albert Cram, and that he went to Port Arthur in part to see Cram to know what he would testify as to the facts of the case. When Cram told him his name was not Albert, but that it was Orrin, he then asked Mr. Adams whether or not he should attend court at Jasper. Mr. Adams answered if he was not Albert Cram he need not go, but if he was Albert Cram he should go. It is also shown that, when the application was presented, the court asked the question generally if anybody had seen Albert Cram. Receiving no reply, the court then turned to Mr. Adams and asked him if he had seen Mr. Albert Cram lately, and was informed by Mr. Adams that he had not, whereupon the court said from all these facts he would hold that the witness had never been served, but that a brother of Albert Cram, to wit, Orrin Cram, had been served instead of Albert Cram; that after having notice from the officers at the last term of the district court six months ago that Albert Cram was then in Morgan City, La., no attempt was made to take his depositions. The court was informed by Mr. Adams, after this case was tried, when the defendant was given time in which to prepare his motion for a continuance, that in consultation he (Mr. Adams) asked the other attorneys what he must say should the court ask him if he had seen Albert Cram, and that they said to him, "Well, have you seen Albert Cram?" and was informed by Mr. Adams that he had not, and then they said, "Then tell the court you have not seen him," and that he did as they had agreed that they should. It is further shown that, when the application for continuance was overruled, the court entered a fine against Albert Cram and a judgment nisi ordering process to issue. The amount of the judgment nisi was \$500. Now the court finds as follows:

"From all the facts, the court holds that the witness Albert Cram was never served, but that a brother of Albert Cram, to wit, Orrin Cram, was served as the witness Albert Cram; that after having notice from the officer, at the last term of the district court six months ago, that Albert Cram was then in Morgan City, La., no attempt was made to take his depositions. The court was also informed by Mr. J. T. Adams, after this case was tried, that when the defendant in this case was given time in which to prepare his motion for a continuance, that in consultation, he (Mr. Adams) asked the other attorneys what he must say should the court ask him if he had seen Albert Cram, and that they said to him, 'Well, have you seen Albert Cram?' and,

'I said no,' and then they said, 'Well, then tell the court you have not seen him,' and 'that he did as they had agreed that he should.'"

The witnesses for the state, Smith and Schmizer, testified when Mr. Adams came to Port Arthur he asked them to locate the witness Albert Cram so he could talk with him. They finally did so, and in the evening they introduced the man to him as Albert Cram with whom Adams had the conversation. In this conversation Adams was informed by Cram that his name was not Albert, but Orrin, Cram. Cram asked Mr. Adams then if he should attend court. He said, "If you are not Albert Cram, there is no necessity for your going," or, "you need not go," or substantially this; but, "If you are Albert Cram, you had better attend court." He was a stranger to Adams; the first time they had ever seen each other. Now, under this condition of the record, the court finds that Albert Cram was not served, and yet enters a judgment nisi against him fining him \$500 for nonattendance upon the court, and yet all the process was served upon him as Albert Cram, and the officers indicate in their statements that he was Albert Cram. The court seems to find, with Mr. Adams, that he was not Albert Cram, but Orrin Cram, and proceeds to fine Albert Cram \$500 for nonattendance on the court for process served upon Orrin Cram, and for this reason he says the diligence is not sufficient. I cannot agree with the trial judge. Appellant did not have to resort to depositions under the circumstances of this case. When the motion for new trial presented all these matters, the court should have granted a new trial. The witness was a most material witness under the showing made, and, if his testimony is true, it went directly to the very substance of the state's case. If, as the officers say, this was Albert Cram, and they served him a few days before court, the diligence was sufficient whether it was served for the defendant or the state. Diligence is not always the final test. Fair trial being guaranteed by the Constitution, it is far more important that material testimony be had. No accused citizen ought to be rendered infamous on a test of strictest technical diligence. Having been served for the state, defendant had a right to take advantage of such service. He himself had issued process, but for some unexplained reason it had not been returned by the officer. Subsequently that issued by the state was served and return made. Both parties believed he was Albert Cram, issued process for him, and the return shows it was Albert Cram. The officers believed he was Albert Cram, and their return on process as well as their testimony so indicates. The court did not find, and would not have been justified in finding, that Mr. Adams kept the witness away, or was instrumental in keeping him away. The evidence shows to the contrary.

Under the circumstances of this case, I am of opinion the court erred, and the judgment should be reversed and remanded. I cannot concur in this affirmance, and enter my dissent.

### MERKEL v. STATE. (No. 8305.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914.)

#### 1. RAPE (§ 51\*)—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain a conviction of rape by force or threats.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.\*]

#### 2. INDICTMENT AND INFORMATION (§ 137\*)—MOTION TO QUASH—GROUNDS.

Under Code Cr. Proc. 1911, art. 409, providing that any person, before the grand jury has been impaneled, may challenge the array or any juror, and that in no other way shall objections to the qualifications and legality of the grand jury be heard, a motion to quash the indictment because the grand jurors' names had been published in a newspaper 40 days before the term of court without any challenge of any when impaneled, held properly denied.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.\*]

#### 3. JURY (§ 58\*)—JURY WHEEL LAW—CONSTITUTIONALITY.

Rev. St. 1911, arts. 5151-5158, providing that in counties containing a population of 20,000 or more the tax collector, the tax assessor, the sheriff, the county clerk, the district clerk, or any of their deputies, shall meet and select from the qualified jurors the jurors for service in the district and county courts for the ensuing two years by writing their names on cards, placing their names in a wheel, and drawing therefrom, is constitutional.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 266; Dec. Dig. § 58.\*]

#### 4. JURY (§ 131\*)—BIAS—EXAMINATION—HYPOTHETICAL QUESTION.

In a prosecution for rape, where defendant at the trial was 23 years of age, refusal of a hypothetical question to jurors on their voir dire, as to whether they would have any bias against a 35 years old man having sexual intercourse with a 16 or 17 year old girl, was not reversible error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 131.\*]

#### 5. JURY (§ 131\*)—VOIR DIRE—EXAMINATION—DISCRETION OF DISTRICT ATTORNEY.

The action of the district attorney in testing the jurors on their voir dire in asking, under the statute, if they had conscientious scruples as to the infliction of the death penalty, in some cases challenging therefor and in others not, was a matter wholly within his discretion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 131.\*]

#### 6. WITNESSES (§ 393\*)—IMPEACHMENT—TESTIMONY OF GRAND JUROR.

In a criminal prosecution, where the state put on grand jurors to show that the testimony of a witness for defendant before them differed from her testimony at the trial, the testimony of one grand juror that he translated her testimony, given in German, for the other jurors, was not objectionable because he was not sworn in the grand jury as a witness to make such translation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.\*]

#### 7. CRIMINAL LAW (§ 829\*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In a criminal prosecution, defendant's requested special charge relative to impeaching testimony held properly refused, where the court's charge covered that matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 8. CRIMINAL LAW (§ 1092\*)—BILL OF EXCEPTIONS—TIME FOR FILING.

Where a bill of exceptions was filed long after the adjournment of the court, the evidence as to a ground of exception, even if contained in the bill, could not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

#### 9. CRIMINAL LAW (§ 942\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.

A new trial will not be granted for newly discovered evidence going merely to the impeachment of a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.\*]

Davidson, J., dissenting.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

J. G. Merkel was convicted of rape by force or threats, and he appeals. Affirmed.

D. A. McAskill, of San Antonio, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of rape by force or threats on Esther Koch, a young girl about 16 years of age, committed on or about July 17, 1913.

Some of the facts are established without any contradiction. Esther was a young German country girl, the daughter of a German Methodist preacher. Very shortly prior to the alleged rape, she had lived in San Antonio as a servant for her aunt, who ran a rooming house. She was unfamiliar with the city of San Antonio. She had never seen nor heard of appellant prior to Sunday night, July 13, 1913, just three or four days before the alleged rape. Appellant was a German 23 years old at the time of this trial in January, 1914. Something like 2½ years before the alleged assault, he had married, but some year and a half before then had separated from his wife, but was not divorced from her. After his separation from his wife some year and a half before the alleged rape, he met a German woman, recently from Germany, whose name was Katy Sigmund, and he soon began living in adultery with her, and continuously so lived with her up to the time of the commission of this offense. He had gotten her pregnant. He had been living about San Antonio some months, but just a short time before this offense he moved in rather a sparsely settled portion of the country four miles from the city of San Antonio and lived at a house with the woman Katy, ostensibly

as his wife, and the people in the neighborhood were so informed and regarded her. She was soon to be confined—perhaps some two months later. He wanted to hire some girl to go out to stay with her and help do the work until after she was confined. He applied to Esther's aunt for such a girl and made arrangements with her by which he could hire Esther. For the first time on said Sunday night he met and saw Esther at church, with his reputed wife, and they, together, took Esther out with them that night to their country place in their buggy. Esther only stayed with them from Sunday night until late Thursday evening or early Thursday night following, when appellant and his reputed wife, Katy, took her back to her aunt's. When she reached her aunt's she was crying, in much distress, and at once told her aunt and uncle and others, in effect, that appellant had raped her. The next day two physicians examined her, and both testified that they examined her vagina, found the hymen ruptured, the vagina lacerated, and showed to be of recent origin. One of the physicians, Dr. Shropshire, testifying:

"She was lacerated, torn, evidently somebody had used her, had intercourse with her, or used their fingers, one or the other. \* \* \* The hymen was ruptured. It looked to be of recent occurrence. It was black and blue as though it was extravasated, the blood under the skin."

Of course, no statement of facts can portray the testimony of any witness the same as if the witness was seen and heard by the jury and lower court; but we will here give her testimony on direct examination substantially as given in the statement of facts:

"My name is Esther Koch. My father is Rev. J. F. Koch. I know J. G. Merkel. I first met him on Sunday night at the German Methodist Church. A lady was with him whom he called his wife. He did not introduce me to her, but I heard him call her his wife. From there I went with them to their home four miles out of San Antonio, somewhere in the neighborhood of the cement works. Nothing occurred the night we got out there. I slept in the room where both of them were. The defendant always wanted to kiss me, and I told him, no, sir; my father learned me better, and I would have none of that. That occurred several times. The first time he tried to kiss me was on Tuesday, the second day I was there. That was in the house. His wife was with us there; it was in her presence. He would always want to take hold of me, and I would push him away. I said I would not have that. We were all in the kitchen at one time" (this seems to have been Wednesday morning), "and he picked me up and carried me out. I fought as much as I could when he picked me up; I wanted to stay in the kitchen with his wife. He put me on a cot" (this, we take it, was Thursday evening, or, at any rate, when he had the act of sexual intercourse), "took off my clothing, and my underwear. While he was taking off my underwear, I fought him as much as I could. I was crying and hollering. As soon as he took me up I began to cry. I asked him to let me alone. He was by the side of the bed when he took my underwear off, and when he was taking my underwear off I resisted him as much as I could; I fought him. I was unwilling for him to take my underwear off. I did not agree to any of these things I have testified to. After he took my underwear off, he got on the

bed and got on me, and when I cried out he held my mouth shut. He told me if I didn't quit hollering he would cut my throat, and after awhile he would cut his. This was after we got through. I saw him have a knife in his hands. I believe the knife was shut. When he got on me, he took out his privates and put his privates in me. I was refusing to let him do that. It caused me a whole lot of pain. After he had finished, he went to his wife; she had fainted. She was just by the side of the bed where I was, and I was crying. After he had finished, we begged him to take me home. I begged him, and she begged him. He said, no, she wasn't able to go, and he couldn't bring me home. I didn't know the way home, I had never been in San Antonio before I came to stay with my aunt. He told me if I told what had happened he would go to jail and my name would be no account any more. My period of sickness had come on a short time before this, and after he had finished with me I saw some blood, about a wash pan full. I was sitting over the wash pan so the blood could run into it. His wife afterwards begged so much that he brought me home, and when he brought me home it was in the afternoon, dark. He took hold of me twice while I was out there. He took hold me the day before, for the first time; took hold of my hands and dragged me along on the floor and threw me on the bed. He wanted to do me, and I said, 'Let me alone.' I was crying at that time. He said he wanted to play with me. He put his hands on my underwear, and when he took my underwear off I told him, 'No.' I used the German language in talking. I only speak English since I am here, just a little at school. Mr. Merkel told me if I told anybody what had occurred he would not bring me home, and I told him I wouldn't say anything. After we started home, he wanted to turn back if I wouldn't promise not to tell. When I got home, I told my auntie, and my uncle, and all of them. I told them as soon as I got home."

Taking her testimony as a whole, she shows that he had intercourse with her only once; that he first tried to do so on Wednesday morning; she stating on cross-examination:

"On Wednesday morning Mr. Merkel came into the kitchen and dragged me out by one hand, and laid me down on the bed, unbuttoned my drawers, and took them off, and did something to me; but he did not put his private organ in my private organ that morning."

Appellant admitted that he had intercourse with her on Thursday morning, and was about to have intercourse with her again that evening; but his reputed wife was present and raised so much trouble, and fainted, that he desisted.

The appellant, by his testimony and that of said woman with whom he lived in adultery, would show that this 16 year old, inexperienced, country girl beguiled him, and that she induced him to have sexual intercourse with her in the presence of said woman and under the revolting circumstances shown. In other words, that she induced him to copulate with her, and that it was not only willingly done on her part, but at her solicitation. The jury did not believe this, although the issue was submitted in his favor by the court in the strongest possible way for him.

[1] In our opinion the evidence was sufficient to justify the conviction, and we can-

not disturb the verdict of the jury. The court, in his charge on this issue, submitted everything that the law would authorize in appellant's favor. No objection is made to the charge on this question. Appellant did request a charge for peremptory acquittal, but this was properly refused.

[2] Appellant made a motion to quash the indictment, because the grand jurors' names were known publicly and published in the newspapers some 40 days before the term of court. No challenge of them or either of them was made at the time they were impaneled. The statute (C. C. P. art. 409) is:

"Any person, before the grand jury has been impaneled, may challenge the array of jurors or any person presented as a grand juror; and, in no other way, shall objections to the qualifications and legality of the grand jury be heard."

This law shows appellant's motion could not be sustained. All the decisions are to the same effect. See some of them cited under said article of the Procedure.

[3] Appellant made a motion to quash the special venire on various grounds. He attacked the constitutionality of section 1 thereof by the Acts of 1911, p. 150 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5151). See R. S. arts. 5151-5158. The first act on this subject was passed in 1907 (page 269). The amendment of section 1 of that act by the act of 1911, supra, removed even some of the apparent objections that had been made to that section of the 1907 act. This law has been held constitutional by this and the civil courts so long, and the question discussed so thoroughly, we regard it as wholly unnecessary to further discuss it. We cite some of the cases holding the law constitutional. *Smith v. State*, 54 Tex. Cr. R. 298, 113 S. W. 289; *Logan v. State*, 54 Tex. Cr. R. 74, 111 S. W. 1028; *Huddleston v. State*, 54 Tex. Cr. R. 93, 112 S. W. 64, 130 Am. St. Rep. 875; *Brown v. State*, 54 Tex. Cr. R. 121, 112 S. W. 80; *Jones v. State*, 54 Tex. Cr. R. 507, 113 S. W. 761; *Oates v. State*, 56 Tex. Cr. R. 571, 121 S. W. 370; *Rasor v. State*, 57 Tex. Cr. R. 10, 121 S. W. 512; *Beaver v. State*, 63 Tex. Cr. R. 581, 142 S. W. 11; *Dallas, etc., St. R. Co. v. Chase (Civ. App.)* 118 S. W. 783; *Dallas Consol. Electric St. R. Co. v. Chambers*, 55 Tex. Civ. App. 331, 118 S. W. 851; *Northern Tex. Trac. Co. v. Danforth*, 53 Tex. Civ. App. 419, 116 S. W. 148; *Houston Elec. Co. v. Faroux (Civ. App.)* 125 S. W. 922; *Rice v. Lewis (Civ. App.)* 125 S. W. 961.

[4] Appellant has two bills of exceptions on the refusal of the court to permit him to ask the special veniremen certain questions on their voir dire examination. The bills nor record otherwise shows what examination was made of the jurors on their voir dire. We do not understand from the bills or otherwise that it is claimed any juror had any bias or prejudice against appellant personally. C. C. P. art. 692, subd. 12. In fact, the record would indicate the reverse of this. The questions asked were based on the hy-

pothesis of whether they would have bias or prejudice against a 35 year old man having sexual intercourse with a 16 or 17 year old girl. As we understand the questions, they were not for the purpose of showing, as stated, any bias or prejudice against appellant, nor that they could not try him in this case impartially, but were directed towards their bias, etc., against the crime with which he was charged and to a hypothetical state of fact which was not shown to exist in this case. As stated above, the record shows that appellant was only 23 years old when this case was tried, not 35, as stated in the hypothetical question. As the matter appears, we think it does not present error. The law is, as stated in 1 *Thomp. on Trials* (2d Ed.) p. 117:

"Hypothetical questions, that is, questions as to what the juror would or would not decide in a supposed state of evidence, are not allowed," citing several authorities.

As said by this court in *Mason v. State*, 15 Tex. App. 549:

"It was the duty of the court to see that a jury was impaneled, composed of men who were free from all bias for or prejudice against the defendant; who were impartial towards either the state or the defendant. In determining as to the fitness of a juror, the question is largely one of discretion with the trial judge. He has the proposed juror before him, observes his manner of answering questions, his appearance, and many other indications which cannot be brought before this court; and hence the trial judge is in a much better condition to pass upon the fitness of the individual to serve as a juror in the case, than this court can be from the record alone. Such being the case, this court will not revise such action of the trial judge unless it should be made apparent to us that the trial judge had abused the discretion confided to him, to the injury of the defendant's rights, or that he had infringed the law. *Ray v. State*, 4 Tex. App. 450; *Gardenhire v. State*, 6 Tex. App. 147; *Wade v. State*, 12 Tex. App. 358."

Again, as said by this court in *Pierson v. State*, 18 Tex. App. 559:

"It has been well said: 'The rule is well settled that it is the duty of the court to superintend the selection of the jury, in order that it may be composed of fit persons. Large discretion must be confided to the trial court in the performance of this duty, nor will the action of the court in this behalf be made the subject of revision, unless some violation of the law is involved or the exercise of a gross or injurious discretion is shown.' *Thompson & Merriam on Juries*, § 258. And it has been repeatedly held by this court that, in determining as to the fitness of a juror, the question is one largely of discretion with the trial judge, and his action therein will not be revised by this court, unless it be made apparent that the discretion has been abused to the injury of the defendant's rights, or that the law has been infringed."

See, also, *James v. State*, 167 S. W. 727; *Cooper v. State*, 162 S. W. 364; *Ellis v. State*, 154 S. W. 1010.

[5] The district attorney in testing the jurors on their voir dire examination asked, under the statute, if they had conscientious scruples in regard to the infliction of the death penalty. In some instances the district attorney made this a cause for challenge, and in others he did not. The appel-

lant objected to this. This was a matter wholly within the discretion of the district attorney, and the appellant could not legally complain of his action.

[6] The appellant had said woman he was living in adultery with, Katy Sigmund, testify in his behalf. It seems she spoke German only, or English very imperfectly. She testified before the grand jury. The state put on some of the grand jurors to show that her testimony before the grand jury was different in some particulars from what it was on this trial. One of these jurors testified that he translated for the other jurors some of her testimony. Appellant objected to this grand juror's testimony on this point because the grand juror was not sworn in the grand jury as a witness to make such translations. This shows no error.

[7] The appellant requested a special charge relative to the evidence impeaching said woman. The court, as we take it, copied almost literally, at least substantially, this charge in his main charge to the jury and refused appellant's. The court's charge covering that requested by appellant, it was proper to refuse his.

[8, 9] Appellant has one bill complaining that the court erred in overruling the amended motion for new trial wherein he set up newly discovered testimony. No such motion is in the record. From the bill on the subject, however, it is shown that said claimed newly discovered testimony could have been used solely for the purpose of impeaching the state's witness, or, as stated in the bill, "it raises a doubt as to the truthfulness of Esther Koch." The record also discloses that the court heard evidence, affidavits, on this subject; but what they were the record does not disclose. The bill was filed long after the adjournment of the court, and the evidence could not be considered on that ground, even if it had been contained in the bill. *Graham v. State*, 163 S. W. 730, and cases collated. Besides, it is the uniform holding of this court that new trials will not be granted for newly discovered evidence, even if newly discovered, which goes merely to the impeachment of a witness.

The judgment is affirmed.

DAVIDSON, J., dissents.

#### PYE v. STATE. (No. 2448.)

(Court of Criminal Appeals of Texas. June 25, 1913. Rehearing Denied Dec. 3, 1913.)

#### 1. EMBEZZLEMENT (§ 43\*)—LARCENY (§ 52\*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for theft or embezzlement of a note, evidence that when the owner learned defendant had pledged the note, he made no objection and did not appear surprised is admissible to show the owner's consent.

[Ed. Note.—For other cases, see *Embezzlement*, Dec. Dig. § 43;\* *Larceny*, Cent. Dig. §§ 137, 147; Dec. Dig. § 52.\*]

#### 2. EMBEZZLEMENT (§ 47\*)—LARCENY (§ 68\*)—EVIDENCE—JURY QUESTION.

In a prosecution for theft or embezzlement of a note which was delivered to defendant to enable him to raise money for the owner, the question whether defendant believed he had permission to use the note for his own benefit held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Embezzlement*, Dec. Dig. § 47;\* *Larceny*, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.\*]

#### 3. EMBEZZLEMENT (§ 28\*)—LARCENY (§ 30\*)—SUFFICIENCY OF INDICTMENT—DESCRIPTION.

An indictment, charging the theft or embezzlement of a vendor's lien note, which merely described the instrument as one vendor's lien note for the payment of \$8,000 and of the value of \$8,000, is sufficient.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 41, 42; Dec. Dig. § 28;\* *Larceny*, Cent. Dig. §§ 64-75, 99; Dec. Dig. § 30.\*]

Davidson, P. J., dissenting in part.

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

F. E. Pye was convicted of crime, and he appeals. Reversed and remanded.

E. T. Branch, Lane, Wolters & Storey, and McDonald Meachum, all of Houston, for appellant. Richard G. Maury, Dist. Atty., of Houston, and C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged in the first count with the theft of one vendor's lien note for the payment of \$8,000 and being of the value of \$8,000; and in the second count charged with embezzlement of the note.

The indictment is attacked because it does not sufficiently describe the note. The indictment charges in both counts the note to be, "One vendor's lien note for the payment of \$8,000 and of the value of \$8,000." It is contended the indictment is not sufficient in that the description of the note was not as demanded by the terms of the law. The indictment does not undertake to allege by whom the note was executed, nor the date of its execution, nor the date of its maturity, nor the date when it was made payable, nor to whom it was payable, nor upon what land or property the vendor's lien was held, nor in what county it was situated, nor any attempt to describe the property or house or land, nor the county in which it was situated, nor the place where the note was payable, nor any matters of description which would enable appellant to plead a conviction thereon in bar of a subsequent prosecution for the same alleged offense. The case of *Calentine v. State*, 50 Tex. Cr. R. 154, 94 S. W. 1061, 123 Am. St. Rep. 837, decides this question in favor of appellant's contention. This case was followed in *Patrick v. State*, 50 Tex. Cr. R. 499, 98 S. W. 840, 123 Am. St. Rep. 861, 14 Ann. Cas. 177. Under those authorities we are of opinion this indictment is not sufficient. Thus far these cases have not been overruled, and in the opinion of the

writer ought not to be. They announce the correct doctrine. This note was before the grand jury evidently, or could have been, because it was used on the trial of the case. They could have given such a description of the note as would have identified it from other notes, and so identified it as to show the very note upon which the prosecution was based, as by giving some description of it that would individuate it. This was not done, and the grand jury failed to allege in the indictment that a better description than that alleged could not be given or ascertained. Therefore under these authorities we think this indictment is insufficient. Appellant was convicted and given two years for embezzlement.

A brief statement of the facts perhaps may be necessary. Mr. Goree, an attorney for the Washington County Bank, had in charge for collection an indebtedness for \$7,500 against the Shelp Rubber & Supply Company, of which appellant was guarantor. Goree was about to bring suit on said indebtedness, and appellant asked him to hold off, that is, not to do so, whereupon Goree demanded that he, appellant, give him additional guaranty. Appellant thereupon turned over to him, in order to prevent the bringing of the suit, a vendor's lien note for \$8,000, signed by one Hill, and payable to L. H. Perry, and indorsed by Perry, and which note was the note claimed to be embezzled. Perry testified that he had turned over this note and quite a lot of other notes to appellant, on which he was to borrow money for him, Perry, and that appellant subsequently reported to him that this note was lost. He returned the other notes to Perry. Perry also testified, when he heard the note was lost, that he had Hill to execute another note, on its face the same as the original, and that on this duplicate note borrowed money from J. N. Taub, a merchant of Houston. Shortly after Mr. Taub ascertained that Goree held the other note, which was identical with his. He called on Perry to get the other note out of the way, and Perry and appellant went to Goree, and appellant gave Goree another note, which was indorsed by Perry, and the note which was the subject of this indictment was then turned over to Perry by Goree and canceled. Mr. Taub testified that Perry knew of the existence of the note in Goree's hands when he spoke to him, and that Perry did not appear to be surprised when he told him, and that the note was purely accommodation paper, and that he, Taub, held the first lien on the property which overcovered the value of the property.

The evidence shows that the maker of the note, Hill, was a carpenter, working for \$3 or \$3.50 a day, and that he gave the note for \$8,000 to Perry, on which there was a prior lien that practically covered the value of the property. Perry testified that it was a bona fide sale, and that he afterwards returned to said Hill the land paid by Hill as a first

payment, and that the first lien was not released when Hill gave the note, while the other evidence was that the note was an accommodation paper, and given without consideration by Hill, in order to enable Perry to borrow money thereon, and that the note had already been assigned to Mr. Taub and was of no value. Perry testified that he did not give his consent to appellant to put up the note with Goree, but appellant testified that Perry would usually let him do anything he wanted with the collateral, and when the note was surrendered back to Perry by Goree, that Perry was perfectly satisfied at that time, and that the note was not worth a cent. Appellant's testimony was that, being guarantor in favor of the Washington County Bank, he deposited the note temporarily with Goree, in order to prevent Goree from suing him at that time, and that he only put up the note temporarily, without any intention either to permanently appropriate it or to cause Perry any loss or to defraud Perry, that he knew that the note was a mere accommodation note and of no value, and that Mr. Hill told him so, and would not go on the stand and deny that it was an accommodation paper, and that he knew that Mr. Perry had not sold the property, and that the duplicate note had already been assigned to Mr. Taub and the note was of no value, and that Perry would usually let him do anything he wanted to do with the collateral, and that when the note was surrendered to Perry by Goree, Perry was perfectly satisfied, and that the note in the first place was not worth a cent and was a second lien note. Goree testified that when he surrendered the note to Perry and received the note of appellant indorsed by Perry, Perry was apparently satisfied, and made no claim that appellant had stolen his note. Mr. Taub testified that Perry knew of the existence of the note in Goree's hands when he spoke to him about it, and that Perry did not appear to be surprised when he told him. Mr. Taub further testified that if his first lien was enforced, there would be very little, if any, value of the note.

The evidence further discloses that Perry had sold or mortgaged the land which it is sought to show was connected with this note, or rather there was a debt over that land for \$13,000, and that the property was situated in Houston, and was not in fact worth more than \$10,000, if that. The \$13,000 indebtedness hanging over it and this \$8,000 note created, on this property worth less than \$10,000, an indebtedness of \$21,000. The state was permitted, over objection of appellant, to prove that after the finding of the indictment in July in this case Perry was sued on the note given to get the note in question from Goree, and had to pay \$500 as a result of the judgment rendered on said civil suit. It seems, however, appellant paid the \$500. There was testimony that there had been other dealings between appellant and Perry in

which accommodation paper figured. As we understand this record this property on which all this indebtedness of \$21,000 was created was subsequently, after getting rid of this accommodation lien, sold by Perry at \$8,000. This may be perhaps a sufficient statement of the case to review some or all of the questions. The \$500 note paid by Perry on the judgment was really paid by appellant, or at least Perry was paid the \$500 by appellant.

[1] Appellant offered to prove by Perry that he was not out anything on the note itself, and by appellant that the witness Perry never had him arrested, or made any complaint about his having used the note in question to prevent the suit being filed against appellant, and that Perry seemed entirely satisfied with his conduct in the matter when he indorsed the substitute note put up by him to secure the return of the note in question, which testimony was excluded by the court. We think, without stating the reasons for which this was offered, this testimony should have gone to the jury. *Taylor v. State*, 50 Tex. Cr. R. 377, 97 S. W. 473; *Jenkins v. State*, 34 Tex. Cr. R. 201, 29 S. W. 1078; *Farrar v. State*, 29 Tex. App. 253, 15 S. W. 719; *Stanton v. State*, 42 Tex. Cr. R. 271, 59 S. W. 271.

The state was permitted to show, over objection of appellant, that four months after the indictment was presented that Perry had to pay \$500 in cash, in order to be released from his obligation on the substituted security given to Goree, the obligation being that same was subsequent to the finding of the indictment and was proof of acts between other parties, and that same was prejudicial to defendant as showing a loss by Perry subsequent to the presentment of the indictment, and was proof of a judgment in the civil court. It is claimed this evidence was hurtful on the issue of value, and acts done by other parties after the presentment of the indictment could not bind or make a note, valueless at the time of the supposed conversion, become of value, and same was liable to mislead the jury. It is contended by appellant that this proposition is elementary. He cites *Nesbitt v. State*, 144 S. W. 945; *Hatfield v. State*, 67 S. W. 111; *Richardson v. State*, 46 Tex. Cr. R. 84, 79 S. W. 536. We are of opinion that this contention of appellant, under the authorities, is correct. This was long after the transaction, and if there had been any conversion it was at the time that appellant took the note for his own use. The value of the note was to be determined by its standing at time of conversion. The law fixed that status at that time. The rule is fundamental that, in order to constitute theft or embezzlement, the fraudulent intent and conversion must coincide, that is, in theft the fraudulent intent must exist at the time of the taking. If a party is charged with em-

bezzlement or theft by conversion, then fraud must exist at the time of the conversion. Appellant, of course, after the testimony was admitted, had to meet it the best way he could, but this did not cure the error of its admission. The authorities are all one way on this proposition.

Again appellant requested the court to give the following instruction:

"The gist of the offense of embezzlement is the fraudulent intent, and before you can convict the defendant, you must believe from the evidence, beyond a reasonable doubt, that the embezzlement, misapplication, or conversion, if any there was, was done with a fraudulent intent, and if defendant had the intention to merely temporarily use the vendor's lien note in question, without any intention to defraud, or if you have a reasonable doubt as to this, then you should acquit the defendant."

This is properly reserved in both ways, by bill of exceptions and in motion for new trial. The contention of appellant is that this charge was demanded by the evidence and was the defendant's defensive theory, and called the court's attention to the necessity of presenting a correct and affirmative charge on his defensive theory, and the court having omitted in his main charge to give any charge presenting his defensive theory, the refusal to give this charge was prejudicial error, and should be held to be sufficiently so to be reversible. The bill of exceptions sets out the contention of the parties. We are of opinion this charge should have been given. Appellant testified that his intention was to use the note only temporarily and without any idea of defrauding Perry; that he knew the note was of no value, and was an accommodation note, which was corroborated by other testimony, and nowhere did the court affirmatively present his defensive theory. It is a fundamental proposition that wherever a defensive theory is presented by the record, the defendant is entitled to a distinct and affirmative presentation of that issue, in order to prevent the jury from ignoring his defense and conduct them to a proper verdict if they find his evidence to be true or there was a reasonable doubt of it. See the following authorities: *Reynolds v. State*, 8 Tex. App. 412; *Greta v. State*, 9 Tex. App. 429; *Jackson v. State*, 15 Tex. App. 84; *White v. State*, 18 Tex. App. 57; *Burkhard v. State*, 18 Tex. App. 599; *Irvine v. State*, 20 Tex. App. 12; *Bond v. State*, 23 Tex. App. 180, 4 S. W. 580; *Smith v. State*, 24 Tex. App. 290, 6 S. W. 40; *Williams v. State*, 24 Tex. App. 342, 6 S. W. 531; *Thompson v. State*, 24 Tex. App. 383, 6 S. W. 296; *Dones v. State*, 8 Tex. App. 112; *Erwin v. State*, 10 Tex. App. 700; *Ainsworth v. State*, 11 Tex. App. 339; *Neyland v. State*, 13 Tex. App. 536; *Bonner v. State*, 29 Tex. App. 223, 15 S. W. 821; *Nalley v. State*, 30 Tex. App. 456, 17 S. W. 1084; *Hays v. State*, 30 Tex. App. 472, 17 S. W. 1063; *Carter v. State*, 30 Tex. App. 551, 17 S. W. 1102; 28 Am. St. Rep. 944; *Hargrove v. State*, 33

Tex. Cr. R. 431, 26 S. W. 993; *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913; *Wright v. State*, 35 Tex. Cr. R. 470, 34 S. W. 273; *Carver v. State*, 36 Tex. Cr. R. 552, 38 S. W. 183; *Winters v. State*, 37 Tex. Cr. R. 582, 40 S. W. 303; *Taylor v. State*, 50 Tex. Cr. R. 379, 97 S. W. 473; *Mortimore v. State*, 60 Tex. Cr. R. 69, 130 S. W. 1004; *Carden v. State*, 59 Tex. Cr. R. 501, 129 S. W. 362; *Campbell v. State*, 37 Tex. Cr. R. 572, 40 S. W. 282; *Treue v. State*, 44 S. W. 829; *Strickland v. State*, 47 S. W. 471; *Driver v. State*, 48 Tex. Cr. R. 20, 85 S. W. 1056; *Golightly v. State*, 49 Tex. Cr. R. 45, 90 S. W. 26, 2 L. R. A. (N. S.) 383, 122 Am. St. Rep. 779, 13 Ann. Cas. 827; *Freeman v. State*, 52 Tex. Cr. R. 500, 107 S. W. 1127; *Cain v. State*, 49 Tex. Cr. R. 360, 92 S. W. 808; *Dyerle v. State*, 68 S. W. 175; *Sowell v. State*, 32 Tex. Cr. R. 482, 24 S. W. 504; *Henderson v. State*, 1 Tex. App. 437; *Harris v. State*, 51 Tex. Cr. R. 564, 103 S. W. 390; *Scott v. State*, 153 S. W. 871.

[2] Appellant testified that he had no intention of defrauding Perry or permanently depriving him of the note; that he thought he would use it temporarily and return it to him when necessary; that Hill had told him it was an accommodation note; he knew it was an accommodation paper; that Perry had not sold the property; that he deposited the note with Mr. Goree simply to get temporary relief; that the note was of no value. There is evidence, not only by appellant but other testimony, to the effect that the note was an accommodation note. It seems to be uncontroverted, shown by the state as well as defendant's evidence, that the property for which this note was given had an existing debt hanging over it for \$13,000. This note was for \$8,000, and the value of the property covered by these liens was \$10,000 or less. It was in evidence that Hill was a carpenter, employed by Perry at \$3.50 a day, and that Hill executed this note to Perry for this \$8,000 on the property above mentioned. Appellant testified he had it from Hill that it was an accommodation note, and he knew as a matter of fact himself it was an accommodation note. Appellant testified, and some of the facts we have already detailed show he was sustained to some extent in stating, he was only temporarily using the note with Goree to prevent Goree bringing suit against him in favor of the Washington County Bank, and the evidence further shows that he was financially pressed at the time, and that a suit at that time might be of very serious consequences to him, and by using this note he could temporarily stave off litigation and in the meantime gather his financial matters together and relieve some of his outstanding paper or property and take up and substitute the note Goree in place of the note he used Goree. In all cases where it was an issue as to whether the property was used

temporarily or converted permanently, it is the duty of the court to submit the issue to the jury. It is further the rule under all the cases, so far as we are aware, that where the property is only temporarily used and not a permanent deprivation, then it would not be theft, and if the jury believed defendant's side of the case under such circumstances, he would be entitled to an acquittal. The court charged the state's side of it, but refused to give the defendant's side of it. A list of some of the authorities bearing upon the temporary use will be found collated in Branch's Criminal Law, § 798. On the question of intent see Branch's Crim. Law, § 779. In *Taylor's Case*, 50 Tex. Cr. R. 379, 97 S. W. 473, in regard to this phase of the law, this court said:

"Where the state seeks a conviction, whether under the general statute of theft or under that making the conversion by bailee theft, the fraudulent appropriation and the intent to deprive the owner of the property must exist at the time of the taking, or at the time of the conversion, as before stated. Under the general statute the fraudulent intent is coexistent with the taking. Under the statute in regard to conversion by the bailee, it must coincide with the act of conversion. Under both statutes the fraudulent intent to appropriate permanently must necessarily exist. If appellant borrowed the money on the ring with the intent and purpose to redeem the ring, this would seem to exclude the idea of a fraudulent intent to permanently deprive the owner of the property, if not of a fraudulent intent altogether."

In the case of *Carden v. State*, 59 Tex. Cr. R. 501, 129 S. W. 362, the same doctrine was laid down in regard to threats, although they were denied, yet the defendant was entitled to a charge submitting his theory of the case.

In *Freeman v. State*, 52 Tex. Cr. R. 500, 107 S. W. 1127, appellant testified to a certain state of facts, which statement was contradicted by prosecutrix. The court failed to charge with reference to appellant's defense, which was that his intention was not to assault the girl, but merely to secure from her the ring. The court said in that case:

"This was appellant's affirmative defensive theory, and one he supported by his testimony. We are of opinion this charge should have been given. It is fundamental in this state that the charge must distinctly set forth the law applicable to the case, and this must be determined by the evidence adduced. \* \* \* It is further a fundamental proposition of law that the charge must embrace the law applicable to every phase of the case made by the evidence and every legitimate deduction to be drawn therefrom. \* \* \* The fact that the evidence may be such as the court may believe untrue will not change this rule. Under our system the jury constitute the judges of the facts, credibility of the witnesses, and the weight to be given their testimony. It is also equally as well settled in this state, that the accused is entitled to a distinct and affirmative, and not merely an implied or negative, presentation of the issues which arise upon his evidence, in order to prevent the jury from ignoring his defense, and to conduct them to a proper verdict if they find this evidence to be true." *Taylor v. State*, 50 Tex. Cr. R. 379, 97 S. W. 473; *Cain v. State*, 49 Tex.

Cr. R. 360, 92 S. W. 808; *Dyerle v. State*, 68 S. W. 175; *Sowell v. State*, 32 Tex. Cr. R. 482, 24 S. W. 504; *Henderson v. State*, 1 Tex. App. 437; *Harris v. State*, 51 Tex. Cr. R. 564, 103 S. W. 390; *White v. State*, 18 Tex. App. 57; *Scott v. State*, 153 S. W. 871.

It may not be necessary to cite further authorities on this proposition; at least it would seem to be unnecessary. The fraudulent intent at the time of the conversion is the gist of the offense, and in theft or embezzlement there must be a fraudulent intent to permanently and not temporarily take or convert the property. *Taylor v. State*, 50 Tex. Cr. R. 379, 97 S. W. 473; *Mortimore v. State*, 60 Tex. Cr. R. 69, 130 S. W. 1004; *Branch's Criminal Law*, on Temporary Use, § 798, and on Intent, § 779, for collation of other authorities.

After the jury had been out for about 17 hours, specifically mentioned in the bill of exceptions, they were recalled by the court, and the following charge given:

"You are instructed that an accommodation note placed in the hands of an innocent third person, for value without notice, is just as binding and valid as if consideration had passed from the maker to the payee at the time the note was made, and could be enforced against the maker and indorsers in the hands of innocent third persons without notice just the same as though it was a bona fide transaction.

"You are further instructed that the original of a note that has been substituted in the hands of innocent third parties for value without notice is a valid and binding obligation on the maker and indorser, although the maker may have executed a substitute for the original.

"You are further instructed that in arriving at the value of the note introduced in evidence you may take into consideration all of the facts and circumstances adduced before you, and that the question to be decided by you, as to the value of the note, is its value at the time the same was converted or misapplied by the defendant, if you find beyond a reasonable doubt that it was fraudulently misapplied or converted, and not its value at any subsequent time."

We are of the opinion the contention is correct; that this charge should not have been given. There were many exceptions taken and reasons assigned why this charge was wrong. This charge presented only the theory of the state and, in our judgment, more favorable to the state than it was entitled to have. The court by this charge made the criterion of value, so far as appellant was concerned, in the hands of innocent third parties, and absolutely eliminated all of his defensive theories, and it was a charge on the weight of evidence. It is a correct proposition of law that an accommodation note in the hands of innocent third parties is available; that is, it is not subject to the want of consideration, as it is in the hands of parties with notice of its character as an accommodation paper. There was evidence, not only from appellant but from other sources, adduced on the trial, sustaining him to the effect that this was an accommodation paper, and that appellant knew it. Of course, the law is too well settled for discussion that, in the

hands of the parties to the accommodation transaction the paper would be valueless. Appellant was the agent of Perry, one of the parties to the note, and for the double reason that he was agent for Perry and stood in his shoes in disposing of the paper, acting as his agent, and positively knew, at least so testifies, that the paper was an accommodation paper, this charge was erroneous. Whatever he did with the paper as the agent of Perry would be Perry's act. He stood in Perry's shoes, and so far as his holding the paper is concerned he was Perry's agent. If he had stolen Perry's note from Perry with knowledge of its want of value, he would not have stolen anything. If at the time he converted it it was valueless, he had not embezzled anything. It is sometimes a little difficult to fix upon a fact or the facts which show the fraudulent taking or conversion in embezzlement. But wherever that fact exists in embezzlement would be the conversion. If appellant converted it from Perry as the indictment charges, then he converted a paper that he knew to be an accommodation paper, or believed to be an accommodation paper, and which the facts would justify the jury in believing was an accommodation paper. He converted it as the agent of Perry; therefore it was Perry's property when he converted it. He is not charged with swindling Goree, but it charged with embezzling Perry's property. The court's charge would indicate to the jury, and seems to have been to so instruct them that they should fix appellant's guilt, so far as the value of the paper is concerned, in the hands of Mr. Goree. The court does not even charge the converse of the proposition. Appellant, as before stated, was charged with embezzling Perry's property. He is not charged with embezzling it after it got into the hands of third parties, nor could they fix the criterion in the hands of innocent third parties as the criterion of value in the hands of Perry, for whom appellant was the agent and whose property he is alleged to have embezzled. Appellant did not obtain a cent, and Perry lost nothing.

There is another question in this phase of the case. There is evidence all through the record that the note was valueless, and there is evidence of the fact that Mr. Perry virtually agreed to all appellant did and had knowledge of it. Taub testifies he apparently knew it, and was not surprised when told of the condition of things, and Goree testifies to the same thing, and appellant testifies he thought it was all right with Perry; that he had been in the habit of handling Mr. Perry's collateral notes, and Perry did not express any surprise at it, and went with appellant to Goree and executed with appellant another note and took up the \$8,000 note in question and canceled it. Goree said he canceled it. Perry testified that he canceled

it. This charge, we think, is wrong from another standpoint. It fixes the value in the hands of innocent third parties, and not in the hands of Perry through his agent, appellant. If appellant had stolen this note, there is no question of the fact it would have been valueless, because he would have been stealing a paper from Perry that he and Perry knew at the time was valueless, and embezzlement is but a different form of theft; *at the time of conversion the property must have a value.* Appellant makes the contention that where the value is necessary to be alleged, it is necessary to prove, and the evidence must show some specific value, and in this case the state has failed, in our judgment, to prove the value of the note; that it was worth \$50 or over, or in fact of any value. We are of opinion that this contention is correct. We are of opinion that the passing of the note by appellant to Goree did not enhance the value of the note that belonged to Perry; it did not lend any value to Perry's alleged property. The passing of the note into the hands of Goree, conceding that he was not acquainted with the fact that it was an accommodation paper, might have created an obligation against Perry, but would hardly be thought to make the note available as Perry's property. The creation of an obligation against Perry does not constitute embezzlement. Appellant received no consideration for leaving the note with Goree, outside of an extension of time, or rather Mr. Goree's promise not to sue. There was no money passed; there was no value shown. Nothing had passed to appellant from Mr. Goree except a promise not to sue. Appellant simply had an extension of the debt for which he was guarantor; he received nothing which he could convert. If appellant had sold Goree the note for cash consideration and retained the money for his own use, he would not have been guilty of embezzling the note. He may perhaps have been guilty of swindling Mr. Goree, or possibly of embezzling the proceeds of the note, but not of embezzling the note itself.

Appellant also makes another contention, which seems to us to be sound, that the state failed to prove that the note was ever of any value either in the hands of Perry, appellant, or Goree. The facts show conclusively that Hill was insolvent. It would hardly be thought that any man with any business qualification and accountability financially would lend his name to Perry, as the record shows this man Hill did, under the circumstances. In fact it is shown that Hill was simply a carpenter, working for wages at \$3.50 a day, and the circumstances show Perry was fully bankrupt and was floating fictitious loans in order to keep up his financial schemes. The security upon which the note was based was worth nothing so far as this note is concerned. While Perry said it was worth \$10,000, yet it is shown, and by

Perry himself, that there was a \$13,000 first lien upon it besides the \$8,000 note mentioned in the record, but his testimony goes to show that after he got rid of those accommodation liens he sold the property for \$8,000. So it will be seen the property fell \$5,000 short of releasing the first lien security. Mr. Taub testifies, and from this record he seems to be a responsible business man, that the note "was not worth eight cents, that it was worth nothing." Taub knew of the property and knew Perry and doubtless knew Hill; at least his testimony shows he was familiar with those transactions. Besides this testimony, all the circumstances of the case, even the evidence for the state, indicates but one safe conclusion, it occurs to us, that is, that the note, upon any theory of this evidence from which it may be considered, was worthless, and the state, instead of proving beyond a reasonable doubt any specific value of the note, absolutely disproved it. It may be Mr. Perry and Mr. Pye were running these matters together. The testimony rather indicates that Perry was indulging in some pretty extravagant financial transactions without much backing to it, and that Pye was familiar, at least to some extent, with those facts, and that he had assisted Mr. Perry in these matters, handling his, Perry's, collateral, and this accounts for the reason why Mr. Perry was not surprised at the transaction between Pye and Goree, and all these other matters that have cropped out in the evidence, and if those facts exist, the evidence would strongly indicate from that standpoint Pye had authority, or was justified in believing he had authority, to handle the property and do with it as he pleased. This phase of the case, however, was not submitted to the jury. Under all the circumstances of this case it may be a serious question whether the state has a case to show embezzlement by Pye of Perry's property of any amount, that is, that the note was valueless, and any conversion by Pye of a valueless piece of paper could not be embezzlement because of a want of value.

For the reasons indicated the judgment is reversed, and the cause is remanded.

HARPER, J. [3] While agreeing to the reversal of the case, I do not concur in that part of the opinion holding the indictment defective, but hold that the indictment is not invalid.

I do not agree that the court should have submitted the issue of temporary appropriation. The testimony shows that Pye hypothecated the note with Goree and placed it beyond his (Pye's) control, and Perry had to substitute other collateral to secure the release of the note owned by him and which Pye had appropriated to his own use, and think the evidence of Perry having to pay \$500 was admissible on two phases of the testimony: First, as tending to show the value of the \$8,000 note at the time of its ap-

propriation; and, secondly, if there was any evidence tending to show a temporary appropriation, then this was a cogent circumstance to prove a permanent appropriation that Perry first had to put up other collateral to get the \$3,000 note appropriated by Pye released, and then to get this collateral released he had to pay \$500. There are other matters that might be mentioned, but, agreeing with the conclusion reached, I concur in a reversal of the case, especially on the grounds that, whether or not Perry knew at the time Pye appropriated the note and consented thereto, and, secondly, if the dealings between the parties were such as to lead Pye to believe he had Perry's permission to use the property, then this issue should have been submitted to the jury.

PRENDERGAST, J. In my opinion the indictment is good. I think the trend of all the later cases is to that effect. It seems to me from the statement of the case by Presiding Judge DAVIDSON that it must be reversed. The time for adjournment for this term of court is so near at hand, and there being so much other pressing business necessary to be disposed of before adjournment, precludes a special study of this case now. At a later date, even if the reversal stands, we may write further herein on the various questions arising and necessary to be decided herein. It may be upon a thorough consideration we may reach the conclusion the case should not be reversed.

#### ZWEIG v. STATE. (No. 2080.)

(Court of Criminal Appeals of Texas. April 30, 1918. On Motion for Rehearing, March 11, 1914. On Second Motion for Rehearing, March 25, 1914.)

#### 1. RECEIVING STOLEN GOODS (§ 7\*)—REQUISITES OF INDICTMENT—TIME AND PLACE OF ORIGINAL TAKING.

An indictment for receiving stolen property knowing that it had been stolen and bringing it into this state need not allege the time and place of the original taking, though it must allege that it was fraudulently received and concealed with knowledge that it had been acquired by theft, and the name of the owner, if known, and the name of the person from whom received.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.\*]

#### 2. RECEIVING STOLEN GOODS (§ 7\*)—INDICTMENT—PROOF AND VARIANCE.

Under Pen. Code 1911, art. 1431, providing that any person receiving stolen property in another state knowing it to have been stolen, and bringing it into this state, shall be guilty of receiving stolen property, an allegation in an indictment for the offense that the property was received "in the county of St. Louis," was not an element of the offense, and would be disregarded as surplusage; and, even if a descriptive averment necessary to be proved, and even if the city of St. Louis, in which it was received, was a municipality separate from the county of St. Louis, proof that the city was always considered as a part of the county

was not a variance, but sufficiently sustained the descriptive averment.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, First and Second Series, Receiving Stolen Goods.]

#### 3. INDICTMENT AND INFORMATION (§ 60\*)—REQUISITES AND SUFFICIENCY—STATUTE.

If, eliminating surplusage, an indictment so avers the constituent elements of the offense as to apprise the defendant of the charge against him and to enable him to plead the judgment in bar of another prosecution, it is good in substance under the Code, and therefore sufficiently charges the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 286, 2 7; Dec. Dig. § 60.\*]

#### 4. CRIMINAL LAW (§ 80\*)—TRIAL—PRINCIPAL AND ACCESSORY.

Pen. Code 1911, art. 90, expressly requiring that where a principal is arrested he shall be tried before the accessory, is special and controls the general provisions of Code Cr. Proc. 1911, art. 727, relating to the severance on trial of defendants, and hence one indicted as an accessory cannot be first tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103-111, 1384; Dec. Dig. § 80.\*]

#### 5. CRIMINAL LAW (§ 1119\*)—APPEAL—PRESUMPTION.

On appeal the legal presumption is that the court ruled correctly, and to have the refusal of a severance reviewed, the bill must state matters as to arrest, trial, and continuance which would show error in the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.\*]

#### 6. INDICTMENT AND INFORMATION (§ 132\*)—ELECTION OF COUNTS—TRIAL.

In a trial of an indictment for bringing stolen goods into the state charging only one transaction by different counts, the state was not required to elect upon which count it would ask for a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-447, 449-453; Dec. Dig. § 132.\*]

#### 7. CRIMINAL LAW (§ 400\*)—EVIDENCE—BEST AND SECONDARY EVIDENCE.

In a prosecution for bringing stolen property into the state testimony of one of the company alleged to have been the original owner that it was a corporation was admissible as a fact that the witness personally knew.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

#### 8. CRIMINAL LAW (§ 1091\*)—APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions to evidence is too general for consideration, where it includes a number of statements, some of which are clearly admissible, and there is nothing in the objection pointing out specifically the supposed objectionable parts of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.\*]

#### 9. CRIMINAL LAW (§ 422\*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.

In a prosecution for bringing stolen property into the state, the statements and acts of all the conspirators during the pendency of, and in furtherance of, the common design to

convert the goods to their use, such as its division, etc., were admissible against another, though said and done in his absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

#### 10. RECEIVING STOLEN GOODS (§ 6\*)—ELEMENTS OF OFFENSE.

To constitute the offense of bringing stolen goods into the state, it was not necessary that defendant himself should ship the goods, as if he was the procuring cause, he would be legally responsible for bringing them into the state.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 8; Dec. Dig. § 6.\*]

#### 11. RECEIVING STOLEN GOODS (§ 4\*)—POSSESSION OF OWNER.

In a prosecution for bringing stolen goods into the state, the fact that one in charge of the corporation, alleged to be the original owner of the property, had employed a drayman to carry the goods to the depot from which they were stolen did not take them out of his possession.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Century Dig. § 6; Decennial Dig. § 4.\*]

#### 12. CRIMINAL LAW (§ 829\*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

A requested charge covered by the main charge was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 13. GRAND JURY (§ 36\*)—WITNESSES—ATTENDANCE—EVIDENCE BEFORE GRAND JURY.

Witnesses need not be personally before the grand jury as examining trials are had, testimony taken, reduced to writing, and sworn to and transmitted to the grand jury, which is authorized to return an indictment thereon if found sufficient.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 75-78; Dec. Dig. § 36.\*]

#### 14. RECEIVING STOLEN GOODS (§ 8\*)—SUFFICIENCY OF EVIDENCE.

In a prosecution for bringing stolen goods into the state, evidence held to show that defendant received the goods from the persons named in the indictment.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 15-18; Dec. Dig. § 8.\*]

On Motion for Rehearing.

#### 15. RECEIVING STOLEN GOODS (§ 7\*)—INDICTMENT—THEFT.

Under Pen. Code 1911, art. 1431, providing that if any person has committed an offense in another state which, if committed in this state, would be the receiving of stolen property knowing it to have been stolen, shall bring it into this state he shall be guilty of receiving stolen property, and article 1432, providing that it must appear that the offense charged would also have been receiving stolen property under the law of the other state, it was not necessary that an indictment, specifically alleging that the acts of accused under the laws of Missouri constituted the offense of receiving stolen property, allege the facts going to constitute theft by the original taker from whom the property was received.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.\*]

#### 16. INDICTMENT AND INFORMATION (§ 60\*)—PURPOSE OF "INDICTMENT."

The office and purpose of an "indictment" is to notify one of the offense with which he is charged, and the elements thereof, that he may properly prepare his defense, and usually

when an offense is charged in the language of the statute, it is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267, Dec. Dig. § 60.\*]

For other definitions, see Words and Phrases, First and Second Series, Indictment.]

#### 17. RECEIVING STOLEN GOODS (§ 9\*)—ISSUES—ORIGINAL TAKING.

In a prosecution for bringing stolen goods into the state knowing them to have been stolen, where there was evidence that defendant was at a certain place in the other state with the original taker of the goods and admitted that they had crooked goods, and that the original taker resided in the other state, had the reputation of being a professional thief, and had been convicted of similar thefts, while defendant resided in Texas, the refusal to submit a count charging defendant with theft of the goods and the submission of that adjudging him with receiving stolen goods knowing them to be stolen goods, was proper.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 19-22; Dec. Dig. § 9.\*]

Davidson, P. J., dissenting.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Louis Zweig was convicted of receiving stolen goods, and he appeals. Affirmed.

W. A. Morrison, U. S. Hearrell, and M. G. Cox, all of Cameron, and Lightfoot, Brady & Robertson, of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted under an indictment charging, first, that appellant was guilty of theft in the state of Missouri and brought the stolen property into this state. This count was not submitted to the jury. The second count, which was submitted and under which he was convicted, omitting formal parts, charges: That appellant on or about the 31st day of October A. D. 1910, in the county of St. Louis, state of Missouri, and anterior to the presentment of this indictment, did unlawfully and fraudulently receive from Lefty Linnaman and other parties to the grand jury unknown certain corporeal personal property (here follows a description of the property and its value); the same then and there—

"being the property of and belonging to the Sanders Duck & Rubber Company, a corporation duly incorporated under the laws of Missouri, and which said property had theretofore been acquired by the said Lefty Linnaman and other parties to the grand jurors unknown, in such manner as that the acquisition of the same comes within the meaning of the term 'theft,' the said Louis Zweig then and there well knowing the same to have been so acquired at the time he received the same as aforesaid, and which said acts by the said Louis Zweig were, by the laws of the state of Missouri then and there in force, the offense of receiving stolen property, and which acts, if the same had been committed in the state of Texas, would, under the laws of the said state of Texas then and there in force, have been the offense of receiving stolen property; and the said Louis Zweig, did afterwards unlawfully, viz., on or about the 21st day of November, A. D. 1910.

bring the aforesaid property into the state of Texas and into the county of Milam."

We have copied the indictment because many of the contentions of appellant are based thereon.

[1] The first complaint is that the count in the indictment is insufficient because it fails to allege the date that Lefty Linnaman and others committed the theft. While appellant says in his brief he has been unable to find any authorities on this question, yet he earnestly insists that it is essential that the date of the original theft shall be stated. By reading the indictment it is seen that appellant is prosecuted for receiving stolen property knowing that it had been stolen and bringing it into this state. Whether or not it is necessary in an indictment charging one with receiving stolen property, to allege the date of the original theft is no new question in this state. When the Supreme Court had jurisdiction in criminal matters this question was before them in the case of *State v. Perkins*, 45 Tex. 10, and they held that it was unnecessary to allege "*the time and place of the original taking*," citing Bishop's Crim. Proc. § 928. And since the creation of this court, in the case of *Brothers v. State*, 22 Tex. App. 447, 3 S. W. 737, this question is again decided adversely to appellant's contention, this court saying:

"Is it essential to the validity of a charge for receiving stolen property that the count shall contain a direct, distinct, and affirmative allegation of all the facts going to constitute theft against the original taker from whom it has been received? The pleader, it will be noted, has followed substantially form No. 512, prescribed for receiving stolen property, in Willson's Criminal Forms, page 220 (now section 1524, White's Ann. Code). Under the great weight of authority, the form is unquestionably sufficient. See Whart. Precedents and Indictments (4th Ed.) No. 450; 2 Archbold's Crim. Practice and Pleading (8th Ed.) top p. 1425, side p. 474.

"Speaking of the offense of receiving stolen property, Mr. Bishop says of the indictment: 'As in larceny, so in receiving, the transaction is identified by the description of the stolen things and their ownership. The thing stolen must be described in the same manner as in larceny. The name of the thief is not identifying matter, and hence it need not be alleged. The owner's name is essential to identification; hence it must be stated if known. Commonly in England and in numbers of our states, the indictment does not aver from whom the stolen goods were received. Some of our American cases require it.' 2 Bish. Crim. Prac. (3d Ed.) §§ 982, 983; and to the same effect see 1 Whart. Crim. Law (8th Ed.) § 997. In Texas it has been the rule that an indictment for receiving stolen property must allege the name of the owner of the property if known, and the name of the person from whom received. *State v. Perkins*, 45 Tex. 10. Judge Willson's form is sustained by all standard authorities, and the count here complained of is in compliance with said form. It was not error to overrule the motion to quash. *Nourse v. State*, 2 Tex. App. 304."

In these and cases cited in them will be found a discussion of all questions raised by appellant in his motion to quash, and which decide all of them adversely to him.

[2, 3] A serious question in the case is that, the state having alleged that appellant received the stolen property "in the county of St. Louis," the proof must show that he received the property in that county. Is this an essential allegation in the indictment? As applicable to this case, article 951, Pen. Code 1895 (Pen. Code 1911, art. 1431), reads:

If any person having received stolen property in any other state, knowing the same to have been stolen, shall bring into this state any property so acquired or received, he shall be deemed guilty of receiving stolen property, and shall be punished as if the offense had been committed in this state.

Are the words in the "county of St. Louis," not being an element of the offense (for it was wholly unnecessary to allege in what county in Missouri the property was received, as held by all the authorities), in any way descriptive of the identity of what is legally essential to the charge contained in the indictment? In the case of *Mayo v. State*, 7 Tex. Cr. App. 346, the question of what is descriptive of the offense and what may be treated as a surplus allegation is discussed at length, and the rule is said to be:

"A rule almost fundamental is that no allegation, whether it be necessary or unnecessary, or more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage. 1 Bishop's Cr. Proc. § 485; *Warrington v. State*, 1 Tex. App. 168. But allegations not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as mere surplusage, and may be entirely disregarded. *United States v. Howard*, 3 Sumn. 12 [Fed. Cas. No. 15,403]. And where an indictment contains matter unnecessary to a description of the offense, it may be rejected. *State v. Coppenburg*, 2 Strob. [S. C.] 273. Again, if, eliminating surplusage, an indictment so avers the constituents of the offense as to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good in substance under our Code. *Coleman v. State*, 2 Tex. App. 512; *Burke v. State*, 5 Tex. App. 74. A variance in the name in an indictment will not be fatal if the name be immaterial to constitute the offense and may be rejected as surplusage. 2 East P. C. 593; *Roscoe's Cr. Ev.* 82."

Tested by this rule, the words "county of St. Louis" may be rejected as surplusage, and still all the elements would be charged and the indictment would be so definite that appellant could successfully plead it in bar of any subsequent prosecution for this offense. In the case of *Clark v. State*, 41 Tex. Cr. R. 641, 56 S. W. 621, Presiding Judge Davidson aptly states the correct rule:

"This is a well-settled principle of criminal pleading: If, eliminating surplusage, the indictment so avers the constituent elements of the offense as to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good in substance, under our Code, and therefore sufficiently charges the offense. *McConnell v. State*, 22 Tex. App. 354 [3 S. W. 699, 58 Am. Rep. 647]; *Coleman v. State*, 2 Tex. App. 512; *Burke v. State*, 5 Tex. App.

74; *Mayo v. State*, 7 Tex. App. 342; *Holden v. State*, 18 Tex. App. 91; *Cudd v. State*, 28 Tex. App. 124 [12 S. W. 1010]; *Hammons v. State*, 29 Tex. App. 445 [16 S. W. 99]; *Taylor v. State*, 29 Tex. App. 466 [16 S. W. 302]; *Lomax v. State*, 38 Tex. Cr. R. 318 [43 S. W. 92]."

Numerous other cases might be cited, but we do not deem it necessary to do so. If it was essential to allege that the property was received in any certain county in a state, or if the allegation was descriptive of any essential allegation in the indictment, the authorities cited by appellant would be in point but as it was wholly unnecessary under our Code to allege in what county the property was received, and where the words are used, they are not descriptive of what is legally essential to state in the indictment, and, further, when these words are omitted, the indictment specifically charges an offense under our Code, and in language that it could be pleaded in bar of any other prosecution for that offense, we hold that the trial judge did not err in treating these words as mere surplusage. Entertaining this view, it is unnecessary to discuss or determine whether or not the city of St. Louis is or is not in fact a part and parcel of the county of St. Louis, nor the many questions raised by objecting to testimony in regard thereto, nor the special charges asked in relation solely to that question. The gist of the offense in this character of case is the bringing of the stolen property into this state, and it was not essential to allege in what county it was received, and if we should be mistaken in the holding that it was not a "descriptive averment" necessary to be proven, and it should be held to be such a descriptive averment as it must be proven as alleged, then an allegation of that character may be proven by facts which would show that it was generally so spoken of and understood. If it be conceded that the laws of the state of Missouri, introduced in evidence, show that the city of St. Louis is a separate and distinct municipality from the county of St. Louis, yet the same evidence shows that the city of St. Louis is wholly surrounded by the county of St. Louis, and if we are to give credence to the testimony adduced on the trial, it has always been spoken of and considered a part of the county of St. Louis. While it may be said that the laws of the state of Missouri give to the city an independent political existence, yet these same laws show that the city of St. Louis is wholly within the territorial bounds of the county of St. Louis, it being carved out of that county, and the limits of the county entirely surround the city of St. Louis. It is by the record shown that in the city of St. Louis it is generally spoken of and described as within the county of St. Louis. By all the testimony it is shown that the goods were stolen in the city of St. Louis, and Mr. Sanders testified:

"Those goods were taken from me in the county of St. Louis and State of Missouri without my consent."

Frank McKenna testified that the city of St. Louis was within the bounds of the county of St. Louis, and was always spoken of as being within that county. In fact outside of the bare fact that laws of the state had carved out a part of the county of St. Louis and had given it to some extent at least a separate and independent political existence, the record would disclose that it is always spoken of and generally understood to be within the county of St. Louis. And if it should be held that, having stated the goods were stolen from Sanders Duck & Rubber Company in the county of St. Louis, it became a descriptive averment and must be proven as alleged, then it has always been the rule in this state that a descriptive averment of this character may be sustained by proof that it is usually so spoken of and understood. *Dignowitty v. State*, 17 Tex. 531, 67 Am. Dec. 670, and cases cited in *Roman v. State*, 64 Tex. Cr. R. 515, 142 S. W. 913. In Mr. Underhill's work on Criminal Evidence, the rule is said to be:

"The strict technical rules formerly governing this subject have been greatly relaxed, if not altogether abrogated, by statutory enactment or by the liberal spirit of the modern courts of criminal jurisdiction. In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?"

In this case it can be positively said that appellant could not have been misled in making his defense, and he would certainly be able to plead this prosecution in bar of any subsequent prosecution for the offense. So if we are mistaken in holding that the words "county of St. Louis" were not necessary to be alleged to constitute the offense, and could and should be treated as surplusage, then we think such an allegation can be proven by evidence that it was so called, termed, and spoken of, and in either event the court did not err in the premises.

[4, 5] Appellant next complains of the action of the court in overruling his application for a severance. The application nor the bill reserved, does not make manifest that Henry Zweig had ever been arrested, nor that he was willing to be first tried; nor was it shown whether Henry Zweig had been indicted as an accomplice, principal, or accessory to the offense, nor that granting same would not have resulted in a continuance. If he was indicted as an accessory to the offense, this court has held that under the law he could not be first tried. In *Williams v. State*, 27 Tex. App. 471, 11 S. W. 481, we held:

"It was not error to refuse the defendant's motion to put John West upon trial before trying the defendant. Said West was indicted as

an accessory to the theft charged against the defendant, and it is expressly provided that where 'the principal is arrested he shall be first tried.' Pen. Code, art. 90. The defendant being the principal, and under arrest, it was not only proper, but obligatory upon the court, to try him first. This requirement of the statute is special and controls the general provision relating to the severance on trial of defendants. Code Crim. Proc. art. 669a."

As said by this court in *Edgar v. State*, 59 Tex. Cr. R. 256, 127 S. W. 1053, on appeal the legal presumption is that the court ruled correctly, and to have the matter revised by us on appeal, the bill must state matters which would show the error in the ruling of the court. If Henry Zweig was under arrest, and willing to be tried, and to have granted the application would not have worked a continuance, and the indictment against him did not charge him with being an accessory, these facts should have been shown, in order to avail appellant of this ground in the motion for new trial. For correct rule in regard to these matters see *Ortiz v. State*, 151 S. W. 1058, and cases there cited.

[6] There was no error in the court refusing to make the state elect under which count in the indictment he would ask for a conviction at the close of the testimony offered in behalf of the state. In section 300 of Branch's Crim. Law he correctly states the rule to be:

"If only one transaction is charged, and different counts are contained in the indictment to meet the possible phases the testimony may assume, the state will not be required to elect" (citing *Goode v. State*, 57 Tex. Cr. R. 220, 123 S. W. 597, and numerous other cases, which will be found noted in that section).

[7] In bill of exception No. 1 it is shown that appellant objected to the witness H. A. Sanders testifying that the Sanders Duck & Rubber Company was a corporation. As no effort was made to show for what purposes the company was incorporated, but merely the fact that it was an incorporated company, the court did not err in the matter. This was a fact that the witness personally knew.

[8] In bill No. 9 is set out the testimony of this witness almost in full, covering some 12 pages of the record, at the conclusion it being stated that the objections were that the witness was "incompetent to testify as to the identity of the goods alleged to have been obtained as shown by his testimony." Mr. Sanders testified that he was able to identify the goods found as the goods stolen from him; and, while appellant might contend that his cross-examination weakened that statement, yet this would go to the credit of the witness and not the admissibility of the testimony. As stated in *Ortiz v. State*, 151 S. W. 1057:

"A bill of exceptions is to general for consideration if it includes a number of statements, some of which are clearly admissible, and there is nothing in the objection \* \* \* pointing out the supposed objectionable portions of the evidence" (citing Branch's Crim. Law, § 47, and numerous authorities).

And the same might be said as to the testimony of M. Bourlandt, which covers some eight pages of the record, at the last the objection being stated, "for the reason that the testimony in reference to statements made by Henry Zweig not in the presence of defendant were not admissible against appellant."

[9] However, we will state that the record disclosed that appellant, Henry Zweig, and Bourlandt were in business as partners at Cameron, Milam county; that if the state's theory is correct, appellant was in St. Louis and shipped the alleged stolen goods from St. Louis to an address in Taylor, Tex.; at the suggestion of Henry Zweig, Bourlandt went to Taylor, paid the freight, and reshipped the goods to Zweig & Bourlandt at Cameron; that the goods were there received, and by Henry Zweig and Bourlandt, and when they learned that they were likely to be caught in possession of the goods, they sought to conceal them; that appellant then came to Cameron and reshipped the goods to another point, where they were finally discovered and identified as the stolen goods by Mr. Sanders. The statement of all the conspirators during the pending of the conspiracy is always admissible in evidence, and, as it is shown that the conspiracy to convert these goods to the use of appellant, Henry Zweig, and Bourlandt was not completed, and, when it was learned that the theft was about to be discovered, it was sought to conceal the goods, the statements of each and all the conspirators were admissible, and the court did not err in admitting the statements of Henry Zweig which he did admit. In Branch on Crim. Law, § 240, it is said:

"Acts and declarations of one conspirator in furtherance of the common design are admissible against another conspirator pending the conspiracy and until its final termination. This proposition includes anything that was within the contemplation of the conspiracy, such as dividing the spoils, or any of those matters that may be subsequent to, but included in, the scope of the conspiracy. *O'Neal v. State*, 14 Tex. App. 582; *Rix v. State*, 33 Tex. Cr. R. 353, 26 S. W. 505; *Franks v. State*, 36 Tex. Cr. R. 149, 35 S. W. 977; *Small v. State*, 40 S. W. 790; *Long v. State*, 55 Tex. Cr. R. 57, 114 S. W. 632; *Gracy v. State*, 57 Tex. Cr. R. 68, 121 S. W. 706; *Milo v. State* [59 Tex. Cr. R. 196] 127 S. W. 1028; *Kipper v. State*, 45 Tex. Cr. R. 384, 77 S. W. 611; *Holt v. State*, 39 Tex. Cr. R. 299 [45 S. W. 1016] 46 S. W. 829; *Eggleston v. State* [59 Tex. Cr. R. 542] 128 S. W. 1111.

"What is said and done by any of the conspirators, pending the conspiracy and in furtherance of the common design, is admissible against the one on trial, though said and done in his absence. *Wallace v. State*, 46 Tex. Cr. R. 349, 81 S. W. 966; *Barber v. State*, 69 S. W. 515; *Trevino v. State*, 41 S. W. 609; *Dobbs v. State*, 51 Tex. Cr. R. 115, 100 S. W. 946; *Roma v. State*, 55 Tex. Cr. R. 344 [116 S. W. 598]; *Smith v. State*, 21 Tex. App. 96, 17 S. W. 560; *Armstead v. State*, 22 Tex. App. 59, 2 S. W. 627; *Richards v. State*, 53 Tex. Cr. R. 400 [110 S. W. 432]; *Bowen v. State*, 47 Tex. Cr. R. 137, 82 S. W. 520]; *Williams v. State*, 45 Tex. Cr. R. 240, 75 S. W. 509; *Chapman v. State*, 45 Tex. Cr. R. 484, 76 S.

W. 477; *Hannon v. State*, 5 Tex. App. 551; [*Taylor v. State*] 3 Tex. App. 200; *Moore v. State*, 15 Tex. App. 1; [*Phelps v. State*, 15 Tex. App. 55]; *Eggleston v. State* [59 Tex. Cr. R. 542] 128 S. W. 1111."

[10] It was not necessary that appellant himself should ship the goods from Taylor to Cameron. If he was the procuring cause to have the goods shipped from St. Louis to the address at Taylor, and his partners, or one of them at his instance, reshipped the goods from Taylor to Cameron, he would be legally responsible for the act of bringing the goods into Milam county, and the court did not err in refusing special charge No. 2 on this phase of the case.

[11] Mr. Sanders testified that he was in charge of the corporation and its property. The fact that he employed a drayman to carry them to the depot from which place they were stolen would not take them out of his possession. The possession of the drayman, under such circumstances, was temporary, and they remained in Sanders' possession until delivered to the railway company, and the court did not err in refusing the special charges in regard to such possession.

[12] Special charge No. 7 was covered by the court's main charge; therefore it was unnecessary to give it.

[13] Under the evidence in this case special charge No. 8 was not called for. Appellant apparently proceeds on the theory that the witnesses must be personally before the grand jury. This is not the law. Examining trials are held, and testimony taken, reduced to writing and sworn to, which is transmitted to the grand jury. The grand jury is authorized to return an indictment on this testimony if they deem it sufficient, and the evidence shows the testimony adduced at the examining trial was before the grand jury and considered by them.

[14] It may be said that the evidence relied on by the state to prove that appellant received the goods from the persons named in the indictment is circumstantial. The court gave a full and fair charge on circumstantial evidence, and the circumstances would fully authorize the jury to find appellant guilty under the second count in the indictment. The circumstances would show appellant in possession of these goods in Mayer Katz's yard, boxing them for shipment; they are shipped from St. Louis, and placed in his store in Cameron, and when he ascertains search is being made for them, he in person ships a portion of them away from Cameron to avoid detection. Lefty Linnaman is placed in such juxtaposition to appellant as authorized a finding that he was the person from whom appellant received the goods.

We have carefully reviewed each bill of exceptions, and ground in the motion for new trial, and are of the opinion that the court properly submitted the case on circumstantial

evidence, and the evidence is amply sufficient to support the verdict.

The judgment is affirmed.

DAVIDSON, P. J., dissents.

#### On Motion for Rehearing.

HARPER, J. [15] On motion for rehearing it is insisted that, as the second count in the indictment, charging appellant with receiving stolen property and bringing same into this state, did not allege that the manner Lefty Linnaman had obtained the goods constituted theft under the laws of the state of Missouri, and the same acts would constitute theft under the laws of this state, this count in the indictment is for that reason fatally defective. Receiving property known to have been stolen, and bringing same into this state is a separate and distinct offense from the original taking, and it will be noticed in the original opinion that this count in the indictment does allege that goods had been acquired in such manner as the acquisition of the same came within the meaning of the term "theft," and—

"the said Louis Zweig then and there well knowing the same to have been so acquired at the time he received the same as aforesaid, and which said acts by the said Louis Zweig were, by the laws of the state of Missouri then and there in force, the offense of receiving stolen property, and which acts, if the same had been committed in the state of Texas, would, under the laws of the said state of Texas then and there in force, have been the offense of receiving stolen property; and the said Louis Zweig did afterwards unlawfully, viz., on or about the 21st day of November, A. D. 1910, bring the aforesaid property into the state of Texas, and into the county of Milam."

Article 1431 of the Penal Code of 1911 provides if any person, having committed an offense in a foreign country, state, or territory which if committed in this state would have been receiving of stolen property knowing the same to have been stolen, shall bring into this state any property so received, he shall be deemed guilty of receiving property stolen knowing the same to have been stolen, and shall be punished as if the offense had been committed in this state. Article 1432 provides that it must be made to appear that the offense charged would also have been receiving stolen property by the law of the foreign country, state, or territory. This the indictment specifically alleges, and it was not necessary to allege in the indictment the facts going to constitute theft against the original taker from whom the property was received. *Hodges v. State*, 22 Tex. App. 415, 3 S. W. 739; *Brothers v. State*, 22 Tex. App. 447, 3 S. W. 737. In the first count in this indictment (which was not submitted to the jury), wherein appellant was charged with theft of the goods, it was alleged—

"which said acts by the said Louis Zweig were, by the laws of the state of Missouri, then and there in force, the offense of theft, and which said acts, if committed in the state of

Texas, would, under the laws of the state of Texas then and there in force, have been theft, and the said defendant did afterwards unlawfully bring the aforesaid property into the state of Texas, and into the county of Milam."

In the case of *Morgan v. State*, 31 Tex. Cr. R. 7, 18 S. W. 647, this court held:

"There were five counts in the indictment preferred against the defendant; the first being one for theft, and the other four charging appellant with receiving stolen property knowing the same to have been stolen. The verdict of the jury was: 'We, the jury, find the defendant guilty as charged, and assess his punishment at confinement in the penitentiary for two years.' The judgment rendered upon this verdict was one finding the defendant guilty of fraudulently receiving stolen property, knowing the same to have been stolen.

"It is insisted on this appeal that the verdict and judgment must have been predicated upon the second count in the indictment; and it is further insisted that if such be the case, the verdict and judgment cannot stand, because the said second count is fatally defective in that it fails to state or allege in terms the date when and the place and county in which the said offense was committed. The date and the county were properly alleged in the first count of the indictment, which was the count for theft. This being so, it was unnecessary to repeat the date and county in the second count. In the case of *Hutto v. State*, 7 Tex. App. 44, where, in the second count of an indictment the name of the month was written 'January,' and in the first count, which was dismissed, it was correctly spelled, it was held that the motion in arrest of judgment was correctly overruled; and the case of *Wills v. State*, 8 Mo. 52, was cited, wherein it was held that where a nolle prosequi to the first of two counts of an indictment was entered, and the time of committing the offense was only shown by reference to the first count, the defendant might be tried and convicted on the second count. *Boles v. State*, 13 Tex. App. 650. See, also, *Regina v. Waverton*, 2 Lead. Crim. Cases (2d Ed.) 157. The particular objection to the second count, as above stated, is not well taken."

And in the case of *Dancey v. State*, 35 Tex. Cr. R. 618, 34 S. W. 113, 938, this court held:

"While it has been decided that each count, as to the charging part, is independent of every other count, still the preceding count or counts may be looked to, to supply auxiliary allegations—to supply defects in the subsequent counts" (citing *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463; *Boles v. State*, 13 Tex. App. 650).

[16] What is the office and purpose of an indictment? It is to notify one of the offense with which he is charged, and the elements thereof, that he may properly prepare his defense, and usually when an offense is charged in the language of the statute, this is sufficient. The indictment in this case charged appellant in specific terms that he received stolen goods from Lefty Linnaman knowing they had been stolen, and brought them into this state, and is sufficient in law to charge this offense, and specifically alleged that the acts committed by appellant were a violation of the laws of the state of Missouri, and if committed by him in this state, would have been a violation of the laws of this state.

The indictment in this case does allege the time and place. It first alleges that on or

about the 31st day of October appellant received the property in the state of Missouri, knowing the same to have been stolen, and thereafter, on or about the 21st day of November, he brought the stolen property into this state. But appellant insists that it was necessary to name the *place in the foreign state* where the goods were received. This requisite is not stipulated in articles 1431 and 1432 of the Penal Code; and to so hold would be for us to add to the elements of the offense. However, appellant insists that if mistaken in that contention, then as the pleader elected to allege that the goods were received in the county of St. Louis, in the state of Missouri, then it became necessary to prove the allegation as alleged. In the original opinion we showed that the statute (articles 1431 and 1432) did not require the indictment to state the point within the foreign state where the goods were received, but only that they were received in such foreign state and brought into this state, and the county brought to, to show that such county had venue of the offense, and, such allegation not being a requisite of the indictment, same might be rejected as surplusage. In the case of *Dent v. State*, 43 Tex. Cr. R. 151, 65 S. W. 634, this court held:

"Redundant allegations, and those which are in no manner necessary to a description of the offense, and which are not essential to constitute the offense, and which can be entirely omitted without affecting the charge against the accused, and without detriment to the indictment, are treated as mere surplusage, and may be entirely disregarded as part of the indictment. *Gordon v. State*, 2 Tex. App. 154; *Burke v. State*, 5 Tex. App. 74; *Hampton v. State*, 5 Tex. App. 463; *Mayo v. State*, 7 Tex. App. 342; *Smith v. State*, 7 Tex. App. 382; *Rivers v. State*, 10 Tex. App. 177; *Gibson v. State*, 17 Tex. App. 574; *Holden v. State*, 18 Tex. App. 91; *Moore v. State*, 20 Tex. App. 275; *McConnell v. State*, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Osborne v. State*, 24 Tex. App. 398, 6 S. W. 536; *Watson v. State*, 28 Tex. App. 34, 12 S. W. 404; *Cudd v. State*, 28 Tex. App. 124, 12 S. W. 1010; *McLaurine v. State*, 28 Tex. App. 530, 13 S. W. 992; *Finney v. State*, 29 Tex. App. 184, 15 S. W. 175; *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Taylor v. State*, 29 Tex. App. 466, 16 S. W. 302; *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411; *McDaniel v. State*, 32 Tex. Cr. R. 16, 21 S. W. 684, 23 S. W. 989; *Loggins v. State*, 32 Tex. Cr. R. 358, 24 S. W. 408; *Williams v. State*, 35 Tex. Cr. R. 391, 33 S. W. 1080; *Lassiter v. State*, 35 Tex. Cr. R. 540, 34 S. W. 751; *Webb v. State*, 36 Tex. Cr. R. 41, 35 S. W. 380; *Jordan v. State*, 37 Tex. Cr. R. 222, 38 S. W. 780, 39 S. W. 110."

Appellant insists that if it was not necessary that the county in the foreign state where the goods were received should be named (and articles 1431 and 1432 show that it was not necessary to do so, as the place is sufficiently alleged where the state is named where the goods were received), yet as they were named, such allegation became descriptive of the offense, and had to be proved as alleged. We do not think such allegation can be said to be descriptive of the offense here-

in alleged, but if so, the proof met the allegation, for while it is shown that the city of St. Louis is a separate and distinct entity from the county, yet Messrs. Sanders and McKenna testify positively that it was generally spoken of and referred to as being within the county of St. Louis, and there was no evidence offered to the contrary. And where the proof, and all the proof, shows this to be true, it was not necessary to submit that issue to the jury. Had appellant offered any testimony that it was not so generally spoken of, understood, and referred to, then there would have been an issue raised, and it would have been necessary to submit it to the jury. *Polk v. State*, 148 S. W. 311; *Pendy v. State*, 34 Tex. Cr. R. 644, 31 S. W. 647; *Bird v. State*, 16 Tex. App. 531; *Lott v. State*, 24 Tex. App. 725, 14 S. W. 277; *Taylor v. State*, 27 Tex. App. 44, 11 S. W. 35. So it is seen that if it be conceded that the allegation is descriptive, and must be proven as alleged, it has been held in this state that if it was so commonly called, referred to, and spoken of as alleged, upon proof of this fact, this would present no variance. Mr. Wharton in his work on Criminal Law, says, "Variance in criminal law is not now regarded as material unless it is of such substantive character as to mislead the accused in preparing his defense, or would place him in second jeopardy for the same offense," and in the case of *Woodward v. Barth*, 7 Barn. & Cres. 301, it was held a "declaration in the pleadings that the plaintiff delivered a trunk to be put on the coach at Chester, in the county of Chester, was held supported by evidence that it was delivered in the city of Chester, which is a county of itself, separate from the county of Chester at large."

So we hold, as in the original opinion, that it was unnecessary to allege in the indictment the point or place in the state of Missouri appellant received the goods, it being necessary to state only that he received them in that state, and such act was a violation of the law of that state, and he brought them into Texas, and if his acts if done here would constitute a violation of the law, and, the allegation of the point or place of reception in Missouri being an unnecessary allegation, it may and should be treated as surplusage. In the proof, if not alleged, it would not be necessary to make proof of the point and place he received them in Missouri, only that he received them in Missouri. We are also of the opinion that it is not descriptive of the offense, for it is in no sense descriptive of the goods he received, nor did it tend to identify them, and as the point in the state was an unnecessary allegation, nor would it be in any wise descriptive of the state in which he received them. But if it should be held that the place of reception in any manner was necessary or in any wise descriptive of the offense, the proof showing that the place he received them was generally known, referred to, and called the place named in the indict-

ment as the place of reception, this would present no material variance, and the proof is sufficient to sustain the allegation. It cannot be nor is it insisted that he was in any wise misled by such allegation, nor that a plea of former jeopardy would not lie and prevail should it be attempted to prosecute him for the offense alleged.

[17] Mr. McKenna testified to seeing Lefty Linnaman in possession of these goods.

"I saw Lefty Linnaman and Sam Mintz on the 21st day of November, 1910, in a stable at 2205 North Market street. Lefty Linnaman was nailing the top on the boxes, preparing to ship the stuff. Sam was in there with him, standing by."

David Bloomfield testified he saw appellant in St. Louis in Mayor Katz's yard; that Lefty Linnaman was with him; that appellant admitted it was crooked goods he had there in the yard; that he saw rubber coats, yellow slickers, etc., they being the goods as shown by the evidence and circumstances afterwards found in Texas. He testified that this was the only time he ever saw Lefty Linnaman at Katz's house, and that was the time he heard appellant order Lefty Linnaman to deliver the goods to the storage house. Appellant in his motion for rehearing insists that this possession here shown would come nearer showing him to be the original thief than a receiver of the stolen goods. If this was all the evidence in the record, this contention might be presented with some force, but the evidence discloses that Lefty Linnaman resided in St. Louis, had the reputation of being a professional thief, was engaged in thefts similar to this, and had been convicted, since this offense was committed, of theft of just such goods, while appellant resided in Texas and, if the state's case is true, was there but temporarily, and if his contention is true, he was not in St. Louis, but in Texas, at this time, and, considering all the facts and circumstances in evidence, while the indictment charged both theft and receiving stolen property, and the court could have submitted both counts to the jury, yet we do not think the court erred in not submitting the count charging him with theft of the goods, and in submitting the count charging him with receiving stolen goods knowing they were stolen. And that he knew they were stolen goods is evidenced by his acts after the goods had been received in Cameron, Tex.; for upon learning that an investigation was being made in Texas in regard to these goods, he takes them out of his store in Cameron, ships them to Rockdale, giving his name as Gordon. They are then shipped to Taylor, where they are found by Mr. McKenna, identified by Mr. Sanders, and shipped back to Cameron. Here Mr. Sanders asserted his claim to the goods; appellant does not contest this claim, but allows Mr. Sanders to take possession and reship them to St. Louis. Had he not known they were stolen goods, he would not have quietly stood by and let Mr. Sanders take them.

While many questions are raised again on the motion for rehearing, and we have thoroughly considered them, we are of the opinion they were correctly disposed of in the original opinion, and it is not necessary to write further.

The motion for rehearing is overruled.

DAVIDSON, J., dissents.

#### On Second Motion for Rehearing.

HARPER, J. Appellant has filed a motion asking leave to file a second amended motion for rehearing in this cause, after the motion for rehearing had been overruled on March 11, 1914. In this second amended motion he seeks to assign errors on grounds not assigned in the motion for new trial in the court below, nor assigned in the motion for rehearing in this court. Under such circumstances such grounds were not considered in the original opinion, nor in the opinion on the motion for rehearing, and cannot, under the law of this state governing such matters, be now considered by us, and the second amended motion for rehearing, filed with the clerk on March 12th be and the same is here now ordered stricken from the record, and the clerk of this court is ordered to issue the mandate in this cause.

#### HICKS v. STATE. (No. 2679.)

(Court of Criminal Appeals of Texas. Nov. 26, 1913. On Motion for Rehearing, March 4, 1914. Dissenting Opinion Dec. 21, 1914.)

#### 1. CRIMINAL LAW (§ 1092\*)—BILL OF EXCEPTIONS—BYSTANDERS' BILL—STATUTES.

Under Acts 32d Leg. c. 119, § 7 (Vernon's Sayles' Ann. Civ. St. 1914, § 2073), allowing the filing of bills of exception within 30 days after adjournment without order of court, and providing that if bills are not filed within such 30 days they cannot be legally filed unless the court, by order authorizes their filing, a bystanders' bill proven up and filed 38 days after adjournment of court would not be considered, where the only order in the record was one granting defendant 30 days after adjournment in which to file a statement of facts and bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

#### 2. CRIMINAL LAW (§ 949\*)—MOTION FOR NEW TRIAL—VERIFICATION—SUFFICIENCY.

A motion for a new trial on the ground that the verdict was reached by lot, not sworn to by appellant or any one else, and not supported by the independent affidavit of any one, was insufficient; and even though sworn to was a nullity, if made before appellant's attorney, and could not be considered by the Court of Criminal Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2337, 2339-2344; Dec. Dig. § 949.\*]

#### 3. WITNESSES (§ 331½\*)—IMPEACHMENT—CROSS-EXAMINATION.

In a prosecution for murder, where the wife of defendant, formerly the wife of deceased, testified that deceased and not defendant was the father of her older child, the state was properly

allowed, on cross-examination, to ask her if appellant and not deceased was its father.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.\*]

#### 4. WITNESSES (§ 389\*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

In a prosecution for homicide growing out of deceased's attempts to obtain the younger child of defendant's wife, who had formerly been his wife, where it was a question as to whether deceased or defendant was the father of her older child, and where she denied having told a deputy sheriff that deceased was not and did not claim to be the father of the child, the state was properly permitted to introduce the deputy and prove by him that she did make such statement to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243-1245; Dec. Dig. § 389.\*]

#### 5. CRIMINAL LAW (§ 1171\*)—APPEAL—HARMLESS ERROR—LANGUAGE OF DISTRICT ATTORNEY.

In a prosecution for homicide, the language of the district attorney in his closing argument, to the effect that the state had proved the main facts of the case as to the actual killing, and that he had other witnesses by whom he could have proved the same facts if necessary, was harmless, where there was no controversy that defendant killed deceased, he having so testified, and where defendant asked no written instructions as to such remarks.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

#### 6. CRIMINAL LAW (§ 858\*)—TRIAL—EXHIBITS TO JURY.

Code Cr. Proc. 1911, art. 751, providing that the jury may take with them all the original papers in the case and any papers used as evidence, is permissive and not mandatory, and the refusal after the charge to permit the jury to take letters offered by defendant bearing on the issues was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059, 2062; Dec. Dig. § 858.\*]

#### 7. CRIMINAL LAW (§§ 805, 822\*)—INSTRUCTIONS—CONSTRUCTION.

A charge on a murder trial must be given in several paragraphs and cannot all be given in one, and in determining its sufficiency it must be construed as a whole and not by isolated extracts or paragraphs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1958, 1989-1991, 1994, 1995, 3158; Dec. Dig. §§ 805, 822.\*]

#### 8. HOMICIDE (§§ 13, 23\*)—MURDER IN SECOND DEGREE—IMPLIED MALICE.

Malice is a necessary ingredient of the offense of murder in the second degree, and, while in murder in the first degree malice must be proved beyond reasonable doubt, in murder in the second degree it will be inferred from the fact of an unlawful killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 18, 35, 39, 40; Dec. Dig. §§ 13, 23.\*]

#### 9. HOMICIDE (§ 23\*)—MURDER IN THE SECOND DEGREE—IMPLIED MALICE.

When the fact of an unlawful killing is established and the facts do not establish express malice nor tend to mitigate, or justify the act, the law implies malice, and the homicide is murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40; Dec. Dig. § 23.\*]

**10. CRIMINAL LAW (§ 1056\*)—APPEAL—REVERSAL.**

Where defendant took no exception to the charge of the court on murder in the second degree during the trial and asked no instruction to cure the defect, if any, in the court's charge, and first complained of it in his motion for a new trial, the Court of Criminal Appeals, under Code Cr. Proc. 1911, art. 743, was prohibited from reversing a conviction therefor, unless the error appearing from the whole record was calculated to injure his rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.\*]

**11. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—MURDER IN THE SECOND DEGREE.**

When self-defense and manslaughter are both raised, an instruction submitting murder in the second degree and excepting both self-defense and manslaughter is proper; but where such exceptions are not made in submitting murder in the second degree, but are specifically submitted in other parts of the charge, there is no reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

**12. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE.**

In a prosecution for homicide, where the court, in submitting self-defense, did not merely lay down abstract propositions without applying the facts to the case, but covered the question of apparent danger and required the jury to consider the facts from defendant's standpoint, the court's use of "words coupled with acts" was not objectionable as requiring the jury, before finding self-defense, to find that deceased used some words towards defendant, when in fact there were no words used or relied on by defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

**13. HOMICIDE (§ 340\*)—APPEAL—PARTY ENTITLED TO COMPLAINT—CHARGE.**

Where on the evidence self-defense was not in the case, a charge thereon was clearly in defendant's favor, and he could not complain of it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

**14. HOMICIDE (§ 295\*)—CHARGES—THREATS.**

Where the evidence did not show that deceased made any threat against defendant, no charge on threats was called for.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.\*]

**15. HOMICIDE (§ 295\*)—INSTRUCTIONS—ADEQUATE CAUSE—INSULTING WORDS OR CONDUCT.**

Where the state's evidence tended to show that defendant did not kill deceased because of insulting words and conduct of deceased towards his former wife, then defendant's wife, but because of deceased's attempt on her marriage to defendant, to get the custody of her minor child, a charge that such insulting words or conduct were adequate cause if they were the real cause of the killing, provided it took place immediately or so soon thereafter as defendant knowing of such words or conduct met deceased, was not reversible error, as eliminating all acts and conduct of deceased at the time of the killing tending to show adequate cause.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.\*]

**16. HOMICIDE (§ 295\*)—CHARGES.**

In such prosecution, where the evidence showed that deceased passed near defendant on

the day of the killing, when defendant had no gun, and that shortly before the killing he saw deceased with a gun, and again without any, when defendant without any provocation, and while deceased was quietly walking along the street, shot and killed him, a charge that the provocation must arise at the time of the killing, and that the passion should not arise from a former provocation, and that the shooting must spring directly from passion arising out of provocation when given, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.\*]

**On Motion for Rehearing.****17. CRIMINAL LAW (§ 956\*)—MOTION FOR NEW TRIAL—VERIFICATION—STATUTES.**

Under article 837, Code Cr. Proc. 1911, providing that new trials in cases of felony for matters attacking the verdict, which are extrinsic the record, if not expressly requiring such matters to be sworn to, and in view of article 26, providing that whenever the Code fails to provide a rule of procedure the rules of the common law shall govern, it is necessary to the consideration of a ground of motion attacking the verdict on any matter extrinsic the record itself, as that it was a quotient verdict, that, as a matter of pleading, he support it by his own affidavit or the affidavit of some one else specifically showing the truth of the grounds of attack, and, when it is not so sworn to or supported, it presents no question requiring the lower court to consider or investigate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.\*]

**18. CRIMINAL LAW (§ 866\*)—VERDICT—QUOTIENT VERDICT.**

A quotient verdict in a trial for homicide amounting to a sentence for 19 years and some months, which the jurors agreed to reduce by making it 19 years even, was valid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. § 866.\*]

**19. HOMICIDE (§ 39\*)—"MANSLAUGHTER"—SUDDEN PASSION.**

Under the statute sudden passion is requisite to constitute "manslaughter," which is homicide committed under the immediate influence of "sudden passion," arising from an adequate cause, the passion that blindly strikes, and not the passion of revenge; and, however sudden the passion, if the evidence does not show that it was from an adequate cause, the homicide cannot be manslaughter; and, whatever the adequate cause, if the homicide was not committed under the immediate influence of sudden passion arising therefrom, it cannot, under the statute, be manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59-61; Dec. Dig. § 39.\*]

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.)

**20. HOMICIDE (§ 11\*)—DEGREES—MALICE.**

In the absence of the passion that reduces a homicide to manslaughter, the unattended adequate cause may become evidence of antecedent malice, and, instead of constituting an extenuation of the crime, may and would become an aggravating circumstance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.\*]

**21. HOMICIDE (§ 254\*)—SUFFICIENCY OF EVIDENCE—MURDER IN SECOND DEGREE.**

Evidence held sufficient to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.\*]

Davidson, J., dissenting.

Appeal from District Court, Caldwell County; Frank S. Roberts, Judge.

Mannie Hicks was convicted of murder in the second degree, and he appeals. Affirmed.

E. B. Coopwood and O. Ellis, Jr., both of Lockhart, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** Upon a charge of murder appellant was convicted of murder in the second degree, and his punishment fixed at 19 years' confinement in the penitentiary.

The conviction occurred on April 11, 1913. On April 15th appellant filed his amended motion, in lieu of his original, for a new trial, the last ground of which is as follows:

"Because the jury arrived at their verdict by lot; that is to say, the defendant is advised and believes and the facts are that the verdict of the jury was arrived at in this manner: The 12 jurors placed on a sheet of paper the number of years he was in favor of confining the defendant in the penitentiary, then adding the several figures, then divided the whole sum by 12, thus arriving at the 19 years' imprisonment for the defendant; the jurors having agreed in advance to abide by the result of such lot. The defendant asks the court to hear testimony as to how the jury arrived at their verdict, and that a new trial be granted."

There appears in the record what would be appellant's bill of exception No. 3 on this point if it had been allowed by the court. But the court refused to approve it and stated that he did so for the reason that a bill involving the same matter was presented during the term of said court. Then there appears in the record what must be this bill referred to by the court. The court qualified that bill by stating:

"No issue as to the misconduct of the jury having been submitted to the court, the jury was not permitted to be sworn and impeach its verdict which appeared not impartial or unfair under all of the facts of the case."

This bill would show that when appellant's said amended motion for new trial was heard on April 15, 1913, appellant had eight members of the jury in open court and asked permission to swear them, "by whom the defendant's attorneys stated they believed, and said they had been so informed, they could prove that the verdict of the jury was arrived at in this manner: That the 12 jurors agreed in advance that each man set down the number of years he was in favor of putting the defendant in the penitentiary for, to add up the 12 sums, and to divide the total sum by 12, and that each of the jurors agreed to be bound by the result obtained; that each juror did put the amount or number of years he was in favor of on a piece of paper, and all of the different numbers of years were added together, and were then divided by 12, and the result was 19 years; and that the jury then affixed his punishment in their verdict at 19 years in the

penitentiary." From all that appears in the record on this subject, the above presents the matter substantially correctly.

[1] Then there appears in the record on this subject what purports to be a bystanders' bill, which was not taken or attempted to be filed until May 26, 1913, 38 days after the court had adjourned for the term. The court made and filed a qualification of this purported bystanders' bill, which, he says—

was filed "without my knowledge or notice to the district attorney, was presented to me for approval within the time prescribed by law, and same was disallowed for the reason therein indorsed, and being in substance as follows: For the reason that a bill of exception to the same subject-matter, viz., the refusal of the court to hear testimony on defendant's motion for a new trial, had been duly prepared by the defendant and presented to me for approval and by me duly approved and, as approved, agreed to and accepted by the defendant and ordered filed as a part of the record in this case during the session of the court, and which bill of exception so approved, in substance, states the true facts as to the action of the court in refusing to hear testimony on said motion for new trial. The clerk of the court is ordered to file the foregoing statement and explanation in connection with said purported bill of exception, and make same a part of the record in this cause."

There is but one order in the record which is dated April 15, 1913, by which it is ordered:

"The defendant be and he is hereby granted 30 days after the adjournment of this court in which to file a statement of facts and bills of exception."

The statute authorizes a statement of facts of the evidence on the trial of the cause to be filed at any time within 90 days after the adjournment of court, or 90 days after the order overruling the motion for a new trial in case the term of court lasts longer than eight weeks, without any order of the court to that effect. It also allows the filing of bills of exception within 30 days after said time, without any order of the court; but, if the bills of exception are not filed within said 30 days, then they cannot be legally filed, unless the court, by order properly and timely made, authorizes the filing of such bills of exceptions after said 30 days. By such proper order, timely made, the time for filing such bills of exception may be extended for 90 days, but no longer. Section 7, p. 266, of the act approved March 31, 1911, of the 32d Legislature (Vernon's Sayles' Ann. Civ. St. 1914, § 2073), at its Regular Session. This not only is statutory, but this court has all the time so held in a large number of cases unnecessary to cite. So that under no circumstances is this court required or authorized to consider said purported bystanders' bill proven up and filed 38 days after the adjournment of court.

[2] As shown above, the said ground of the motion for new trial was not sworn to by appellant or any one else and was not supported by the independent affidavit of any one

whomsoever. In *Bryant v. State*, 153 S. W. 1158, this court said:

"It has always been held that, when matters extrinsic the record are sought to be raised in the motion for new trial, such grounds should be verified by the affidavit of the appellant"—citing *Barber v. State*, 35 Tex. Cr. R. 70, 31 S. W. 649.

See, also, *Serop v. State*, 154 S. W. 558. This court has uniformly and in many cases held that an affidavit attacking the verdict of the jury cannot be considered by this court and is a nullity, even though sworn to, if the affidavit is made before appellant's attorney. *Maples v. State*, 60 Tex. Cr. R. 171, 131 S. W. 567; *Patterson v. State*, 63 Tex. Cr. R. 297, 140 S. W. 1128; *Scott v. State*, 143 S. W. 610. So that, as this matter is shown in the record, the action of the court presents no reversible error.

The record shows that several years before the killing of Emmett Moore, deceased, by appellant, said Moore and appellant's wife had been married, but divorced, and that after the divorce said Moore had married another woman and appellant had married and was living with the former wife of Emmett Moore, Sallie, as his wife; that, when Moore and Sallie were divorced, Sallie had two children. After the divorce, a question came up between them as to the custody of the younger of these two children. Deceased had procured its custody and had his mother to take charge of it for him, and she kept such charge for about a year. Shortly before the killing, Sallie had managed to get possession of this child, without the consent of the deceased, and the deceased began to try to regain possession of the child. He was much attached to it. Sallie had all the time retained the possession of her older child. Deceased at no time attempted to get possession of that child. The theory of the state was, and there was evidence tending to support it, that the killing occurred because of the deceased's repeated attempts to regain possession of this younger child. Appellant's contention was that the killing did not occur about the possession of this younger child, but that it occurred because of the deceased's conduct towards appellant's wife in attempting to induce her to leave appellant and come back to and live with the deceased, and the deceased's repeated attempts to induce Sallie to do this and his solicitations to get her away from appellant and have illicit sexual intercourse with him.

[3, 4] Appellant introduced his wife, Sallie, as a witness for him and had her testify, among other things, that the deceased was the father of both of her children. This older child was born within a few months prior to the marriage of deceased and Sallie, and the question arose as to the paternity of that older child. Her conception resulting in the birth of this child occurred months before deceased and she were married. The state attempted to show that appellant, and not deceased, was the real father of Sallie's old-

er child. Sallie testified, at appellant's instance, that deceased, and not appellant, was the real father of her older child. In this attitude, the state was permitted, in cross-examination of Sallie Hicks, appellant's wife, when she was on the stand, after she had testified in substance as stated above, to ask her if appellant, and not deceased, was the father of her older child; and, further, that a few days before the trial when the deputy sheriff, Mr. Ellison, summoned her as a witness, if she did not tell him that deceased was not the father of her older child and that deceased did not claim the said older child as his. She denied telling Mr. Ellison any such thing. The court then permitted the state to introduce Ellison and prove by him that at said time and place she did make to him that statement. The court, in qualifying appellant's bills on this subject, stated substantially that such were the issues and the evidence introduced by appellant and testified to by his wife, and that he permitted the cross-examination of appellant's wife and the contradiction of her by Mr. Ellison under the circumstances. In our opinion, under the circumstances of this case, the action of the court was correct.

[5] By another bill appellant complains of the language by the district attorney in his closing argument to the jury, to the effect that the state had proved the main facts of the case, as to the actual killing, by good white men, naming them, and that we have several other witnesses summoned, both black and white, by whom we could have proven the same facts, but consider it useless to put them on the stand, as defendant had not contradicted their testimony; that the said witnesses were present and would have testified as the other witnesses, and the defendant could have put them on the stand if the state's witnesses had not told the truth. The court, in approving appellant's bill to this effect, states that no written instructions were asked by defendant to said remarks. There was no controversy that appellant killed the deceased, he himself so testifying, and there was practically no difference between him and the state's witnesses as to the immediate facts of the killing. Even if the district attorney's remarks were improper, under the facts of this case, they present no reversible error.

[6] The appellant produced, identified, and introduced in evidence some letters by the deceased to his said wife, Sallie. One of them is quite lengthy. As a whole, they show that the deceased claimed to have great affection for her and for her and his younger child, and was pleading for her to abandon appellant and go back to him and live with him in illicit sexual relations. Appellant's bills show that, after argument for both sides had been concluded and the court had charged the jury, and they were ready to retire to consider their verdict, appellant's attorneys privately approached the court and

requested that the jury be permitted to take these letters with them in their retirement. This request was not made in the hearing of the jury, and the jury at no time requested to have the letters with them, and the court did not at any time advise the jury that they could not have said letters in their final deliberations. The bills as qualified by the court, further show that all these letters were read distinctly and intelligently to the jury by counsel when offered in evidence, and in the argument to the jury their contents were fully and ably discussed, and the jury was fully advised of all therein contained.

Our statute (article 751, C. C. P.) provides: "The jury may take with them, on retiring to consider their verdict, all the original papers in the cause, and any papers used as evidence."

This article of the statute shows that it is not mandatory, but permissible, and it has always been so held and construed by this court. See some of the decisions cited under this article in the Revised C. C. P. of 1911, and in note by Judge White under the same article in his Ann. C. C. P. The action of the court presents no reversible error.

Appellant's other complaints are attacks on the court's charge and the refusal of the court to give some charges requested by him. Most of these complaints are very general and point out no specific error. However, we will pass on all of them, considering those raising kindred subjects together.

One complaint, in effect, is that the court's charge on murder in the second degree required that they should convict him of that degree of murder, unless they found him not guilty under his claimed self-defense, and claimed that thereby the court eliminated from the minds of the jury manslaughter, thereby virtually telling the jury that they must either convict of second degree murder or find self-defense.

[7] It is elementary in this state that in determining the sufficiency of a charge it must be construed as a whole and not by isolated extracts, excerpts, or paragraphs, and that a charge on a murder trial cannot all be given in one paragraph, but must necessarily be given in several. In discussing this question it will be necessary to show what the court did charge in this case.

[8, 9] After correctly defining murder in the first degree in accordance with the statute, in a separate paragraph, the court told the jury:

"Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter or which excuse or justify the homicide."

This is a quotation of the latter part of the definition of murder, article 1140, P. C. The charge then defines "malice," and "express malice," and proceeds to fully instruct the jury correctly as to murder in the first degree and submit that degree of murder to the jury for a finding. Then he takes up

murder in the second degree, defines it, and submits that degree to the jury for a finding, charging as follows:

"Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that, in murder in the first degree, malice must be proved, to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be inferred from the fact of an unlawful killing.

"Implied malice" is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree.

"The instrument or means by which the homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.

"Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary. Homicide is justified by law when committed in defense of one's own person against any unlawful and violent attack, made in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury.

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, with implied malice, in the county of Caldwell, and state of Texas, on the 29th day of March, 1913, as alleged, with a deadly weapon and not in his own self-defense as the same is herein defined, did shoot and thereby kill Emmett Moore as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided it be not less than five years."

The definition of murder in the second degree, and how and when the law infers malice from an unlawful killing in exact accordance with the two paragraphs of the court's charge above quoted, has been the established law of this state ever since we have had two degrees of murder. Judge White, in his Ann. P. C., in section 1257, after stating what is ipso facto murder of the first degree, says:

"If, however, they do not establish a murder committed in one of these modes, and do not show any justification, excuse or mitigation for the homicide, the law implies the malice and the murder is murder in the second degree"—citing *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Jordan v. State*, 10 Tex. 479; *Hamby v. State*, 36 Tex. 523; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Atkinson v. State*, 20 Tex. 522; *Farrer v. State*, 42 Tex. 285; *Ferrell v. State*, 43 Tex. 503; *Hill v. State*,

11 Tex. App. 456; *Ellison v. State*, 12 Tex. App. 557; *Neyland v. State*, 13 Tex. App. 536; *Martinez v. State*, 30 Tex. App. 129, 16 S. W. 767, 28 Am. St. Rep. 895; *Childers v. State*, 33 Tex. Cr. R. 509, 27 S. W. 133; *Baltrip v. State*, 30 Tex. App. 545, 17 S. W. 1106.

Again, in section 1259, he says:

"Implied malice is the essential characteristic of murder in the second degree. It is not a fact, but an inference or conclusion deducible from particular facts and circumstances judicially ascertained. Thus, when the fact of an unlawful killing is established, and there are no circumstances in evidence which show the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice and the offense is murder in the second degree"—citing *Martinez v. State*, supra; *Harris v. State*, 8 Tex. App. 90; *Tooney v. State*, 5 Tex. App. 163; *Douglass v. State*, 8 Tex. App. 520; *Hubby v. State*, 8 Tex. App. 597; *Hill v. State*, supra; *Ellison v. State*, supra; *Neyland v. State*, supra; *Reynolds v. State*, 14 Tex. App. 427; *Turner v. State*, 16 Tex. App. 378; *Stanley v. State*, 18 Tex. App. 392; *Smith v. State*, 19 Tex. App. 95; *Hart v. State*, 21 Tex. App. 163, 17 S. W. 421; *Baltrip v. State*, supra.

This court, in *Barton v. State*, 53 Tex. Cr. R. 445, 111 S. W. 1042, expressly approved and commended as admirably presenting the law on the subject a charge of which the two paragraphs first above quoted are literally the same. Mr. Branch, in his *Criminal Law*, section 426, in the first subdivision on page 255, gives as a correct charge substantially the first paragraph above quoted, citing *Douglass v. State*, 8 Tex. App. 520, *Neyland v. State*, 13 Tex. App. 536, supra, and *Gonzalez v. State*, 30 Tex. App. 224, 16 S. W. 978; and then follows with a literal copy of the second paragraph as the law on the subject, and cites *Barton v. State*, supra; *McGrath v. State*, 35 Tex. Cr. R. 423, 34 S. W. 127, 941; *Smith v. State*, 45 Tex. Cr. R. 553, 78 S. W. 694; *Carson v. State*, 57 Tex. Cr. R. 398, 123 S. W. 590, 136 Am. St. Rep. 981; and *Harris v. State*, 8 Tex. App. 90.

There can be no question but that the first two paragraphs of the court's charge above given are unquestionably correct.

[10] The appellant took no exception whatever to the charge of the court on murder in the second degree before the trial was concluded. He first complained of it in his said amended motion for new trial. He asked no instruction on the subject to cure the defect, if there be an injurious defect in the court's charge. Article 743, C. C. P., as it was in force at the time of this trial, prohibits this court under such circumstances from reversing the judgment, unless the error appearing from the record was calculated to injure his rights. This must be determined from the whole record.

In addition to what is quoted above, as portions of the court's charge, the court in separate complete paragraphs charged on self-defense and plainly told the jury that if appellant killed the deceased in self-defense to acquit him. The court also charged

manslaughter under the statute in separate and complete paragraphs, and in submitting manslaughter told the jury that if they believed beyond a reasonable doubt all of the facts which show manslaughter to find appellant guilty of manslaughter and assess his punishment accordingly, and in two other paragraphs he told the jury:

"Should you find the defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter, you will state of which offense found guilty; and, if of murder, you will state of which degree of murder, and for whatever offense you may find him guilty, you will affix the punishment for that crime as above directed.

"If from the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express or implied malice, then you must give the defendant the benefit of such doubt and not find him guilty of a higher grade than murder in the second degree. Or if, from the evidence, you believe beyond a reasonable doubt that the defendant is guilty of some grade of culpable homicide, but you have a reasonable doubt whether the offense is murder in the second degree or manslaughter, then you must give the defendant the benefit of the doubt, and in such case if you find him guilty it could not be of a higher grade of offense than manslaughter."

Then, in addition, charged that the burden of proof is on the state, and the defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, in case you have a reasonable doubt as to defendant's guilt, you will acquit him and say by your verdict not guilty.

[11] It is true that this court, in *Best v. State*, 58 Tex. Cr. R. 330, 125 S. W. 909, and cases following it, laid down and approved a charge on submitting murder in the second degree, wherein, when self-defense and manslaughter are both raised in the case, embracing an exception of both self-defense and manslaughter, which we still commend; but the court in that case, and in those following it, does not hold that, where these defenses are not excepted, the charge would be necessarily erroneous. On the contrary, this court has repeatedly held that where such exceptions are not made in submitting murder in the second degree for a finding, but are in other portions of the charge specifically submitted, no reversible error is presented. *Childs v. State*, 35 Tex. Cr. R. 573, 34 S. W. 939; *McGrath v. State*, 35 Tex. Cr. R. 423, 34 S. W. 941; *Smith v. State*, 48 Tex. Cr. R. 250, 89 S. W. 817; *Foster v. State*, 51 Tex. Cr. R. 77, 100 S. W. 1159. And see, also, *Puryear v. State*, 56 Tex. Cr. R. 231, 118 S. W. 1042; *Davis v. State*, 57 Tex. Cr. R. 548, 124 S. W. 104; *Pratt v. State*, 59 Tex. Cr. R. 172, 127 S. W. 827; and *Pratt v. State*, 59 Tex. Cr. R. 640, 129 S. W. 364. So that appellant's complaint of said charge under the facts and circumstances of this case does not present any reversible error.

[12] Several general complaints are made-

by appellant to the court's charge on self-defense, such as the failure to submit "a clean-cut charge of self-defense," simply submitting abstract propositions and not applying the facts to the law. Wherein or how is not pointed out. Again, on that subject, failing to apply the facts to the law of apparent danger. Again, that the jury must view all the facts and defendant's surroundings from his standpoint. Again:

"In an attempt to charge on self-defense and apparent danger by using the words, 'Upon the law of self-defense you are instructed that if from the acts of the said Emmett Moore, or from his words, coupled with his acts,' the court, by using the words 'his words coupled with his acts,' charged the jury in substance that they must find before they find self-defense that the deceased, at the time of the homicide, used some words towards defendant, when in fact there were no words used, nor relied upon by the defendant."

Appellant requested two special charges along the same line, which were refused.

Even if the evidence in this case in any way called for a charge on self-defense, taking the court's charge as a whole, we think all of appellant's complaints are without foundation, and that they are substantially met by the charge of the court which was given. In submitting self-defense the court did not merely lay down abstract propositions of law and not apply the facts to the case, as claimed by appellant, and did cover the question of apparent danger and required the jury to consider the facts from the defendant's standpoint. Appellant's complaint that the court in instructing self-defense used "words coupled with acts" could not have affected appellant injuriously. If at all, that expression would have been in his favor and not against him.

[13] However, we desire to say that in our opinion, after a most careful and thorough study of the evidence in this case, self-defense was not in the case and should not have been submitted by the court. But its submission was clearly in favor and not against him, and, of course, he cannot complain because thereof. *Jones v. State*, 63 Tex. Cr. R. 413, 141 S. W. 953, and authorities therein cited.

[14] The evidence does not show that deceased made any threat against appellant; hence, no charge on threats was called for.

[15, 16] Appellant has several complaints of the charge of the court on manslaughter. The first is that in charging upon, and what constituted, adequate cause, he charged only on insulting language towards appellant's wife and ignored and eliminated from his charge all acts and conduct of the deceased at the very time of the killing that would tend to show adequate cause. The next complaint is inconsistent with this, in that he therein complains that the court told the jury that the provocation must arise at the time of the killing, and that the passion was not the result of a former provocation, and

that the act causing death must be caused directly by the passion arising out of the provocation then given, etc. The court in the charge on manslaughter followed substantially, if not literally, our statute on the subject. And among other things he told the jury that the passion mentioned in the statute must spring from some provocation sufficient to produce in the mind of a person of ordinary temper such a degree of one of the mental emotions mentioned in the statute as to render, and at the time of the killing did render, the mind of the defendant incapable of cool reflection, "and in determining such state of mind you must do so from all the evidence in the case." Then he told the jury that insulting words or conduct of the deceased towards appellant's wife was in law adequate cause, if such words or conduct were the real cause which provoked the killing; provided that the killing took place immediately upon the happening of insulting conduct or uttering of the insulting words, or so soon thereafter as the party killing may meet with the party killed after having been informed of such conduct, and the jury is at liberty to determine in every case whether such insulting words or conduct were the real cause which provoked the killing; and if such words or conduct were the real cause which provoked the killing, and if the killing occurred at the first meeting of the parties, then the party killing could not be convicted of a higher offense than manslaughter. In submitting manslaughter for a finding, he told the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Mannie Hicks, in the county of Caldwell and state of Texas, on or about the 29th day of March, A. D. 1913, with a gun, the same then and there being a deadly weapon, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury, did unlawfully shoot and thereby kill the said Emmett Moore, and you further believe from the evidence that at the time of the killing, if any, the mind of the defendant was under the immediate influence of sudden passion aroused by adequate cause, as the same is herein explained, and while the mind of the defendant was in such condition, he shot with intent to kill and did kill the deceased, then you will find the defendant guilty of manslaughter and assess his punishment at confinement in the penitentiary for a term of not less than two years nor more than five years, as you may determine and state in your verdict."

As stated above, the state's contention was, and there was evidence tending to show, that appellant did not kill the deceased because of the insulting words and conduct of the deceased towards his wife, but over the custody of the minor child of deceased by appellant's wife when they were married. The deceased's first insulting letter to appellant's wife was written by deceased and received by her in November, 1912, and appellant, as the uncontradicted evidence shows, had met the deceased several times since then. The last letter was written, it is true, just two days

before the killing occurred; but about that same time his wife had received a letter from the deceased's attorney demanding the possession from her of said child, and showing that if she did not voluntarily surrender the child legal proceedings would be instituted by deceased for its possession, and that appellant took that letter to town with him the day of the killing, and his first business in town was seeing about the possession of that child. It was proper therefore for the court to tell the jury that the insulting words or conduct of the deceased towards appellant's wife must have been the cause of the killing. Again, the evidence was sufficient to show that the deceased passed in a few feet of appellant the day of the killing and some time before the killing, but at that time appellant did not have his gun. Appellant himself testified that a short time before the killing he saw the deceased when the deceased had a gun, and that it was some time thereafter when he saw him again without any gun, when he (appellant) had his gun, loaded with buckshot, that he, without any provocation at that particular time, when the deceased was making no demonstration whatever, but quietly and peaceably walking along the streets with his hands swinging down, shot and killed him. We think none of appellant's attacks on the court's charge on manslaughter show any reversible error.

The verdict of the jury is not excessive in contemplation of law, nor the facts of this case. If the state's case is to be believed, the killing of the deceased by appellant almost, if it did not fully, amounted to a cold-blooded assassination.

There is nothing else raised that requires any discussion.

The judgment will be affirmed.

#### On Motion for Rehearing.

Before the original opinion was prepared, considered in consultation, and handed down, the record in this case was read and studied again and again with a great deal of care. When the cause was submitted, it was orally argued by appellant's able attorney. In addition, a very lengthy and elaborate brief was filed, all of which was also fully considered and appellant's brief studied carefully. Notwithstanding this, in dictating the opinion, some mistakes in stating some of the facts were made. These have been pointed out in appellant's arguments on his motion for rehearing. It is difficult to understand how such mistakes are made in dictation, and especially how they escape detection when reading the opinion and discussing the case in consultation. Such mistakes are always to be regretted. It is in substance conceded by appellant's attorneys in their arguments on rehearing that some, if not all, of these mistakes are somewhat immaterial. We think none of them are material.

In appellant's motion for rehearing he presents several of the same matters passed

upon and decided in the original opinion. It is unnecessary to take up and discuss most of them again, but we will take up and discuss the material and important ones. Appellant, in presenting his motion for rehearing, by each of his attorneys, has filed quite lengthy, vigorous, and able arguments presenting their views and contesting the original opinion. These, also, have had full and careful consideration. We will now pass to the consideration of said material and important questions.

[17] The first of these is appellant's contention that the ground of his motion for new trial, claiming that the verdict of the jury was reached by lot, should have been considered and the evidence of some of the jurors heard by the lower court, and that this court erred in not reversing the case because thereof. This matter was sufficiently stated in the original opinion. It is unnecessary to restate it here. As we understand appellant's contention and argument, it, in substance, is that his motion for new trial on that ground did not have to be sworn to in order to present the question and, require the lower court to swear and hear the jurors testify; contending that the statute does not so require. Concede, for the sake of the argument, that our *statute*, in stating on what grounds a motion for a new trial may be granted, does not in express language require the motion setting up matters extrinsic the record to be sworn to, then what does our law say shall be required? Article 28, C. C. P., in unmistakable, clear, and explicit language says:

"Whenever it is found that this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern."

In 12 Cyc. 748, in like language, it is said:

"In England at common law, and in most states as matter of practice, the motion for a new trial, when founded on facts not of record, is made on affidavits signed and sworn to by defendant or by some person having knowledge of the circumstances."

Precisely to the same effect is 1 Chitty's *Crim. Law*, §59.

In 2 Thompson on Trials (2d Ed.) § 2758, he says:

"By the practice of a majority of the states, where the grounds of new trial are other than that the verdict or judgment are contrary to the law or evidence, or that the trial court erred in some matter of law, the motion must be supported by affidavit, unless it is made upon the minutes of the court, by bill of exceptions or a statement of the case, according to the practice of many states. The grounds usually enumerated are (1) irregularities; (2) misconduct of the jury, etc. \* \* \* In the absence of statutes requiring affidavits in support of the motion, by the practice of many states, they are held necessary. \* \* \*"

To precisely the same effect is his same section in his first edition.

In 14 Ency. of Plead. & Prac. p. 904, it is again said:

"When the ground for a new trial consists of extrinsic facts and matters not of record, such as irregularity of the court, jury, or prevailing

party, or accident and surprise, or misconduct, or newly discovered evidence, the proper method is to set forth the facts by affidavits in support of the motion, as stated heretofore in considering these grounds for a new trial."

In 12 Ency. of Plead. & Prac. pp. 557-559, it is said:

"When the objection has not been waived, misbehavior on the part of the jury is properly taken advantage of by a motion for a new trial. \* \* \*

"When a party moves for a new trial on the ground of misconduct which occurred during the trial, he must aver and show affirmatively that both he and his counsel were ignorant of the misconduct charged until after the trial.

"An application for a new trial on the ground of misconduct must be supported by affidavits as to the facts.

"An affidavit to secure a new trial on account of the misconduct of a juror must clearly set out the facts constituting the alleged irregularity.

"The affidavit should be positive as well as specific, and should be sustained by oath and not merely founded on information and belief."

In 28 Cyc. p. 11, it is said:

"In many jurisdictions it is a rule of practice that a motion based on facts outside of the record, or of which the court cannot take judicial notice, must be supported by affidavits showing such facts."

We think there can be no sort of doubt but that these authorities establish, beyond question, that, in order for appellant to have had considered his ground of motion attacking the verdict of the jury on any matter extrinsic the record itself, as a matter of pleading, he must support it by his own affidavit or the affidavit of some one else specifically showing the truth of the grounds of attack. And when it is not so sworn to or supported, it presents no question requiring the lower court to consider or investigate it.

But we are by no means left to common-law authorities or authorities outside of this state. They are ample, clear, and to the point in this state.

Judge White, in section 1155 of his C. C. P., expressly gives the form of a motion for new trial under our statute, and under subdivision 3 of article 837, prescribing the ground of verdict by lot on which a motion for new trial shall be based, he gives this form:

"(3) The verdict of the jury was decided by lot [or, in a manner other than by a fair expression of opinion by the jurors] in this, to wit [here set out the facts], and defendant, in support of this ground for new trial, submits herewith the affidavits of the jurors John Smith and Thomas Jones, etc., who sat upon and tried the case, said affidavits being marked as exhibits A and B."

In Johnson v. State, 24 S. W. 94, when Presiding Judge Hurt and Judges Davidson and Simkins constituted this court, through Judge Simkins, they said:

"The other ground upon which a reversal is sought is by impeaching the verdict of the jury. This, however, cannot be considered, as the affidavit does not appear in the record as being signed or sworn to. We do not hesitate to say that if we were to consider it no good reason is shown for reversing this case. It does not pretend to state the names of the jurors who made the statement against appellant, nor that it in-

fluenced the jurors' finding in any way. There was no issue tendered the state in said motion. The judgment is affirmed."

In Morrison v. State, 89 Tex. Cr. R. 522, 523, 47 S. W. 369, 370, when this court was composed of said Presiding Judge Hurt and Judges Davidson and Henderson, through Judge Henderson, they said:

"Appellant assigned as one of the grounds of his motion for a new trial that the jury received other testimony than that developed on the trial of the case, to wit, that one of the jurors stated in the jury room that a former jury which tried the case found defendant guilty, and assessed his punishment at 20 years in the penitentiary. Appellant stated in his affidavit that he was unable to procure an affidavit from any of the jurors as to the facts, because they were not willing to make one, and asked the court to summon the jurors who tried the case, and place them under oath, so that the defendant might have the benefit of their testimony. The state made a motion to strike out said affidavit and that part of the motion, because it was too general, and did not set up the facts. The court granted the motion, and struck out that part of the defendant's application for a new trial. Appellant then offered to show by one A. Cohen that he was one of the jurors who tried the case, and that, after the jury had retired to consider their verdict, some member of the jury stated that defendant on a former trial had been convicted, and given 20 years in the penitentiary; that said statement about what defendant had received as punishment at a former trial influenced him in the verdict rendered on the last trial. The district attorney objected to this evidence on the ground that it should be presented by affidavit, and not stated orally; whereupon defendant's counsel stated that the witness was unwilling to make an affidavit, but that he would swear to the above facts upon the stand under oath; and the court, over the defendant's objections, refused to allow said witness to testify as aforesaid. It is not necessary to decide the questions involved in this matter, as the case must be reversed on other grounds heretofore stated. We are inclined to the opinion, however, that the affidavit seeking to attack the verdict of the jury was too general. The practice of allowing jurors to impeach their verdict is not countenanced in the courts of most of the other states of the Union. See 2 Thomp. on Trials, § 2618, and authorities there cited. Our courts, however, have taken a contrary view, and we have gone to a considerable extent in authorizing jurors to impeach their verdicts. The attempted impeachment, here, however, as far as the predicate was concerned, stated no facts, and, we think, was too general in its terms. It is not deemed necessary to discuss what effect the announcement in the jury room that appellant had previously been convicted, and his punishment assessed at 20 years in the penitentiary, may have had upon the jury. The mere statement of that fact in the jury room may not have operated to the prejudice of appellant. Before a case would be reversed on this ground, some prejudice must be shown. The bare statement that a former jury had tried the case, and rendered a certain verdict against defendant, would not ordinarily cause a reversal."

Again, when Presiding Judge White and Judges Hurt and Davidson constituted this court, it, in Gordon v. State, 29 Tex. App. 411, 16 S. W. 337, in an opinion by Judge Davidson, held: He stated that appellant filed his motion for new trial and therein alleged that on the trial below he did not plead, nor did his counsel for him, nor was he called on to plead, nor offered the privilege of pleading, and that neither he nor his

counsel refused to plead so as to authorize the court to enter one for him.

"This motion was sworn to by the defendant in the court below. There was a sworn motion also to correct the judgment by eliminating therefrom the recitation of the plea of not guilty therein entered. This, as well as the motion for a new trial, was overruled. There are no affidavits in the record as to the truth of these statements of defendant, except his own."

Then in the opinion is copied what purports to be an affidavit not signed, purporting to be the affidavit of two of his attorneys, wherein it is stated that they examined said motion for new trial, and that the matters and things set out therein are within their knowledge true and correct. To the bottom of this document this appears:

"Witness my hand and seal of office at Ft. Worth, this the 24th day of January, 1891.

"L. R. Taylor, District Clerk."

The opinion proceeds to state that this document was filed January 24, 1891. It was not signed by either of the parties named in the body of it. It did not have the jurat of the officer attached to it, certifying the necessary oath was administered to said named parties, nor is there anything to indicate that they were sworn to its contents. Judge Davidson then says:

"\* \* \* It will be seen that it is not an affidavit. It cannot be treated as an affidavit. Nothing will be indulged in favor of such matters when they operate as an attack upon the judgment of a court of record, to the end that the judgment may be set aside or vacated on appeal. Every presumption must and will be indulged by appellate courts, tending to uphold and sustain judgments of trial courts. A party attacking such judgments must make it apparent that sufficient error exists to set aside or annul them."

And he affirmed said judgment.

In a death penalty case, which was affirmed (*Shutt v. State*, 71 S. W. 18), this court, when composed of Davidson, Presiding Judge, and Judges Henderson and Brooks, through Judge Brooks, said:

"In motion for new trial he (appellant) also complains that the foreman of the jury, Hardy, prior to being accepted upon the jury, stated that he did not have time to serve upon the jury; that he would acquit or convict defendant in five minutes. To strengthen appellant's position, he insists that the verdict was returned in 30 minutes. We cannot review this question, in the absence of bill of exceptions. And there are no affidavits presenting this matter, but it is brought forward in the motion sworn to by appellant. It is well known that issues of fact made in motion for new trial must be sustained by evidence dehors the motion. The fact that appellant swore to the same is not sufficient"—citing *Gordon v. State*, supra.

In the case of *Moss v. State*, 39 Tex. Cr. R. 4, 41 S. W. 832, on rehearing, this court, through Judge Davidson, said:

"The grounds of the motion for a new trial for that reason were not, and could not be, considered. The motion for rehearing is based upon the fact that said statement was not considered, and asserts as a fact that the county judge approved a statement of facts, and had it filed during the term at which the case was tried. This motion is signed by the attorneys, but there is nothing to indicate to this court that said statement of facts was approved and filed, or

that there was any statement of facts prepared in the case, outside of this statement of the motion. This motion is not sworn to, and there is nothing in it, by way of certificate or affidavit or certified copies, that there is a statement of facts on file in the trial court, approved by the judge. As the matter is presented to us in the motion, we cannot consider it."

In *Dignowitty v. State*, 17 Tex. 532, 67 Am. Dec. 670, when our Supreme Court had criminal jurisdiction, on this subject it said:

"The application for a new trial, resting upon the unsupported affidavit of the party, was manifestly insufficient, though its force had not been impaired, by the counter affidavit, or by anything appearing to the contrary, or the matters deposed to by the accused."

In *Goodson v. State*, 41 S. W. 605, this court, through Judge Davidson, said:

"As the second ground of the motion for a new trial, appellant stated that Marcus Taylor was related to W. S. Brooks within the third degree, and the record shows that W. S. Brooks was joint owner of the stolen animal, and that therefore Marcus Taylor was disqualified as a juror. These matters are in no way verified in any part of the record, except that Brooks was a part owner of the animal, and there is no bill of exceptions showing that Marcus Taylor was a juror in the case. There is nothing except the simple statement of appellant in his motion for a new trial, indicating that Marcus Taylor was related to W. S. Brooks. If counsel desired this matter considered on appeal, they should have established it in some manner."

See, also, *Lester v. State*, 2 Tex. App. 446.

In *Stubblefield v. Stubblefield*, 45 S. W. 967, the Court of Civil Appeals of the Third District, through Chief Justice Fisher, on this question, said:

"The point presented in the motion for a new trial that the juror Daniels was not qualified to sit upon the jury was not raised in a way that required the trial court to pass upon that question. Daniels, it seems, was one of the jurors that participated in the trial of the case. No objection was raised at the time as to his disqualification, which consisted, as stated in the motion for a new trial, of bias in favor of the plaintiff, and that he made statements to the jury after retirement to deliberate upon their verdict. The conduct of the juror in this respect, and his disqualification by reason of bias in favor of the plaintiff, are only called to the attention of the court in the motion for a new trial, which was not sworn to; nor is it supported by any affidavit whatever."

In *Kahanek v. Galveston, etc., R. Co.*, 72 Tex. 477, 478, 10 S. W. 570, 571, Chief Justice Stayton of our Supreme Court, in passing upon what character of affidavit could be considered in a motion for new trial, said:

"It may be claimed, however, that appellant offered such evidence in connection with his motion for a new trial as was sufficient to show that the county judge was not disqualified. That consisted of an unsworn statement made by the county judge on the 10th of December, 1887, and filed with the motion. It was no part of the proceedings or record of the proceedings which were had on August 6, 1887, in the county court. No bill of exceptions was taken to the action of the court in overruling the motion for a new trial, and we are unable to ascertain whether the court considered or refused to consider the statement made by the county judge. If he refused to consider it he did not err, even if upon an issue made he might have heard evidence for the respective parties as to

the qualification of the county judge. *Slaven v. Wheeler*, 58 Tex. 23."

"When matters of fact are involved in the rulings of the court below, such rulings will not be revised by this court unless the facts are substantiated by proper bill of exception. Statements in a motion for a new trial or an assignment of errors do not suffice." *Marshall v. State*, 5 Tex. App. 273; *Sharp v. State*, 6 Tex. App. 658.

In *Jordan v. State*, 10 Tex. 501, in discussing the ground of a motion for new trial of matters dehors the record, the Supreme Court said:

"This court cannot notice the mere statements of counsel made in their motion for a new trial."

And further, on page 502, of 10 Tex., said:

"In considering the motion, the court may judge, not only of the competency, but of the effect of evidence. There may be cases where the court might well grant a new trial, if, in the opinion of the presiding judge, injustice had been done; while, at the same time, should a new trial be refused, this court would not be warranted in reversing the judgment. The judge who presides at the trial is afforded much better and more ample means of judging of the merits of the application than the revising court can be. And therefore it is the governing rule of the action of this court, affirmed and enforced by repeated decisions, from the earliest cases upon the subject to the present time, not to reverse the judgment of the district court refusing a new trial, unless some principle of law has been violated, misconceived, or disregarded, to the prejudice of the party, or there is good reason to apprehend that injustice has been done, in refusing the application. Though the district court, in its discretion, upon the application of the accused, might have granted a new trial, if, from the evidence and circumstances of the case, as they were apparent to the presiding judge, in his opinion, the ends of substantial justice required it; yet, from anything before us in the record, we cannot say that any principle or rule of law has been infringed or injustice done."

In *Short v. State*, 36 Tex. 645, the Supreme Court said:

"After the verdict of the jury the defendant filed a motion for a new trial, and assigns as grounds for the motion two alleged errors. The second, which is that there were not 12 competent and legal jurymen impaneled to try said case, appears first in the motion for a new trial, and is wholly unsupported by the record, and therefore deserves no further notice here."

In *Forcy v. State*, 60 Tex. Cr. R. 214, 131 S. W. 585, 32 L. R. A. (N. S.) 327, it is said:

"It has been many times held that a mere statement of a fact in a motion for new trial or in bill of exceptions is not the equivalent of finding that the fact so stated is true."

In *Salmon v. State*, 154 S. W. 1026, this court said:

"Appellant contends, in his motion for new trial, that the verdict of the jury was reached by lot. This motion is not sworn to, and is in no way supported by any affidavit. Under such circumstances, the court did not have to consider it."

We have already quoted in the original opinion what this court said in *Bryant v. State*, 153 S. W. 1156:

"It has always been held that, when matters extrinsic the record \* \* \* are sought to be raised in motion for new trial, such ground should be verified by the affidavit of the appellant."

In *Serop v. State*, 154 S. W. 538, this court said:

"In the motion for a new trial, defendant alleges that the jury discussed on their retirement the prevalence and frequency of robbery in the city of Dallas, and alleges that this discussion was detrimental to defendant. This ground of the motion is not supported by the affidavit of any juror nor any person who purports to know that such matters were discussed by the jury; therefore it presents no error."

While some of these cases may not be directly in point, the trend of all of them are.

The italics in quoting above are ours. In the original opinion we also cited *Maples v. State*, 60 Tex. Cr. R. 171, 131 S. W. 567, *Patterson v. State*, 63 Tex. Cr. R. 297, 140 S. W. 1128, and *Scott v. State*, 143 S. W. 610, to the effect that the affidavits contesting the grounds of his motion for new trial extrinsic the record were void and could not be considered when made before the attorney for either side in the case. There are other decisions to the same effect unnecessary to cite. This court, through Judge Davidson, in said *Maples Case*, supra, said:

"Under our statute the court may decide a motion for new trial on contested issues by means of affidavits or by hearing testimony. Of course, the affidavits mentioned in the statute means such as can be legally taken. An affidavit taken by a party not authorized to administer oaths in the particular transaction would not constitute a legal affidavit, and therefore not the basis of testimony on objection"—citing *Testard v. Butler*, 20 Tex. Civ. App. 106, 48 S. W. 753; *Rice v. Ward*, 93 Tex. 532, 56 S. W. 747; *Blum v. Jones*, 86 Tex. 492, 25 S. W. 694; *Floyd v. Rice*, 28 Tex. 341; *Rice v. Ward*, 93 Tex. 532, 56 S. W. 747; 13 Cyc. 352, for collation of authorities.

Our statute (article 837, C. C. P.) prescribes: "New trials, in cases of felony, shall be granted for the following causes, and for no other." Then follows nine separate and distinct grounds specified in the statute. Eight of them—all except the ninth—provides for matters which can be used to attack the verdict of the jury, which are extrinsic the record, and are not included therein. Even within some of these eight, there may be embraced several distinct and separate matters.

Appellant even urges strenuously that the lower court should take as confessed, unless expressly by written pleadings contested by the attorney representing the state, such extrinsic attack of the jury, unsupported by anything on earth, affidavit or otherwise, merely setting up such ground in the motion for new trial, and hold as sufficient, and require the court to grant a new trial. Such doctrine cannot for one moment be sanctioned by this court. The rules of law above shown, wherein it is expressly required that any ground in a motion for new trial which is extrinsic the record, attacking the verdict of the jury, must and shall be supported by affidavit, in order to even raise the question so as to authorize the lower court to consider it at all, is absolutely essential to the

due administration of justice and the proper procedure in the trial of causes in the court below. Otherwise what a floodgate of mere "fishing" with a dragnet would be turned loose, unsupported by affidavit or the record, or otherwise! Verdicts and judgments of the lower court, if such were the case, would be mere farces. The trial courts would be converted into courts for the trial of the jury and not of an accused. The time of the term of court would be taken up in hearing the 12 jurors testify in every case the details of how they arrived at their verdicts. And, in addition, it might be necessary to hear many other witnesses. The jurors would be attacked in their testimony by admissions or statements claimed to have been made out of court. Their general reputation for truth and veracity might also be attacked, and a great number of witnesses sworn, and testify on various phases of such "fishing" unsworn grounds for new trial. All merely on a "fishing" statement made in the motion for new trial that they, in some unknown and unalleged way, improperly arrived at their verdict. Such contests would engender anything else but the due and orderly administration of the law and fair and legal trials and verdicts. The practice in the lower courts has all the time been, for an accused, himself, or some one for him, who knows the facts, to swear to any extrinsic attack of the verdict, in order to have such ground considered.

[18] Before passing from this question, we desire to state that our recollection is clear and distinct that appellant's attorney, in presenting this question in oral argument, on the original submission of the case, stated to the court, in effect, that if the court below had heard the jurors, who were present, testify, it would have been shown that they agreed to set down the respective time they each were in favor of assessing as a penalty against appellant, add that up, and divide it by 12, and, when they did so, the quotient amounted to 19 years and 2 months, or 19 years and 4 months; we are not clear and distinct whether it was 2 or 4 months, but one or the other. And that when they found that their experiment or agreement resulted in this time, that they, thereupon agreed—all of them—to fix the amount of the punishment at 19 years even, and not 19 years and 2 or 4 months, as the case was, the result of which, in our opinion, would be that while they experimented as to what the number of years, under the process stated, would amount to, when they ascertained that it would be 19 years and 2 or 4 months, they thereupon abandoned their previous agreement to abide by the result, did not abide by it, but unanimously agreed to fix a less time, and did fix a less time than the quotient reached in the manner suggested. Under many decisions of this court, if that was the case, the verdict was a valid one, and the court should not have set it aside

even if he had heard the testimony. *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773; *Cravens v. State*, 55 Tex. Cr. R. 521, 117 S. W. 156, 16 Ann. Cas. 907; *Reyes v. State*, 55 Tex. Cr. R. 425, 117 S. W. 152; *Goodman v. State*, 49 Tex. Cr. R. 191, 91 S. W. 795; *Barton v. State*, 34 Tex. Cr. R. 613, 31 S. W. 671; *Hill v. State*, 43 Tex. Cr. R. 586, 67 S. W. 506; *Keith v. State* (Cr. App.) 56 S. W. 629; *Leverett v. State*, 3 Tex. App. 217. It is needless to cite the many other cases to the same effect. There is no intimation in this court, nor was there in the lower court, that any juror hesitated about finding appellant guilty of murder in the second degree. In fact, we take it this was an absolute certainty. They at first differed merely as to the number of years they should fix as his punishment.

In discussing one of appellant's bills of exceptions, wherein the state was permitted to contradict the testimony of appellant's wife wherein she testified that deceased was the father of both of her children, in some way we incorrectly stated this:

"This older child was born within a few months *prior* to the marriage of deceased and Sallie and the question arose as to the paternity of that older child. Her conception resulting in the birth of this child occurred months before deceased and she were married."

Taking this statement as a whole, it certainly could not be misleading, did not and could not have had any effect on the decision. However, where the words "*prior to*" in the sentence quoted above, beginning with, "*this older child was born within a few months prior to the marriage of deceased and Sallie.*" appear, the use of said words "*prior to*" was a mistake, and instead should have been "*after*." For the evidence, without contradiction, shows that this older child of Sallie was born within a few months *after* her marriage to deceased, and, as stated in the latter part of the quotation above, "*her conception resulting in the birth of this child occurred months before deceased and she were married.*"

There is but one other question we will discuss briefly which is very earnestly pressed by appellant; and that is his contention that the evidence was wholly insufficient to sustain a verdict for murder in the second degree, and that it excluded any other finding of guilt than manslaughter. We deem none of the other questions again presented in the motion for rehearing require any discussion.

Appellant, in his argument for rehearing, claims that this court, in the original opinion, in discussing some of the evidence as to murder in the second degree, incorrectly stated the effect of some of the evidence. What he calls attention to and urges was said more in discussing manslaughter than murder in the second degree. We did not undertake to state all the evidence, nor detail it. We were merely stating some of the

conclusions which the whole evidence authorized. Such mistakes in our conclusions, if there are any, are of no effect upon the conclusions reached, nor the decision of the case. Different parties in studying the record might reach different conclusions, perhaps. We were looking at it from a wholly disinterested standpoint. Appellant's attorneys, naturally and properly, look at it from a partisan standpoint. They urge every particle of evidence, and cull it from the whole record, that tends in any way to support their contention. We do not so look at it, nor consider it; but, as stated above, we do so wholly disinterested, not biased, or prejudiced, and with the view of seeing whether or not the jury from the whole evidence were justified in reaching the conclusion they did. We think none of these matters are of sufficient importance to restate or rediscuss them.

There can be no question, and we for no moment in the original opinion intimated, that manslaughter was not pertinently and forcibly raised by the evidence. It unquestionably was. But that by no means excludes the fact that murder in the second degree was also shown. The jury and the lower court heard all of the witnesses, saw their manner of testifying, and unanimously reached the conclusion that, while manslaughter was raised, appellant was not guilty of that offense, but, instead, was guilty of murder in the second degree. The evidence, without reciting it, is amply sufficient to sustain this unanimous opinion of the 12 disinterested and impartial jurors and of an able and impartial trial judge.

[18] In accordance with our statute, two clear requisites are necessary to constitute manslaughter: First, "sudden passion"; and, second, that that "sudden passion" must arise from an "adequate cause." And that, in order to show that an unlawful homicide is manslaughter and not at least murder in the second degree, such homicide must be "committed under the immediate influence of sudden passion," and that "sudden passion" must arise "from that adequate cause." If either of these requisites are wanting, then the homicide cannot be manslaughter, but must be murder in the second degree at least. *Puryear v. State*, 56 Tex. Cr. R. 233, 118 S. W. 1042. However "sudden" the passion, or whenever it was aroused, if the evidence does not show that it was from an "adequate cause," the homicide cannot be manslaughter. And whatever the "adequate cause," if the homicide was not committed "under the immediate influence of sudden passion arising therefrom," it cannot, under the statute, be manslaughter. See *McKinney v. State*, 8 Tex. App. 645; *Ex parte Jones*, 81 Tex. Cr. 448, 20 S. W. 983; *Massie v. State*, 30 Tex. App. 69, 16 S. W. 770; *Blackwell v. State*, 29 Tex. App. 200, 15 S. W. 597; *Miller v. State*, 31 Tex. Cr. R.

639, 21 S. W. 925, 37 Am. St. Rep. 836; *Clore v. State*, 26 Tex. App. 624, 10 S. W. 242; *Hill v. State*, 11 Tex. App. 456; *Neyland v. State*, 13 Tex. App. 536; *Childers v. State*, 33 Tex. Cr. R. 509, 27 S. W. 133; *Pickens v. State*, 81 Tex. Cr. R. 554, 21 S. W. 362; *Breedlove v. State*, 26 Tex. App. 453, 9 S. W. 768; *Jordan v. State*, 62 Tex. Cr. R. 350, 137 S. W. 133; *Oldham v. State*, 63 Tex. Cr. R. 527, 142 S. W. 13; *Alexander v. State*, 138 S. W. 737.

In *Ex parte Jones*, 81 Tex. Cr. R. 447, 448, 20 S. W. 983, 984, this court correctly held:

"But the Code has, in cases \* \* \* of insulting words and conduct to female relatives, extended the time in which homicide, when committed, may still be manslaughter. In such cases the law requires the homicide to occur as soon as \* \* \* the party killing may meet the one giving the insult, after being informed thereof. \* \* \* If not done at such time, the injury may become evidence of malice and preparation to kill; evidence of premeditation and deliberation. \* \* \* The law made a further concession to human frailty when it divided murder into two degrees. \* \* \* Under our Code, a homicide committed in *sudden* passion, upon an inadequate cause, is murder in the second degree. \* \* \* But it is to be observed it must be the *passion that strikes*; for if the slayer broods over his injury (or insult), and deliberately forms the design to kill, and prepares for it, the presence of passion at the moment of the premeditated homicide cannot change its nature. The law makes no allowance for the *passion of revenge*. While it concedes something to the instinctive, unreasoning *passion*, that *blindly strikes*, it has no sympathy with the vindictive, calculating spirit, that deliberately premeditates and maliciously acts."

[20] The court in this case expressly and pointedly, in effect, submitted to the jury that if the mind of the appellant was under the immediate influence of sudden passion, aroused by adequate cause, and that cause was the insult to his wife, to find him guilty only of manslaughter.

"In the absence of the passion that reduces a homicide to manslaughter, the unattended adequate cause may become evidence of the most cogent force showing the antecedent malice on the part of the slayer. In such case the adequate cause, unattended by the necessary passion rendering the mind incapable of cool reflection, instead of constituting an extenuation of the crime, may and would become an aggravating circumstance attending the commission of the offense." *Massie v. State*, 30 Tex. App. 69, 16 S. W. 770.

To the same effect is *Miller v. State*, 31 Tex. Cr. R. 639, 21 S. W. 925, 37 Am. St. Rep. 836; *Ex parte Sherwood*, 29 Tex. App. 334, 15 S. W. 812, and many other cases.

[21] Appellant had known of the insulting conduct of deceased to his wife in a letter he had written to her months before this killing. These insults had been renewed just two days before the killing. In the meantime, and all along during the same time, a controversy had arisen between appellant's wife and him and the deceased over the custody of the deceased's and appellant's wife's younger child. Appellant considered all these matters. He went to town in the

morning of the day the killing occurred and investigated the divorce decree between the deceased and his wife as to the custody of this child, talked to parties about it. He himself knew the deceased was then in the same town; he had seen him. He deliberately, and with malice in his heart, went and bought a double-barrel shotgun of a special bore that shot with unusual force the deadly buckshot. Specially bought the largest buckshot he could find for this gun, declining smaller shot. He loaded this gun, while in town, with these deadly missiles. The gun was wrapped up with paper so as to conceal it, and he carried it about in this condition. Mr. Wells, a witness of the killing, a disinterested white man, standing within a few feet of the appellant at the time it occurred, said of this wrapped gun thus, "I thought it was window shades"; that appellant stood there, knowing that his intended victim was in that immediate vicinity, because he had seen him go down that way shortly before then. Standing thus in wait for his victim, he saw him approaching wholly unarmed, with his hands swinging down by his side. The deceased, not discovering appellant, walked leisurely within a few feet of him. And as the same witness, Mr. Wells, testified:

"At this time Emmett Moore was just stepping up on the sidewalk of the curb, and just as he made the second step Mannie cocked the gun and said, 'There is the son of a bitch now!' and fired. At the time he was shot, Emmett seemed to be walking along leisurely with his hands down, going towards Mr. Cardwell's front door. I did not hear him say a word. As the gun fired, he put his coat around his neck and made towards Cardwell's store. After Mannie fired the first shot, he followed Emmett with his gun drawn and kept snapping it. Somebody came up and helped take the gun away from Mannie. Mannie followed Emmett to Cardwell's store."

And the evidence, without contradiction, further shows that, as he staggered into Cardwell's store with appellant following him and snapping his gun at him, he fell dead.

Many other circumstances going to show murder in the second degree might be recited. The evidence, in our opinion, was amply sufficient to sustain murder in the second degree.

The motion for rehearing is overruled.

DAVIDSON, J. (dissenting). At the time of the rendition of the opinion by the majority I entered my dissent. In the multiplicity of matters I overlooked filing the reasons for that dissent at an earlier date.

My Brethren, through Presiding Judge PRENDERGAST, reached the conclusion that because of one of the grounds of the motion for new trial, to wit, that the verdict of the jury was reached by lot, not being supported by the affidavits of any of the jurors, it could not be considered. With that conclusion I cannot agree. A verdict by lot

is interdicted by article 837 of the Code of Criminal Procedure, 1911. Article 837 provides that:

"New trials, in cases of felony, shall be granted for the following causes: \* \* \* (3) Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors."

This question was raised as one of the grounds of the motion for new trial. This was not supported by the affidavit of any juror. Appellant offered eight of the jurors as witnesses to prove the verdict was reached by lot, and the jurors would have so testified, and their evidence would have brought the verdict clearly within the most rigid rule required by any decision, and would have proved beyond any question that the verdict was by lot. I do not care to repeat the evidence. The trial court refused to entertain it because no issue had been raised by the state. In other words, this ground of the motion had not been controverted by the state. This furnishes no excuse; in fact, it would rather tend to augment appellant's side of the case. It would not do to lay down the rule that, because the state does not controvert an issue on motion for new trial, therefore the court will not consider it. If this rule obtained, then the conclusion would be irresistible that the state can defeat any ground of the motion for new trial and set aside the statute by failure or refusal to join issue with the defendant, and that therefore the defendant would be denied his guaranties of a fair hearing on his legal rights. The state by remaining silent or refusing to join issues cannot defeat appellant of a fair trial, or a hearing upon any issue he suggests to the court, which is favorable to his side of the case. The statement of the proposition demonstrates the error. The majority opinion, however, seems to place this upon a different rule: that is, that the ground of the motion for new trial could not be considered because it was not verified or accompanied by affidavits to the effect that the verdict was by lot. I do not so understand the law, nor do I believe it has heretofore been so understood either by the Legislature or the courts. As I understand the majority opinion, it is admitted, or practically so, that the statute does not demand accompanying affidavits, and that, where the motion is silent on this question with no accompanying affidavits, the common-law rule will prevail. Therefore they reach the conclusion, under the authorities they cite, that it is necessary that the affidavits accompany this ground of the motion to verify it.

Another article of our Code of Criminal Procedure provides that the provisions of such shall be liberally construed to obtain the objects and purposes declared by the Legislature in such code. The fundamental proposition of criminal procedure is to give the accused a fair trial before an impartial jury,

and this under the rules prescribed by the Legislature. Among other things, it is provided that no verdict can stand if obtained by lot or any other unfair means. This statute should be liberally construed to attain its purpose, to wit, to prevent such verdict by lot or other unfair means. This is the legislative will as expressed in the statute, and should be so construed as to prevent such verdict. The statute has not provided this issue shall be raised by affidavits and not otherwise. In the nine grounds set out in the statute for which new trials may be granted, the Legislature did not see proper to provide these shall be raised by affidavits as prerequisite to consideration by the court. Under subdivisions 6 and 8 of article 837, affidavits may be filed, and under subdivision 6 the motion for new trial, based on newly discovered testimony, shall be governed by the same rules as those which regulate civil suits. That subdivision is not further noticed because not in any way called in question here, nor has it any relation to this question further than it would emphasize the fact that under subdivision 3 the affidavit is not required. Subdivisions 6 and 8, *supra*, are rather exceptions in the statute emphasizing the fact that the other grounds of the motion for new trial are not to be verified by affidavit; that is, it is not necessary to so verify them. Subdivision 8 refers to the misconduct of the jury, and it is provided that, where from the misconduct of the jury the court is of the opinion the defendant has not received a fair and impartial trial, it shall be competent to prove such misconduct by the voluntary affidavit of jurors, and the verdict may also in like manner be sustained by such affidavit. It will be noticed, however, that this subdivision does not make it a prerequisite to consideration of the question as to the misconduct of the jury that it be verified by affidavit. Article 841 of the Code of Criminal Procedure expressly provides that the state may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial; and, in such case, the judge shall hear evidence, by affidavit or otherwise, and determine the issue. If the defendant files his affidavit, and there is no issue suggested by the state, the motion for new trial will be passed upon from the affidavits filed. If there are counter affidavits or a controversy about the matter, the court may then hear evidence, and this he may do either by affidavits or by other testimony. This is expressly so by the terms of legislative enactment; and it is to be noted there is a difference between subdivision 3 of article 837 and subdivision 8 of the same article. In one an affidavit may be presented, while in the other it is not required or even mentioned.

Clearly, under article 841 the court shall hear evidence by affidavit or otherwise and determine the issue, because of the statute.

This may be done by affidavit or by other character of testimony, either verbal or documentary. This can be introduced as any other evidence where it is relevant, necessary, or admissible. Article 837 provides that new trials in cases mentioned under the terms of the statute shall be granted for the reasons therein set out. The third subdivision is where the verdict has been had by lot, or any other manner than by the fair expression of the opinion of the jurors. This does not require or intimate that affidavits are necessary. The question can be determined either by affidavits or any other character of legitimate testimony. This court cannot interpolate the statute and make it requisite under this subdivision that affidavits be filed. If they are filed, they will be entertained by the court. If they are not filed, and evidence is offered to sustain or justify the ground of the motion for new trial under article 841, it will be heard. For the court to interpolate or add to this subdivision of the article the requirement of an affidavit is an assumption of legislative prerogatives. This cannot be done by the express terms of article 2, § 1, of the Constitution, and not only so, but such assumption would be plainly violative of legislative authority and enactment as under the terms of articles 837 and 841, *supra*. The rule laid down by the majority is of the harshest and strictest nature and is as far removed as possible from the statutory rules. It seems to be destructive of the very thing the statutes were enacted to prescribe and to perpetuate. I do not believe it the correct doctrine that the rule of liberal construction applies only when favorable to the state or conviction or affirmation. The Legislature has not so prescribed; on the contrary, it is provided that the presumption of innocence and the reasonable doubt shall obtain, and this follows the case to its final conclusion. Our criminal procedure in all of its rules providing for trial before a jury is enacted to the end that the trial may be had under prescribed forms and requirements. That affidavits, under the circumstances of this case, are prerequisite to presenting the question of a vicious verdict by lot, seems to me to be assumed, outside the statute, and subversive of its plain provisions. Speaking of this question, in *Stanley v. State*, 16 Tex. App. at page 400, Presiding Judge White said:

"If the evidence had been claimed as newly discovered, then, indeed, the supporting affidavit of the proposed witness would have been requisite to the validity of the motion. Code Crim. Proc. art. 777, subdiv. 6; Clark's Crim. Law, of Texas, p. 571, note, § 6. In all other respects, it is only when the state has taken issue with the defendant upon the truth of the causes set forth in the motion for new trial that the judge hears evidence, by affidavit or otherwise, to enable him to determine the issue. Code Crim. Proc. art. 781. When not controverted, and not based upon newly discovered evidence, no supporting affidavits are required. If the state took issue on and controverted the motion in this case, the record fails to show it."

known, and by stamping him, the said E. Zabola, with his feet and by shoving, throwing, casting, and bumping the body of said E. Zabola against the cross-ties and rails of a railway track and against the earth and ground, against the peace and dignity of the state."

The court charged the jury in this connection:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did unlawfully beat, bruise, wound, and strike and thereby kill E. Zabola as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than five years."

Several objections were urged to this charge; among others, that it authorized the jury to convict appellant if he killed deceased with a deadly weapon or instrument reasonably calculated or likely to produce death. Objection is also urged to that portion of the charge which authorized a conviction if the defendant killed the deceased in a sudden transport of passion aroused without adequate cause and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury. Upon another trial the court should submit the issues to the jury as set out in the indictment. There was no allegation in the indictment that deceased was killed with a deadly weapon. While this might not be a serious matter and for which the judgment ought to be reversed, about that we express no opinion, but upon another trial the court should submit the allegations contained in the indictment. A deadly weapon or instrument reasonably calculated, etc., is not set out in the indictment, unless it be inferred from the general allegations "some means unknown to the grand jurors," or unless it be held that the allegation which says he beat him against the railroad track and ties, to meet this phase of the charge. We do not believe so. However, under the other phase of the charge, under all of our decisions, this charge is fatally defective. It would not be murder in the second degree, as stated by the court, if appellant killed in a sudden transport of passion aroused without adequate cause and not in defense of himself. Murder in the second degree is a killing upon implied malice; it is a killing with express malice eliminated, and without manslaughter, self-defense, or other extenuating circumstances, on the other. The jury was not informed of what is meant by "sudden transport of passion aroused without adequate cause." And manslaughter is nowhere in the charge given; no instruction upon the law of manslaughter was embodied in the charge, nor was any

definition given of what it took to constitute adequate cause. See *Pollard v. State*, 45 Tex. Cr. R. 126, 73 S. W. 953; *Whitaker v. State*, 12 Tex. Cr. App. 436; *Beckham v. State*, 69 S. W. 536.

In this connection, that part of the charge is urged as error which says that:

"Implied malice is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree."

This charge, standing alone without some explanation as to what is meant by mitigation, extenuation, or justification, is not sufficient. While the court's charge may be sufficient upon the definition of self-defense, it nowhere undertakes to instruct the jury as to any other inferior degree of the difficulty, such as manslaughter or negligent homicide, or any of those matters that would mitigate. It seems, under practically all the authorities, this is error. One of the latest cases upon this is *Roberts v. State*, 156 S. W. 651. See *Holden v. State*, 1 Tex. App. 235; *Priesmuth v. State*, 1 Tex. App. 480; *Davis v. State*, 2 Tex. App. 588; *Kouns v. State*, 3 Tex. App. 13. This seems to be practically the unbroken line of authorities. The court should have gone further and explained these matters to the jury. Taking the two charges criticized, and to which objection is urged, the law of the case was not submitted to the jury as required by the statute and the decisions as applicable to a state of facts where a conviction for murder in the second degree is sought.

In this connection, while it is not urged, in view of another trial we would suggest that manslaughter be submitted to the jury if the facts upon another trial are as contained in this record; and we are further of opinion that the issue of aggravated assault should have been given. No witness swears to any instrument used by the defendant, and the evidence fails utterly to disclose the finding of any instrument, or any fact outside of the wounds, that an instrument was used. It is true that the wounds upon the body indicate that there were broken ribs, which would tend to show violence out of the ordinary was used, and under our statute, if there is an issue which shows an ordinary fight and without intent to kill, the party might be guilty of any degree of assault usually, where the assaulted party dies. It is left entirely to inference as to how the deceased was killed or with what, if any, instrument. Deceased was lying beside the railroad track, and almost immediately after the defendant left the deceased a heavy engine passed by where the body of the deceased was near the track. As to whether this engine struck the body of the deceased and broke the ribs is not shown, except it be from the dying state-

ment of the deceased to the effect that defendant killed him. However, there is no evidence before the court as to what sort of instrument appellant used; no witness undertaking to swear there was any bludgeon or instrument of any sort used. So, taking it altogether, we are of opinion the charge on manslaughter and aggravated assault should have been given, and we mention this so, if the facts on another trial are as upon this trial, these issues should be submitted to the jury.

There is a bill of exceptions of some length reserved to the manner of examining the Mexican witnesses for the state. The questions are clearly and pointedly leading and suggestive. The court said he permitted this because they were Mexicans and did not seem to understand very well, speaking through an interpreter. Even from that view of it, we think the questions are entirely too leading and suggestive. As illustrative:

"Q. Ask her to state to the jury what, if anything, she heard the dead Mexican or Zabolá say to him (defendant) about not taking his money. A. She said she heard this dead man ask him for his money; said, 'Give me my money.' Said he went off and left him. Q. Ask her to state to the jury if she heard the defendant say anything about this would be his last day? A. Told him that was his last day."

There are two or three pages of these questions and answers. We are of opinion that even if they were Mexicans and had to speak through an interpreter, these questions went a little too far. The witnesses seem to have been intelligent, and there is an affidavit connected with the motion for new trial which indicates one of them could speak the English language well; but, in any event, it could have been asked her to state what was said by the parties at the time of the difficulty, and, if she then could not recollect or seemed to want sufficient intelligence to understand, a more direct question could have been asked. We believe under this bill of exceptions the questions were just a little too suggestive and leading. Upon another trial these matters should be avoided.

[1] Three bills of exception are found in the record which recite that the district attorney in his closing argument said:

"Since the trial of this case, I have learned that this defendant is a bad hombre; that Mexico is about the last place he would want to go to, as he has committed a crime over there and had to leave that country on account of it, and they would like to get hold of him for it."

Numerous objections were urged to this manner of argument. The court signs the bill by stating that:

"The evidence showed that some time after the homicide the defendant was arrested in New Mexico, and the district attorney in opening the state's case had alluded to the fact that the defendant had fled soon after the crime was committed. The defendant's attorney in answer thereto stated that it was probable that defendant was not fleeing from any crime, but was

going to his home in Old Mexico. To this the district attorney in concluding the case said that from the circumstances surrounding this killing we have a right to infer that the defendant had probably fled from crime committed by him in his own home, as he had fled from this crime, and that he was not going in the direction of his home."

The court's attention was called to the argument of the district attorney by defendant's counsel, and the court inquired of the district attorney what the statement was. The district attorney repeated the statement, to which the defendant excepted, and the district attorney stated that the argument was proper, and again repeated the same words. Defendant's attorney requested the court to stop the district attorney from repeating the statement, but under the circumstances it appeared to the court to be a proper argument and deduction from the evidence and argument.

Another bill recites that for the second time the district attorney said:

"Well, gentlemen, I repeat that since the trial of this case I have learned that this defendant is a bad hombre; that Mexico is about the last place he would want to go to, as he has committed a crime over there and had to leave that country on account of it, and they would like to get hold of him for it."

The same objections and same procedure was gone through, and the court qualifies this bill by referring to his qualification of the previous bill.

Another bill recites that for the third time the district attorney said:

"Well, gentlemen, I again repeat that since the trial of this case I have learned that this defendant is a bad hombre; that Mexico is about the last place he would want to go to, as he has committed a crime over there and had to leave that country on account of it, and they would like to get hold of him for it."

The same objections were made and the same qualification as in the previous bills; at least, the court signs the last two bills as he did the first bill.

These speeches and remarks were not justified by anything in this record. There was no evidence to the effect that the defendant fled from Mexico to this country for crime, or that he committed any crime in Mexico. There is no evidence in this record that he was a bad man in Mexico or a bad man anywhere, unless whatever deduction might be had from the facts of the case in connection with this trouble. As to what his previous record or standing was there is no testimony. He had not placed in evidence his reputation or character from any standpoint. There were two matters emphasized three times by the district attorney that are not justified: First, that he was a bad man; and, second, that he had fled from Mexico on account of crime in that country and for which those people over there wanted him. We have had occasion several times recently to call attention to such speeches outside the record, and about which there was no testimony. This should be avoided. They

call for reversals. The prosecution should keep within the record.

The judgment is reversed, and the cause is remanded.

PRENDERGAST, P. J., and HARPER, J. We agree to the reversal of this case on account of the matters presented in regard to the action of the district attorney in stating to the jury "that he had learned this defendant is a bad hombre, that he had committed a crime in Mexico," etc.; there being no evidence as to these matters in the record.

[2, 3] We do not think the charge on murder in the second degree is subject to the criticism herein contained, and for our views we refer to *Hicks v. State*, 171 S. W. 755, this day decided. Nor is any other error presented by the record when it is read as a whole.

WICKS et al. v. COMVES et al. (No. 356.)  
(Court of Civil Appeals of Texas. El Paso.  
Dec. 3, 1914. Rehearing Denied  
Dec. 24, 1914.)

1. SPECIFIC PERFORMANCE (§ 10\*)—PARTIAL ILLEGALITY OF CONTRACT.

A contract, illegal in part, may be specifically enforced if the illegal part is severable, but not if the contract is entire.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 20-25, 50; Dec. Dig. § 10.\*]

2. CONTRACTS (§ 122\*)—VALIDITY OF LEASE—CONTRARY TO CITY ORDINANCE.

A lease of space, for a fruit stand on the outside of a store building, providing that if the occupation of the space be contrary to ordinance, then the lessee will be provided space inside the building, is not illegal, though an ordinance is passed forbidding the erection of such stand on the sidewalk.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 495; Dec. Dig. § 122.\*]

3. LANDLORD AND TENANT (§ 32\*) — SUBLESSEE—ACCEPTANCE OF RENTS.

Where an assignee of a stock of confectionary and the lease of a store actually knew that there was a sublease to a fruit dealer, who had his stand on the outside of the store, the acceptance of the rents from the sublessee ratified the lease, though it contained a provision that if the city compelled the vacation of the fruit stand, the lessee would give the sublessee space inside.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 92; Dec. Dig. § 32.\*]

4. LANDLORD AND TENANT (§ 80\*) — BREACH OF CONTRACT — SURRENDER OF PREMISES — ORDER OF COURT—FUTURE PROFITS.

Where, in sequestration proceedings between an assignee of a lease and a sublessee of the original lessee, it was expressly ordered by the court that a surrender of the premises would not prejudice the right of either party, such surrender cannot be urged as defeating the sublessee's right to recover future profits in an action on the contract of lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 254-257; Dec. Dig. § 80.\*]

Walthall, J., dissenting.

Appeal from District Court, Harris County;  
N. G. Kittrell, Judge.

Action by Louis Comves and others against Moye Wicks, Jr., and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

F. F. & E. T. Chew, of Houston, for appellants. A. B. Wilson and Cole & Cole, all of Houston, for appellees.

HARPER, C. J. Appellee Louis Comves, brought this suit against appellants, Moye Wicks, Jr., Z. Morris, G. L. Black, and A. J. Zydias for specific performance of a lease contract between James Condos & Co., and Louis Comves, and in the alternative for damages, for failure upon their part, appellants, to render specific performance. A verdict was instructed by the trial court for appellees, and a judgment was rendered for \$905, from which their appeal is perfected.

The assignments of error and the several propositions sufficiently reveal the points of law involved in this appeal, so that it is not deemed necessary or expedient to quote the pleadings of the parties.

The first to seventh assignments charge error upon the peremptory instruction of the trial court, and charge that the trial court erred in the instructed verdict, in refusing a special charge, because: (a) The lease contract was in violation of a city ordinance of the city of Houston against storing or vending fruits, etc., on sidewalks; (b) a portion of the lease contract being void and unenforceable, for illegality, it destroys the whole of the contract; (c) was the contract ratified because appellants accepted rents? (d) because appellee voluntarily surrendered the premises, and he is therefore not entitled to recover damages; (e) appellee not having been dispossessed of the premises, is not entitled to recover, because not entitled to demand the five feet square unless dispossessed.

[1] In this class of cases the exact contract sought to be enforced must be construed, and if illegal in whole, it cannot be enforced; if in part, and not severable, then the vice permeates the whole, and it cannot be enforced in part, but if severable, and the legal part in no way depends or rests upon the illegal part, the contract is severable and the legal portion will be enforced. Being of the opinion that a correct answer to the query, "Is any portion of the contract sued on illegal?" must be resolved in favor of its legality as a whole, it will be unnecessary to discuss the severability of the contract.

[2] The parts of the contract sued on essential to the determination of the questions presented by the assignments are as follows:

"This agreement of lease \* \* \* between Jos. Condos & Co. \* \* \* and Louis Comves \* \* \* witnesseth that the lessor does \* \* \* lease and demise unto the lessee \* \* \* the possession and occupancy and use of the following property: That certain fruit stand \* \* \* being upon the outside of the one story building now occupied by Condos Bros., as a candy store \* \* \* said fruit stand ex-

tending from the main street entrance of Condos Bros., to the corner of the building on Texas avenue, thence to the back entrance on Texas avenue of Condos Bros. place of business, together with all shelving, \* \* \* etc., which are a part thereof \* \* \* for a monthly rental of \$200.00 in advance \* \* \* said lease being from the first day of May, 1911, until April 1, 1914. \* \* \* It is expressly understood and agreed that in the event the city of Houston complains of this aforesaid fruit stand being placed upon the outside of said building and projecting over and covering a portion of the sidewalk in front and on the side of said building, or in the event that any city ordinance which is now in force or which may hereafter be passed by the city of Houston shall make it impossible for said fruit stand to remain upon the outside of said building or to project over or occupy a portion of the sidewalk around said building, and if it shall be a violation of any such city ordinance to have such fruit stand project over or occupy a portion of said sidewalk, then it shall be the right and privilege of the lessee herein to remove said fruit stand, together with all shelving, stands and other fixtures and appurtenances thereto from said sidewalk, and said Condos Bros. shall give him a space inside of said building now occupied by Condos Bros., in which space he shall be permitted to erect said fruit stand, together with all shelving, stands and fixtures thereto belonging and shall be permitted to conduct said fruit stand within said building. In the event it becomes necessary to remove said fruit stand inside of the building now occupied by Condos Bros., the lessee herein shall be given a space in the corner of said building on Main street and Texas avenue, said space to be a square, each side of which is to be five (5) feet in which to erect said stand. In the event said stand is erected in said building, all the privileges and rights of both parties to this lease shall be the same as if said stand had remained upon the outside of said building."

From the whole of this contract, it is apparent (while not expressly stipulated therein) that the understanding between the parties was that the leased premises were to be occupied by the lessee solely as a fruit stand, if at all, but there is no provision in the writing that it shall be so occupied; in other words, it is no part of the contract that it shall be so occupied. There are many provisions in this writing which binds the lessor to furnish in lieu of the structure described the space five feet square inside of the building, the existence of any one of which is sufficient to require the lessor to comply therewith. One of these is that, if it shall be a violation of any city ordinance to have such fruit stand to project over or occupy any portion of said sidewalk, etc., there being such an ordinance at the date of the contract, eo instanti, upon the signing of this contract, or at any time thereafter within the life of his contract, the lessee was entitled to have and occupy the five-foot space within the building, and the mere knowledge that the structure leased was being used by the lessee in a business prohibited by the ordinance of the city could not vitiate the contract as written. *McKinney v. Andrews*, 41 Tex. 363; *Bishop v. Honey*, 34 Tex. 245; *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808.

The stipulations in the contract above quoted expressly negative the idea that it

should be used in violation of any ordinance, and its clear meaning is that the fruit stand is leased, provided it can be lawfully occupied by the lessee, and if it cannot, then the five-foot space is leased in its stead, by the same writing.

[3] The premises were taken over by appellants from Condos & Bros., and the uncontradicted evidence shows that appellants had constructive and actual notice of appellee's lease when they accepted rents. Condos told them of the lease, and it was recorded on the same day that the appellants took their bill of sale. Thereafter, with such notice, appellants accepted rents, by which acts they ratified the contract, so the court did not err in refusing the special charge requested upon ratification.

[4] Appellant in their sixth assignment complains that the appellee voluntarily surrendered the premises, and therefore was not entitled to recover for future profits under his contract of lease. The facts are that appellants sequestered the premises, appellee replevied, and thereafter in open court, to avoid going to trial on the cross-action of appellants for rent and possession, he agreed to surrender the premises with the express understanding in open court, and the court's order so states, that neither parties' rights should be in any way prejudiced by the surrender of the property to appellants. It cannot be held that under such circumstances the appellee also abandoned his right to recover damages for the breach of the contract sued on.

For the reasons given, the assignments are overruled and cause affirmed.

WALTHALL, J. (dissenting). On the 1st day of May, 1911, James Condos & Co. held a lease on a building owned by H. O. House, on the corner of Texas avenue and Main street in the city of Houston, Tex., and were occupying said building and conducting therein a confectionary. On the said date, Louis Comves, appellee, was a fruit dealer, and under a parol arrangement with Condos & Co. was in possession of and using during the month of May a certain fruit stand partly on the outside of said building and on the sidewalk of the corner of Main street and Texas avenue, immediately in front of the Condos & Co. building, including about 12 or 18 inches in depth in the wall of the building, with an understanding between them that Condos & Co. would give appellee a written lease for the space he occupied of said building, and with the further understanding that if the city complained of the fruit stand being placed on the outside of the building, and he should not be permitted, under an ordinance of the city of Houston then in force, or any other ordinance of the city, to occupy the portion projecting over and covering the sidewalk, Condos & Co. in that event would give appellee a five-foot square

space on the inside of the said building, and that for the use of said space, whether for that on the outside and the 12 or 18 inches of the wall, or the space to be occupied on the inside of the building, appellee was to pay as rent to Condos & Co. the sum of \$200 on the first of each and every month, which he complied with, paying to them the said rent for the months of May and June. On the 24th day of May, 1911, Condos & Co. sold their business, stock of goods, fixtures, the lease on the building, and their subleases to the appellants, who were to close up the deal and go into possession on the 1st day of July following, which was consummated as agreed. On the 1st day of July, appellee and Condos & Co. entered into a written lease, reciting that it was made on the 1st day of May, 1911, by the terms of which Condos & Co. leased to appellee the following:

"That certain fruit stand located on the southeast corner of Main street and Texas avenue in the city of Houston, Harris county, Texas, said fruit stand being upon the outside of the one-story brick building now occupied by Condos Bros. as a candy store, soda fountain and ice cream parlor, said fruit stand extending from the Main street entrance of Condos Bros. to the corner of the building on Texas avenue and extending thereto down Texas avenue to the back entrance of Condos Bros. place of business, together with all shelving, stands, and other fixtures belonging thereto and which are a part thereof, said fruit stand to be rented by the lessee at a monthly rental of two hundred (\$200.00) dollars in advance, beginning on the 1st day of May, 1911, and thereafter on the 1st day of each and every month until the expiration of said lease; said lease being from May 1, 1911, until April 1, 1914."

The fourth paragraph of said lease recited that:

"It is expressly understood and agreed that in the event the city of Houston complains of this aforesaid fruit stand being placed upon the outside of said building and projecting over and covering a portion of the sidewalk in front and on the side of said building, or in the event that any city ordinance which is now in force or which may hereafter be passed by the city of Houston shall make it impossible for said fruit stand to remain upon the outside of said building or to project over or occupy a portion of the sidewalk around said building, and if it shall be a violation of any such city ordinance to have such fruit stand project over or occupy a portion of said sidewalk, then it shall be the right and the privilege of the lessee herein to remove said fruit stand, together with all shelving, stands and other fixtures and appurtenances thereto from said sidewalk, and said Condos Bros., shall give him space inside of said building now occupied by Condos Bros., in which space he shall be permitted to erect said fruit stand, together with all shelving, stands and fixtures, thereto belonging and shall be permitted to conduct said fruit stand within said building."

The same paragraph then describes the "space to be a square each side of which is to be five feet," and that "all the privileges and rights of both parties to this lease shall be the same as if said stand had remained upon the outside of said building." The lease was signed and acknowledged by both parties on the 1st day of July, 1911, and on same day filed for record.

It was agreed on the trial by plaintiff and defendants that on and prior to the 1st day of May, 1911, and during the entire period in which appellee occupied and claimed to be entitled to the possession of the premises in controversy, article 694 of the Revised Code of Ordinances of the City of Houston was in force and effect, and at the time of the trial was in force and effect. The ordinance referred to made it unlawful for any person or persons to store or expose for sale or sell on any sidewalk or street in the city of Houston, any fruits, nuts, candles, tobacco, soda water, or any other goods, wares, or merchandise, or to occupy the sidewalk with any booth or frame structure for carrying on any business or occupation.

The bill of sale and assignment delivered to appellants by Condos Bros. on July 1, 1911, among other things, provided:

"The said Condos Bros., for the consideration aforesaid, transfer, assign and deliver unto the said Moye Wicks, Jr., and associates, all written subleases executed by them in favor of other parties, sublessees, to any portion of the premises described in the leases from Henry C. House to said Condos, and especially the sublease to the cigar stand and the fruit stand and to the portion of said premises now being used as a moving picture show and the said Moye Wicks, Jr., and his said associates, are to respect said subleases and to receive the benefits therefrom according to the terms and conditions expressed in said subleases."

It was admitted that appellee paid the rent monthly for the use of the premises, to the appellants from and including the month of July, 1911, to and including the month of January, 1912. Early in January, 1912, the authorities of Houston required the appellee to remove his fruit stand from the sidewalks. Appellee called on appellants to give him the five-foot square on the inside of the building, and appellants refused to do so. Appellee paid no rent to appellants after January, on account of their refusal to let him have the five-foot square, but continued to occupy the small space in the wall of the building until May 25, 1912, when he surrendered it to appellants. Appellee set up the above facts substantially in his various pleadings, and alleged that appellants had actual and constructive notice of his possession and lease, and that by the appellants receiving the rents with knowledge of all the facts ratified the terms of the lease contract appellee had with Condos & Co. Appellee prayed for injunction against appellants, restraining them from interfering with him in taking possession of and using for his fruit store the five-foot square on the inside of the building, then occupied by appellants, and for damages. The appellants demurred generally, and both by special exception and answer claimed that appellee's lease contract with Condos & Co. was wholly illegal and void, because of the city ordinance above stated; denied knowledge of appellee's lease contract; denied any acceptance or ratification of appellee's said lease contract. Defendants pleaded a cross-

action for possession of the space occupied by appellee, and, the appellee having sequestered the small space in the wall above mentioned, appellants asked judgment against appellee and his sureties on the replevin bond for their damages occasioned by the wrongful withholding of the said space. On the trial, the court heard the evidence and submitted the case to the jury for their finding on a general charge. After the jury had been out for some time, the court called the jury in, withdrew the general charge, and instructed the jury to return a verdict for appellee on the ground that appellants had ratified the lease contract by an acceptance of the rent, and submitted to the jury the rule for the measure of damages for them to adjust and find. The jury, under the instruction given, found a balance for appellee and fixed his net damages at \$905. The court rendered judgment for appellee and against appellants for possession of the property called for in the lease contract from Condos & Co. to appellee, giving him the further use of same until the 1st of April, 1914, and judgment for the sum of \$905. Other features of the case will be stated more fully where necessary under the assignments of error to which they apply.

Appellants' first, second, and third assignments of error and the propositions thereunder, in different ways, challenge the validity of the lease contract upon which the suit is brought, claiming that it is illegal, wholly void, and unenforceable in any of its parts, because of the ordinance of the city of Houston, then and at all times thereafter in force, forbidding the use of any of its sidewalks for the purposes mentioned in the lease. Was the lease contract void, because illegal, in whole or in any part of it?

It has been said that the right of private contract is no small part of the liberty of the citizen, and the most important functions of courts are to maintain and enforce it, rather than to enable parties to escape from their obligations on the pretext of public policy, unless the contract contravenes public right or public welfare or some law. If courts were unmindful of such important duties, it would be a denial to parties capable of contracting of the power to make their own contracts, and assuming the guardianship of capable people, and largely destructive of property. But while that is true, it is equally important that such fundamental rights conform to the necessities of the social state and the liberty of contract to be controlled by a reasonable exercise of the police powers. It has therefore been uniformly held that parties cannot be permitted to contract with reference to those matters which, for the good of all, should be suppressed or restrained. It would be an unprofitable and endless task to enumerate the conditions under which courts have held contracts void and refused to enforce them. At common law, a consid-

eration was illegal when it violated rules of religion, morals, or public decency, or contravened public policy or law. It is so with us. We have many statutes prohibiting certain acts, and any contract to do the forbidden act creates no legal obligation. In the case of *Heirs of Hunt v. Heirs of Robinson*, 1 Tex. 748, where appellant sought to reverse the judgment of the trial court on the ground that the contract at the time it was made was contrary to the law forbidding the alienation of the land—the subject of the contract—Justice Lipscomb said:

"It is believed to be a rule of universal application that to undertake to do an act forbidden by the law of the place where it is to be done is an invalid agreement and imposes no legal obligation. There is a moral obligation in the absence of a penalty to obey the law. Courts are organized under the law and are required to administer it, and, it would seem to be an anomaly were they so far to sanction its violation as to give effect to a contract forbidden by the law that they are bound to respect and enforce."

In that case, the court say that a distinction was once made in the English courts when the law duly forbid the doing of an act, and where it imposed a penalty for doing it, but the current of authority is now destructive of any such distinction, holding all contracts against law alike invalid.

But it is claimed that the fourth paragraph of the lease contract removes any feature of illegality in the contract, and that it was not unlawful in the instant case for the parties to agree, as in the fourth paragraph, that in the event the city of Houston complains of the fruit stand being placed on the outside of the building, or the city ordinance then in force should make it impossible for the fruit stand to remain on the sidewalk or project over it, then it shall be the right and privilege of the lessee to remove the fruit stand, shelving, stands, fixtures, and appurtenances from the sidewalk, and the lessors should give him space on the inside of the building; that the said fourth paragraph inserted made a contract in every way relieved of any feature of it being in violation of the city ordinance. If there had been no city ordinance prohibiting the permanent and exclusive use of the sidewalk for purposes of a fruit stand by a private person, such use, under the authorities I have examined, would be contrary to public policy, and a contract so providing would be void. The following cases so hold: *Heineck v. Grosse*, 99 Ill. App. 441; *Ryan v. Allen*, 138 Ill. App. 52; *Pagames v. Chicago*, 111 Ill. App. 590. Chief Justice Marshall in discussing *Armstrong v. Toler*, 11 Wheat. 261, 6 L. Ed. 468, said:

"I understand the rule, as now clearly settled, to be that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a mere contract, it is equally tainted by it."

In the same case, the learned Chief Justice said:

"I should consider a bond or promise afterwards given \* \* \* to constitute a part of the *res gestæ*, or of the original transaction, though it purports to be a new contract, for it would clearly be a promise growing \* \* \* out of and connected with the illegal transaction."

Judge Stayton quoted and applied the above statement of the law in *Seeligson v. Lewis & Williams*, 65 Tex. 215, 57 Am. Rep. 593. I have examined many cases similar to the case at bar, and in every case the courts have held that an abutting owner of property has no right, nor can the city confer any right, upon him to appropriate to his sole, private use any portion of the sidewalk, and therefore an agreement, by which an abutting property owner attempted to lease or grant the right to erect a stand upon the sidewalk is against public policy, and where that policy has been expressed by a city ordinance, the act is both against public policy and the law and is void.

I do not believe that the cases referred to by the court in the majority opinion sustain the conclusion reached. In the case of *McKinney v. Andrews*, 41 Tex. 363, appellant sought to recover the value of a wagon and five yoke of steers, which she alleged was hired by her from her intestate for the purpose of hauling cotton from the county of Grayson to San Antonio, and which, as she avers, appellee promised to return to her intestate or account for its use and reasonable value. Appellee answered that the wagon and team were used with the knowledge and consent of appellants' intestate for the purpose of transferring cotton for the Confederate States from the interior of the state to San Antonio, to be exchanged for powder, lead, and other munitions of war to be used in carrying on the war against the United States, and that, being against public policy or for an illegal purpose, was void. The court simply held that mere knowledge of the unlawful purpose (if it was unlawful—a question which Judge Gould did not decide) was too remotely connected with it to avoid the contract. The suit was for the recovery of the value of the wagon and oxen, which appellee admitted he had sold and appropriated the proceeds, and was not for their hire. The court held that it might be that a recovery could not be had on the contract for the use of the wagon and team, which was tainted with illegality.

In *Bishop et al. v. Honey*, 34 Tex. 245, the suit was by a mechanic on a building contract, in which the defendant answered that she had the house built for a house of prostitution, and that plaintiff knew that fact when he undertook to build the house, and that the contract, being contrary to good morals, was void. The court held that, there being no allegation that plaintiff was to be concerned or interested in the contemplated illegal use of the building, he could recover

for the value of the labor and material used in erecting the building. But in that case, the court held that:

"If the plaintiff is in any way the gainer by, or the partner in, an illegal contract, one which is *contra bonos mores*, he cannot recover upon such contract; he cannot recover upon it if it be shown that he is *particeps criminis*."

The court in that case said that the house was not to be paid for out of the proceeds of an illegal vocation, but was to be paid for as the work progressed.

The only other case referred to by the court in the opinion is *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808. In this case, Corbett made a written contract with Labbe by which Corbett agreed that Labbe should bear all expenses and have the use of 1,000 picked ewes for the period of three years, and same were delivered. The sheep were valued at \$2,750, and for their use Labbe was to pay semiannually a sum equal to 12 per cent. of their value, and at the end of three years, Labbe was to redeliver to Corbett the same number of picked ewes, and on failure to do so should pay the agreed value. At the end of the time the sheep were not redelivered, and the action was to recover their value. One of the answers made by Labbe was that the sheep were infected with a contagious and infectious disease, and that the false and fraudulent representations of Corbett that they were not so diseased caused him, Labbe, to drive the sheep under the contract beyond the limits of his own land and upon the public highway, a violation of the law, the plaintiff Corbett knowing the diseased condition of the sheep. The trial court sustained the plaintiff's demurrer to the answer, setting up the above facts. Judge Stayton, in rendering the opinion of the court, said:

"The pleadings do not allege that appellee had knowledge of the fact that the appellant intended to drive the sheep along or upon public roads in taking them from one range to another, but do allege that the appellant was caused or induced so to drive them by the representations made by the appellee to the effect that the sheep were not affected with the \* \* \* diseases named; that is, that he was thus induced to do an act which, as to him, in the absence of knowledge that the sheep were so diseased, would not be penal in its character, which he would not have done had he known the sheep were diseased. \* \* \* The uses to which the parties contemplated that the ewes should be put, the breeding of lambs and the growing of wool, were lawful in themselves. The contract gave the appellant the right to them for these or any other lawful uses for the named period; but there is nothing in it tending to show that, for the accomplishment of these purposes, any act forbidden by law was necessary, contemplated, or required by the contract."

In the instant case, both parties were to benefit by a violation of the city ordinance.

But the counter propositions of appellee to the assignments and propositions of appellants are to the effect that the lease contract is based upon a valid consideration, is divisible, and is therefore not void, but is enforceable as to the legal part with reference

to the space five feet square on the inside of the building. As all of the issues under these assignments and propositions thereunder and appellee's counter propositions might be considered in the discussion under the quære presented by appellee in his argument under his first counter proposition to appellant's first assignment of error, we quote it:

"Quære: It being admitted that it was unlawful to lease part of the sidewalk, as being opposed to a city ordinance in force at the time, was the contract severable, so as to be upheld as to the legal part with reference to a space five feet square on the inside? This is the issue."

Appellee's counter proposition, or rather quære, it will be seen, concedes to be illegal the feature or portion of the lease contract that violates the city ordinance, because to lease the fruit stand, situated as it was partly on the sidewalk, would not only be a lease of the portion of the sidewalk occupied by the fruit stand, but the use of the portion of the fruit stand on the sidewalk would be to store, and expose for sale and sell the commodities of the fruit stand, on the sidewalk, the very thing prohibited by the ordinance of the city. The next part of the quære presents the question, Was the contract severable, so as to be upheld as to the legal part? The quære, then, assumes that the legal part was the portion of the lease contract with reference to the five-foot square on the inside of the building. I agree with that portion of appellee's statement that a part of the lease contract is in violation of the city ordinance, and that the portion of the lease contract that violates the ordinance cannot be enforced. As to whether the contract is severable, and, if severable, what part is in violation of the city ordinance are the determinative questions in the case. Appellee's suit in the trial court assumed that the lease contract was severable, and that the legal part of it was with reference to the five-foot square space on the inside of the building. If the negative of either one of these propositions is the proper construction of the lease contract, appellee has no cause of action. Let us assume for the purpose of discussing the last of the two propositions, first, that the lease contract is severable. How shall we separate or sever the contract so as to consider the parts? We are not aided by appellee's brief in making a severance of the contract. We must, however, follow the contract and separate it as the parties to the contract contemplated it should be, if it is severable. A part of the fruit stand was in the wall of the building and did not occupy or trespass on any part of the sidewalk, and a part of the stand did occupy a part of the sidewalk. The parties to the contract contemplated that the part of the fruit stand occupying the sidewalk would have to be removed on account of the ordinance, and undertook to provide for that portion of it by giving in lieu of it

the five-foot square space on the inside of the building. We then necessarily divide the contract as the parties to it divided the fruit stand—a part of it on the sidewalk and a part of it not on the sidewalk. The part on the sidewalk was the part outlawed by the city ordinance. When the sidewalk part of the fruit stand was removed, the lessee demanded of the lessor its complement on the inside—the five-foot square space contracted for. The lessee was not interrupted in his use of the part not on the sidewalk, and he remained in possession of it for some time thereafter, and until he voluntarily surrendered it. The portion of the lessee's rent money, for the part of the fruit stand on the sidewalk before the removal of the fruit stand from the sidewalk, he tendered to the lessor for the space inside as the consideration for the space on the inside. That was the part, however, that was in violation of the city ordinance, and I necessarily conclude it to be the illegal part. But that was the part appellee was trying to enforce by his suit, that is, his demand for the space on the inside. He had no demand to make for the part not on the sidewalk, and made none. It seems to me that it necessarily follows that the lease contract was illegal in part, and that the illegal part, as to the lessee, was as to the portion of the consideration agreed to be paid for the sidewalk part of the fruit stand and rendered to the lessors, when removed, for the space on the inside, and as to the lessor, the illegal part of the contract was a lease of the sidewalk part of the fruit stand and the agreement to give the space on the inside in lieu of it should the city ordinance be enforced and the lessee be required to remove the stand. If appellee's suit was a demand for the enforcement of the illegal part of the lease—and I hold that it was—he could not maintain it. If the basis of his suit was the illegal part of the contract, the appellants could not ratify it and make it legal by an acceptance of the rents.

The construction of the lease contract was a matter of law for the court, and if its illegal feature did not appear on its face, it did appear when the undisputed fact of the city ordinance was shown. I think the court should have instructed the jury to find against the appellee.

I am of the opinion that the case should be reversed and remanded.

R. B. GODLEY LUMBER CO. v. SLAUGHTER et al. (No. 1358.)†

(Court of Civil Appeals of Texas. Texarkana. Nov. 23, 1914. Rehearing Denied Dec. 3, 1914.)

1. VENDOR AND PURCHASER (§ 261\*)—VENDOR'S LIEN—ASSIGNMENT—TRANSFER OF TITLE TO LAND.

The assignee of a vendor's lien note without an assignment of the title to the land is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Writ of error pending in Supreme Court.

not entitled to have the legal title to the land decreed to be in him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. § 261.\*]

**2. VENDOR AND PURCHASER (§ 261\*)—DEBTS SECURED BY VENDOR'S LIEN—TRANSFER—EFFECT.**

Transfer of a debt secured by a vendor's lien transfers the lien, but not the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. § 261.\*]

**3. VENDOR AND PURCHASER (§ 261\*)—VENDOR'S LIEN—ASSIGNMENT—TRANSFER OF LAND.**

Where a vendor assigned a note for a part of the purchase price secured by a vendor's lien, together with all his right, title, and interest in the land to an insurance company, but such company, in reassigning to plaintiff's assignor, only assigned without recourse the note and lien on the land to secure payment of the same, neither plaintiff nor his assignor acquired any title to the land; and hence plaintiff could only recover his debt and have a decree foreclosing the lien, and not a decree vesting the title in him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. § 261.\*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by C. C. Slaughter, Jr., and others against the R. B. Godley Lumber Company. Judgment for plaintiffs, and defendant appeals. Reversed and rendered in part and affirmed in part.

T. N. Jones, of Tyler, and Charlton & Charlton, of Dallas, for appellant. K. R. Craig, of Dallas, for appellees.

LEVY, J. On April 12, 1913, the appellee Slaughter filed his original petition in the district court of Smith county to recover on a vendor's lien note for \$11,329.30, together with interest and attorney's fees; and further to recover on another note for the same amount, together with interest and attorney's fees, alleged to be secured by a lien evidenced by a deed of trust on the same land for which the first note mentioned was given as a part of the purchase money; and further to recover a judgment for certain advances made to the defendant lumber company amounting to \$600.16. The plaintiff prayed for judgment with foreclosure of the vendor's lien which secured the first note, and for judgment with foreclosure of the deed of trust lien securing the second note, and for judgment with decree of an equitable lien on the land for the payment of the open account, and for order of sale and writ of possession. Appellant lumber company, the maker of the notes, filed a general denial and special answer on July 1, 1913. Curtis Hancock, as receiver, appointed by the district court of Dallas county, of all the property of the lumber company, filed a petition in the case alleging the facts with reference to his appointment as receiver, and asked that he be per-

mitted to intervene in the cause. On September 1, 1913, W. M. C. Hill, who had been appointed trustee in bankruptcy for the lumber company by the federal District Court at Dallas, intervened and became a party to the suit, though afterwards this intervention was dismissed. On February 3, 1914, the plaintiff amended his original petition and changed his cause of action from one to foreclose the vendor's lien to a cause of action in trespass to try title to recover the land, and changed the cause of action, in so far as it sought to obtain a foreclosure of the mortgage lien, to one praying that the debt be established as one secured by a mortgage lien, and to have the taxes paid fixed as a lien.

The case was tried to the court without a jury, and a judgment rendered for the plaintiff for the land, and also decreeing that the mortgage debt was established and secured by a mortgage lien. As no point on appeal is made in respect to the mortgage debt and judgment thereof, it is unnecessary to make a statement of the evidence in respect thereto.

The plaintiff introduced in evidence a deed from W. L. Noble to the Godley Lumber Company to the land described in the petition, which he recited as a part of the consideration or purchase money, a note for \$11,329.30, expressly reserving a vendor's lien on property to secure the payment of the note. The note, being in evidence, recited on its face that it retained a vendor's lien to secure the payment. The deed and the note were dated December 5, 1906, and the note was due five years after date. Plaintiff introduced a conveyance from W. L. Noble, the vendor, to the Kansas City Life Insurance Company, dated September 29, 1908, by which Noble conveyed to the lumber company the vendor's lien note executed by the lumber company to him for a part of the purchase money for the land. The conveyance states, among other things:

"And whereas, Kansas City Life Insurance Company, a corporation of Kansas City, in the county of Jackson and state of Missouri, has this day paid to said W. L. Noble the principal amount of the said note with accrued interest thereon, the receipt whereof is hereby acknowledged, in consideration of the said payment, I, the said W. L. Noble, of Dallas county, Tex., do hereby sell, assign, and set over the said note, indebtedness and vendor's lien upon the said land unto said Kansas City Life Insurance Company; and I, the said W. L. Noble, do also bargain, sell, and convey unto the said Kansas City Life Insurance Company all of my right, title, and interest whatsoever in and to the above-described premises, to have and to hold the said indebtedness, note, and lien, and also all the right, title, and interest of the said Noble in and to the said land, unto said Kansas City Life Insurance Company, its assigns and successors forever."

On December 21, 1911, the Kansas City Life Insurance Company executed a conveyance to C. C. Slaughter, which, after describing the note and the amount thereof, says:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Now, therefore, for and in consideration of the sum of eleven thousand eight hundred and ninety-five and  $\frac{78}{100}$  dollars (\$11,895.78), the said Kansas City Life Insurance Company hereby transfers and delivers to said C. C. Slaughter, of Dallas county, Tex., said note and the lien on said land to secure the payment of same, said note being indorsed 'without recourse' on the said Kansas City Life Insurance Company; the title to which lien said Kansas City Life Insurance Company hereby warrants and defends in, through, or by it—the warranty only affects the lien as to the ownership of this company, and no further."

There is no other clause of conveyance except as it reads above.

On April 11, 1913, C. C. Slaughter executed a conveyance to C. C. Slaughter, Jr., which, among other things, says:

"And whereas, I, the said C. C. Slaughter, for a valuable consideration to me paid, have sold, assigned, indorsed, and transferred said note to C. C. Slaughter, Jr., of Dallas county, Tex. Now, therefore, in consideration of the premises, I do hereby grant, bargain, sell, and convey unto the said C. C. Slaughter, Jr., the vendor's lien as retained as aforesaid in said deed from W. L. Noble to R. B. Godley Lumber Company hereinbefore set out on the lands described in said deed, hereby warranting the title to said lien on said lands to the said C. C. Slaughter, Jr., his heirs and assigns."

There is no other clause of conveyance, except as it reads above.

The note offered in evidence has the following indorsements:

"The within note is hereby assigned to the Kansas City Life Insurance Company, the consideration therefor being a full-paid life policy for \$11,000 issued this day by the assignee to the assignor.

"[Signed] W. L. Noble.

"September 30, 1908.

"Pay to the order of C. C. Slaughter without recourse.

"[Signed] Kansas City Life Insurance Co.,  
By F. W. Fleming, Vice Pres.

"Without recourse on me, either in law or in equity, for value received, I hereby transfer the within note, with all liens on property connected with securing the payment thereof, to C. C. Slaughter, Jr., or order. April 1st, 1913.

"[Signed] C. C. Slaughter."

The above instruments are all the evidence introduced by appellee in the trial of the cause pertaining to the title to the land in suit.

#### Opinion.

[1] The appellant makes the point, by proper assignments, that, the plaintiff Slaughter not having acquired the superior legal title to the land, he could not, upon default in the payment of the note held by him, rescind the contract of sale and recover the land. It is well settled by the decisions of this state that the assignee of a vendor's lien note without transfer to him of the superior title to the land is not entitled to have the legal title to the land decreed to be in him. *Farmers' Loan & Trust Co. v. Beckley*, 93 Tex. 267, 54 S. W. 1027; *Hamblen v. Folts*, 70 Tex. 133, 7 S. W. 834; *Hatton v. Bodan Lbr. Co.*, 57 Tex. Civ. App. 478, 123 S. W. 163; *Stephens v. Mathews' Heirs*, 69 Tex. 341, 6 S. W. 567.

[2] And it is further well understood that the effect of the transfer of the debt is to have the lien or security follow the debt as a part of the transfer of the debt. And it is still further held by the courts that, though the lien follows the transfer or assignment of the note or debt, the assignee acquires no interest thereby in the land, and cannot recover the land unless he has acquired the legal title. *Stephens v. Mathews' Heirs*, supra.

[3] In view of this settled rule of law, the question need only be considered of whether or not in this case, which is an action for the land, and not one for foreclosure of the lien, the evidence shows that the plaintiff acquired the superior title to the land. W. L. Noble conveyed the land to the Godley Lumber Company, and expressly retained a vendor's lien to secure a note given in part payment of the purchase money. Noble, the vendor, for a valuable consideration assigned and delivered the note to the Kansas City Life Insurance Company, and such vendor, Noble, at the same time also executed a written conveyance to the said insurance company stating that for the consideration given—

"I, the said W. L. Noble, of Dallas county, Tex., do hereby sell, assign, and set over the said note, indebtedness, and vendor's lien upon the said land unto the said Kansas City Life Insurance Company; and I, the said W. L. Noble, do also bargain, sell, and convey unto the said Kansas City Life Insurance Company all of my right, title, and interest whatsoever in and to the above-described premises, to have and to hold the said indebtedness, note, and lien, and also all the right, title, and interest of the said Noble in and to the said land, unto said Kansas City Life Insurance Company, its assigns and successors forever."

It is not doubted that this conveyance by its terms passed to the life insurance company the superior title of the vendor. The Kansas City Life Insurance Company thereafter, for a valuable consideration, transferred "without recourse" and delivered the note to C. C. Slaughter, and at the same time the Kansas City Life Insurance Company executed a written instrument providing that for the consideration given—

"the said Kansas City Life Insurance Company hereby transfers and delivers to said C. C. Slaughter, of Dallas county, said note and the lien on said land to secure the payment of same, said note being indorsed 'without recourse' on the said Kansas City Life Insurance Company; the title to which lien said Kansas City Life Insurance Company hereby warrants and defends in, through, or by it—the warranty only affects the lien as to the ownership of this Company."

If this paragraph, being the only one therein pertaining to the subject-matter of sale, does not by its terms pass the superior title, then O. C. Slaughter did not acquire the same. The conveyance undertakes to pass the "said note and the lien on said land to secure the payment of same." It is believed that the life insurance company by terms of the conveyance has parted, and in-

tended only so to do, with its title to the note and lien expressly reserved in the deed to secure same, and has not parted nor undertaken to part with the title to the land itself. The language of the instrument defines "the lien" passed as being the lien securing the note in "the payment of same." An assignment of the debt, as the instrument does, legally entitled the assignee to the benefit of the security, and the parties were intending this effect evidently by the instrument. Defining, as the instrument does, the "lien" intended to be passed, as being that lien expressly given as a security for the debt, it would be inconsistent with this contractual stipulation of the parties to extend by construction the meaning of the word "lien" to confer and include any right of title to the land itself. A lien upon land does not import more than security, and is legally distinguishable from a sale of the land itself.

The instrument from C. C. Slaughter to plaintiff in this suit provided that, for the consideration given, C. C. Slaughter does "hereby grant, bargain, sell, and convey unto the said C. C. Slaughter, Jr., the vendor's lien as retained as aforesaid in the deed from W. L. Noble to R. B. Godley Lumber Company, hereinbefore set out, on the lands described in said deed, hereby warranting the title to said lien on said lands to the said C. C. Slaughter, Jr., his heirs and assigns." This conveyance, as seen, passes, and intends to pass, by its language only the lien retained in the deed to secure payment of the note, and does not pass nor intend to pass any interest in the land itself. There is no evidence in the record showing that appellee acquired the superior title to the land, and, failing in such proof, could not, in this action to recover the land, have decreed in him title to the land.

The judgment in his favor for the land must be reversed and here rendered in favor of appellant. As that portion of the judgment establishing the mortgage debt and lien in favor of appellee is not questioned nor complained of by any assignment, it will remain undisturbed, and such portion of the judgment will be affirmed. The cost of appeal will be taxed against appellee Slaughter.

Reversed and rendered in part and affirmed in part.

GLASSCOCK et al. v. WELLS et al.  
(No. 1347.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 18, 1914. Rehearing Denied  
Dec. 3, 1914.)

1. HOSPITALS (§ 4\*)—BOARD OF MANAGERS—APPOINTMENT.

Section 12 of Act March 26, 1913 (Acts 33d Leg. c. 39; Vernon's Sayles' Ann. Civ. St. 1914, art. 1498a), provides for appointment by the commissioners of a board of managers for county hospitals for the care of persons suffering from illness or injury exists. *Held*, that a hospital

established and maintained by a county, not to meet a temporary emergency like that arising from an epidemic of smallpox, but a permanent hospital, was contemplated, and appointment of a board to take charge of a building constructed for, but never equipped or used for, a hospital, and abandoned as unfit for the purpose, is not required.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. §§ 5-10; Dec. Dig. § 4.\*]

2. HOSPITALS (§ 4\*)—BOARD OF MANAGERS—APPOINTMENT.

Neither does the statute require appointment of a board to take charge of pesthouses used only occasionally solely to treat cases of smallpox.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. §§ 5-10; Dec. Dig. § 4.\*]

3. HOSPITALS (§ 4\*)—BOARD OF MANAGERS—APPOINTMENT.

A hospital operated by a city and county on their joint account pursuant to section 14 of Act March 26, 1913 (Acts 33d Leg. c. 39; Vernon's Sayles' Ann. Civ. St. 1914, art. 1498a), providing for its joint control by the commissioners' court and city authorities, is not a county hospital, within the provision of section 12 (article 1498a), for the appointment of a board of managers, and, moreover, control thereof by such a board is not only unauthorized but directly contrary to the provision in section 14.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. §§ 5-10; Dec. Dig. § 4.\*]

Appeal from District Court, Lamar County; A. P. Dohoney, Judge.

Mandamus by R. D. Glasscock and the City of Paris against Rube S. Wells and others. From a judgment for defendants, the plaintiff City of Paris appeals. Affirmed.

Wright & Patrick, of Paris, Tex., for appellant. Moore & Hardison, of Paris, Tex., for appellees.

WILLSON, O. J. This was a mandamus suit brought by R. D. Glasscock and the city of Paris to compel the commissioners' court of Lamar county to appoint a board of managers for a hospital alleged to have been established by Lamar county within its limits. It was contended that the act March 26, 1913, entitled "An act authorizing the establishment of county hospitals," etc. (General Laws 1913, p. 71), charged said commissioners' court with the duty to appoint such a board. On the testimony before him the trial court thought the contention should be overruled, and rendered judgment refusing complainants the relief they sought. Glasscock, it is assumed, was satisfied with the judgment, as the appeal is prosecuted by the city alone.

At the threshold of the inquiry we are confronted with a question as to whether the city of Paris can maintain the suit or not. The question has not been argued in the briefs, and as we are of opinion the judgment should be affirmed, even though the question should be answered in the affirmative, we have not considered and will not determine it.

It appears from the record that Lamar

county owned a "poor farm," and in 1905 and 1906 constructed thereon a hospital building, but that it never equipped or used the building for hospital purposes. The reason why the building was not so equipped and used lies in the facts, perhaps, that it was without heating or lighting facilities and was found to be so badly constructed as to be unsafe. It further appears that the county had constructed two small buildings on said farm, and that same had been used by it, and also by the city of Paris, as a place to detain, care for, and treat persons suffering with smallpox. It further appears:

"That on December 23, 1892," quoting from findings of fact made by the trial court, "certain property known as the Aiken Hospital, within the corporate limits of the city of Paris, was conveyed to the city by W. B. Aiken, upon certain terms and conditions, among them being that the city of Paris should manage and conduct the same as a hospital and annually make sufficient appropriations of money for the purpose of conducting it as a hospital commensurate with the needs of the sick of the city of Paris and Lamar county, and requiring the admission to said hospital of all white persons who were sick as should make a written statement of their inability to pay for their care and treatment free of charge, and providing for the admission to the hospital of the indigent white sick residing in Lamar county outside of the city of Paris upon such reasonable rate of charge as shall from time to time be agreed upon by the city of Paris and the county of Lamar. That since said date the city of Paris and Lamar county have expended large sums of money in improving and adding to said hospital, sharing such expenses equally, and for several years prior to this time have made annual appropriations in equal amounts, and have jointly managed, controlled, and conducted a hospital in which both pay and charity patients are accepted; charity patients from the city of Paris and Lamar county being given preference. That by the terms of the deed of gift no person suffering from any contagious or communicable disease can be admitted into said Aiken hospital; that said Aiken Hospital affords adequate facilities for the care and treatment of all white sick of Paris and Lamar county, except persons suffering with contagious or communicable diseases."

The act referred to above provides that:

"The commissioners' court of any county shall have power to establish a county hospital and to enlarge any existing hospitals for the care and treatment of persons suffering from any illness, disease or injury, subject to the provisions of this act."

It further provides that:

"When the commissioners' court shall have acquired a site for such hospital and shall have awarded contracts for the necessary buildings and improvements thereon, it shall appoint five citizens of the county, of whom at least two shall be practicing physicians, and at least one a woman, who shall constitute a board of managers of said hospital."

Section 12 and parts of section 14 and section 15 of the act are as follows:

"Sec. 12. Wherever a county hospital for the care and treatment of persons suffering from any illness, disease or injury exists in connection with, or on grounds of a county poorhouse or elsewhere, the commissioners' court shall appoint a board of managers for such hospital, and such hospital, and its board of managers, shall thereafter be subject to all provisions of this act, in like manner as if it had been originally estab-

lished hereunder. Any hospital which may hereafter be established by any commissioners' court shall in like manner be subject to all the provisions of this act."

"Sec. 14. \* \* \* It shall be lawful for the commissioners' court of any county to co-operate with and to join the proper authorities of any city or town having a population of ten thousand persons or more in the establishment, building, equipment and maintenance of a hospital in said city or town, and to appropriate such funds as may be determined by said commissioners' court, after joint conference with the authorities of such city or town as may be necessary, and the management of such hospital shall be under the joint control of such commissioners' court, and city authorities."

"Sec. 15. Where no provision is made as provided in section 14, and no county hospital is now provided for the purpose aforesaid, or where such provision is inadequate, it shall be the duty of the commissioners' court of each county which now has a city with a population of more than ten thousand persons, on or before December 1, 1913, and of any county which may later have a city with a population of more than ten thousand persons, within six months from the time when such city shall have attained such population, \* \* \* to provide for the erection of such county hospital or hospitals, as may be necessary, for that purpose, and to provide therein a room or rooms, or ward or wards, for the care of confinement cases, and a room or rooms, or ward or wards, for the temporary care of persons suffering from mental or nervous disease, and also to make provision in separate buildings for patients suffering from tuberculosis and other communicable diseases, and from time to time to add thereto accommodations sufficient to take care of the patients of the county. This time may be extended by the state board of health for good cause shown. Unless adequate funds for the building of said hospital be derived from current funds of the county, available for such purpose, issuance of county warrants and scrip, it shall be the duty of the commissioners' court to submit, either at a special election called for the purpose, or at a regular election, the proposition of the issuance of county bonds for the purpose of building such hospital."

The suit, it will be remembered, is not to compel the commissioners' court to provide for the erection of a county hospital, but is to compel that court to appoint a board of managers for a county hospital alleged to have been established and to be in operation in the county.

[1] In support of its claim to the relief sought, the city contends: First, that the buildings constructed by the county on its poor farm, as stated, constituted a county hospital, within the meaning of the act; and, second, that the Aiken Hospital, operated as it was by the county jointly with the city, also was a county hospital, within the meaning of the act. Both contentions, we think, should be overruled.

[2] In providing for the appointment of a board of managers for a county hospital, it is obvious, we think, that the Legislature had in mind a hospital established and maintained by a county, not to meet a temporary emergency like that arising from an epidemic of smallpox, but permanently and continuously, for the treatment of illness, disease, and injuries generally. It is manifest from the provisions of the act that the Legisla-

ture did not mean to require the appointment of such a board to take charge of the building constructed by Lamar county for use as a hospital, but which it never equipped nor used for that purpose, and which, because it was unfit for the purpose, it had abandoned all intention of ever equipping and using. It is equally manifest from those provisions that the Legislature did not mean to require the appointment of such a board to take charge of the pesthouses used only occasionally and for no other purpose than to detain, care for, and treat persons suffering with smallpox. That the Legislature had in mind an institution of a permanent character, to be continuously maintained, equipped for the care and treatment of sick and injured people generally, is indicated by such provisions in the act as those fixing the term of office of members of the board of managers at two years, requiring the board to meet at the hospital at least once in every month, to appoint a superintendent and other officers for the hospital and fix their salaries, to appoint a staff of visiting physicians, etc., and by such provisions as the one conferring upon any ill, diseased, or injured resident of the county a right, on application made to the superintendent and a compliance with regulations prescribed, to be admitted as a patient.

[3] It is as plain, we think, that the Alken Hospital in the city of Paris, operated by Lamar county and said city on their joint account, was not a county hospital, within the meaning of the provision in the act requiring the commissioners' court to appoint a board of managers. Aside from the fact that by the terms of the gift of that property to said city it was to be managed and controlled by the city alone, it seems clear, from a provision in section 14 of the act, that the Legislature did not contemplate that a board of managers should be appointed for a hospital so operated. The provision referred to is the one declaring that the management of a hospital operated by a county and a city therein having a population of 10,000 persons, as the city of Paris had, should be "under the joint control of such commissioners' court and city authorities." An attempt to place this hospital under the control of a board of managers appointed for the purpose would not only be unauthorized by the act but would be, in face of the provision thereof, specified directly to the contrary.

The judgment is affirmed.

#### MILNER v. SIMS et al. (No. 1364.)

(Court of Civil Appeals of Texas. Texarkana. Dec. 3, 1914.)

#### 1. EVIDENCE (§ 472\*)—OPINION EVIDENCE—MENTAL CAPACITY.

The opinion of a family physician as to mental capacity to make a will or deed is in-

admissible, as an invasion of the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195, 2248; Dec. Dig. § 472.\*]

#### 2. DEEDS (§ 211\*)—INCOMPETENCY OF GRANTOR—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to support a finding that a grantor was mentally incompetent when executing a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

#### 3. DEEDS (§ 196\*)—INCOMPETENCY OF GRANTOR—PRESUMPTION—BURDEN OF PROOF.

A grantor is presumed, at the time of the execution of a deed, to have had sufficient mental capacity to dispose of her property as she saw fit, and the burden rests on parties seeking to set the deed aside for incapacity to show otherwise.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.\*]

#### 4. APPEAL AND ERROR (§ 719\*)—REVIEW—JURISDICTION BELOW.

Lack of jurisdiction of the trial court is fundamental, and it must be considered on appeal, even without assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

#### 5. QUIETING TITLE (§ 7\*)—WILLS (§ 205\*)—WILL AS CLOUD—PROBATE.

A will not probated does not constitute a cloud on title, and, until it has been, is no evidence of title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.\*; Wills, Cent. Dig. §§ 507, 509-512, 561, 924; Dec. Dig. § 205.\*]

#### 6. WILLS (§ 257\*)—PROBATE AND PROOF OF EXECUTION—JURISDICTION OF DISTRICT COURT.

The power of probating wills or proving their execution for record as muniments of title is lodged by law in the county court, and the district court can only pass on such question in cases appealed; and hence in an original proceeding, as by suit to set a will aside, it cannot forestall the action of the county court and deprive it of its original jurisdiction to determine issues as to validity of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 592, 593; Dec. Dig. § 257.\*]

Appeal from District Court, Hopkins County; Wm. Preisor, Judge.

Suit by Ready Sims and others against M. F. Milner. From a judgment for plaintiffs, defendant appeals. Reversed.

J. H. Beavers and W. G. Russell, both of Winnsboro, for appellant. C. O. James and C. E. Sheppard, both of Sulphur Springs, and W. D. Suiter, of Winnsboro, for appellees.

HODGES, J. This is a suit filed by the appellees to cancel a deed and a will in which certain property was conveyed to the appellant. The facts show that Mrs. M. A. Speer was the widow of J. M. Speer, who died in 1890. At the time of his death Speer and his wife owned a tract of land situated in Hopkins county, on which the widow continued to reside until October, 1912. Some time during that month she left her former home, and thereafter resided with her daughter Mrs. Milner, the appellant herein, who

lived in Wood county. Mrs. Speer died some time during the month of May, 1913. About ten days or two weeks before her death she made a deed, in which she conveyed her interest in her real estate to her daughter Mrs. Milner. The consideration expressed in the deed was love and affection and care and attention for the grantor during the remainder of her life by Mrs. Milner. About the same time she made a will, in which all of her property was bequeathed to Mrs. Milner. This suit was instituted by Mrs. Meed (one of the surviving daughters of Mrs. Speer) and the children of a deceased daughter, and in it they seek to have both the deed and the will canceled, as clouds upon their title to the property they would otherwise acquire by inheritance from Mrs. Speer. It is alleged that at the time of the making of the deed and will Mrs. Speer was aged and infirm; that her mind had become impaired to such an extent that she was incapable of making either a valid deed or a valid will. It is further charged that undue influence was used by Mrs. Milner to induce her to execute both of these instruments. There being no evidence of any undue influence, that ground of complaint seems to have been abandoned, and that issue was not submitted to the jury. The court submitted the case upon special issues relating only to the mental capacity of Mrs. Speer to execute the deed and will. Upon answers finding that she was not mentally capable, a judgment was entered in favor of the appellees canceling both the deed and the will.

[1] The first assignment which we shall notice complains of the admission of the following testimony from Dr. Attaway, a physician who had attended Mrs. Speer some months prior to her death:

"Mrs. Speer was not competent to execute a deed of conveyance or will disposing of her property and estate, and was not mentally capacitated to know the extent and result of the instruments."

The court appended an explanation to the bill of exceptions, in which it is stated that before the witness was permitted to give that testimony he testified that he was a practicing physician, had known Mrs. Speer for quite a number of years, had been her family physician, and was familiar with her condition; that she was at the time suffering from senile dementia, which he explained to be disintegration of the tissues, atrophy, or a drying up of the brain cells; that such condition was progressive, and would grow worse as she grew older. The inadmissibility of this character of testimony is so well settled by the decisions of our Supreme Court that it is unnecessary to do more than to refer to a leading authority upon that question, *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64. Others equally as specific might be cited, but the very proposition here involved is there so fully discuss-

ed, and the ruling so clearly announced, that further citations are unnecessary. The fact that the witness may be an expert in diagnosing mental and physical diseases does not authorize him to determine questions of law. The appellees contend, however, that, conceding that this question was objectionable upon the issue of Mrs. Speer's capacity to execute a will, it was admissible upon the issue of her capacity to execute the deed. They insist that the courts make a distinction between controversies involving the validity of a will and those involving the validity of a deed. We are unable to appreciate the force of that suggestion. The principle upon which the testimony is rejected is applicable equally to both. If it is an invasion of the province of the jury in the one instance, it is none the less so in the other. We think the court erred in admitting the testimony quoted.

[2] Appellant also contends that the evidence was insufficient to support the finding that Mrs. Speer was mentally incompetent when she executed the deed. The briefs of both parties quote elaborate extracts from the testimony of the witnesses as to Mrs. Speer's mental condition during several months prior to her death. That offered by the appellees tended to show that at the time of the execution of the deed Mrs. Speer was about 87 years of age and in feeble health; that in her early life she had possessed an unusually bright mind, but for some years her mental powers had been on the decline, and that she was suffering from senile dementia; that her memory had become defective. She had also become addicted to the habit of using morphine to some extent, her mind was unsound, and she was incapable of attending to her business affairs. The testimony offered by the appellant tended to show that, although she was a woman of advanced age and was in a physically weakened condition, her mind was still sufficiently strong to understand all of her business affairs, to know and comprehend what she was doing at the time she executed the deed and will; that she knew the full import of those documents, and comprehended the names and relation of the beneficiaries; that her mind was not unsound, but was good for one of her age. It appears that the desire to convey the property by deed and will to her daughter, Mrs. Milner, originated with Mrs. Speer herself. There is no suggestion or intimation that the least persuasion or compulsion was used by any one to induce her to execute either of those documents. It also appears that the deed was prepared by Judge Speer, of Ft. Worth, at the special instance and request of Mrs. Speer. According to his testimony, the notary who took her acknowledgment had previously known Mrs. Speer, and she recognized him when he entered the room, although he had not seen her for a number

of years. They discussed the deed and its contents, and she perfectly understood the legal import of the instruments—fully comprehended what she was doing. He further testified that she called his attention to the fact that the field notes in the deed included a tract of land which she and her husband had previously sold to other parties, and expressed some uneasiness lest that error might invalidate the instrument. She signed the deed and acknowledged it after he had assured her that it would not have such an effect. One of the subscribing witnesses to the will, which appears to have been made about the same time, testified that he also had known Mrs. Speer many years prior to that time, but several years had intervened since he had seen her last; that she recognized him when he entered the room, and together they recalled occurrences that had transpired 20 years prior to that time. He also testified that she was rational; that she understood all that she was doing; and that her mind, though impaired to some extent by age, was good—as much so as could be expected of a person of her age. This testimony is uncontradicted, except inferentially by that of the witnesses for appellees, in saying that her mind was unsound, and that the impairment of her faculties, due to old age, would be continuous and grow worse as she grew older. There were several witnesses who testified that Mrs. Speer's mind, though to some extent weakened by age, was sound, and that she fully comprehended what she was doing.

[3] Presumptively, Mrs. Speer at the time of the execution of the deed possessed sufficient mental capacity to dispose of her property as she saw fit, and the burden rested upon the appellees to show that she did not. We think it would be doing violence to the overwhelming testimony adduced upon the trial of this case to say that at the time of the execution of the deed Mrs. Speer did not understand the transaction in which she was about to engage; that she did not comprehend its legal import and the actual consequences, and know the objects of her bounty; in other words, that she did not fully comprehend all that was necessary to be understood and comprehended by one engaging in such an undertaking in order to make her deed valid as a conveyance. The mere fact that she was old and feeble, that her memory had become faulty and her mental faculties somewhat impaired, was not sufficient to warrant a court in setting aside her deed or will. The right of a grantor to dispose of her property according to her own wishes is just as sacred, and should be guarded with as much care, as any rights due to the living. 1 Devlin on Deeds, §§ 68, 69, and cases cited in notes. We suggest that upon another trial, unless the evidence upon this issue is materially strengthened the court should in-

struct a verdict for the defendant in this suit.

[4] The court also, in entering judgment, ordered a cancellation of the will as a cloud upon the title of the appellees. It appears that no question of the jurisdiction of the court to determine that issue was raised. The lack of jurisdiction in the trial court is fundamental, and must be considered on appeal, even without assignments.

[5] It is not stated whether or not this will had been probated. If it had not been, it did not constitute a cloud upon the title. A will is no evidence of title until it has been probated.

[6] The power of probating wills, or of proving their execution for record in order that they may constitute muniments of title, is by our laws lodged in the county court, and the district court can only pass upon such questions in cases appealed. The district court cannot, therefore, in an original proceeding like this, forestall the action of the county court and deprive it of its original jurisdiction to determine such issues. If the will had been probated, the district court would also be without jurisdiction because of the statute which requires controversies of this character to be originally commenced in the county court.

The judgment of the district court is reversed, and the cause remanded.

#### STYLE et al. v. LANTRIP. (No. 1398.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 19, 1914.)

#### 1. PARTNERSHIP (§ 119\*)—APPOINTMENT OF RECEIVER—AUXILIARY RELIEF.

A petition, for a partnership receiver, merely alleging that the copartner had absented himself and that another was claiming his interest and the exclusive control, whereby petitioner was in danger of losing the money invested, is insufficient where neither the terms of the partnership agreement nor the value of the property is stated, as except in the case of lunatics and infants, the exercise of such appointed power is purely auxiliary depending on the pendency of a suit seeking some ultimate relief, which is within the jurisdiction of the court.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 181½; Dec. Dig. § 119.\*]

#### 2. PARTNERSHIP (§ 197\*)—NATURE—"LEGAL ENTITY."

An ordinary partnership is not a "legal entity," and can neither sue nor be sued in the firm name.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. § 197.\*]

For other definitions, see Words and Phrases, First and Second Series, Entity.]

#### 3. APPEAL AND ERROR (§ 384\*)—APPEAL BOND—REAL PARTIES IN INTEREST—PARTNERSHIP.

Where a petition for partnership receiver alleges that petitioner was a copartner with a named defendant, doing business under the name Style Furniture Company, and that the firm was moved to another city, whereupon her copartner disappeared, and another named person claimed to own his interest and also the exclu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sive interest, and was doing business under the name West Side Furniture Company, the other members of which were unknown, an appeal bond, by defendants, in the firm name, is insufficient, as the individuals were the real parties in interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049-2056; Dec. Dig. § 384.\*]

**4. APPEAL AND ERROR (§ 139\*)—PERSONS ENTITLED TO APPEAL—NOMINAL PARTY.**

An appeal, by a nominal party who is not affected by the judgment, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 905; Dec. Dig. § 139.\*]

Appeal from District Court, Bowie County; W. T. Armistead, Special Judge.

Petition by Mrs. Mattie Lantrip against Leonard Style and others. From an order appointing a receiver as prayed for, defendants appeal. Appeal dismissed.

E. Newl Spivey and Mahaffey & Hughes, all of Texarkana, for appellants. C. A. Wheeler and J. I. Wheeler, both of Texarkana, for appellee.

HODGES, J. On the 17th day of July, 1914, Mrs. Mattie Lantrip, the appellee in this appeal, filed in the court below, the following petition:

"The State of Texas, County of Bowie.

"In the Special District Court Bowie County, Texas.

"October Term, 1914.

"To the Honorable W. T. Armistead, Judge of Said Court:

"Now comes Mrs. Mattie Lantrip, who resides in Miller county, Ark., hereinafter styled plaintiff, and complains of Leonard Style, whose residence is unknown, W. B. Riddick, who resides in Bowie county, Tex., the Style Furniture Company, a partnership composed of Leonard Style and Mrs. Mattie Lantrip, and whose place of business is at 213 West Broad street, Texarkana, Bowie county, Tex., and the West Side Furniture Company, a partnership composed of W. B. Riddick and others whose names are unknown to plaintiff, and whose place of business is alleged to be at 213 West Broad street, Texarkana, Tex., all of whom are hereafter styled defendants.

"For cause of action plaintiff shows to the court: That on or about August 1, 1913, she and the defendant Leonard Style formed a partnership under the name of the Style Furniture Company, for the purpose of engaging in buying and selling new and secondhand furniture at 323 West Broad street, Texarkana, Tex., and that she contributed to the said partnership in cash about \$1,250, and that the defendant Leonard Style contributed to the said partnership in cash about \$200. That she and the defendant Leonard Style continued doing business at 323 West Broad street, in Bowie county, Tex., until about the 30th day of January, 1914, when the defendant Leonard Style persuaded her to move their place of business to 213 West Broad street, Bowie county, Tex., and that they continued their said business at 213 West Broad street, Texarkana, Tex., until about [the] 11th day of March, A. D. 1914. That on the 11th day of March, A. D. 1914, the defendant Leonard Style left said business in charge of the defendant W. B. Riddick, under the pretense of going to Kansas City to look for a more suitable location, and the said Leonard Style has never returned to Texarkana, and the plaintiff is unable to locate him or to learn why he has failed

to return to Texarkana and assist in carrying on their said business. That immediately after the said Leonard Style left Texarkana, the defendant W. B. Riddick, who has charge of the business, began to claim that he had purchased the interest of the said Leonard Style in the said Style Furniture Company, and refused to permit plaintiff to have anything to do with the said business, to examine the books of said business, or to participate [in] the profits of said business, and that she has been wholly excluded from participating in said business in any manner since said day. That the defendant W. B. Riddick is disposing of the said stock of goods, the same being the property of the Style Furniture Company, without accounting to this plaintiff for any of the proceeds thereof. That the defendant W. B. Riddick until recently conducted the said business under the name Style Furniture Company, and plaintiff is now informed, and so believes on information and belief, that the said W. B. Riddick is now pretending to be the sole owner of said business, and that he is now conducting the same under the name of the West Side Furniture Company. That she has been unable to get any statement of the assets and liabilities of said business since about [the] 1st day of February A. D. 1914, and for that reason she is unable to give the approximate value of the assets or the approximate amount [of the] liabilities of said business. That unless prevented defendant W. B. Riddick will sell and dispose of the stock of goods belonging to the said business, and will dissipate the proceeds thereof, to plaintiff's damage the sum of \$1,250. That plaintiff has no adequate remedy at law, and therefore prays the court that a receiver be appointed to take charge of said stock of goods, wares, and merchandise, together with all bills and accounts that may be due the said Style Furniture Company, or the West Side Furniture Company, and the books of the said Style Furniture Company, and the West Side Furniture Company, and to wind up said partnership and to render an accounting of the same, and to sell all the property of the said partnerships and to pay all debts due by said partnerships, to collect all notes and accounts owing to the said partnerships, and to do all things necessary for the protection of the interests of the partners of said partnerships. That unless a receiver is appointed at once the defendant W. B. Riddick and others, composing the West Side Furniture Company, will sell and dispose of the said stock of goods, and will appropriate the proceeds thereof to their own use and benefit without accounting to plaintiff as a partner, and will thus deprive the plaintiff of the value of her interests in the said stock of goods, wares, merchandise, and other assets belonging to the said partnership. Wherefore, premises considered, plaintiff prays that the defendants, Leonard Style, W. B. Riddick, the Style Furniture Company, and the West Side Furniture Company, be cited to appear and answer this petition; that a receiver be appointed at once with authority to take charge of the goods, wares, and merchandise of the said Style Furniture Company, and the said West Side Furniture Company, together with all the property belonging to the said companies, and all books, notes, and accounts and invoices of the said companies; that the receiver be authorized to invoice, inventory, and appraise all property belonging to the Style Furniture Company, and to the West Side Furniture Company, and to return same to this court with a list of claims against said company; to sell all of the stock of merchandise of the said company at retail, in the ordinary course of trade, and to account for proceeds thereof to this court, and if necessary to purchase stock and replenish same from time to time as to the said receiver may appear to be necessary to carry on said business, and for such other

and further orders of this court as may be found necessary in the premises granting relief to plaintiff and in accounting for said partnerships and in winding up their affairs."

The petition was sworn to in proper form. On the next day after the filing of this petition it was presented to Hon. W. T. Armistead, judge of that court, in chambers at Jefferson, Tex., and he on that day, without notice to any of the parties named as defendants, made an order appointing S. L. Gill receiver for the property described in the petition, conferring upon him, in substance, the powers prayed for. This appeal is from that order.

[1] In a brief filed by the "appellant," without stating which appellant, the only objection urged is that the allegations of the petition did not justify the trial judge in appointing a receiver without first giving notice to the opposing parties. This suit seems to be an action to have a receiver appointed to take charge of certain partnership property, with authority to ascertain and settle the debts and wind up the partnership business. Neither the terms of the partnership agreement nor the value of the property is stated. On the contrary, it is expressly alleged by the petitioner that she does not know the value of the partnership assets. Except in the case of lunatics and infants the appointment of a receiver alone does not constitute a cause of action. The exercise of such appointing powers is purely auxiliary, depending upon the pendency of a suit, seeking some other and ultimate relief, which is within the jurisdiction of the court. *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342; *Hermann v. Thomas*, 143 S. W. 195; *T. & P. Ry. Co. v. Gay*, 86 Tex. 582, 26 S. W. 599, 25 L. R. A. 52; *High on Rec.* § 17. It is not only essential that the petition should state grounds calling for the appointment of the receiver to take charge of the property involved in the litigation, but it should also show upon its face an independent cause of action within the jurisdiction of the court. It should show that the subject-matter or amount in controversy is within the court's jurisdiction. *Bates v. Hill*, 144 S. W. 288; *Stricklin v. Arrington*, 141 S. W. 189; *Ware v. Clark*, 125 S. W. 618; *Smith v. Horton*, 92 Tex. 21, 46 S. W. 627. In merely calling attention to the failure of the petition to state the value of the property, we do not wish to be understood as saying that it is otherwise legally sufficient.

[2, 3] But there is another obstacle which precludes the adjudication of this controversy on its merits—the absence of any appeal bond by the real parties defendant in the court below. After reciting some preliminary facts essential to describe and identify the order appealed from, the bond contains the following:

"And whereas said Style Furniture Company and the West Side Furniture Company desire to appeal from said order, etc. \* \* \* Now, therefore, know all men by these presents that we, the Style Furniture Company and the West Side Furniture Company as principals, and \* \* \* and \* \* \* as sureties, acknowledge ourselves bound to pay to the plaintiff, Mrs. Mattie Lantrip, the sum of two thousand dollars," etc.

The bond is signed "Style Furniture Company" and "West Side Furniture Company" by their attorney. Then follow the signatures of the sureties. Nowhere does the name of either Leonard Style or W. B. Riddick, the real parties defendant, appear in the bond. An ordinary copartnership, such as that described in the original petition filed in this suit, is not a legal entity, and can neither sue nor be sued in the courts of this state by the firm name. *Glasscock v. Price*, 92 Tex. 271, 47 S. W. 965; *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. It is true that both the Style Furniture Company and the West Side Furniture Company are named in the petition as defendants, but that language is mere surplusage, and should not be considered in determining the identity of the real parties defendant. The petition fails to state the name of those who compose the West Side Furniture Company further than to say that W. B. Riddick is one, and that the others are unknown. A suit against W. B. Riddick did not have the effect of bringing the West Side Furniture Company before the court. *Frank v. Tatum*, supra. It cannot be claimed that the Style Furniture Company is before the court as a defendant, for Mrs. Lantrip, the plaintiff in the suit, is a member of that firm, and is named as the sole obligee in the appeal bond. If the court were called upon to render a judgment on this bond, against whom could it be rendered? Certainly not against either Riddick or Style, because they do not appear as having appealed; and if not against them, then no other parties are named who might be held liable.

[4] We do not overlook the fact that our statute now permits defective bonds on appeal to be amended under certain conditions. But we are inclined to think this bond is equivalent to no bond at all from the only parties who have the right to prosecute this appeal. If Riddick and Style are not made parties to the appeal by that bond, it is now too late for them to perfect their appeal by filing a new bond. An appeal by a nominal party who is not affected by the judgment will not be considered. *Hawley v. Whitaker*, 33 S. W. 688. Even if it should be held that the bond is merely defective and may be amended, this appeal would ultimately have to be dismissed because of the defects pointed out in the original petition.

The appeal is therefore dismissed.

**MARION COUNTY et al. v. PERKINS BROS. CO. (No. 1356.)**

(Court of Civil Appeals of Texas. Texarkana. Nov. 28, 1914.)

**1. INJUNCTION (§ 13\*)—OFFICERS—OFFICIAL DUTY—PROPERTY RIGHTS.**

An officer will not be restrained from performing an official duty except on clear showing that the act is unlawful and that its performance will result in private injury to complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 13; Dec. Dig. § 13.\*]

**2. PLEADING (§ 34\*)—PETITION—CONSTRUCTION.**

A petition against an officer seeking to enjoin performance of official duty will be strictly construed, and every reasonable inference will be indulged in favor of the legality of the act sought to be restrained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

**3. TAXATION (§ 611\*)—COLLECTION OF TAXES—INJUNCTION—PETITION.**

A petition to enjoin an alleged excessive tax was insufficient, where it merely alleged that the officers were demanding payment without an allegation that an attempt had been made to enforce collection by an actual or threatened levy on complainant's property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.\*]

**4. TAXATION (§ 611\*)—WRONGFUL ENFORCEMENT—INJUNCTION—AMOUNT IN CONTROVERSY—JURISDICTION.**

In a suit to enjoin a tax, the petition should allege the nature and extent of the injury to which petitioner will be subject if the writ is not issued, which is usually the value of the property seized to constitute the tax in order to show what court has jurisdiction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.\*]

Appeal from District Court, Marion County; W. T. Armstead, Judge.

Suit by Perkins Bros. Company against Marion County and others. Judgment for plaintiff, and defendants appeal. Reversed, with instructions to dismiss.

W. L. Grogan, of Jefferson, for appellants.  
R. R. Taylor, of Jefferson, for appellee.

**HODGES, J.** In December, 1913, Perkins Bros. Company, which is described as a private corporation, filed an application in the court below seeking to restrain the county of Marion and the tax collector of that county from demanding certain taxes which it is claimed were illegally assessed. On January 26th an amended original petition was filed. It is alleged that Perkins Bros. Company is a private corporation, with its place of business and domicile in Jefferson, Marion county, Tex., with S. P. Perkins as its president, who resides in Hunt county, Tex.; that during the year 1913 it was a taxpayer in Marion county; "that it rendered its as-

sessments of its property for taxation to the tax assessor for said county for said year 1913 at and for the sum of \$10,000, which complainant believes was full valuation; that there is and was a custom in force at that time, and it was the rule of said commissioners' court to accept a valuation of 60 per cent. on all property rendered for taxation." It is alleged that Marion county, acting through its commissioners' court, during the year 1913 arbitrarily and without notice to the complainant raised its assessment from \$10,000 to \$15,000, and that the county and its tax collector are now unlawfully demanding payment of the sum due upon that assessment, which amounts in the aggregate to \$211.50. It is further alleged that the amount due upon an assessment of \$10,000 is \$141, and that sum is tendered into court. It is further alleged:

"That after said commissioners' court, or board of equalization, had raised said assessment, and just as soon as complainant heard of it, it went to said commissioners' court, or board of equalization, and demanded a hearing on the same, and it was denied a hearing by said commissioners' court, or board of equalization; that this complainant is now without a remedy for the redress of this wrong, and will suffer irreparable injury at the hands of said respondent if it is allowed to go ahead and extort from this complainant said illegal and wrongful taxes, as hereinbefore set forth and alleged."

It is also averred:

"That they (the board of equalization) received other assessments of property at a valuation of 60 per cent. and denied this right to this complainant."

The petition closes with a prayer for a writ of injunction restraining the county and the tax collector "from any further attempt to collect said illegal taxes."

Upon a trial before a jury a judgment was rendered in favor of the complainant. An appeal was perfected by all of the parties defendant in the suit, but briefs are filed by Marion county alone.

[1-3] There are several specific errors assigned, some of which are based upon the remarks made by the attorney for the appellee in his argument before the jury. Without discussing those assignments in detail, we suggest that the language used was improper and would, in our opinion, be sufficient ground for reversing the case in a close contest on the facts. But we think the amended original petition, upon which the case was tried, is fundamentally defective, and for that reason the case should be reversed. An officer will not be restrained by a writ of injunction from the performance of an official duty, except where it is clearly shown that the act to be forbidden is unlawful and that its performance would result in some private injury to the complaining party. And in determining whether or not that situation exists, the averments of the pleader seeking such re-

lied will be strictly construed, and every reasonable inference will be indulged in favor of the legality of the official act sought to be restrained. *Gillis v. Rosenheimer*, 64 Tex. 246; *Schlinke v. De Wit County*, 145 S. W. 660, and cases there cited. Where the writ is invoked to prevent the collection of a tax, as in this instance, it devolves upon the party seeking to restrain such collection not only to allege and prove that the excess of which he complains is unlawful, but that unless its collection is enjoined he will sustain some injury to his property. The petition in this case fails to state any facts which show that the appellee will sustain any injury if the writ is not issued. It is true it does allege that it will suffer an irreparable injury unless the parties defendant are enjoined; but this is not sufficient. In such cases the pleader must state the facts upon which he relies to support that general averment, so that the court may determine that question for itself. *Holbein v. De La Garza*, 126 S. W. 42; 22 Cyc. pp. 927, 928; 1 High on Inj. §§ 22, 489, 491. It is not claimed that any property has been seized, or is liable to be seized and sold in satisfaction of this alleged unlawful demand. It is merely alleged that the parties defendant are "demanding" payment. Until this demand assumes the form of an attempt to enforce collection by an actual or threatened levy upon the appellee's property, it does not disclose any injury that will call forth a writ of injunction.

[4] It is also apparent that the petition fails in another respect to state a cause of action within the jurisdiction of the district court. Jurisdiction in such cases is to be determined by the nature and extent of the injury the petitioner will sustain if the writ is not issued. This is usually the value of the property seized. This sum should be stated in order to comply with the rule that the jurisdiction of the court over the subject-matter should affirmatively appear from the face of the petition. *Smith v. Horton*, 92 Tex. 21, 46 S. W. 627; *Ware v. Clark*, 125 S. W. 618. It may be that when an effort is made to enforce collection of this tax the value of the property seized, or the damage likely to result, will bring the case within the jurisdiction of the county court.

We shall not undertake to discuss the questions raised in the various assignments of error. The tax collector, who is an important party to this appeal, has filed no briefs, and Marion county is only a nominal party, and for that reason we dispose of the appeal only on the fundamental objections referred to.

The judgment will be reversed, with instructions that the suit be dismissed unless the petition is so amended as to cure the defects mentioned. But we do not wish to be understood as holding that the petition is sufficient in all other respects.

**MURCHISON v. MURCHISON.** (No. 1350.)  
(Court of Civil Appeals of Texas. Texarkana.  
Nov. 26, 1914.)

**1. DIVORCE (§ 48\*)—GROUNDS—CONDONATION.**  
Condonation applies to cruelty and other grounds of divorce, as well as to adultery; the only difference being that an act of cruelty is condoned only until the particular act is repeated.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 169, 170, 184; Dec. Dig. § 48.\*]

**2. DIVORCE (§ 27\*)—GROUND—CRUELTY.**

Corporal punishment administered by a wife to her stepdaughter was not such cruel treatment of the husband as entitled him to a divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 62-83; Dec. Dig. § 27.\*]

**8. DIVORCE (§ 49\*)—CRUEL TREATMENT—CONDONATION.**

Where a husband continued to live with his wife without protest harmoniously for a considerable time after she administered corporal punishment to his daughter, and without mentioning the fact to her, and they separated not because he was unwilling to live with her as his wife, but because she was unwilling to longer live with him as her husband, her act in whipping the daughter was condoned.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 171-179; Dec. Dig. § 49.\*]

Appeal from District Court, Cherokee County; L. D. Guinn, Judge.

Action by A. J. Murchison against Mary Murchison for divorce. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Norman, Shook & Gibson, of Rusk, for appellant. Perkins & Perkins, of Rusk, for appellee.

**WILLSON, C. J.** This appeal is from a judgment granting appellee, plaintiff below, a divorce from appellee, on the ground that she had been guilty of such cruel treatment of him as to render their living together insupportable.

Appellant insists the testimony was not sufficient to support the judgment, and, as we think this contention must be sustained, it will not be necessary to consider other questions made by assignments in the briefs.

It seems from the testimony that the parties had been married about two years at the time of the trial in the court below. Each of them had been married before, and appellant then had a daughter about five years old, and appellee had five children then living with him—three sons, aged, respectively, 13, 19, and 22 years, and two daughters, aged, respectively, 9 and 11 years. Testifying as witnesses, the parties agreed they got along together pleasantly enough during the first six or eight months following their marriage, but that thereafter, until June 23, 1913, when they separated, they did not always get along together so pleasantly. According to appellee's account of it, his refusal to sell his home in Cherokee county and move to Houston county, where appel-

lant's mother lived, and appellant's mistreatment of his children, were the causes of the disagreements between them. According to appellant's account of the matter, the unpleasantness between them was due to appellee's children's mistreatment of her and his refusal to do anything to protect her from such mistreatment. The specific act of appellant, relied upon as sufficient to support the finding that she had been guilty of such cruel treatment of appellee as to warrant the relief granted to appellee, was her conduct in whipping appellee's youngest daughter, Mattie, three or four weeks before the parties separated. According to the child's account of the incident, appellant, without cause for so doing, whipped her so severely with a peach-tree limb about three feet long and as large as the tip of her little finger, as to cut a place two or three inches in length on one of her legs and another place about as long on one of her hands, deep enough to cause same to bleed profusely, and then threatened to beat her to death if she told any one about it. The child, however, told appellee about the whipping administered to her on the day it occurred, and exhibited to him the wounds she claimed appellant had inflicted on her person. Appellee said nothing to appellant about the matter during the three or four weeks they lived together after the time the child was subjected to the whipping. He gave as a reason why he did not mention it to appellant that the child had requested him not to let appellant know she had told him of the incident. His account of what occurred at the time they separated was as follows:

"The morning we separated my little son spoke something about going to see my married daughter, and I just made the remark that 'I sorter look for them over here to-day,' and my wife blated out that 'she didn't want them to come over here; that she had somewhere to go.' Well, she never had mentioned going to me. When she said that—she had before that raised sand about them [his daughter and her husband] coming down there, and I had said nothing, and it raised my passion that morning when she said that, and I walked out where she was on the gallery and I sat down and commenced this way, 'Why is it you want to raise sand whenever I am looking for my children to come to see us?' and she says, 'I never done it,' and it had not been a minute since she had, and I says, 'It has got so lately that you treat my children like dogs, and if I offer to correct yours the devil is to pay,' and she jumped up and got her bonnet and away she went. I went out there with the full intention of talking to her about the matter, and if she had not agreed to have done better and quit her way of doing, I intended to tell her she would have to hit the road, I wouldn't stand it any longer. When I went out on the gallery and sat down on the steps I intended to have referred to her whipping little Mattie if I had had a chance, if she had stopped long enough. I didn't speak to her about it because she broke it off in the abrupt way she did. She got up and left and didn't let me finish the conversation I started in with. I was speaking to her in a kind manner. I went out there to talk with her about the way she was doing and to tell her she would have to make some reformation

or we would have to separate, and I intended to tell her that if she had given me time. I didn't anticipate that she was going to break away so suddenly. She went up to her brother's, who was living on my place."

Appellant admitted she whipped the child, but denied she did so without sufficient cause, and denied she whipped her so severely as to draw blood from her. And appellant's account of what occurred at the time she left appellee differed in some respects from his account as set out above. As, however, the trial court had a right to believe appellee's account and disbelieve appellant's, it is not worth while to state the points of difference between them. Appellee testified he whipped his children "once in a while" while appellant was living with him, and that on one occasion after he and appellant separated he whipped Mattie with a leather razor strop.

[1-3] It seems that "the doctrine of condonation applies as well to cruelty and other grounds of divorce as to adultery; the difference being that an act of cruelty is condoned only until the particular act is repeated." *Bingham v. Bingham*, 149 S. W. 218; *Nogees v. Nogees*, 7 Tex. 538, 58 Am. Dec. 78. If, therefore, appellant's conduct in whipping the child was such cruel treatment of appellee as entitled him to a divorce—and we are of the opinion it was not (*Eastman v. Eastman*, 75 Tex. 473, 12 S. W. 1107; *Jones v. Jones*, 41 S. W. 413; *Bush v. Bush*, 103 S. W. 217)—the relief he sought should have been denied him; on the ground that he had condoned the act and it had not been repeated, nor had appellant thereafterwards been guilty of other misconduct. That appellant's act in whipping the child was not such cruelty toward appellee as rendered their living together insupportable conclusively appeared in the fact that for three or four weeks thereafterwards they did live together without complaint on appellee's part, and harmoniously for aught shown in the record to the contrary. And it appeared from appellee's own testimony that he and appellant did not cease to live together because he was unwilling to longer live with her as his wife, but because she was unwilling to longer live with him as her husband.

The judgment will be reversed, and judgment will be here rendered denying appellee the relief he sought.

## BUHLER v. E. T. BURROWES CO.

(No. 5330.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 4, 1914. Rehearing Denied  
Dec. 23, 1914.)

### 1. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—RIGHT TO SUE—NONCOMPLIANCE WITH STATUTE.

A foreign corporation which contracted to sell and install in a building in this state screen doors and window screens and performed the contract, its agent doing the carpenter work necessary to fit and install them, was transacting

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

business in the state, whether the screens were shipped to the purchaser or to the agent, and hence, where it had not obtained a permit to transact business in the state, it could not sue for the purchase price of the screens.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

**2. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS — RIGHT TO SUE — NONCOMPLIANCE WITH STATUTE—"DOING BUSINESS."**

A single transaction is sufficient to constitute the transaction of business in this state by a foreign corporation not having a permit to transact business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

Appeal from Bexar County Court for Civil Cases; J. H. Clark, Judge.

Action by the E. T. Burrowes Company against C. Buhler. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

Searcy & Browne, of San Antonio, for appellant. Schlesinger & Schlesinger and Chas. E. Lee, all of San Antonio, for appellee.

**MOURSUND, J.** [1] The E. T. Burrowes Company, a foreign corporation, sued C. W. Buhler and A. J. Herrmann in justice's court upon a written contract, reading as follows:

San Antonio, Texas, 11/18, 1911.

Order for

Indexed Dec. 1, 1911.

Burrowes Wire Screens.

To the E. T. Burrowes Co., Portland, Maine,

U. S. A. A. J. Herrmann, Archt.

By C. W. Buhler.

To be sent about Feby. 1st.

To be paid for by May 1st, 1912.

When screens are received by purchaser they are ready to be fitted to windows and doors. All moldings, pieces and hardware, as per catalogue, are finished without extra charge.

Price as below:

All windows and doors on 1st and 2nd floors, except screened porch 2nd floor.

C. B. 14.

Our best work and finish del. and installed for \$195.30.

A. J. Herrmann, Archt.

Accepted:

Salesman: L. H. McDaniels.

An appeal being taken by plaintiff to the county court for civil cases the case was tried in such court without a jury, and plaintiff adjudged to recover from Buhler the amount sued for, but that it take nothing as against Herrmann. Buhler filed a written denial of plaintiff's right to sue, the ground being that plaintiff was a foreign corporation transacting business in this state without a permit to do so and without filing a copy of its articles of incorporation with the secretary of state.

The only question for our decision is whether the court erred in holding that plaintiff could maintain the suit. The evidence upon this issue, in addition to the contract above set out, is as follows: L. H. McDaniels, who resided in San Antonio, was the agent for plaintiff at the time he accepted the written

contract, and had been such agent in 1910, 1911, and 1912. The screens were sent, and he installed them. He did not recall whether he hired any one to assist him. He always ordered the window screens to fit exactly, so that all there was to do was to attach the fixtures to the house and hang the screens, but he always ordered the doors too large, so that he could cut them down and make them fit the opening. He sometimes hired a carpenter to cut them down and sometimes did the work himself. He had a little carpenter shop out at his house where he did this kind of work. The business of the plaintiff is the manufacturing of screens in Maine, and those installed by McDaniel were there made according to the measurements taken by him in San Antonio. Herrmann, the architect who ordered the screens for Buhler, testified that the screens were installed by McDaniels, or some one for him; that he had often ordered Burrowes screens and Mr. McDaniels or some one else always put them up; that it was sometimes necessary to do work on the screens to make them fit perfectly. It was agreed that the E. T. Burrowes Company is a foreign corporation, incorporated under the laws of Maine, and that it has not filed with the secretary of state of the state of Texas a duly certified copy of its articles of incorporation and obtained a permit to transact business in Texas.

Appellant contends that appellee could not maintain this suit in our courts, and the question arises whether the facts show that the transaction out of which this suit arises constituted the transaction of business in this state or whether it constituted interstate commerce. It is clear that the transaction constituted interstate commerce, unless the fact that the screens were to be installed alters the case. Appellant relies upon the case of Smythe Co. v. Ft. Worth Glass & Sand Co., 105 Tex. 8, 142 S. W. 1157, but in that case the contract was to build three gas producers in this state and there was no pretension that they were sold in a foreign state, and the evidence showed that in building the same material was used which had been bought in this state and therefore in part, at least, the foreign corporation was seeking to recover for material, the sale of which was not protected by the commerce clause of the federal Constitution. The Supreme Court declined to express an opinion whether contracts for the sale of machinery in another state to be installed in this state by the seller are protected by the said commerce clause. In the case of De Witt v. Berger Mfg. Co., 81 S. W. 334, the Court of Civil Appeals for the Third District held that a foreign corporation, without complying with our statute, could sue to recover the price of certain metal ceiling and side walls shipped from Ohio, and the cost of putting same up in this state. The facts are not fully stated, nor did

the Supreme Court pass upon the case, the application for writ of error having been dismissed for want of jurisdiction. We find cases from other states which hold that sales of articles to be installed in such states are nevertheless protected by said commerce clause of the Constitution. See *Flint & Walling Mfg. Co. v. McDonald*, 21 S. D. 526, 114 N. W. 684, 14 L. R. A. 673, 130 Am. St. Rep. 735; *Milan Mill. Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135.

We have found a recent decision by the United States Supreme Court which, we think, should govern us in deciding this case. It is the case of *Browning v. City of Waycross*, decided April 6, 1914, and reported in 233 U. S. 16, 34 Sup. Ct. 578, 58 Lj. Ed. 828. In that case it is held that an agent for a foreign corporation, who solicited orders for the sale of lightning rods in another state, received the rods, and erected them for such corporation, the price paid for the rods to the corporation including the duty to erect them without further charge, may be subjected to a municipal tax without violating the commerce clause of the federal Constitution. The case now being considered by us is very similar to the case just mentioned. In this case the appellee contracted to sell and install screens for a certain price, and fulfilled that contract, its agent who solicited and received the order doing the carpenter work necessary to fit and install the screens. The evidence does not show to whom the screens were sent, but the contract provided that "when the screens are received by the purchaser they are ready to be fitted to windows and doors." It is, however, not material whether they were sent to the purchaser or the agent. The fact remains that the foreign corporation bound itself to put up screens in this state, and did put them up.

[2] The evidence further shows that this was its regular way of doing business. However, this is not material, as one transaction is sufficient to constitute the transaction of business in this state. *Smythe v. Ft. Worth Glass & Sand Co.*, supra. If a foreign corporation can, without complying with our statutes, engage in the business of putting up screens in Texas, a business which any carpenter can perform, it can also sell all the material for a house, ship it in from another state, and contract to put it up in this state, keeping a force of carpenters and mechanics for that purpose. Nor can it be contended that the installation of screens is such a delicate and complex task that the business of selling them cannot be carried on unless the seller furnishes experts to do the work of putting them in place, so this case does not fall within the class of cases upon which the Supreme Court of the United States declined to express an opinion in the *Browning v. City of Waycross* Case. We conclude that the

court erred in holding that appellee could maintain the suit.

The judgment is reversed, and the cause dismissed.

# PORTERFIELD et ux. v. TAYLOR.

(No. 1349.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 27, 1914. Rehearing Denied  
Dec. 17, 1914.)

## 1. DEEDS (§ 6\*)—NATURE OF INSTRUMENT—DEED OR EXECUTORY CONTRACT TO CONVEY.

An instrument in form of a deed, reciting that the grantors had employed the grantee as their attorney to prosecute a suit to recover the land in controversy for another and in consideration of the faithful performance of the grantee's duties, the grantors sold, etc., one-fourth of whatever sum might be realized out of and collected in the cause together with one-fourth of all rents and appurtenances thereto pertaining, recovered by the grantors in the suit and assigned and transferred a one-fourth interest in the cause of action, etc., constituted a present conveyance of one-fourth of the grantors' legal title in the land, and not an executory contract to convey.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 6; Dec. Dig. § 6.\*]

## 2. TRUSTS (§ 103\*)—CREATION—ENFORCEMENT.

Where a widow, having conveyed her homestead to her son, after marriage, employed an attorney to recover the land, executing with her husband a deed to a one-fourth interest in the cause of action and without the attorney's knowledge obtained from the son a reconveyance, she held an undivided one-fourth of the land as the attorney's trustee.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 154; Dec. Dig. § 103.\*]

## 3. PARTITION (§ 16\*)—INTEREST IN PROPERTY.

Where a client held a one-fourth interest in certain land as her attorney's trustee, such title was sufficient to enable him to maintain partition.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 52; Dec. Dig. § 16.\*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Suit by H. L. Taylor against G. M. Porterfield and wife. Decree for complainant, and defendants appeal. Affirmed.

Fitzgerald, Butler & Bulloch, of Tyler, for appellants. Lasseter & McIlwaine, of Tyler, for appellee.

**WILLSON, C. J.** This suit was brought by appellee against appellants to partition 31 acres of land in Smith county. Appellee alleged that he owned a one-fourth, and that appellants owned a three-fourths, undivided interest in the land.

From testimony heard on the trial, it appeared that prior to August, 1912, Mrs. Porterfield, then Mrs. Senter, a widow, conveyed the land to her son H. B. Senter. After she married Porterfield, she, joined by him, employed appellee to represent her as an attorney at law in a suit afterwards commenced in the district court of Smith county to cancel and annul her deed to Senter (on the ground, it seems, that the consider-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ation therefor had failed), and for damages. Before the cause was reached for trial Mrs. Porterfield and Senter, without the knowledge or consent of appellee, effected a compromise thereof, by the terms of which Senter was to reconvey the land to Mrs. Porterfield and the suit was to be dismissed. The land was reconveyed to Mrs. Porterfield in compliance with the agreement, and appellants in writing requested the clerk to dismiss the suit. It was not dismissed, however. Instead, appellee, having learned of the compromise effected by his clients, intervened therein and sought judgment for a part of the land, on the ground that appellants had conveyed to him a one-fourth undivided interest in the cause of action in consideration of his services as their attorney in the suit. Without notice of any kind to appellants of the intervention by appellee, or knowledge thereof on their part, the suit was tried February 21, 1912, and judgment was therein rendered in appellee's favor against appellants for a one-fourth undivided interest in the land. Afterwards this suit was brought for a partition, as stated. Appellee contended in this action, as he did in his intervention in the suit against Senter, that appellants by a written instrument duly executed by them, dated August 2, 1911, had conveyed to him a one-fourth undivided interest in the land. The instrument was as follows:

"The State of Texas, County of McLennan. Know all men by these presents, that I, Mrs. Q. A. Porterfield, joined by my husband, G. M. Porterfield, for and in consideration of legal services rendered and to be rendered me by H. L. Taylor, attorney at law, Waco, Texas, and the prosecution of a suit pending in the district court of Smith county, Texas, styled Mrs. Q. A. Porterfield et al. v. H. B. Senter, a suit for the cancellation and rescission of a deed, and for damages, as is more fully shown by plaintiff's original petition filed therein, have this day and do by these presents constitute and appoint said H. L. Taylor my attorney at law and in fact and employ him to collect any and all monies growing out of and incident to the prosecution of said cause in said court pending and to do any and all acts in the premises and adjudication of said cause and to prosecute said claim at law to all courts having jurisdiction to same; and we do hereby authorize my said attorney to compromise, settle and receipt in our names for all amounts that may be due us from said defendant H. B. Senter; and we hereby agree and bind ourselves that we will carry on no negotiations of any kind with reference to the settlement of this cause of action; and further agree that the said Taylor shall have the full and exclusive power and authority to compromise or otherwise settle said cause of action.

"In consideration of the faithful performance of the duties imposed upon him as our attorney in said styled cause, we hereby sell, convey, assign and transfer, and agree to pay and deliver to said Taylor, one-fourth of whatever sum may be realized out of and collected in said cause from said defendant, together with one-fourth of all rents and appurtenances thereto pertaining, recovered by us from the defendant H. B. Senter through compromise or judgment of the court; and we do hereby assign and transfer a one-fourth interest in said cause of action, subject, however, to this agreement, that

the plaintiffs herein agree to pay for three-fourths of all the expenses incident to the trial of this cause. And the said Taylor agrees to pay the remaining one-fourth of said costs.

"This instrument was executed after the above suit was filed on this the 2d day of August, 1911.

Mrs. Anna Porterfield.  
"G. M. Porterfield."

Attached to the instrument was a certificate as follows:

"The State of Texas, County of McLennan. Before me, the undersigned notary public in and for McLennan county, Texas, on this day personally appeared Mrs. Q. A. Porterfield and G. M. Porterfield, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office this the 2d day of August, 1911.

"J. W. Taylor, Jr.,  
"Notary Public McLennan County, Texas."

Appellants contended that the instrument just set out was a forgery; that they, nor either of them, never either executed or acknowledged the execution of same. The contention, however, was determined against them; the jury finding on special issues submitted to them that appellants did execute and acknowledge the execution of the instrument. Appellants further contended that, if the instrument was executed and acknowledged by them as it purported to have been, it nevertheless did not operate to pass an interest in the land to appellee, because it appeared to be merely an executory contract, and as such was not enforceable because, as they averred, the land at the time the instrument purported to have been made was their homestead, and because if it was not their homestead it was part of Mrs. Porterfield's separate estate, and the execution of the instrument did not appear to have been acknowledged by her in the way necessary to bind her. On pleading and testimony authorizing it the jury found that the notary who, according to the face of the certificate, took her acknowledgment, "showed the contract to Mrs. Anna Porterfield, and then and there fully explained the same to her on an examination privily and apart from her husband G. M. Porterfield, and Mrs. Porterfield on said examination acknowledged to the notary that the same was her act and deed, that she had willingly signed the same, and that she wished not to retract it."

On findings made as stated and testimony heard by him, the court rendered judgment for appellee for a one-fourth undivided interest in the land, and directed a sale thereof for the purpose of making a partition between him and appellants.

#### Opinion.

[1] The contention made by appellants, that the instrument set out in the statement above should be construed to have been an executory and not an executed contract, should, we think, be overruled.

For the consideration recited therein the instrument purported to assign and trans-

fer to appellee a one-fourth interest in appellants' "cause of action" against Senter, and we see no reason why it should not be held to have had that effect at the time it was delivered to him.

That appellants had a "cause of action" against Senter, and that that cause of action, in part at least, was based on a right existing in them to recover the land Mrs. Porterfield had conveyed to Senter, is not questioned in the record before us. By virtue of the assignment appellee became, jointly with appellants, the owner of that right. Had the suit commenced to enforce the right been prosecuted to a judgment in appellants' favor for the land, the cause of action would have become merged in the judgment, and appellants and appellee would have owned the judgment jointly, as they did the right on which it was based. 20 A. & E. Enc. Law, p. 599.

The transaction between the parties in that event, we think, in legal effect would not be unlike the ordinary one whereby the owner of a right to land evidenced by a certificate contracts with another to locate it on their joint account. In cases of that kind it is held that when the legal title to the land vests in the owner of the certificate he holds as trustee to the extent of the interest of the other party. *Stieler v. Hooper*, 66 Tex. 354, 1 S. W. 317; *Doss v. Slaughter*, 53 Tex. 237.

[2, 3] We see no reason why appellants, because they acquired the legal title to the land by compromise with instead of by a judgment against Senter, should not be treated as holding a one-fourth interest therein as trustee for appellee. If they held in that capacity, then appellee had a right to maintain his suit for a partition against them (*Sutton v. Sutton*, 39 Tex. 549); and we think the fact that the land was Mrs. Porterfield's homestead and a part of her separate estate at the time she conveyed it to Senter was not an answer to the suit; for at the time she dealt with appellee the title was not in her, but was in Senter, who then had possession of the land.

The judgment is affirmed.

BRAY et al. v. SEWALL et al. (No. 371.)  
(Court of Civil Appeals of Texas. El Paso.  
Dec. 10, 1914.)

**1. MORTGAGES (§ 561\*) — ACTIONS FOR DEFICIENCY—SUFFICIENCY OF ANSWER.**

In an action on promissory notes secured by a deed of trust for a deficiency remaining after foreclosure of the deed of trust, an answer by certain defendants, alleging facts as to collusion between plaintiff and another defendant alleged to have assumed payment of the notes, held subject to some of the special exceptions for immateriality, indefiniteness, and insufficiency, which were sustained by the trial court.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1609-1621; Dec. Dig. § 561.\*]

**2. APPEAL AND ERROR (§ 737\*)—ASSIGNMENTS OF ERROR—INCLUDING ERRORS IN ONE ASSIGNMENT.**

Where the special exceptions to an answer each presented various questions of law, but the assignments of error complaining of the sustaining of the various exceptions were grouped, they could not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3030-3032; Dec. Dig. § 737.\*]

**3. APPEAL AND ERROR (§ 742\*) — ASSIGNMENTS OF ERROR — SUFFICIENCY OF STATEMENT ACCOMPANYING ASSIGNMENTS.**

Where the statement accompanying assignments of error complaining of the sustaining of special exceptions to the answer did not refer to the transcript, was not germane to the proposition under the assignments, and nowhere pointed out the part of the answer to which the exceptions referred, nor set out or gave the substance of the exceptions so as to show that they presented a single proposition of law, the brief did not conform to the rules.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Error from District Court, Harris County; Wm. Masterson, Judge.

Action by Campbell Sewall and others against John W. Bray and others. Judgment for plaintiffs, and defendants Bray and wife bring error. Affirmed.

Atkinson, Graham & Atkinson, of Houston, for plaintiffs in error. Campbell, Sonfield, Sewall & Myer, of Houston, for defendants in error.

WALTHALL, J. [1] On October 3, 1912, Campbell Sewall brought this suit in the district court of Harris county, Tex., against Frost Seastrunk, John W. Bray and wife, Irma V. Bray, et al., to recover a balance due on two promissory notes of \$5,000 each, described in the petition. He alleged that he had acquired said notes from J. J. Sweeney, without recourse; that said notes were secured by a trust deed on certain property in Houston; that he had foreclosed said trust deed and bought in said property; and that there remained an unpaid balance due of \$2,168.30 for which he prayed judgment, which included interest and attorney's fees. Defendants Bray and wife, in their answer, admitted the execution of the notes; admitted that Frost Seastrunk had executed the notes to them, and that they had transferred them to Sweeney, and stated that in August, 1911, Seastrunk had sold the property described and embraced in the deed of trust to R. G. Boon, and that Boon had conveyed same to L. P. Scarborough, who had assumed the payment of said two notes, including interest, and that on September 6, 1911, said Scarborough, for a valuable consideration, executed a written option contract to Bray, and deposited it in escrow by which Bray acquired the right to repurchase said property from Scarborough at any time before 12 o'clock on the 28th of February, 1912, upon the payment by Bray to Scarborough of \$1,250 in

cash with interest, and on the further consideration that, at the time said Bray exercised his option, he should reimburse Scarborough for any expense incurred by him on said property, including any interest he had paid on said two notes. It was further alleged that, after Scarborough had secured the deed to said property and executed said option contract to Bray, he brought suit against a railway company for damages to the property, included in the deed of trust, and that, while said action was pending, he was advised that Bray claimed said land by reason of the said option deed, and that Bray was going to exercise his option, and that Scarborough claimed that any damage recovered in the suit against the railway company did not belong to Bray, and that said suit was in the hands of his attorneys. The answer of Bray and wife further alleged that said deed in escrow did not reserve to said Scarborough the said claim for damages against said railway, and that one of Scarborough's attorneys undertook to withdraw said deed from the escrow deposit and substitute another deed, which he (Bray) refused to accept, and demanded that the original deed be returned, which was done, and that Bray exercised his option to repurchase the said property, and paid the purchase price required. Bray's answer further alleged that said Scarborough failed to pay said interest on said two notes in order to prevent the said Bray from exercising his said option, and that plaintiff was induced by said Scarborough to acquire said notes from Sweeney, in order to compel him (Bray) to pay the 10 per cent. attorney's fees, provided in the said notes, and that when he (Bray) learned that plaintiff had bought said notes he then tendered in cash to the attorneys for Scarborough and plaintiff the interest due on said notes, which they refused to accept. Bray further alleged that Scarborough and his attorneys were acting with plaintiff and used his name for the purpose of preventing him (Bray) from exercising his said option; that the interest on said notes was due on February 4, 1912; that plaintiff purchased said notes on the 6th day of February, 1912; and that at the time of the purchase of said notes Sweeney had not declared said notes due on account of the failure to pay the interest, when it became due; that plaintiff paid to Sweeney all the interest due on said notes; and that, when plaintiff got possession of said notes, he at once declared them due for failure to pay the interest when due; and that because of plaintiff's relationships with him (Bray) plaintiff was not authorized to declare said notes due; and that any attempt to accelerate the maturity of said notes was inequitable, unjust, and did not have the effect to mature same. It was further alleged that plaintiff called on the trustee in the deed to act in foreclosing the deed of trust, and that, on his refusing to do so, appointed a substitute

trustee who sold said property without knowledge of him (Bray), and that said property was bought in at said sale by plaintiff. Defendant Bray further alleged that, by reason of the facts stated, the said notes were not due when the sale under said deed of trust was made; that said property was prematurely sold, and defendant asked that sale be set aside and the suit abated.

By supplemental petition, plaintiff interposed a general demurrer, and 17 special exceptions to the answer of defendants Bray and wife. The special exceptions were to the effect that the answer was too general and not sufficiently specific to put plaintiff upon notice or advise him of what defendants would undertake to prove in support thereof, and were largely conclusions and not facts; that it was immaterial to any issue in the case whether Scarborough assumed the payment of the two notes sold to Sweeney, no copy being attached and no facts alleged further than mere conclusion of the pleader to show whether the payment of said Sweeney notes was assumed by Scarborough or not; and that it was immaterial, so far as plaintiff was concerned, whether Scarborough assumed or was obligated to defendants to pay said notes or not; that it affirmatively appeared from the answer that plaintiff was in no way responsible for Scarborough's failure to pay the interest on said notes; and that the allegation of such assumed duty was no defense to plaintiffs' cause of action; that Exhibit A, attached to defendants' answer and made a part thereof, shows that it was optional with Scarborough to pay said interest just as it was optional with defendant Bray to take said property; and that the answer did not show that plaintiff was in any way responsible for the default of either Scarborough or Bray; that it was immaterial that Bray did not know the semiannual interest had not been paid on said notes; and that the facts stated in the answer did not excuse Bray from the payment of the interest or see that Scarborough had done so; that the allegation of tender of the interest by defendants to plaintiff are insufficient as to date of tender, amount of tender, and the answer does not show actual payment into court of any interest or principal, and no offer is made to abide the result of the controversy and make good the alleged tender and thus prevent the plaintiff declaring said notes due and proceeding to foreclose his lien on the property; that the answer does not show that the purchase of said notes by plaintiff was in any respect for the use or benefit of defendants; that the answer shows that defendant was a resident of the county in which the property was situated, on which a foreclosure of the lien was made, and no necessity is imposed upon plaintiff by law to notify defendant personally of said foreclosure sale; that the defenses pleaded in the answer constitute no defense

to plaintiffs' suit for the unpaid balance of said two notes, but is a collateral attack upon the sufficiency of the sale of said property by the trustee under the deed of trust. The several exceptions asked that the several immaterial matters pointed out be stricken out. We have stated only the substance of a few of the special exceptions, but possibly enough to show several of the issues of law presented. The general demurrer was by the court overruled; but the 17 special exceptions were all sustained, and the defendants declining to amend, even to the extent of eliminating the immaterial matter, judgment was entered for plaintiff, from which this writ of error is prosecuted.

[2, 3] No motion for a new trial appears in the record, but defendants Bray and wife file assignments of error, numbered first, second, third, fourth, fifth, and sixth. Assignments of error numbered 1 and 2 are grouped and complain of the action of the court in sustaining the 17 special exceptions to the answer. The assignments do not copy the exceptions, nor state specifically to what part of the answer the exceptions refer.

Assignments numbered third, fourth, fifth, and sixth are also grouped and unnumbered, and, while each of said assignments complain of the action of the trial court in sustaining the 17 special exceptions to the original answer, the various exceptions each present various questions of law, and cannot be grouped so as to show a single proposition. In our opinion, the brief filed by plaintiffs in error does not conform to the rules for briefing cases. The assignments are entirely too general in complaining of the action of the court in sustaining the 17 special exceptions to their original answer. While many of the exceptions contain in part repetitions of other exceptions, they each present various questions of law, and point out much immaterial matter, and ask that same be stricken out. The statement following the proposition under the first and second assignments of error, which are grouped, does not refer to the transcript, and in our opinion is not germane to the proposition, and there is no statement under the assignment pointing out the part of the answer to which the exception refers, or setting out or giving the substance of plaintiffs' exceptions, so as to show that the exceptions present a single proposition of law. Each exception presents a different ground of objection, and each raises distinct questions of law and cannot be grouped, except those that reiterate the same proposition. The same criticism applies to the third, fourth, fifth, and sixth assignments of error. We think several of defendants' exceptions should have been sustained and much of the immaterial matter found in defendants' answer should have been stricken out, which defendants in the action refused to do. It could serve no purpose to point

them out here. We have stated the issues fully, so that the points of objection to the answer and to the immaterial matter contained in the answer, raised and pointed out by the exceptions, could be seen without the necessity of discussing them severally. We think the court was not in error in rendering judgment for plaintiff.

Judgment is affirmed.

#### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. MATHEWS. (No. 1338.)

(Court of Civil Appeals of Texas. Texarkana. Oct. 22, 1914.)

#### APPEAL AND ERROR (§ 263\*)—QUESTIONS REVIEWABLE—REFUSAL OF INSTRUCTIONS—EXCEPTIONS.

Refusal of special requested charges is not reviewable, unless exceptions were reserved to the refusal as required by statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.\*]

Appeal from Cherokee County Court; C. F. Gibson, Judge.

Action by Giles Mathews against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Marsh & McIlwaine, of Tyler, for appellant. Perkins & Perkins, of Rusk, for appellee.

HODGES, J. This suit was instituted by the appellee against the appellant to recover damages for killing and injuring certain animals by one of the appellant's trains at a public road crossing. A trial before a jury resulted in a verdict in favor of the appellee for \$400.

There are but two assignments of error presented, both of which complain of the refusal of the court to give special charges requested by the defendant below. The record does not show that any exceptions were reserved to the refusal of the court to give these charges, as is now required by statute. The law regulating such proceedings was fully stated and discussed in *Railway Co. v. Wadsack*, 166 S. W. 42.

There appearing no fundamental errors that would justify a reversal of the case, the judgment is affirmed.

#### ST. LOUIS, S. F. & T. RY. CO. v. TUDLE et al. (No. 1296.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 18, 1914. Rehearing Denied Dec. 3, 1914.)

#### APPEAL AND ERROR (§ 79\*)—JUDGMENTS APPEALABLE—"FINAL JUDGMENT."

A judgment which did not dispose of a party to the suit is not a "final judgment," and no appeal therefrom will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 484-493; Dec. Dig. § 79.\*]

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action between James Tudle and others and the St. Louis, San Francisco & Texas Railway Company. There was a judgment for the former, and the latter appeals. Appeal dismissed.

Andrews, Ball & Streetman, of Ft. Worth, and Head, Smith, Maxey & Head, of Sherman, for appellant. J. L. Cobb and Jones & Hassell, all of Sherman, for appellees.

LEVY, J. The judgment in this case does not dispose of Hallie Tudle, who was a party to the suit. As there is no final judgment, as we conclude, this court would have no jurisdiction to entertain the appeal. Davis v. Martin, 15 Tex. Civ. App. 62, 53 S. W. 599. Appeal dismissed.

CHAVERS et al. v. HENDERSON.  
(No. 1339.)

(Court of Civil Appeals of Texas. Texarkana. Oct. 15, 1914.)

LOGS AND LOGGING (§ 3\*)—CONVEYANCE OF  
STANDING TIMBER—FORFEITURE.

An instrument conveying standing timber on described land, giving the purchaser five years within which to cut and remove the timber, and providing for the extension of the time on the purchaser's first removing timber from the part of the land the vendor wishes to use for farming, does not create an interest in land, and the timber not removed within the time is forfeited, where, before the expiration of the time, the vendor gave notice where to cut, and the purchaser failed to cut the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

Appeal from District Court, Marion County; H. F. O'Neal, Judge.

Action by Henry Chavers and another against Clark Henderson. From a judgment for defendant, plaintiffs appeal. Reversed and rendered.

April 6, 1908, appellant Chavers, who owned a tract of 160 acres of land in Marion county, sold the pine and gum timber measuring more than 12 inches at the stump on 135 acres thereof to one John Spearman. The contract of sale was in writing, but it was not copied into the record on this appeal. However, from findings made by the court below it appears that Spearman undertook to remove the timber from the land within five years from the date of the contract, but that it was understood and agreed between him and Chavers that the time for the removal of the timber should be extended if he (Spearman) should first cut off the timber on the part of the land "Chavers wanted to clear up and put into a state of cultivation." It seems that Spearman was unable to pay for the timber as he had agreed to, and induced one Rhyne to advance for him to Chavers the purchase price of the land. To secure Rhyne in the sum so advanced, by

agreement of the parties Chavers conveyed the timber to Rhyne by a deed dated June 15, 1911, as follows:

"Know all men by these presents that Henry Chavers, of the county of Marion, state of Texas, for and in consideration of the sum of \$375 to me in hand paid by A. M. Rhyne, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said A. M. Rhyne, of the county of Cass, state of Texas, all that certain tract or parcel of pine and gum timber situated," etc. "The said timber is to be cut down to 12 inches in diameter at the stump, and said A. M. Rhyne is to have five years time from date April 6, 1908, to remove same, also roads and right of way for moving same; time to be extended if he removes timber from where I want to clear for farming purposes. To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging to the said A. M. Rhyne, his heirs and assigns forever. And I do hereby bind myself, heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said A. M. Rhyne, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof. Witness my hand," etc.

Spearman having paid to Rhyne the money advanced for him as stated, the latter, on December 21, 1912, conveyed the timber to the former, who conveyed same to appellee, Henderson. In the conveyance from Rhyne to Spearman it was stipulated that the timber "must be cut and removed within the time designated in deed from Henry Chavers, and this conveyance is made subject to all the terms of the Chavers deed"; and in the conveyance from Spearman to appellee was a like stipulation. Appellee, after the expiration of five years from April 6, 1908, but at a date not otherwise specified in the record, cut and removed from the land 120,000 feet of timber of the value of \$2 per 1,000 feet. The suit resulting in the judgment from which this appeal was prosecuted was brought by Chavers and appellant James Jordan to restrain appellee from cutting and removing any more of the timber and to recover the value of the 120,000 feet cut and removed as above stated. The trial court was of the opinion that the effect of Chavers' deed to Rhyne was to pass to the latter the absolute title to the timber, and concluded that appellants therefore were not entitled to the relief they sought. He accordingly rendered judgment dissolving an injunction he had granted to appellants and awarding the timber and costs to appellee, Henderson.

R. R. Taylor and Schluter & Singleton, all of Jefferson, for appellants. T. D. Rowell and W. L. Grogan, both of Jefferson, for appellee.

WILLSON, C. J. (after stating the facts as above). This case is distinguishable from Carter v. Clark & Boice Lumber Co., 149 S. W. 278, only in the fact that in this one it was agreed that the time for removing the

timber specified in the deed might be extended if the purchaser should first remove the timber from the part of the land Chavers wished to use for farming purposes. With reference to this phase of the case, the trial court found that Chavers did not notify Rhyne, but, "before the expiration of the time limit for cutting the timber, did notify Spearman where to cut the timber on the land he wanted to put into cultivation, and requested him to do so, and that said Spearman failed to cut said timber." We do not think the difference noted furnishes a reason why the ruling made in the Carter Case should not be held to control this one. Therefore the judgment of the court below will be reversed, and judgment will be here rendered perpetuating the temporary injunction granted by the court below, whereby appellee was restrained from cutting and removing any of the timber from the land, and awarding to appellants a recovery against appellee of the sum of \$240, the value of the timber cut and removed after April 6, 1913, together with interest thereon from December 3, 1913, and the costs incurred in this court and the court below.

MISSOURI, K. & T. RY. CO. OF TEXAS v.  
DELLMON. (No. 1291.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 13, 1914. Rehearing Denied  
Nov. 19, 1914.)

1. EVIDENCE (§ 471\*)—OPINION EVIDENCE—  
WHAT CONSTITUTES.

In an action by a passenger, who claimed to have contracted a serious cold resulting in tuberculosis because of draughts on defendant's train, neither the question to a witness who accompanied the passenger as to the passenger's condition on the trip, nor the witness' answer that he took cold and was feeling bad when he returned, is objectionable as opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

2. EVIDENCE (§ 471\*)—OPINION EVIDENCE—  
ADMISSIBILITY.

Where a passenger claimed that exposure on a train resulted in a cold and tuberculosis, a witness may testify that since the trip the least exertion tired him out.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

3. EVIDENCE (§ 553\*)—OPINION EVIDENCE—  
EXAMINATION OF EXPERTS.

A hypothetical question is properly excluded, where based upon a premise contrary to the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.\*]

4. APPEAL AND ERROR (§ 1050\*)—REVIEW—  
HARMLESS ERROR.

Where a passenger claimed that a cold contracted on defendant's train resulted in tuberculosis, the exclusion of a question of a medical expert as to whether that was not unusual is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

5. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL.

Refusal of requests covered by the charges given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

6. TRIAL (§ 261\*)—INSTRUCTIONS.

A special charge should direct the attention of the court and jury to the particular phase of the case sought to be presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.\*]

7. DAMAGES (§ 208\*)—PERSONAL INJURIES—  
JURY QUESTION.

Where a passenger claimed that exposure on defendant's train resulted in tuberculosis, testimony that he was directed to consult a throat specialist, without any showing that he did not do so, does not raise the issue of whether he was negligent in failing to procure competent medical treatment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

8. TRIAL (§ 125\*)—ARGUMENT OF COUNSEL.

Argument of counsel for a passenger claiming to have contracted tuberculosis because of exposure on defendant's train that he would not have tuberculosis for the railroad is not improper as tending to cause the jury to award excessive damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.\*]

9. NEW TRIAL (§ 104\*)—NEWLY DISCOVERED  
EVIDENCE.

A new trial will not be awarded because of newly discovered evidence, which is wholly cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

Error from District Court, Hunt County; Wm. Pierson, Judge.

Action by Joe R. Dellmon against the Missouri, Kansas & Texas Railway Company of Texas. There was a judgment for plaintiff, and defendant brings error. Affirmed.

About 6 o'clock of the morning of October 22, 1911, defendant in error (hereinafter referred to as plaintiff), then about 16 years of age, accompanied by a young man named Stapleton, went aboard one of plaintiff in error's (hereinafter referred to as defendant) trains then leaving Greenville for Dallas. They took a seat together—appellee next to a window, the curtain to which was so pulled down as to conceal the fact that the glass thereof had been so broken as to permit wind to enter the car through same. The weather was cold, and, as the car was not heated, plaintiff soon found it to be uncomfortable. He discovered after a while that the glass in the window beside him had been broken as stated, and thereupon he and Stapleton left the seat they were occupying, and, going to the rear part of the car, stood there until about 9 o'clock, when the train reached Dallas. On the ground that defendant was guilty of negligence in using the car in the condition it was in, and in failing, if it did use same, to have it properly heated, resulting, as he claimed, in his contracting bronchitis and

consumption, plaintiff, by his next friend, sued and recovered against defendant the judgment from which this appeal is prosecuted. The sufficiency of the testimony to support the finding of the jury involved in their verdict, that defendant was guilty of negligence as charged against it, and that plaintiff was without fault is not questioned by defendant. Therefore we adopt those findings as our own, and further find that plaintiff was damaged in the sum named by the jury.

Dinsmore, McMahan & Dinsmore, of Greenville, for plaintiff in error. Evans & Carpenter, of Greenville, for defendant in error.

WILLSON, C. J. (after stating the facts as above). [1] After plaintiff's witness Stapleton had testified that he accompanied plaintiff on the trip to Dallas and was with him during all of that day after they left Greenville, plaintiff asked him this question: "What did you observe concerning his (plaintiff's) condition that day?" Defendant's objection to the question, on the ground that "it was irrelevant and immaterial to any issue in this case and called for an opinion and conclusion of the witness and did not elicit a fact, and was no part of the *res gestæ*," having been overruled, the witness answered: "Well, he was sneezing, and said he was feeling bad and began to feel bad and taken a pretty bad cold in the afternoon and was feeling pretty bad when he got home." The action of the court in overruling the objection is made the basis of the first assignment. Clearly, neither the question nor the answer of the witness, so far as it was responsive to the question, was subject to the objection made. 1 Wigmore on Evidence, § 223.

[2] The objection to the testimony of the witness Mrs. Penrich that appellee had "not been able to do anything about the house. The least thing tires him out"—also was without merit. *Railway Company v. Reagan*, 34 S. W. 797.

[3] Nor do we think the court erred in sustaining the objection made by plaintiff to the hypothetical question propounded to the witness Dr. French. A premise of that question was that the cold plaintiff suffered from did not develop until the day following the day he made the trip to Dallas, whereas the testimony was that the cold developed during the day he made the trip. *Hicks v. Ry. Co.*, 71 S. W. 322.

[4] And certainly if the court erred, as is asserted in the fourth assignment, in sustaining the objection interposed to the question propounded to Dr. French on his cross-examination, as follows: "Well, Doctor, if I was to start out on a train up here and in running a distance of about 16 miles in about 30 minutes I got cold and contracted cold enough to put me in condition that I had to be treated for a whole year, and then

developed consumption on it, tuberculosis, that would be a little unusual, wouldn't it?"—the error was not such a one as to require a reversal of the judgment.

[5] The portion of the court's charge to the jury set out in the statement under the sixth assignment is not believed to be obnoxious to the criticism made of it. We do not think the jury would have construed the portion of the charge referred to as meaning that plaintiff would not have been guilty of negligence if, after seating himself by the window, he negligently remained there after he discovered the glass thereof had been broken out. Therefore said assignment is overruled, as is also the seventh, in which defendant complains of the refusal of the court to give the instruction it requested with reference to that phase of the case. We think the issue of contributory negligence was sufficiently presented in the instruction given to the jury and complained of as stated.

[6, 7] In its eighth assignment defendant complains of the action of the court in refusing a special charge requested by it, submitting to the jury as an issue in the case a question as to whether plaintiff had negligently failed to secure treatment by competent medical men, whereby the injury he had suffered had been aggravated. The testimony relied upon to support the contention made is that of Dr. French, to the effect that after he had treated plaintiff about a year he advised him to go to Dr. Swindell, a throat specialist, for treatment. This assignment would be sustained but for the fact that it does not appear, from any testimony we have been referred to or been able to find in the record, that plaintiff did not follow the advice so given him, and but for the fact that the special charge requested and refused was so general as to fail to direct the attention of the court and jury to the particular phase of the case presented by the testimony referred to. *Railway Company v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 656, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. The burden was on defendant to show that plaintiff did not consult a throat specialist as he had been advised to, and in the absence of proof that he did not, an issue as to whether he was negligent or not in not doing so did not arise.

The complaint made in the ninth assignment is that the judgment is excessive. But, plainly, it is not, if it was true, as the jury may have found it to be, that as a result of negligence on the part of appellant plaintiff was suffering from tuberculosis of the lungs.

[8] What has been said disposes of all the assignments except the fifth, with reference to a portion of the argument of plaintiff's counsel to the jury, and the tenth, presenting for review the action of the court in refusing to grant defendant a new trial on the ground of newly discovered evidence. We do

not think either of the matters complained of in these assignments furnishes a reason why the judgment should be set aside. The assertion of counsel objected to (to wit, that he "would not have tuberculosis of the lungs for the Katy Railroad from Denison to Dallas") reasonably could not be said to have induced a jury of ordinarily intelligent men, as we must assume and have no doubt the jury in this case were, to return a verdict different from the one they would have returned had such an assertion not been made in the argument to them.

[9] As to the testimony discovered after the trial of the case, it was cumulative merely to testimony admitted on the trial, and did not furnish a reason why the court below should have granted the new trial as prayed for. *Ham v. Taylor*, 22 Tex. 225; *Latham v. Selkirk*, 11 Tex. 314.

The judgment is affirmed.

### FIREMAN'S FUND INS. CO. v. LYON. (No. 1278.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 21, 1914. Rehearing Denied  
Dec. 10, 1914.)

#### 1. INSURANCE (§ 665\*)—FIRE POLICIES—ACTIONS—EVIDENCE.

In an action on a fire policy, providing that it should be void if the property insured remained vacant or unoccupied for 10 days, evidence held to show no waiver of the vacancy clause when insured was given permission to remove the building from one lot to another.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

#### 2. INSURANCE (§ 387\*)—FIRE INSURANCE—CONDITIONS—ESTOPPEL.

That a fire company allowed the holder of a policy, providing that it should be void in case the premises remained vacant for over 10 days, to remove the building from one lot to another, and after the removal notified the insured that the policy would again be in force, it not having been operative while the building was in transit, does not estop the insurer from relying on a breach of the vacancy clause.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1025; Dec. Dig. § 387.\*]

Error to Hunt County Court; Geo. B. Hall, Judge.

Action by E. W. Lyon against the Fireman's Fund Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed and rendered.

This suit is by defendant in error to recover on a fire insurance policy issued by the plaintiff in error upon a dwelling. The dwelling was destroyed by fire on September 13, 1911. The insurance company pleaded as a defense the breach of the following stipulation in the policy:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if a building herein described shall be or become vacant or unoccupied and so remain for ten days."

The defendant in error replied by pleas of waiver of the provision as to occupancy and agreement to keep the policy in force by indorsement of proper permit, and estoppel from claiming a forfeiture by reason of the vacancy, and asked to have the policy reformed so as to cover the house in its vacant condition. There was a trial to a jury, and verdict for defendant in error.

The evidence establishes that S. R. Polk owned premises on West Lee street in Greenville, and situate thereon was a dwelling occupied by him. On October 22, 1910, the plaintiff in error, through its agent, issued to Polk a policy of insurance insuring the dwelling until October 22, 1911, in the sum of \$900 against loss by fire "while occupied by owner and tenant as a dwelling." On July 19, 1911, E. W. Lyon, the defendant in error, became the owner of the house and lot by purchase from Polk, and on said date the policy of insurance was transferred to the ownership of E. W. Lyon with the consent of the insurance company indorsed thereon. At the time of the issuance of the policy, there was a lien upon the premises in favor of the bank at Detroit, Mich., and there was a loss payable clause in favor of the bank attached to the policy, and the policy was in the bank's possession from that date until after the dwelling was destroyed. Polk resided in the house after the sale of the premises and the transfer of the policy to Lyon, until about the 10th or 12th of August, 1911, at which time he moved out, and the house was vacant and unoccupied continuously from the day Polk moved out to and including the day it was burned. The defendant in error determined to move the house from West Lee street to the southeast corner of Wall and Washington streets, and immediately upon its being vacated by Mr. Polk went to see the agent of the insurance company and informed him with respect to moving the house, and asked him whether the insurance would be in force while the house was being removed, at the same time informing him that Polk had moved out and that it was then vacant. The agent informed defendant in error that under the policy the insurance would not cover the building during the time it was being moved from one location to another, but told defendant in error to notify him when he had placed the house in its new location and he "would put the insurance in force," meaning that he would authorize and cover the new locality by a provision to that effect. On August 31, 1911, when the house had been moved to its new location, the defendant in error informed the agent of the insurance company of the fact and stated to him that he "wanted the insurance put in force again," and the agent replied, "All right, that it would be attended to." Thereupon the agent sent his son to the premises for the purpose of obtaining the correct lo-

cation of the house. The son, after inspecting the location, at once returned to the office, and there was written, and subsequently indorsed on the policy, the following:

"Form No. 7 $\frac{1}{4}$ . S. R. Polk (assigned to E. W. Lyon). Removal permit. \$900.00 on the one-story, shingle-roof, frame building and additions attached thereto, including heating and lighting apparatus and all permanent fixtures, while occupied by tenant as a dwelling and situated as follows: On the S. E. corner Wall and Washington streets in Greenville. August 31, 1911. J. H. Van Amburg, Agent."

One copy of this permit was pasted in the agent's record book in his office, one copy was sent to the insurance company's home office, and one copy to the Detroit bank to be attached to the policy. The agent's son knew the house was vacant on August 31, 1911, but neither Van Amburg nor his son knew of the continued vacancy after that date. On August 31, 1911, there was written, and subsequently indorsed on the policy, form No. 72, reading:

"Report of Removal of Dwelling. Permission is hereby given to remove property insured by this policy to — story — roof — building, occupied for dwelling purposes, situated S. E. cor. Wall and Washington streets, Greenville, Texas, subject to all the written and printed conditions thereof, all liability in former location ceasing from this date. Rate — increased to \$1.12 per cent. Premium — additional .30."

It appears that the fire hazard in the new locality was greater than in the former, and because of that fact the increased rate and premium were charged. The increased premium applied exclusively to the removal permit. The evidence is undisputed that the dwelling was vacant and unoccupied from August 31, 1911, the date of completed removal, to and including September 13, 1911, the date of loss by fire. The agent testified that there was no agreement or permit as to future vacancy or nonoccupation of the dwelling in its new location, and that no such permit was asked for nor given. We conclude that the condition in the policy as to vacancy and nonoccupation was not performed by defendant in error from August 31, 1911, the day of removal, to and including September 13, 1911, the day of the loss by fire, and that there was not a waiver, or intended waiver, of such condition of the policy, nor is the company estopped in point of fact from claiming a forfeiture by reason of the fact of vacancy from August 31st to and including September 13th.

Looney, Clark & Leddy, of Greenville, and Wm. Thompson and Jno. S. Patterson, both of Dallas, for plaintiff in error. Evans & Carpenter, of Greenville, for defendant in error.

LEVY, J. (after stating the facts as above). [1, 2] The policy of insurance upon which this suit was based contained the provision that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if a building herein described shall be or become vacant or unoccupied and so remain for ten days."

And the record admits the fact that the dwelling covered by the policy remained vacant and unoccupied from the time it was ready for occupancy on August 31, 1911, to and including September 13, 1911, the day it was destroyed by fire. As it could not very well be asserted, in view of these conceded facts, that the policy was not terminated by its own terms of contract, a liability on the policy in favor of the insured could not be sustained unless, as claimed by the insured, there was sufficient proof to authorize a finding of fact by a jury that the condition in the policy was waived and the company estopped from taking advantage of it. The insurance company by proper assignment contends that there is no evidence showing, or upon which a legitimate inference could be formed, that it waived the condition, or upon which to predicate estoppel. In respect to this contention it appears from the evidence that the policy was issued and delivered in the first instance on October 22, 1910, to S. R. Polk, who at that time was the owner of the premises and building. The defendant in error subsequently purchased of Polk the lot and building, and this same policy of insurance thereon was assigned and transferred in writing to him on July 19, 1911. Polk occupied the dwelling at the time of the issuance of the policy and until about the 10th or 12th of August, 1911, at which time he moved out. The defendant in error decided to move the house from its then location on West Lee street, as set out in the policy, to another lot owned by him on the corner of Wall and Washington streets. Defendant in error testified:

"When we got ready to move the house, I wasn't sure about the insurance. I went to see Mr. Van Amburg and told him I was going to move the house, and asked him about the moving, and he said when moving it the insurance would be at my risk, that is, off; but if I got it moved and set up he would put it on. I don't remember any talk about the occupancy at all. I told him I was going to move it and I wanted to be sure about the insurance, whether the insurance would be on and whether at my risk while it was being moved. He said during the time the house was being moved the insurance would be off, and when I got it moved and notified him he would put the insurance in force. About two weeks, maybe a little longer, from the time we commenced moving, until the house was set up, as soon as we got it set up, I notified Mr. Van Amburg that the house was up and I wanted the insurance put in force again, and he said all right that it would be attended to. About three or four days before the house burned, I met Mr. Van Amburg at Bell's hardware store, and told him I was very busy trying to gather my crop and was building a house and my mother was sick, and asked him if he had my insurance fixed up. He said he did. I told him I hadn't time to look after it, and he said he was taking care of it and to go on about my work and to depend on him, whenever I gave him my insurance he would keep up with it; and that was all the conversation I had with him until after the house burned."

Van Amburg was the local agent of the insurance company in Greenville. The agent testified that:

Defendant in error "gave me information in regard to moving the house from West Lee to Washington street location. I said to him, in substance, what I said to others, that during the time the house is moved from one place to another the insurance is not in force, but may be reinstated when the house is set on the new location. My best recollection is that I told him then to let me know when he got it set up. \* \* \* On the morning of August 31st he came to me and said the house was in its new location, and wanted to know if the insurance was in force. We talked trying to locate the house. Neither he nor I nor my son knew the exact location—that is, the cross-street—and my son got a buggy and went and got the location. Mr. Lyon did not remain in my office until my son returned. When Mr. Lyon came to notify me that the house had been placed in the new location, I told him I would get the location and make the transfer, and I did do it, according to the attachment to the policy, removal permit. (The removal permit was attached in writing to the policy.) It is not the form used in case of a vacancy. \* \* \* I never made a charge against Mr. Lyon for the privilege of permitting the house to remain vacant, and Mr. Lyon never paid me anything for that privilege. \* \* \* Vacancy was not considered. It was a question of removal, and the question of vacancy was not mentioned, and he did not make any request for a vacancy permit. I never had any agreement or contract with Mr. Lyon at any time or place to look after his property and see whether it was vacant or not or occupied. Mr. Lyon, like a great many of my other customers, told me to keep his insurance in force. I did all that Mr. Lyon requested me to do, and all that I agreed to do with Mr. Lyon in regard to this insurance. I never did tell Mr. Lyon that I would look after his property in regard to it becoming vacant, and try to keep the insurance in force by reason of the vacancy. Nothing was ever said about it."

It is quite true that it appears from this evidence that at the time the defendant in error went to see the agent to find out whether "the insurance would be off" while the house was being moved to the new locality, the agent said that "he would put the insurance in force again" when the house was removed and notice given him of that fact. But it is quite clear, also, that the parties had in view only this removal permit. And the removal permit authorizing a change of locality being actually indorsed on the policy on August 31, 1911, the date of removal, there was fully carried out the agreement of the agent to "put the insurance in force again." And the indorsing of the removal permit and change of location on the policy was perfectly consistent with the subsequent statements of the agent that he "had attended to it" and "made the transfer." Clearly, it seems to us, there is no evidence tending to show an agreement to change, modify, or alter the statement in the policy as to the vacancy and nonoccupation of the house, nor to extend the vacancy and nonoccupation beyond the original terms of the policy. It appears that the house was vacant, to the agent's knowledge, on the day the removal permit and change of location were indorsed on the policy. But the knowledge of vacancy

at that date would not produce the result of waiver or be sufficient for estoppel. *Insurance Co. v. Chadwick*, 13 Tex. Civ. App. 818, 35 S. W. 28; *Ranspach v. Insurance Co.*, 109 Mich. 699, 67 N. W. 976; *England v. Insurance Co.*, 81 Wis. 583, 51 N. W. 955, 29 Am. St. Rep. 917.

The cases of *Assurance Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628, and *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138, cited by defendant in error in respect to the question of insuring vacant property, do not control the instant case. Here the dwelling was not insured in the first instance as vacant, as in those cases. Mr. Polk occupied it as a dwelling at the time of the issuance of the policy to him, and it was likewise occupied as a dwelling at the time the defendant in error had the policy transferred and assigned to him. This original policy remained in force between the insurance company and the defendant in error, with a modification only of the clause in the policy respecting the location of the dwelling insured. The dwelling being occupied at the time the insurance contract was made and the policy delivered, the terms of the policy with respect to continued occupation of the same would apply and govern the rights of the parties here unless waived, which as a fact was not done in the instant case.

The judgment is reversed and here rendered in favor of the plaintiff in error, and the costs of the trial court and of this appeal will be taxed against the defendant in error.

TULLOS v. CHURCH, County Judge, et al.  
(No. 5400.)

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 7, 1914.)

1. COUNTIES (§ 196\*)—CONTRACTS—EXISTING DEBT LIMIT—INJUNCTION.

In view of Rev. St. 1911, art. 4643, subds. 1, 2, providing that a writ of injunction may be granted when the applicant is entitled to the relief demanded, and it requires the restraint of some act prejudicial to him, and where, pending litigation, a party is doing or threatening to do some act in violation of the right of the applicant, a taxpayer in a county may not only maintain a suit to enjoin the execution of a void debt, but to prevent illegal tax levy, in excess of the county's constitutional debt limit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 808; Dec. Dig. § 196.\*]

2. COUNTIES (§ 196\*)—INDEBTEDNESS—INJUNCTION—PETITION.

A taxpayer's petition, in a suit to enjoin a county from an illegal tax levy to meet a contract obligation in excess of the constitutional debt limit, must affirmatively show that the alleged prior indebtedness had been legally created, and was a valid and subsisting obligation against the county, when the contract obligation was sought to be created.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 808; Dec. Dig. § 196.\*]

### 3. COUNTIES (§ 222\*)—ACTION ON OBLIGATIONS.

Plaintiff, in a suit to obtain a judgment on an obligation of a county, must plead and prove all the things requisite to make it a valid and binding obligation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 355-359; Dec. Dig. § 222.\*]

Appeal from District Court, Live Oak County; F. G. Chambliss, Judge.

Action for injunction by W. Tullis against F. H. Church, County Judge, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Swearingen & Ward, of San Antonio, for appellant. Denman, Franklin & McGown, of San Antonio, and Dougherty & Dougherty, of Beeville, for appellees.

CARL, J. This suit was instituted by W. Tullis, appellant, against F. H. Church, county judge, and the members of the commissioners' court of Live Oak county, and the county and district clerk and county treasurer, for an injunction to restrain the execution and delivery of any contract with the Alamo Construction Company, the Midland Bridge Company, or any other person or company, and to restrain the execution and delivery of any warrant or warrants in any sum for the payment of any part or all of any contract for bridge purposes; the petition alleging, substantially: That the plaintiff is a property taxpaying citizen of Live Oak county; that the total value of taxable property in that county is \$4,642,000; and that "there is now and was on the 17th day of October, 1914, an outstanding indebtedness created by the county commissioners' court for road and bridge purposes amounting to approximately \$75,811.74," the gross items of which are set forth, as well as the due dates. It is further alleged that the outstanding existing indebtedness requires an annual levy and collection in taxes in the sum of more than \$7,000, and that:

"The annual tax that must be levied and collected to pay these obligations of the county of Live Oak, Tex., now existing and outstanding, is in excess of 15 cents on the \$100 of the valuation of all property in the county of Live Oak, Tex."

The petition also sets out the following order of the commissioners' court:

"On this the 15th day of September, A. D. 1914, being the second day of the regular September term, A. D. 1914, all members of this commissioners' court of Live Oak county being present, there came on to be heard the matter of building the bridges and approach, to wit: Four bridges on the Kittie-Oakville Road and five bridges on the George West-Lyne Ranch Road and an approach to the Nueces River Bridge, and issuing of warrants in the payment therefor and the levying of a tax for payment of said warrants and interest thereon, and bids for the building of the said bridges and approach having been duly advertised for as provided by law, and the Alamo Construction Company having made the lowest bid therefor, is hereby awarded the contract for said work on the ex-

press condition that a final contract shall be drawn up satisfactory to all parties to the contract and that the aforementioned successful bidder shall give bond satisfactory to all parties in the sum of \$5,500 conditioned on the satisfactory completion of said work according to said contract and the full performance by said Alamo Construction Company of said contract. It is further ordered by the commissioners' court that the warrants of Live Oak county be issued to Alamo Construction Company now for the payment for said bridges and approach, in the sum of \$10,895, being the amount of said bid; but it is further provided and ordered that said warrants shall not be delivered to said Alamo Construction Company, except in payment for labor done and material purchased and delivered to said Alamo Construction Company, except in payment for labor done and material purchased and delivered at Kittie and George West, according to the estimates made by Bartlett and Ranney, engineers of San Antonio, Tex., of the value of such material and labor, provided that not more than 80 per cent. of such amount of warrants need be delivered until the work is finally accepted by the county, and upon such final settlement all remaining of said warrants shall be delivered as per contract. And it is further ordered that warrants of Live Oak county for \$700 be issued to Bartlett and Ranney; said warrants are for payment for plans, specifications, and inspection of construction of the above-described work and traveling expenses in connection therewith. And it is hereby further ordered that a road and bridge tax be and is hereby levied annually for Live Oak county sufficient to pay annually the interest on all of the warrants above ordered issued to the Alamo Construction Company and to Bartlett and Ranney and sufficient also to pay each year an amount equal to 2 per cent. of the principal of said warrants into a sinking fund for the payment of said warrants."

The debt thereby sought to be created is alleged to be in addition to the debts herein formerly shown. The suit is to restrain the execution of the contract and the execution and delivery of the warrants provided for in said order, which are payable in five years, because the county has exhausted its borrowing capacity for road and bridge purposes, and that no special tax for road and bridge purposes has been voted by the people.

The trial court sustained the general demurrer and the following special exceptions:

"First. Plaintiff's petition is insufficient, in that it does not show that any injury or threatened injury will be caused to plaintiff by the doing of the acts sought to be enjoined in said petition of any interference or threatened interference with any legal right of the plaintiff, for said petition seeks to show that the signing of the contract and the issuance of the warrants sought to be enjoined are in excess of the county of Live Oak's authority to create indebtedness, and that if signed and issued respectively will create no obligation on the county, and said county and said plaintiff will not be bound in any manner to pay the same, and that the petition does not show that the acts sought to be enjoined can possibly create any obligation against or do any damage to the county of Live Oak or to plaintiff.

"Second. Said petition shows no equity, in that it does not show any damage that can accrue to the county or to plaintiff, but, on the contrary, shows only that the effect of said contracts and said warrants will be, if signed and issued, that the bridge company and plain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff will build said bridges for said county and accept their payment therefor the county's certificates of indebtedness which the plaintiff alleges are void, because the county has no right to issue them. That said petition shows only that said bridge company may build said bridges for Live Oak county free of charge, and against such action plaintiff shows no cause for the issuance of your honor's injunction.

"Third. And further excepting to said petition, these defendants say that it is insufficient in that it does not show upon its face that the plaintiff has a plain and adequate remedy at law, in that, if the indebtedness evidenced by said contract and warrants is in excess of said county's power to create a debt, the collection of any taxes from the plaintiff to pay said debt can be successfully resisted by him in an action at law, and the collection of said warrants against the county can be successfully resisted by said county in an action at law."

Appellant declined to amend, his cause was dismissed, and he has prosecuted this appeal.

[1] When analyzed, this case narrows down two propositions: First, as to whether a taxpayer can maintain a proceeding to enjoin the execution of a void debt on the part of the county; and, second, whether it is necessary for the bill to plead all the facts which would show that the debts already in existence against the county had been regularly created and were valid and subsisting obligations, at the time the debts complained of were sought to be created.

If the allegations of the petition are true, and sufficient to show that the county of Live Oak has exhausted its power to create obligations for road and bridge purposes, and that debts already in existence would require all of the 15-cent tax on the \$100 taxable valuation, and no special tax for those purposes has been voted, then there would be a cause of action. It does not seem to be questioned that a taxpayer may maintain an injunction to prevent a wrongful application of public funds. And if he may prevent the misapplication of public funds after those funds are in hand, we see no sound reason why he may not intervene to prevent the creation of a contract illegally, by means of which funds are to be obtained. Judge Brown says:

"The citizen need not wait until an unlawful contract has been consummated, but may prevent the wrongful act by injunction." *City of Austin v. McCall*, 95 Tex. 577, 68 S. W. 794, citing *Crampton v. Zabriske*, 101 U. S. 600, 25 L. Ed. 1070.

"In that case Justice Field stated the law in this language: 'Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon prop-

erty holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases.'"

See, also, *Rev. St. art. 4643, §§ 1, 3*; *Morris v. Cummings*, 91 Tex. 618, 45 S. W. 383; *City of Covington v. Dodds*, 152 Ky. 617, 153 S. W. 964; *Day Co. v. State*, 68 Tex. 526, 4 S. W. 865; *City of Brownwood v. Brown Telegraph & Telephone Co.*, 152 S. W. 709; *Sullivan v. Dooley*, 31 Tex. Civ. App. 589, 73 S. W. 82.

In a note to the case of *Pierce v. Hagans*, 36 L. R. A. (N. S.) page 9, we find how this subject has been dealt with in other jurisdictions:

"An action was brought by a taxpayer for an injunction to restrain the officers from creating illegal debts in excess of revenue, and from levying and collecting taxes in payment thereof. It was held that an injunction would be granted. *Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912. The court said: 'We conclude, then, that in a proper case municipal officers may, at the instance of a taxpayer, be restrained from contracting illegal debts, and from levying and collecting taxes for the payment thereof, and from enforcing the payment of such taxes.'"

See, also, the following cases cited in the same footnote: *Springfield v. Edwards*, 84 Ill. 626; *Ballard v. Cerney*, 83 Neb. 606, 120 N. W. 151; *Pepper v. Philadelphia*, 181 Pa. 566, 37 Atl. 579; *City Water Supply Co. v. Ottumwa (C. C.)* 120 Fed. 309; *French v. Burlington*, 42 Iowa, 614.

In the light of the foregoing authorities, we hold that a taxpayer may not only maintain a suit for injunction to restrain the wrongful use of public funds, but may do so to prevent the illegal acquisition of funds by attempting a tax levy in excess of the constitutional limit.

[2, 3] So, we pass to the consideration of the second question, as to whether it is necessary for the petition to show that the debts already in existence against the county had been regularly created and were valid subsisting obligations of the county at the time this contractual obligation was sought to be made.

Where a suit is brought seeking to obtain a judgment on an obligation of the county, there seems to be no doubt that it is essential that plaintiff plead and prove all the things requisite to make it a valid and binding obligation. *McNeal v. City of Waco*, 89 Tex. 88, 33 S. W. 322; *Biddle v. City of Terrell*, 82 Tex. 335, 18 S. W. 691; *Texas Water & Gas Co. v. City of Cleburne*, 1 Tex. Civ. App. 580, 21 S. W. 393. And this would seem to require that, in addition to showing that it was created in a regular manner, it should also be shown that the obligation is within the constitutional limitation of taxation, and that a tax was provided to pay interest and create a sinking fund.

"The rule of pleading that the statements of a party are to be taken most strongly against himself is reinforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief." *Gillis v. Rosenheimer*, 64 Tex. 246; *Cottulla v. Burswell*, 22 Tex. Civ. App. 329, 54 S. W. 614; *City of Paris v. Sturgeon*, 50 Tex. Civ. App. 522, 110 S. W. 459; 10 Ency. Plead. & Prac. pp. 923, 927; *Schlinke v. De Witt County*, 145 S. W. 663.

In line with the general rule of pleading in injunction matters, as above noted, we hold that it was necessary for the petition to show affirmatively the facts which would make the alleged prior indebtedness of the county valid subsisting claims against the county; and where those things do not appear the petition is subject to a general demurrer. It was not alleged in this case that the prior existing debts of the county had been created regularly by order of the court and a tax levy made to pay interest and create a sinking fund, or that same were to be paid in whole or in part out of current revenues on hand. Therefore the court did not err in sustaining the general demurrer.

If the petition had been good as against a general demurrer, the action of the trial court would not be upheld in sustaining the special exceptions, for reasons appearing in the first part of this opinion.

The judgment of the trial court is affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. ANDERSON. (No. 1270.)

(Court of Civil Appeals of Texas. Texarkana. Nov. 15, 1914. Rehearing Denied Nov. 19, 1914.)

### 1. MASTER AND SERVANT (§ 238\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — CUSTOM.

Under railroad rules that all main line switches in yards be set and locked for main track, proof that it was not customary for foreman operating a hand car to look at the target to see the position of the switch would not relieve him, approaching the switch and knowing that, if it was open, his car would be derailed, from the due exercise of ordinary care to ascertain whether it was open or closed, and his failure to look was negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.\*]

### 2. APPEAL AND ERROR (§ 1047\*)—MOTION TO STRIKE—PREJUDICIAL ERROR.

Where the record did not show but that the verdict might have been based entirely on incompetent testimony, the refusal to strike the testimony was reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.\*]

Appeal from District Court, Titus County; H. F. O'Neal, Judge.

Action by T. J. Anderson against the St. Louis Southwestern Railway Company of

Texas. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

This is the second time this case has been before this court. On the former appeal a judgment in favor of appellee was reversed, and judgment was here rendered that he take nothing by his suit, on the ground: First, that it appeared appellant had not been guilty of negligence as charged against it; and, second, that it appeared that appellee had been guilty of negligence which was a proximate cause of the injury he suffered. 124 S. W. 1002. The Supreme Court, having granted a writ of error, without directly determining whether the conclusion reached by this court that it appeared appellant had not been guilty of negligence was correct or not, affirmed the judgment rendered here, on the ground that it did appear that appellee was guilty of negligence as found by this court. 104 Tex. 340, 134 S. W. 1175. Afterwards that court, on a rehearing granted to appellee, set its judgment aside, and reversed the judgment rendered here, on the ground that there was testimony to support a finding that appellee was not guilty of contributory negligence. 104 Tex. 340, 138 S. W. 107. The nature of the case is fully stated in the opinions of this court and the Supreme Court which may be found in the volumes of the Southwestern Reporter cited above. The testimony in the record on this appeal does not appear to be materially different from the testimony in the record on the first appeal.

Rolston & Rolston, of Mt. Pleasant, Glass, Estes, King & Burford, of Texarkana, and E. B. Perkins and D. Upthegrove, both of Dallas, for appellant. B. Q. Evans and T. D. Starnes, both of Greenville, L. E. Keeney, of Texarkana, and Ward & Ward, of Mt. Pleasant, for appellee.

WILLSON, C. J. (after stating the facts as above). Of the 44 assignments in appellant's brief, we think none of those entitled to consideration presents a reason why the judgment should be reversed, unless it is the twentieth, twenty-first, or twenty-second, in which complaint is made of certain portions of the argument of appellee's counsel to the jury, the twenty-fourth, in which complaint is made of a side bar remark made by said counsel in the presence of the jury, the twenty-fifth or thirty-eighth, in which complaint is made of the conduct of said counsel in propounding certain questions to witnesses, the fortieth, in which complaint is made of the conduct of the officer in charge of the jury, who, it is claimed, communicated to them while they were deliberating as to their verdict certain matters prejudicial to appellant's rights, or the tenth, in which complaint is made of the action of the court in refusing to strike out and exclude from

consideration by the jury certain testimony of the witness Huff. As the assignment last specified will be sustained, and the judgment reversed for the error of the court in refusing to exclude the testimony referred to, we will not undertake to determine whether the other assignments specified, or any of them, should be sustained or not, but will assume that on another trial the rules intended to insure the fair and orderly trial of cases will be carefully observed, and that the questions made by those assignments will not again arise.

At the time he was injured appellee was the foreman of a fencing gang, and was operating a hand car over appellant's main line track within the yard limits of its depot in North Ft. Worth. As a result of its running into an open switch, the car was derailed, whereby appellee and other men on it were thrown to the ground. The target on the switch stand was there for the purpose of indicating to appellee and others operating cars and engines on the track whether the switch was open or closed. It was without defect of any character, and plainly indicated that the switch was open. Had he looked toward it as he approached the switch, appellee could have seen the target at any time after he got within 300 yards of it, and had he seen it he would have known from its position that the switch was open. Had he discovered that the switch was open at any time before he got within 30 feet of it, he could have stopped the car, and so have avoided the accident. He testified that he did not look at the target as he approached the switch, and sought to excuse his failure to do so on the ground, among others, that, because of certain rules promulgated by appellant, he had a right to assume, and did, without looking at the target, that the switch was closed. The rules referred to, so far as it is necessary to state them, were as follows:

"All main line switches in yards must invariably be set and locked for main track."

"When a main track switch is set for a train, the person attending such switch must go to a point on the opposite side of the track at least 15 feet from such switch stand and remain there until the train has passed over the switch."

On the first trial of the case appellant contended that it appeared that other rules, and not those set out above, applied to the situation presented to appellee, but the Supreme Court held the testimony authorized a finding to the contrary, a finding that appellee was justified in assuming from the absence of any one near the switch that it was closed, and a finding that appellee therefore was not guilty of negligence in failing to look at the target. Had appellee on the last trial been content to rely upon the testimony the Supreme Court thought was sufficient to support a finding that he was without fault, the question made by the tenth assignment would not have arisen on this appeal. It seems,

however, he was unwilling to rely on that testimony, and, as is shown by the bill of exceptions reserving that question, proved by his witness Huff that it was not customary, and had never been the custom, for a man operating a hand car to look to the target to see the position of the switch. This testimony was admitted without objection on the part of appellant, but it afterwards moved to exclude same on the ground that "it was," quoting from the bill, "wholly irrelevant and immaterial, because a custom cannot excuse Anderson from performing his duty, unless that custom is known to the railway company and has been agreed to by it; on the further ground that the testimony invades the province of the jury and is giving an opinion on a mixed question of law and fact, whether or not it was Anderson's duty to look at the switch target, whether it was customary or not."

[1, 2] Had the testimony been objected to when it was offered, it is clear, we think, it should have been rejected; for the existence of such a custom would not have relieved appellee of the duty resting on him to use ordinary care as the hand car approached the switch to ascertain whether it was closed or not. Knowing, as he did, that the car was approaching the switch, and knowing, as he did, that if the switch was open when the car reached it, the car would be derailed, appellee, we think, would have been guilty of negligence, as a matter of law, notwithstanding such a custom, if, not being excused from doing so on the grounds pointed out by the Supreme Court, he neglected to look to the target to see whether the switch was closed or not. He had no right, because of such a custom alone, to shut his eyes to a situation made obvious to him by the position of the target. Yet, for aught we can determine to the contrary from the record before us, the finding of the jury in his favor may have been based entirely on the custom shown to exist by the testimony in question. They may have believed the rule requiring one of appellant's employes to be near the switch while it was open had no application to the situation presented to appellee, and therefore that he had no right to assume from the absence of any one near it that it was closed, and yet have believed he was free from fault in not looking to the target to ascertain the position of the switch, because of the custom of men operating hand cars not to look to it.

Ordinarily in objection to testimony urged for the first time in a motion to exclude it is not entitled to favorable consideration it might deserve if made at the time the testimony was offered. Appellee insists this rule should be applied and the assignment overruled. But we do not agree that the discretion conferred upon the trial judge with reference to the exclusion of improper testimony admitted without objection was rightly exercised, and are of opinion that his

action in refusing to strike out the testimony, in view of the case made by the record, was error requiring the judgment to be set aside. Accordingly the judgment will be reversed and the cause will be remanded for a new trial.

**BULLOCH v. MISSOURI, K. & T. RY. CO.**  
OF TEXAS. (No. 1310.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 19, 1914. Rehearing Denied  
Dec. 3, 1914.)

**1. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR—INSTRUCTIONS.**

Where a petition for injuries, suffered by reason of catching cold in an unheated car, alleges that plaintiff at the time was in perfect health, except a slight weakness incident to an operation for appendicitis, plaintiff cannot object that an instruction making it the carrier's duty to heat the car so that a person in normal health and physical condition would not suffer inconvenience stated too low a degree of warmth.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**2. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICATION TO ISSUES.**

A petition for injuries to a passenger, suffered by reason of an unheated car, alleging that plaintiff was at the time in perfect health, except a slight weakness incident to a prior operation for appendicitis, is insufficient to authorize the submission of an issue of aggravation of previous injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**3. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

A party may not allege error as to instruction on an issue not pleaded by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**4. TRIAL (§ 260\*)—INSTRUCTIONS COVERED BY MAIN CHARGE.**

A requested instruction sufficiently covered by the main charge is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**5. APPEAL AND ERROR (§ 759\*)—BRIEFS—ASSIGNMENTS.**

An assignment of error not copied in the brief will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3094; Dec. Dig. § 759.\*]

Appeal from District Court, Hunt County;  
A. P. Dehoney, Judge.

Action by J. W. Bulloch against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Affirmed.

The appellant brought the suit against appellee company to recover damages for injuries to his wife, alleged to have been suffered in consequence of its negligent failure to supply needed heat in one of its coaches on which she was a passenger from Dallas to Greenville. The defendant, besides denial, pleaded negligence of the wife proximately causing her suffering. There is a conflict of evidence as to whether or not the defendant

company was guilty of negligence in failing to supply the coach with needed heat from the cold weather, and there is conflict of evidence as to contributory negligence of the wife in the several respects pleaded. These several questions were by the court submitted to the jury, and were by the jury decided adversely to the plaintiff. We find the verdict of the jury fully supported by sufficient legal evidence. There is no point made on the appeal in respect to the evidence.

Evans & Carpenter, of Greenville, for appellant. Dinsmore, McMahan & Dinsmore, of Greenville, for appellee.

LEVY, J. (after stating the facts as above):

[1] The charge of the court authorized the jury to return a verdict for the plaintiff for the injuries sued for, upon the finding by the jury that:

(1) "Defendant's employes in charge of said train failed to properly heat the car in which plaintiff and his wife were riding, and to keep the same warm to the extent that a person in normal health and physical condition traveling thereon would not suffer inconvenience and injury from the cold;" and (2) "that such failure to heat and keep said car warm, if there was such failure, was negligence" proximately causing the injuries.

Appellant predicates error upon this paragraph of the charge in defining the degree of warmth that was essential to the demand of his wife as, being "to the extent that a person in normal health and physical condition traveling thereon would not suffer inconvenience and injury from the cold." Appellant pleaded in his petition:

"That at the time of the exposure causing the injuries herein set forth she was in perfect health, suffering only from a slight weakness and disability that would be naturally incident to an operation for appendicitis, performed prior to that time at the Baptist Sanitarium in Dallas."

Appellant alleges that the defendant failed to discharge its duty to his wife as a passenger, in this:

"The weather was cold, damp, and disagreeable, and it was necessary for the protection of the passengers on that train that said train be heated and kept warm, but that, notwithstanding the cold, disagreeable weather, the defendant, through its agents and servants, failed and neglected to keep the coaches warm and comfortable, but, on the contrary, the coach in which plaintiff's wife rode from Dallas to Greenville was allowed to be without fire or warmth, and was cold, open, damp, and disagreeable; that plaintiff's wife became very cold, her feet were cold and her body was chilled, and she was caused to suffer a chill and rigor while in said train, in consequence of said exposure, which resulted and caused her to contract a severe cold and la grippe, causing chronic injury and inflammation of the lungs and bronchial tubes and tuberculosis of the lungs."

Properly construing the petition, the plaintiff's case, it must be considered, is founded on the claim that his wife, being "in perfect health, suffering only from a slight weakness naturally incident to an operation for appendicitis, performed prior to that time," at

the time she became a passenger was caused to suffer a severe illness and permanent impairment of health through the negligence of defendant in allowing the car "to be without fire or warmth" and "cold, open, damp and disagreeable." The exact degree of warmth that is essential to passengers, considering the varying predisposition of persons to heat and cold, cannot clearly be defined, and becomes a question that must be dealt with as the proof in each case must authorize. Under a condition of weather that is "cold, damp, and disagreeable," as alleged here, it may be the exercise of a high degree of care on the part of the railway company towards a passenger in supplying the heat in the coach needed to prevent inconvenience and injury to persons generally of normal health. By claiming in the petition that his wife was in good health and had assumed the relation of passenger in that good condition of health, the court's charge in requiring the car to be heated to the degree essential to the need of a person in normal health was but measuring the liability of the defendant to plaintiff in accordance with the declared fact of the petition that the wife was in that normal condition. Had the jury determined under this charge, as they were authorized by its terms to do, that there was a negligent failure to supply the heat needed by a passenger of normal health, such verdict in favor of the plaintiff would have support in, and certainly be in accordance with, his pleading. Plaintiff, at most, could ask no more than his petition averred. It is not believed, in view of the pleading, that appellant can very well insist that the court grievously erred in authorizing a verdict in his favor upon the finding that the railway company negligently failed to keep the coach to that degree of warmth for his wife that was essential to her as a person of normal health and physical condition. As there was no injury to appellant, the assignment is overruled. Rule 62a (149 S. W. x).

[2, 3] The second assignment predicates error in the fourth paragraph of the court's charge substantially the same as in the preceding paragraph, in defining the degree of warmth of the car as being that essential to "persons in normal health and condition." The fourth paragraph, however, undertakes to submit a phase of negligence to the jury dependent upon special circumstances, and quite different from that submitted in the third. The instruction now being considered authorizes the plaintiff to recover of defendant damages upon the ground that the negligent failure to keep the coach in needed heat "aggravated her condition" of health and physical condition, which already "was impaired prior to taking the journey on defendant's train on January 6, 1912." The petition did not aver that at the time she became a passenger she was suffering from seriously impaired health, and that such con-

dition was known to the employees in charge of the car. The petition averred a contrary condition of health. It was incumbent, we think, upon appellant to allege these special circumstances in order to be entitled to have submitted such issue to the jury. And failing, as appellant did, to allege the facts showing the legal liability sought by the instruction to be enforced, he would not be entitled to insist upon a reversal of the judgment by reason of the challenged instruction. Appellee could well insist, as it does, that no injury authorizing reversal could be predicated by appellant upon instructions respecting an issue not pleaded by him. The assignment is overruled.

The third assignment is overruled on the same ground that the second assignment is overruled.

The fourth assignment is overruled. The charge correctly presents an issue in respect to contributory negligence raised by the answer and the evidence.

[4] The fifth assignment is overruled. The question sought to be covered by the special charge was sufficiently covered by the court's main charge.

[5] As the sixth assignment is not copied in the brief, we cannot understandingly pass on it, and therefore do not consider it, because of the failure to comply with the rules in respect thereto.

The judgment is affirmed.

ROGERS et al. v. HARRIS. (No. 1345.)  
(Court of Civil Appeals of Texas. Texarkana.  
Nov. 18, 1914. Rehearing Denied  
Dec. 3, 1914.)

1. GUARDIAN AND WARD (§ 44\*)—AUTHORITY TO LEASE.

Rev. St. 1911, arts. 4124, 4136, authorize a guardian to manage and control the ward's property, and to lease the same and collect the rent, but require him to account for reasonable rent when he is not ordered to lease. Articles 4137 and 4139 authorize the court to order a lease for not exceeding one year, and on complaint require the guardian to show cause why he should not be required to rent, and to make an order in such case. *Held*, that a guardian, renting without an order, was not limited to a lease for a year, but had power to lease for a longer term.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 192-201; Dec. Dig. § 44.\*]

2. GUARDIAN AND WARD (§ 44\*)—AUTHORITY TO LEASE.

A guardian at common law can lease a ward's real estate for any term of years not extending beyond minority.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 192-201; Dec. Dig. § 44.\*]

3. LANDLORD AND TENANT (§ 76\*) — ACTION FOR RENT—EVIDENCE.

Evidence in action by a guardian for rent *held* to justify a finding that no agreement was made permitting defendants to sublet.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-230; Dec. Dig. § 76.\*]

#### 4. APPEAL AND ERROR (§ 1074\*)—HARMLESS ERROR.

Where there is a full statement of facts, and no issue raised which cannot be satisfactorily disposed of without conclusions requested, and no objection is raised on appeal to the consideration of findings of fact and conclusions of law certified in the record, error, if any, in failing to file findings of fact and conclusions of law within the time prescribed by statute, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248-4252; Dec. Dig. § 1074.\*]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Suit by Mae Harris against Webb Rogers and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Young & Abney, of Marshall, for appellants. Beard & Davidson, of Marshall, for appellee.

HODGES, J. Mrs. Mae Harris, for herself and as guardian for her minor son, James S. Harris, instituted this suit in the court below against the appellants to recover the sum of \$1,000 alleged to be due for the rent of certain store buildings in the city of Marshall, Tex. The facts show that Mrs. Harris is the guardian of the person and estate of James S. Harris, a minor alleged to be 10 years of age; that the minor owns, subject to Mrs. Harris' one-third life interest, some lots in the city of Marshall, on which are two brick storehouses, which, prior to July 21, 1913, had been leased to the appellants for a term of three years, beginning January 1, 1912, for \$75 per month. In the rear of those two buildings is a space which at that time was covered by some other buildings of an unsubstantial nature. On July 21, 1913, the appellants wrote the following letter to Mrs. Harris:

"July 21, 1913.

"Mrs. J. W. Harris—Dear Madam: If you will erect a one-story brick building in the rear of the building occupied by us, between them and Simpson's barber shop, same to cover all space, and to have two front doors, with partition in center, with two doors, with awning in front, we will take same, together with the buildings we now have, at a lease price of \$100 per month from date of completion, for three years, with privilege of renewal for three years at the same price. We agree upon completion of same to pay \$1,000, ten months' rental, in advance, with guaranty from you in case the building should be destroyed, or partially destroyed, that all rental paid in advance you will refund same immediately.

"Yours truly,

"Rogers Brothers,  
"By W. F. Rogers, Jr."

This offer was accepted by Mrs. Harris, and the construction of the buildings contemplated commenced. A short time before their completion, about the last of September of that year, permission was given to the appellants to move some of their goods into the new buildings, and they have retained possession since that time. Just before the

buildings were completed, however, T. W. Davidson, the attorney who represented Mrs. Harris in her business transactions, had an interview with appellants with reference to subletting the premises. Appellants testified that Davidson agreed that, if they would release Mrs. Harris from her obligation to construct an awning in front of the buildings, she would allow them to sublet. According to the testimony of Davidson, he made no such absolute agreement, but told them that, if they would yield the provision of the contract requiring the construction of the awning, he would submit the matter to Mrs. Harris and advise her to give permission for subletting the premises. It developed, however, that Mrs. Harris declined to accede to such terms, and the awning was thereafter constructed. About October 1, 1913, after the buildings were completed, Mrs. Harris demanded payment of the \$1,000, which the appellants had agreed to pay in advance. This was refused, unless Mrs. Harris would execute a lease giving to the appellants the privilege of subletting. She declined to do this, but it appears that she tendered a lease in all other respects in compliance with the original contract between the parties.

In their answer to the pleadings of the plaintiff, the appellants allege that it was their understanding that they were to have the privilege of subletting, and that they regarded this as a part of the contract which Mrs. Harris was to carry out. In their answer, the appellants, among other things, say:

"The defendants aver that they have repeatedly offered to the plaintiff the one thousand dollars mentioned in their said proposal, if the plaintiff would give them a memorandum in writing sufficient to bind the plaintiff upon said contract, and the plaintiff refused to accede to the defendants' request, and for the purpose of harassing and annoying defendants, and injuring the commercial standing of the defendants, who are engaged in conducting a retail mercantile business, filed this suit against the defendants. On, to wit, the 1st day of November, 1913, the defendants tendered to the plaintiff in person the sum of one thousand dollars, and then and there requested her to sign the lease as stipulated for in said proposition of July 21, 1913, with the addition of a clause allowing defendants to sublet, and she refused to carry out her contract and sign said lease. Defendants then and there offered to pay and tendered plaintiff her one hundred dollars for the October rent, 1913, and she refused to accept the same. The plaintiff's said agent prepared a written lease in accordance with the proposition and the agreement of the parties, except it omitted the clause allowing the defendants to sublet, and a copy of same is hereto attached. and if the clause allowing defendants to sublet is included it expresses the agreement of the parties."

After some other averments, unnecessary to notice in this connection, the petition concludes with the following prayer:

"Wherefore the defendants pray that this honorable court first determine whether or not said contract is capable of specific performance in its entirety, and, if the court should decide

that said contract is capable of specific performance in its entirety, the defendants pray that they have judgment against the plaintiff for specific performance of said contract, and the defendants be allowed to pay said sum of \$1,000 into court, and they here now tender said amount to the plaintiff in open court. In the event the court should determine that said contract is incapable of specific performance as to the interest of the minor, James Harris, in the property involved in the litigation, then they pray that they have specific performance so far as the one-third interest of the plaintiff, Mrs. Mae Harris, in the property, and that they have judgment against Mrs. Mae Harris for their damages on account of the plaintiff being unable to carry out said contract in its entirety, and, in the event it should be determined that said contract cannot be specifically performed in part, then the defendants pray that their rights and the rights of all parties be adjudicated, and that their former contract be held valid, and the defendants be allowed to retain the use of the two stores fronting on Wellington street, and of so much of the two rear stores as covers the ground which they used and enjoyed prior to the erection of the new stores, and that they have judgment against the plaintiff for their damages. The defendants further pray that the defendants be given such other relief in law and equity as they may show themselves to be justly entitled to, and they here now offer to do equity, and to do and perform such acts as the court may require as a condition precedent to obtaining such relief."

The case was submitted to the court without a jury, and a judgment rendered in favor of Mrs. Harris for the amount sued for, and directing her to execute a lease to be delivered to the appellants in accordance with the terms expressed in the written proposal of July 21, 1913.

[1, 2] There are two grounds relied on for the reversal of that judgment. The first is that Mrs. Harris had no legal power to lease the property in controversy for more than one year, and for that reason she was unable to perform her part of the contract upon which the promise to pay the \$1,000 was based. The raising of that question on appeal is somewhat inconsistent with the attitude of the appellants in the trial court. In their prayer for relief they asked that Mrs. Harris be compelled to perform the contract in its entirety. By "entirety" they probably meant one embracing a written permission for them to sublet the premises. The court did just what they asked for, except to require Mrs. Harris to incorporate that provision. The omission of that provision from the written lease would not, of course, in any manner affect the authority of Mrs. Harris to execute a valid lease for three years. But, aside from that objection to the consideration of those assignments at this time, we think Mrs. Harris did have the legal authority to execute a valid lease contract for the term of three years as originally contemplated by the parties. At common law the guardian might lease the ward's real estate for any term of years not extending beyond the ward's minority. 1 Washburn on Real Prop. 404; 21 Cyc. 85, and cases cited in notes. The following provisions of the statute in-

dicating the powers which a guardian may exercise in such matters:

"Art. 4124. The guardian of the estate is entitled to the possession and management of all property belonging to the ward, to collect all debts, rents, or claims due such ward, to enforce all obligations in his favor, to bring and defend suits by or against him; but, in the management of the estate, the guardian shall be governed by the provisions of this title."

"Art. 4136. The guardian may rent the improved property of the ward, other than such property as is named in article 4134 without an order of the court authorizing him to do so, and either at public or private renting; but, when he rents without an order of court, he shall be required to account to the estate of the ward for the reasonable value of the rent of such property for the time the same was so rented."

"Art. 4137. The court may order the farm, plantation, manufactory, business, or any improved property of the estate to be rented, either at public or private renting, for any length of time, not exceeding one year, and upon such terms and conditions as the court may deem for the best interests of the ward."

"Art. 4139. Any person, upon complaint in writing filed with the clerk of the county court, may cause the guardian of the estate of a ward to be cited to appear at a regular term of the court and show cause why he should not be required to rent out the farm, plantation or other improved property of the ward, or why he should not be required to lease for improvement the wild or unimproved lands of the ward; and, upon the hearing of such complaint, the court shall make such order as may, in his judgment, be for the best interest of the estate."

The fact that the court may order the guardian to rent the improved property of the ward for any length of time not exceeding one year can hardly be construed as a limitation of the time for which the guardian may lease it when not acting under an order of the court. This provision doubtless means that, in case the guardian fails to perform his duty of leasing the ward's property and is compelled to do so by the court, the court may direct a renting for any term not exceeding one year, or, if the guardian desire to proceed under the order of the court in renting the ward's property, in order to protect himself from liability on his bond, he may apply to and receive authority from the court to rent the property for a length of time not exceeding one year. The fact that the guardian is made liable upon his bond, when the lease is not made under the direction of the court, is an indication that he was to have more latitude in dealing with the ward's property according to his own discretion.

[3] The second ground urged for reversing the judgment is the refusal of the court to require Mrs. Harris to execute a lease containing a provision permitting the appellants to sublet the premises. Assuming that this parol modification of the written contract might be ingrafted upon it and be specifically enforced, it nevertheless involved a contested issue of fact, and the state of the evidence is such that the court was justified in finding that no absolute agreement was made to grant such permission.

[4] As still another ground for reversing

the judgment, it is contended that the trial court failed to file his findings of fact and conclusions of law within the time prescribed by statute. We find incorporated in the record findings of fact and conclusions of law certified to by the trial judge. No objection is raised to their consideration in this court by the appellee. Even if the court did fail to legally comply with the request of the appellants in this particular, there is nothing in the record to indicate that such failure has operated to the detriment of the appellants in this appeal. There is a full statement of facts, and no issue is raised which cannot be satisfactorily disposed of without the conclusions requested. The error, if any, is harmless.

We find no just grounds for reversing the judgment, and it is accordingly affirmed.

### SUPREME RULING OF FRATERNAL MYSTIC CIRCLE v. HOSKINS et al. (No. 1343.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 11, 1914. Rehearing Denied Nov.  
19, 1914.)

#### 1. INSURANCE (§ 693\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE OF DEATH.

Where a benefit insurance certificate provided for payment upon satisfactory proof of the death of the member, a by-law providing that the member's absence or disappearance from his last known place of residence for any length of time should not be evidence of his death, and that no right should accrue under his certificate, nor should any benefits be paid until conclusive proof had been made of his death, aside from any presumption arising by reason of his absence, was void under Rev. St. 1911, art. 5707, providing that any person absenting himself, beyond sea or elsewhere, for seven years successfully shall be presumed to be dead, unless proof be made that he was alive within that time, since the by-law, construed in connection with the certificate, did not except the absence of a member from the risks assumed, but merely provided what should constitute "satisfactory proof," thereby restricting a rule of evidence, contrary to public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. § 693.\*]

#### 2. INSURANCE (§ 699\*)—REINSURANCE—"LIVING, CONTRIBUTING MEMBERS IN GOOD STANDING"—SUFFICIENCY OF EVIDENCE.

The constitution and laws of a benefit society provided that any member who should abscond or depart from his last place of residence and remain away for one year without reporting his address to the secretary, should forfeit his membership; that the secretary should not receive from any person any assessment, dues, or fines on account of such member, but should notify the person offering to make the payments that proof of the member's location or residence was necessary, suspend the member, and report his action to the supreme secretary. Defendant took over the membership and affairs of such society by a contract providing that all "living, contributing members in good standing" thereby became members of defendant, and that benefit certificates issued to such members were thereby assumed by it. A member disappeared from his last known place of residence more than a year prior to this contract and was not

thereafter heard of within seven years from the date of his disappearance, but his dues had been paid and no attempt had been made to suspend him, though the facts were known to the local secretary, and reported by him to the society. There was no evidence that he was actually dead at the date of the contract. *Held*, that the member was a contributing member in good standing at the date of the contract, and the evidence warranted a finding that he was a living member; especially as Rev. St. 1911, art. 5707, attaches no legal consequences to a person's absence or disappearance, until the expiration of the seven years necessary to raise a presumption of death.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 699.\*]

#### 3. INSURANCE (§ 755\*)—MUTUAL BENEFIT INSURANCE—SUSPENSION—WAIVER OR ESTOPPEL.

Where the constitution and laws of a benefit insurance society provided that any member who should remain away from his last place of residence for one year should forfeit his membership; that the secretary should not receive assessments, dues, or fines on his account, but should notify the person offering them that proof of the member's location or residence was necessary, suspend the member, and report his action to the supreme secretary, but, though a member's disappearance was known to the local secretary and reported by him to the society, no notice was given to a person paying the dues and assessments that proof of the member's location or residence was necessary, and, on the contrary, such payments were accepted and no attempt made to suspend the member, the society waived its right to suspend him, and was estopped from asserting a suspension to defeat a recovery on the certificate after he had been absent for seven years.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

#### 4. DEATH (§ 2\*)—PRESUMPTION FROM ABSENCE—STATUTORY PROVISIONS—"ELSEWHERE."

"Elsewhere" in Rev. St. 1911, art. 5707, providing that any person absenting himself beyond sea, or elsewhere, for seven successive years, shall be presumed to be dead, does not, as claimed, mean outside the state.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, First and Second Series, Elsewhere.]

Appeal from District Court, Gregg County; W. C. Buford, Judge.

Action by Mrs. Margaret E. Hoskins and others against the Supreme Ruling of the Fraternal Mystic Circle. From a judgment for plaintiffs, defendant appeals. Affirmed.

This suit is by the beneficiary upon a life insurance policy. Appellee is the aunt of Joseph T. Hoskins, and his was the life insured. The policy was issued May 27, 1901, and soon thereafter was delivered to appellee, who regularly paid all the premiums which became due upon it after issuance up to and including May, 1913. In the year 1905 Joseph T. Hoskins resided in Dallas, Tex., and was engaged in work there, and this was his last known residence. He was never seen nor heard of after the fall of 1905, though his aunt and relatives made immediate, continued, and very exhaustive, but unavailing, efforts to find or locate him. The

defenses of the appellant are: (1) That the by-laws, which are a part of the contract, provide that absence or disappearance of a member shall not be evidence of the death of such member, and no rights shall accrue until conclusive proof of actual death has been made; and (2) that in taking over the business affairs and members of the American Guild the appellant, by its contract, only assumed contracts on the lives "of all living, contributing members in good standing in the American Guild," of date May 27, 1907. There was a trial to the court without a jury, and judgment was rendered in favor of the appellee.

The court made the following findings of fact, which are supported by the evidence, namely:

"1. Besides the matters of fact expressly, or by provisions of law, admitted to be true by the pleadings of the plaintiff and defendant, I find the following facts to have been proven on said trial:

"2. That Joseph T. Hoskins lived at Longview, Tex., practically all his life, up to July, 1904, when he left for Ft. Worth, Tex., where he remained for a period of probably over one year, during which time he was seen by a number of people and to them expressed affection and regard for plaintiff Mrs. Margaret E. Hoskins and intention to return to his home in Longview, and was last seen in Dallas in the fall of 1905, and that he resided in Dallas at that time, and since said time he has never been seen or heard of since nor shown to be alive. Mrs. Hoskins heard from him regularly up to the time of his disappearance.

"3. That diligent search and inquiry has been made for said Joseph T. Hoskins in Dallas and Ft. Worth, and advertisement, with a liberal reward (inserted in a large daily newspaper in Dallas), for the address or whereabouts of Joseph T. Hoskins. Such inquiry or advertisement made or inserted two or three years after the disappearance of said Joseph T. Hoskins. That no information was ever received from said Joseph T. Hoskins as a result of said inquiry or advertisement.

"4. That L. D. Stansbury, local secretary of the American Guild and worthy collector of the defendant order, knew when Joseph T. Hoskins left Longview, and knew that soon thereafter his address and whereabouts became unknown, and that such facts were communicated to the American Guild by L. D. Stansbury, its local secretary, prior to May, 1907.

"5. That the fact of the disappearance of Joseph T. Hoskins was communicated to the defendant order by L. D. Stansbury, its worthy collector, several times between 1907 and 1913.

"6. That defendant had notice from plaintiff, through her attorney, on or about April 22, A. D. 1913, that Joseph T. Hoskins had disappeared for a long period of time and his address was unknown and has been so for a long period of time; that in May, 1913, defendant furnished blanks for proof of death of Joseph T. Hoskins, and mailed them to the attorney of plaintiff; that same were returned later properly filled out, and proof of death shown by seven years' absence, supported by affidavits of a number of persons; that in May, 1913, defendant accepted payment of the April dues of Joseph T. Hoskins, paid by plaintiff Mrs. Hoskins; that said dues have never been returned to plaintiff Mrs. Hoskins.

"7. That L. D. Stansbury, local secretary and worthy collector of the American Guild and defendant order from 1904 to 1913, was, during said time, a state and national officer of said orders.

"8. That all dues, assessments, or premiums due the American Guild or defendant on the policy of Joseph T. Hoskins have been promptly paid up to May, 1913, when further dues (were) refused by defendant, and that plaintiff has paid defendant \$205 in such dues.

"9. That Joseph T. Hoskins was a living, contributing member in good standing of the American Guild in good standing in May, 1907, when defendant reinsured the members of the American Guild."

The contract of assumption and all the by-laws of the appellant are made a part of the findings of fact here, and as they can be referred to in the record, it is unnecessary to set them out.

Meador & Davis, of Dallas, for appellant.  
M. L. Cunningham, of Longview, for appellees.

LEVY, J. (after stating the facts as above).  
[1] The laws of the appellant, as well as the laws of the American Guild, contain the following article:

"The absence or disappearance of a member of the Fraternal Mystic Circle from his last known place of residence for any length of time shall not be evidence of the death of the member, and no right shall accrue under the certificate of membership to a beneficiary, nor shall any benefits be paid until conclusive proof has been made of the death of the member aside from any presumption that might arise by reason of his absence."

And the appellant pleaded as a defense the provision set out. The trial court, after hearing the case on its merits, made the conclusion of law in respect to the by-law:

"That a provision making ineffective proof of death by seven years' absence is void, being contrary to article 5707, R. S. of Texas, 1911."

Believing, as we do, that the ruling of the court in the respect mentioned was correct and should be sustained, the first and second assignments of appellant, challenging the conclusion of law, are overruled.

The by-law we are considering, which was made a term of the contract, provides that absence without intelligence "shall not be evidence of the death of the member," and requires "conclusive proof," before a liability to pay the policy arises, "of the death of the member aside from any presumption that might arise by reason of his absence." As expressed in the face of the policy, though, the substantial thing the parties had contracted for was that the insurance company should pay the beneficiary the sum of money specified "upon satisfactory proof of the death of the said member while in good standing upon the books of the supreme chapter." The language of the by-law, considered in connection with the language of the policy, would clearly indicate that the insurance company and the insured were agreeing that "satisfactory proof," as expressed in the policy, of the death of the insured must, in order to enforce liability to pay the policy, rest in and be confined exclusively to proof of the actual death of the insured. As the agreement of the parties, as shown by

the language of the by-law, was entirely in respect to "the evidence" that would be "satisfactory proof" of the death of the insured, it would be a restrictive provision of contract in respect only to a rule of evidence, and not a stipulation excepting absence as in the nature of the risk assumed. Therefore the agreement, as expressed in the by-law, declaring that absence without intelligence shall not be evidential data to enforce liability to pay the policy, would, if controlling upon the courts as a term of private contract, operate to prevent the application of article 5707, R. S. of 1911, to such evidential fact, and the legal consequences attached to the fact, as proven here, of absence for seven years without intelligence would be ineffective. As the courts are required, as a part of their duty, to enforce the statutes as the law prescribes shall be done, a failure of the court to apply the statute mentioned to the facts of this case would be allowable only upon the ground that the parties had the legal right of contract in respect to the proof. It is generally said that no person has a vested right in rules of evidence. *Cooley's Cons. Lim.* (7th Ed.) 524; 3 *Page on Contracts*, § 1765. The reason, therefore, as laid down in *Cooley*, supra, is because "the rules of evidence pertain to the remedies which the state provides for its citizens, and generally in legal contemplation neither enter into and constitute any part of any contract nor can be regarded as being the essence of any right which a party may seek to enforce." As it is correct, according to the rule, that no person has a vested right in rules of evidence, and it cannot be regarded as constituting any part of a private contract, then it would follow that parties may not go to the extent of making a valid term of private contract which has the effect of making ineffective an existing statute declaring the legal consequence that attaches to proof of certain facts. In the case of *Eaton v. Ins. Co.*, 136 S. W. 817, the court held void a by-law which sought to deprive a policy holder of a statutory right to sue in the county where the insured resided at the time of his death. See, also, *Travelers' Ass'n v. Branum*, 169 S. W. 390. Under the statute making a fire insurance policy a liquidated demand in case of total loss of a building, an agreement of the parties providing for the payment of the actual value was held void as contravening the statute and paralyzing its execution by the courts. *Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 992. We see no reason why the principle of public policy applied to the latter case above should not apply to the question involved in the instant one, when in each instance the agreement interrupted the application of an express statute.

Appellant cites cases allowing waiver of the statute of limitations, as being analogous to the question here, but we do not believe

that the principle involved in those cases would extend to the question here. Such cases only furnish the restricted rule that parties may go to the extent of agreeing to modify or waive a course of procedure such as pertains to merely personal privileges or such as are created by statute for their benefit. There is a wide difference between the waiver of procedure that pertains merely to personal privileges or benefits, and agreement that contravenes an express statute provided for the enforcement of law in civil actions by the court. The case of *Kelly v. Benefit Ass'n*, 46 App. Div. 79, 61 N. Y. Supp. 394, cited by appellant, seems to broadly assert, without discussion or furnishing a reason or principle for the ruling, that the parties had a legal right to agree upon a provision practically identical with the instant one, and that it was not invalid. We are not inclined to follow the same as authority for a similar ruling in the instant case.

[2, 3] The contract made between appellant and the American Guild at the time appellant took over the membership and affairs of the American Guild provided, "that all living, contributing members in good standing as of this date (May 27, 1907) in the American Guild do hereby become members in good standing of the Supreme Ruling of the Fraternal Mystic Circle," and "that benefit certificates in force heretofore issued or assumed by the American Guild to its now living, contributing members in good standing, are hereby assumed by the said the Supreme Ruling of the Fraternal Mystic Circle." The constitution and laws of the American Guild provided:

"Section 14. Any member who shall abscond, remove, or depart from his home, or last place of residence and remain away for a period of one year, and not report to the secretary of his chapter his location, his post office address, shall thereby forfeit his membership, and his certificate shall become null and void. The secretary shall not receive from any person any monthly assessment, special assessment, dues or fines for or on account of any member who has been absent and whose residence has been unknown for one year, but he shall notify the person offering to make such payments that proof of the member's location or residence is necessary, and he shall at once suspend the member and report his action to the supreme secretary with his reasons therefor, together with the post office address of the beneficiary and the last known residence of the member. Upon satisfactory proof of the member's whereabouts the supreme governor may order him reinstated in the order without expense. In case of the failure of the member, his beneficiary, or other persons interested in his certificate to make proof of the member's whereabouts, his suspension shall remain permanent and binding, and neither the member, his beneficiary, nor any other person, shall have any right to participate in the funds of the order."

The appellant makes the point that it is not liable to the beneficiary under its contract, because the insured had disappeared for more than 12 months prior to May 27, 1907, and had become suspended by virtue of the terms of the laws of the American Guild,

and therefore was not a "living, contributing member in good standing of the American Guild" at the time of the contract. The assignments of error numbered 3 to 13 inclusive, presenting the point, we conclude should be overruled. It is not disputed that all dues and premiums called for by either the American Guild or appellant were paid in due time up to and until May, 1913. The insured therefore was certainly a "contributing" member of the American Guild on May 27, 1907. And, as the court finds as a fact from all circumstances in evidence that the insured "was a living, contributing member" in May, 1907, when the appellant reinsured the members of the American Guild, we would be bound by that finding of fact that he was "living," unless it was unwarranted by proof. There is no pretense in the evidence that he was actually dead in May, 1907, and there is an absence of any proof showing, or from which it could be inferred, that he died at a specific time. The court's finding of fact was therefore warranted. Article 5707 does not, we think, attach legal consequences to absence without intelligence until the expiration of the seven years. The insured being, according to the evidence, both "living" and "contributing," and there being no pretense in the evidence of any attempt to suspend or of there being actual suspension of him until May, 1913, it would appear that the insured was "a member in good standing in the American Guild" when the appellant reinsured the members of the American Guild. In this connection it appears that appellant issued its certificate of reinsurance in May, 1907. By issuing the certificate of reinsurance it would thereby appear, and could be inferred, that appellant decided and considered the insured, within the terms of its contract with the American Guild, as a member in good standing, and was willing to assume and continue the contract of insurance held by the insured. Having so contracted with the insured, and receiving all dues, the appellant would be bound by its contract of assumption, and could not avoid the same in the absence, as here, of pleading and proof of fraud, accident, or mistake. It further appears from the court's findings of fact, which are supported by proof:

"That L. D. Stansbury, local secretary of the American Guild and worthy collector of the defendant, knew when Joseph T. Hoskins left Longview, and knew that soon thereafter his address and whereabouts became unknown and that such facts were communicated to the American Guild by L. D. Stansbury, its local secretary, prior to May, 1907. That the fact of the disappearance of Joseph T. Hoskins was communicated to the defendant order by L. D. Stansbury, its worthy collector, several times between 1907 and 1913."

Having knowledge, as it appears, of the facts that the insured had "removed" or "departed" from his home or last place of residence, and, notwithstanding this knowledge,

continuing, without any attempt at suspension, to collect and receive all dues, the American Guild would, in the facts, be held to have waived any right of suspension of the insured, and would be estopped from asserting a suspension. Therefore, assuming, for the moment, that the appellant could go behind its own contract of reinsurance and predicate any right of forfeiture under the American Guild that the American Guild could legally assert, the appellant could predicate no greater legal right than could the American Guild. According to the by-law it is required of the secretary, in order that the suspension be finally operative, that he shall "notify the person offering to make such payments that proof of the member's location or residence is necessary." There is no evidence that the secretary gave this notice, nor that he made any attempt to suspend the member. Clearly, neither the American Guild nor the appellant could very well assert that there is proof that the American Guild or appellant had so far brought itself within the terms of its by-law regarding suspension as that it could assert suspension under the terms of the law governing suspension. Failure on the part of the secretary of the American Guild or the appellant to perform the duty as to notice required would preclude any insistence that the insured was suspended under the by-law at the time of the contract of May 27, 1907.

[4] By the fourteenth assignment of error appellant contends that "elsewhere" under article 5707, R. S., means beyond the confines of Texas. The appellant cites *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358, and *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060. The case of *Woodmen v. Ruedrich*, 158 S. W. 170, explains these two cases and decides against appellant's contention.

The judgment is affirmed.

HODGES, J., disqualified, and not sitting.

INTERNATIONAL & G. N. RY. CO. v. J. E. BRYANT & CO. (No. 1354.)  
(Court of Civil Appeals of Texas. Texarkana.  
Nov. 26, 1914.)

APPEAL AND ERROR (§ 1042\*)—PLEADINGS—ANSWER—EXCEPTIONS—PREJUDICE.

Where berries were damaged by the negligence of the initial carrier in furnishing an improper car, such carrier was not prejudiced by sustaining an exception to its answer pleading a stipulation that the carrier's liability should terminate on delivery to the connecting carrier.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

Appeal from District Court, Smith County; Jasse F. Odom, Judge.

Action by J. E. Bryant & Company against the International & Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fitzgerald, Butler & Bulloch, of Tyler, Morris & Sims, of Palestine, and Wilson, Dabney & King, of Houston, for appellant. Price & Beard, of Tyler, for appellee.

**WILLSON, C. J.** Appellees were the consignees of a car load (350 crates) of strawberries delivered to appellant at Tyler for transportation over its line and connecting lines of railway to Amarillo. Appellees claimed that, because appellant "negligently failed and refused to furnish a properly equipped car with sufficient ice bunkers and to properly ice and refrigerate the car it did furnish," the berries were so damaged in transit as to be worth \$700 less than they otherwise would have been worth. Special issues were submitted to the jury, and they found that the berries were in good condition when delivered to appellant for transportation, and were in bad condition when they reached Amarillo. The jury further found that the car furnished by appellant was not a proper one, and that same was not properly equipped for transporting the berries, and further that same was not properly iced and refrigerated while in appellant's custody in transit. The jury having further found that the berries were worth \$372 less when they reached Amarillo than they would have been worth had they reached there in good condition, the court on their findings and findings of his own rendered judgment in appellees' favor for said sum of \$372.

It is not believed either of the assignments presents a reason why the judgment should be reversed.

If the trial court erred, as is asserted, in sustaining an exception to the portion of the answer setting up a stipulation in the bill of lading covering the shipment, that appellant's liability should terminate when it delivered the berries to a connecting carrier, the error should be treated as harmless, in view of the fact that it appears from the record that there was testimony to support a finding, involved in the judgment, that the damage to the berries was due to negligence on the part of appellant in furnishing a car unfit for use in transporting the berries.

It was not error to overrule the objections urged to the testimony of the witnesses who loaded the 54 crates of berries at Swan. The testimony was admissible. 1 Wigmore on Ev. § 98.

The judgment is affirmed.

**SMITH et al. v. TIPPS.** (No. 1355.)

(Court of Civil Appeals of Texas. Texarkana. Dec. 3, 1914. Rehearing Denied Dec. 10, 1914.)

**1. VENDOR AND PURCHASER (§ 285\*)—ACTION FOR RECOVERY OF LAND—PLEADING—SUFFICIENCY.**

A petition by a transferee of vendor's lien notes which contains merely a prayer that ti-

tle to the land be divested out of the vendor, who had refused to convey his superior title to the transferee, and the purchaser, without stating why such judgment should be rendered, does not support a judgment awarding the land to him as against the vendor and the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 800-807; Dec. Dig. § 285.\*]

**2. VENDOR AND PURCHASER (§ 261\*) — VENDOR'S LIEN NOTES—ENFORCEMENT—RECOVERY OF LAND—ELECTION OF REMEDIES.**

A transferee of vendor's lien notes and grantee of the superior title of one of the two vendors may not demand a judgment for the notes and a foreclosure of the lien, and for a rescission of the sale and recovery of the land, but he must elect his remedy, and in the absence of an election the court cannot elect for him, nor give him alternative relief, in the absence of a proper pleading in the alternative.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 674-686, 688-695; Dec. Dig. § 261.\*]

**3. PLEADING (§ 251\*) — PETITIONS — AMENDMENTS—CONSTRUCTION.**

A petition, amended petition, and second amended petition cannot be construed together to support a judgment, where they do not conform with District and County Courts Rules 13, 14 (142 S. W. xviii), providing that a party amending his pleadings shall point out the instrument with its date sought to be amended as original petition, and amend by filing a substitute complete in itself, and that unless the substituted instrument shall be set aside on exceptions for a departure, the instrument for which it is a substitute shall not be regarded as a part of the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 734, 735; Dec. Dig. § 251.\*]

Appeal from District Court, Rusk County; W. C. Buford, Judge.

Action by John M. Tipps against Clem Smith and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

By their deed dated November 1, 1906, J. E. Watkins and R. H. Hightower, in consideration of the execution and delivery to them by appellant Clem Smith of his three promissory notes for \$100, interest, and attorney's fees, each payable, respectively, November 1, 1907, 1908, and 1909, conveyed the 80 acres of land in controversy to said Smith. By the terms of both the deed and the notes the vendors' lien was retained on the land to secure the payment of the latter. November 7, 1908, Watkins and Hightower transferred the notes to B. K. Johnson, who, joined by one Moore, on December 14, 1912, assigned same to appellee. Before the notes were assigned to Johnson, Smith made a payment of \$10 on same, and while Johnson owned them made a payment of \$30 thereon. No other payment was ever made on the notes. By an instrument dated January 25, 1912, Hightower conveyed the superior title remaining in him as one of the vendors of the land to appellee. Watkins refused to make such a conveyance to appellee. This suit was commenced by appellee by a petition filed May 1, 1913. As so commenced, it was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to recover on the notes and to foreclose the vendors' lien to secure their payment. Neither appellee's original petition nor the original answer of Smith thereto is a part of the record on this appeal, but it seems Smith interposed as a defense to the suit a plea that the notes were barred by the four-year statute of limitations, and that appellee thereupon filed his "first amended original petition," in which he alleged that while it was true that the notes which matured in 1907 and 1908 were barred, the one which matured in 1909 was not barred at the time he commenced his suit. In this amended petition he undertook to adopt "each and every allegation set out in his original petition," and prayed the court, "as in his original petition, for a foreclosure of his vendors' lien notes and for a sale of said property to satisfy same, and if the court should hold that the notes due November 1, 1907, and November 1, 1908 are barred by the statute of limitations, that he have judgment against the defendants as prayed for in his original petition on the \$100 note due November 1, 1909, and that after the satisfaction of said note the balance of said premises be appropriated and the title to same be declared in this plaintiff, or so much thereof as the court may hold plaintiff is justly entitled to, \* \* \* and that plaintiff would further ask that the title to the entire 80 acres of land described in plaintiff's original petition be declared to be in plaintiff herein, or so much thereof as the court may see proper to render, and that plaintiff have judgment against the defendants, and each of them, for his debt, for the possession of said land and premises, interest, and attorney's fees as prayed for in his original petition," etc. Afterwards appellee sought by a plea filed for that purpose to make Watkins a party defendant in the suit, and for judgment divesting title out of him and vesting same in appellee, and then filed a "second amended petition," in which, without alleging any facts entitling him to such relief, or any relief, he asked "that the deed conveying the land for which the notes herein sued on were given \* \* \* be canceled, and the title to the said 80 acres of land described in plaintiff's original petition, to which reference is here made, be declared to be in plaintiff herein in fee simple." In neither of the amended petitions was the land in controversy described otherwise than by reference to the original petition, which, as before stated, is not a part of the record here. This appeal is by Smith alone from a judgment awarding the land to appellee as against him and as against Watkins.

Strong & Arnold, of Henderson, for appellants. W. M. Futch and Jas. Y. Gray, both of Henderson, for appellee.

WILLSON, C. J. (after stating the facts as above). [1, 2] If the allegations in the sec-

ond amended petition alone should be looked to in determining the question made as to the sufficiency of the pleadings to support the judgment, it is manifest the answer must be in the negative; for no facts showing appellee to be entitled to recover the land, or to relief of any kind, are stated in that petition. It contains merely a prayer that title to the land be divested out of Smith and Watkins and vested in appellee, without stating why such a judgment should be rendered. Doubtless appellee intended the petition to be construed as a part of his first amended petition, and perhaps of his original petition. If it should be so construed, the judgment still could not be said to be warranted by the pleadings; for it would then appear that appellee was in the attitude of asking both a judgment for the debt evidenced by the notes and a foreclosure of the lien retained, and for a rescission of the contract of sale out of which the debt originated. He might be entitled to the one or the kind of relief, according to the facts, but certainly he was not entitled to recover on the notes and to also recover the land. As, in the absence of an election by him as to whether he would seek a recovery on the notes and so affirm the contract whereby the land was sold to Smith, or would seek a recovery of the land and so disaffirm that contract, or of proper pleading in the alternative, the court could not elect for him nor give him alternative relief, it is not believed the judgment could be held to be supported, if all appellee's pleadings should be construed together, as he seems to have intended they should be.

[3] His pleadings, however, could not be so construed without ignoring rules governing in the trial of cases in district courts. Rule 13 (142 S. W. xviii) provides that the party amending his pleadings "shall point out the instrument, with its date, sought to be amended, as 'original petition' \* \* \* and amend such instrument by preparing and filing a substitute therefor, entire and complete in itself," etc., and Rule 14 provides that "unless the substituted instrument shall be set aside on exceptions for a departure in pleading, or on some other ground, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation." And see *Wilson v. Vick*, 51 S. W. 45; *Dunlop v. Dunlop*, 130 S. W. 715; *Ry. Co. v. Halsell*, 98 Tex. 244, 83 S. W. 15.

Because the judgment is without support in the pleadings, it will be reversed, and the cause will be remanded for a new trial.

## FINDLAY v. LUMSDEN. (No. 1350.)

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 21, 1914. Rehearing Denied  
Dec. 3, 1914.)

## 1. JUDGMENT (§ 101\*)—DEFAULTS—PLEADING TO SUPPORT.

A petition good as against general demurrer will sustain a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 168-170; Dec. Dig. § 101.\*]

## 2. JUDGMENT (§ 101\*)—BY DEFAULT—PLEADING TO SUSTAIN.

In an action on notes, a petition which prayed for judgment against the "plaintiff" for the sum due is not bad on general demurrer and will sustain a default judgment; the pleader obviously having used "plaintiff" when he meant to use "defendant."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 168-170; Dec. Dig. § 101.\*]

## 3. ATTACHMENT (§ 209\*)—PROCESS—NOTICE.

Where the property of a nonresident was attached, a judgment foreclosing the attachment is not bad because neither the notice served upon nor the copy of the petition delivered to the nonresident showed that an attachment had been applied for, issued, or levied, or described the property attached.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 675-687, 690, 691; Dec. Dig. § 209.\*]

## 4. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN.

No personal judgment can be rendered against a nonresident upon whom constructive service was had, and whose property was attached.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.\*]

Error from District Court, Morris County; W. T. Armistead, Judge.

Action by C. A. Lumsden against J. H. Findlay. There was a judgment for plaintiff, and defendant brings error. Reformed and affirmed.

Defendant in error was the plaintiff in the court below, and hereinafter will be so designated. His suit was on promissory notes in his favor made by plaintiff in error, who hereinafter will be referred to as defendant, for sums amounting to \$500, besides interest. In his petition plaintiff alleged that defendant resided in the state of Tennessee. The prayer in said petition was as follows:

"Wherefore, premises considered, plaintiff prays that defendant be cited as a nonresident as provided by law, and on a trial of this cause he have judgment against plaintiff for the amount of said notes with interest and costs of suit, together with a foreclosure of attachment lien on any property of the defendant situated in the state of Texas seized under attachment by plaintiff herein, and such other relief both general and special as plaintiff may be entitled to in law or equity."

Notice of the filing of the suit was given to defendant November 27, 1913, by the delivery to him in said state of Tennessee of a notice issued November 24, 1913, as authorized by article 1869, Vernon's Sayles' Statutes, together with a certified copy of plaintiff's petition. The statement in the notice served on defendant of the nature of plaintiff's de-

mand did not show that a part of the relief sought by plaintiff was the foreclosure of a lien he might acquire on property belonging to defendant by the levy of a writ of attachment thereon.

On the day, to wit, November 24, 1913, plaintiff filed his petition, he procured the issuance of writs of attachment, which thereafter, to wit, on December 1, 1913, and December 12, 1913, were levied on certain lands as property belonging to defendant.

Defendant having failed to answer the suit, judgment by default was, on December 16, 1913, rendered against him for the sum and interest sued for, and foreclosing the liens claimed to have arisen by the levy of the writs of attachment on the lands referred to, and directing the sale thereof in satisfaction of the judgment. Pending a sale of the land as so directed, this writ of error was sued out by defendant.

Chas. S. Todd, of Texarkana, for plaintiff in error. Mahaffey, Thomas & Hughes, of Texarkana, for defendant in error.

WILLSON, C. J. (after stating the facts as above). [1, 2] It will be noted that the prayer in the petition was for judgment against the *plaintiff* for the sum due on the notes. It is urged that the petition therefore was not sufficient to support the judgment by default against the *defendant*. The contention is overruled. So obvious an error on the part of the pleader could not have misled the defendant. And, besides, a petition good as against a general demurrer will sustain a judgment by default. *Graves v. Drane*, 66 Tex. 658, 1 S. W. 905; *Matthews v. Boykin*, 40 S. W. 845. It is plain the petition here was not subject to such a demurrer because of the mistake in question. It probably was not even subject to a special exception on that ground (1 Abbott's Trial Brief, p. 90); for the use of the word "plaintiff" was so manifestly an error, and the use of the word "defendant" so plainly intended instead, that the court should "give the pleading the force which the proper word would have given it if the mistake had not been made." *Fry v. Colborn*, 17 Ind. App. 96, 46 N. E. 351.

[3] Neither the notice nor the copy of the petition served on defendant showed either "that an attachment had been applied for, issued, or levied, nor described the property seized." It is insisted the notice, therefore, was not sufficient to support the judgment, so far as it foreclosed a lien claimed against the land levied upon. The law, it seems, is to the contrary of this contention. *Milburn v. Smith*, 11 Tex. Civ. App. 678, 33 S. W. 910. The case cited was one of trespass to try title. The plaintiffs were the heirs of Milburn, and, as such, claimed title to the land. The defendant, through mesne conveyances, claimed it under a sale made by virtue of an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

execution issued on a judgment of a justice court against Milburn. Milburn, at the time the suit resulting in the judgment was instituted, and ever afterwards, was a resident of another state. The notice to him of the suit was by the publication in a newspaper of a citation to him as a person whose residence was unknown. In the citation no mention was made of an intention on the part of the plaintiff to sue out a writ of attachment. After the publication of the citation the plaintiff sued out such a writ on the ground that Milburn was a nonresident of the state, and had it levied on the land. The judgment against Milburn was by default. It recited the issuance and levy of the writ of attachment. It was insisted that the purchaser at the sale made by virtue of the execution issued on the judgment did not acquire the title to the land, because, among other reasons:

"The defendant was beyond the territorial jurisdiction of the court, and no jurisdiction over his person was obtained," and that "no jurisdiction to subject the land was acquired, because the publication of notice was made before the levy of the attachment, and at a time when the court had no jurisdiction of any character."

In support of the contentions made in that case it was asserted that the court acquired no sort of jurisdiction before the attachment was levied, and that the publication, made when there was no jurisdiction, could not be effective to convey notice to the defendant. In overruling the contentions, the court said:

"But the answer is that jurisdiction is acquired only by taking several steps—the institution of suit, the issuance and levy of the attachment, and the compliance with the law regulating publication of notice. Until these things, essential to jurisdiction, have all been done, the power to render judgment is not obtained. It cannot be said that the appropriate proceedings taken before attachment are void; for they are things required by law to give jurisdiction, as well as the attachment. All are essential, and when all have concurred, and not before, the power is complete. Property may be seized under the writ and brought within the power of the court; but where publication is required before judgment can be rendered, the court cannot proceed to judgment without it. The absence of the levy would defeat the notice, and the absence of the notice would defeat the attachment. The mere fact that one precedes the other, if this is authorized by the statute, and is due process of law, cannot prevent the jurisdiction from becoming complete when both concur. It is sometimes said that the question of jurisdiction is to be determined by the answer to the inquiry whether or not the court had power to take the first step. But, in cases like this, jurisdiction over the thing to be affected by the judgment does not arise until all of the steps which the law makes essential have been taken. To strike down any of the proceedings, because they were had before the power was rendered complete, would leave the court powerless to acquire jurisdiction at all. If the statute required the publication to follow the levy, it may be true that publication made before the levy would be ineffective, because it would not be a compliance with this requirement. But we find no such provision. The statute regulating attachments authorizes their issuance either at the commencement of the suit or at any time during its pendency

(Rev. Stat. 1879, art. 154), and the same provision is made with reference to service of process by publication (Rev. Stat. 1879, art. 1235)."

After discussing the question further, the court, in the opinion quoted from, said:

"Unless required by statute, it certainly cannot be necessary to inform him (defendant) of the fact that his property has been seized; for the seizure is due process of law and gives notice of itself. Under our statute, both writs of attachment and citations by publication contain data by which they are connected with the suit in which they are issued, and with each other. A defendant, seeing one, can, by the information which it furnishes, easily find the other. One notifies of the character of the demand, the time and place when and where it will be heard, and when he shall present his defense; and the other informs him of the seizure of his property. They cannot, in the nature of things, be made exactly contemporaneous, in their execution; and the fact that one precedes the other is not a fundamental objection, and cannot, unless in violation of the statute, defeat the jurisdiction. \* \* \* As to the proposition that, if issued before the attachment, the notice must show the purpose to attach, we think it is sufficient to say that, if publication before the levy does not charge defendant with notice, it would not inform him of such purpose, and, if it does notify him of its contents, it would inform him of the suit, and of the liability of his property, to attachment, and of its taking the subsequent seizure would inform him."

We have quoted at such length from the opinion in the Milburn Case because we think all that was there said is applicable to this case and conclusive of the contention made here.

[4] Plaintiff does not claim, and could not (Pennyroy v. Neff, 95 U. S. 714, 24 L. Ed. 565) that by the service of the notice on defendant in Tennessee the court acquired power to render a personal judgment against him for the amount due on the notes sued on. Therefore the judgment will be so reformed as to deny plaintiff a recovery on the notes, and to affirm it in all other respects.

#### FIDELITY & DEPOSIT CO. OF MARYLAND v. ALBRECHT et al. (No. 360.)

(Court of Civil Appeals of Texas. El Paso.  
Dec. 3, 1914. Rehearing Denied  
Dec. 24, 1914.)

#### 1. BANKRUPTCY (§ 205\*)—RIGHT OF TRUSTEE—MERGER OF MORTGAGE LIEN.

H., while owner of the legal title subject to a trust deed to secure debts due beneficiary, mortgaged the property to an indemnity company. The beneficiary of the trust deed was declared a bankrupt, and H., to wipe out his indebtedness to the estate, which was a great deal more than the security, deeded the property to the trustee in bankruptcy, who sold it to others for full price. The trustee in the trust deed also deeded the property to the trustee in bankruptcy. Held that, though the title of the mortgagee and mortgagor vested in the trustee at the same time, there could not be a merger of the mortgage lien, as it was to the advantage of the trustee and his grantees to

keep the lien alive, to defeat the lien of the indemnity company.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. § 205.\*]

**2. MORTGAGES (§ 336\*)—JUNIOR MORTGAGE—PRIVATE SALE UNDER SENIOR MORTGAGE.**

A junior mortgagee is not injured by a private sale under a senior mortgage, which called for a public sale, where the property could not be sold within many thousand dollars of the debt secured.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1024; Dec. Dig. § 336.\*]

Appeal from District Court, Harris County; N. G. Kittrell, Judge.

A suit to foreclose a mortgage by the Fidelity & Deposit Company of Maryland against Henry Albrecht and others. From a decree for defendants, complainant appeals. Affirmed.

Gill, Jones & Tyler, of Houston, for appellant. E. P. & O. K. Hamblen, of Houston, for appellees.

**HARPER, C. J.** The Fidelity & Deposit Company of Maryland, plaintiff below, instituted this suit against W. S. Hipp for \$3,376.35, and against Henry Albrecht, Miss Kate Scanlan, and Andrew Dow to foreclose a mortgage lien on certain lots in the city of Houston, Tex., executed by the said Hipp in favor of the said fidelity company, alleging that said Albrecht, Dow, and Scanlan were claiming an interest in said mortgaged property, and prayed for judgment against Hipp for his debt, and foreclosure against all parties.

Defendants Albrecht, Scanlan, and Dow, in their answer, disclaimed as to certain lots included in the mortgage, and, as to the balance, answered by general denial, not guilty, and for special plea alleged: That prior to the execution of the plaintiff's mortgage one House held valid mortgage liens on the property to secure a debt of \$27,169.96, and that plaintiff's mortgage is secondary thereto. That after the record of plaintiff's mortgage, but before the execution of the particular bond upon which the indebtedness from Hipp to plaintiff arose, Rice, trustee in bankruptcy, of the estate of said House, then bankrupt, acting under the orders of the bankrupt court, had a settlement with Hipp of said \$27,169.96 and an additional indebtedness of Hipp to the bankrupt estate aggregating in all, about \$149,000. In said settlement Hipp transferred the real estate in controversy, certain other property not covered by plaintiff's mortgage and certain personal property in payment of all said indebtedness. That at the time of said transfer all of the real estate transferred was worth less than \$20,600, and that thereafter the defendants, Dow, Albrecht, and Scanlan, purchased from the trustee in bankruptcy, the lots now in controversy. And they further alleged that, if a sale were made of the property under the deed of trust to satisfy

said debt, it would not bring enough to do so.

By supplemental petition, plaintiff replied by general denial not guilty and, especially, that if the mortgages held by the House estate were prior liens to plaintiffs, that they were satisfied and canceled in the settlement between Hipp and the trustee. Therefore, no longer constituted a lien upon the property, but were merged into the legal and superior title.

The case was tried before the court without a jury, and on July 28, 1913, resulted in a judgment for plaintiff against defendant W. S. Hipp for \$4,186.45, with 5 per cent. interest from date of judgment, and costs of suit, and in favor of the defendants Albrecht, Dow, and Scanlan, and intervener, Otis K. Hamblen, denying plaintiff's foreclosure against the lots claimed by said defendants and intervener, respectively, and quieting the title of said lots as against plaintiff's claim, and for costs incurred by said defendants and intervener. From which this appeal is perfected.

**Finding of Facts.**

A. Key and wife executed a deed of trust to T. C. Dunn, trustee, for use of T. W. House. That W. S. Hipp and said Key as partners and individually also executed a deed of trust in like form as above. Said two deeds of trust covered the property in controversy, in this suit, except such as appellees herein have expressly disclaimed. That said two deeds of trust were given to secure all indebtedness then owing by said firm of Hipp and Key to said House, as well as all indebtedness said firm might thereafter incur with said House within two years after the dates of said deeds of trust. That Key and wife thereafter deeded the property to Hipp, subject to said two deeds of trust, and as part of the consideration, Hipp assumed and agreed to pay all indebtedness of the firm of Hipp & Co. to said House, and House released Key from liability thereon. This deed was dated October 19, 1903.

October 10, 1905, and February 14, 1906, Hipp mortgaged this same property, described in plaintiff's petition, to appellants—two separate mortgages—to indemnify against liability on account of bonds theretofore executed for said Hipp, as well as such as might thereafter be executed.

October 17, 1907, House was adjudged a bankrupt in United States court. J. S. Rice was appointed trustee of the bankrupt estate and administered it as such. That at the time House was adjudged a bankrupt Hipp was indebted to him in the sum of \$120,000. That said trustee took charge of the assets of said bankrupt estate, and held the indebtedness against Hipp as secured claims based upon the two deeds of trust above mentioned. That January 3, 1910, the indebtedness from Hipp to House was evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

denced by four 6 per cent. notes, amounting to \$27,169.96, and the balance of said \$120,000 was incurred after September 1, 1905.

Pursuant to an order of bankrupt court the trustee had a settlement with Hipp of said indebtedness, whereon Hipp transferred certain personal property and the realty in controversy in this suit, to said trustee, in settlement of the \$120,000.

Pursuant to this settlement, Hipp and wife executed a deed for this property and other property to the trustee, all of which was worth less than \$120,000. April 23, 1910, upon an order of court the trustee executed his deed for this property and other property to the trustee, all of which was worth less than \$120,000. April 23, 1910, upon an order of court the trustee executed his deed for the property to defendants, Albrecht, Dow, and Scanlan. Filed for record January 20, 1910.

It is agreed between the parties hereto that on June 26, 1910, plaintiff executed a bond indemnifying said Hipp to the Galveston, Harrisburg & San Antonio, and same was delivered without payment of freight.

It is agreed that the fidelity company had no actual notice at the time of the execution of said bond that Hipp had made the conveyance, above mentioned, to Rice, nor that Rice had conveyed to defendant.

That on March 19, 1912, Hipp defaulted in his obligation to the railway company, in the sum of \$3,376.25, and it is agreed that this is the sum Hipp is due the appellants, fidelity company, and is embraced in the bonds executed. All prior liens to appellants were settled by the trustee in bankruptcy.

The trial court made the following finding of fact: That at the time said Dow, Albrecht, and Scanlan took the conveyance of the property in controversy, they relied on the statement of Hipp that Hipp had ceased business relations with plaintiff, and neither owed nor would incur any debt to plaintiff that would be secured by plaintiff's mortgage, and consequently, there was no intention on the part of said trustee or said purchasers, at that time, to preserve for protection against plaintiff's intervening lien the liens formerly held by the House estate on the property in controversy, nor was there any intention to transfer said House estate liens to defendants for their protection against plaintiff's lien, nor was there any intention on the part of said trustee to preserve said liens, at the time Hipp transferred said property to the trustee, for the protection against plaintiff's intervening lien, but in both instances the purchaser thought they were getting a clear title, free of any incumbrance, and without any expectation that the property would be liable for intervening liens.

Appellant, by its many assignments and propositions thereunder, asserts the general proposition of law, that when the title to land and the mortgage debt becomes vested in the same person, the mortgage is merged in the

title, and, therefore, no longer constituted a lien upon the lots, if in fact, there was no intention to keep the lien alive as a protection against the junior lien. And, the trial court having found that there was no intention to keep the lien alive, appellant contends that merger is complete, and therefore it is entitled to foreclose its junior lien.

[1] Whilst this rule of law applies in cases where the facts justify it, we think the facts of the instant case bring it within the rule announced in *Silliman v. Gammage*, 55 Tex. 370:

"That when the estates of the mortgagee and mortgagor are united in the former, he has in equity an election to keep the mortgage title on foot, and that whenever it is his interest, by reason of some intervening title, \* \* \* it will not at law be regarded as merged. This is based upon the presumption, as a matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and it is no matter whether the parties, through ignorance of such intervening title or through inadvertence, actually discharged the mortgage and canceled the note, and really intended to extinguish them. Still, on its being made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title."

This is not a case of the mortgagee obtaining the superior title, but first, the title was taken in the name of a trustee, as such, for the purpose of conveniently subjecting the assets of the bankrupt, House, to the payment of the debts. It therefore clearly appears to the interest of the estate that he (the trustee) must keep alive the prior liens, that he might obtain the full value of the property when sold by him under the order of the court, for the mortgagor's debt to the bankrupt estate was greatly in excess of the value of all the property transferred in settlement thereof, and when appellees purchased from the trustee it was clearly to their interest to keep alive the mortgage liens of House, as against subsequent liens, for they paid full value for the property.

[2] But the equity in this case is clearly revealed in the fact that if there had been a foreclosure of the mortgage and a sale made thereunder, that the property would not have brought within many thousand dollars of the amount of Hipp's debt for which it was given to secure. Therefore, the appellant was not injured by the fact that the mortgagor and trustee elected to apply the property to the settlement of the debt by private contract, rather than by public sale as provided in the mortgage. *Bank v. Strauss*, 29 Tex. Civ. App. 407, 69 S. W. 86; *Huggins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1066; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 513; *Willis v. Heath*, 18 S. W. 801; *Watson v. Markham*, 33 Tex. Civ. App. 476, 77 S. W. 660; *Bank v. Ackerman*, 70 Tex. 320.

The assignments are therefore overruled, and the cause affirmed.

SMITH et al. v. MOORE et al. (No. 1344.)  
(Court of Civil Appeals of Texas. Texarkana.  
Nov. 12, 1914. Rehearing Denied  
Nov. 19, 1914.)

1. HABEAS CORPUS (§ 99\*)—CUSTODY OF INFANTS—FITNESS OF PARENTS—SUFFICIENCY OF EVIDENCE.

In habeas corpus by the parents of a child born prior to their marriage to recover its custody from the father's sister, evidence held insufficient to support a finding that the father was not a fit person to have the custody of the child, and, on the contrary, to show that the fitness of the parents to rear the child was equal to that of the sister and her husband.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

2. HABEAS CORPUS (§ 99\*)—CUSTODY OF INFANTS—GIVING PREFERENCE TO PARENTS.

Where a child born shortly before the marriage of its father and mother was given to the latter's sister to prevent the facts becoming known to other members of his family, but shortly after the marriage the parents abandoned their efforts to conceal the facts and sought to recover the custody of the child, and their fitness to rear it was fully equal to that of the sister and her husband, the father being better able financially to support the child than the sister's husband, the court in habeas corpus erred in awarding the custody to the sister, since, while the welfare of the child will be considered in disposing of its custody, where other things are equal, the natural parents, though they have voluntarily parted with the child, should be given its custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

3. HABEAS CORPUS (§ 99\*)—CUSTODY OF INFANTS—SUFFICIENCY OF EVIDENCE.

In habeas corpus by the parents of a child born out of wedlock to recover its custody from the father's sister to whom the parents had delivered it for the purpose of concealing the facts from other members of the father's family, and with the intention of selling out and moving to some part of the country where its illegitimacy would not be known, evidence held insufficient to support a finding that the child was virtually abandoned by its parents when turned over to the sister and her husband.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

Appeal from District Court, Harrison County.

Habeas corpus by Mary Smith and husband against Nora Moore and husband. From a judgment in favor of defendants, complainants appeal. Reversed and rendered.

Lane & Lane, of Marshall, and W. B. Skinner, of Mt. Vernon, Mo., for appellants. Beard & Davidson, of Marshall, for appellees.

HODGES, J. On October 18, 1913, Knowles and Mary Smith, husband and wife, instituted this suit by writ of habeas corpus against Herman and Nora Moore to recover the custody of Herman Smith, an infant then a little more than 15 months of age. The facts show that Herman Smith is the child of Knowles and Mary Smith, but was born out of wedlock. At the time of its birth the father and mother were engaged to marry each other, and did marry about a month later,

and have lived together as husband and wife continuously since that time. The birth of the child occurred on June 30, 1912, at the home of Mrs. Smith's sister in Missouri, about 30 miles from Mt. Vernon, near which place resided the parents and other relatives of Knowles Smith, and where he had previously made his home. The sister mentioned above kept the child about a week, and, being unwilling to keep it longer, so notified its mother. It was then carried by the latter to her mother in Kansas, where it was kept about another week. The mother of Mrs. Smith, being old and infirm, declined to keep it longer, on account of her physical condition, and the child was again taken possession of by its own mother. On August 17, 1912, after the complainants were married, Smith wrote the following letter to Mrs. Nora Moore, his sister and one of the appellees herein, who was at that time residing at Marshall, Tex., asking her to take the child:

"Mt. Vernon, Mo., Aug. 17, 1912.

"My Dear Sister Nora: I am going to write you Nora, asking a great favor of you, something that almost kills me to ask of you, but believe that you will help me for a while at least. Now Nora listen you know I am married to M., and all with my own free will, and Mary had a baby boy before we were married, and Nora this baby is in Kansas now. I have never seen it only when it was born, and Mary and the doctor tell me it is alright and a well baby boy, and I have heard you say you wish you had one, and I have got to do something soon and very soon, and Nora I don't feel like I could bring it here now for a while at least and disgrace my poor old mother and all the rest. If some one will keep him until I sell out or get shed of what I have then I could leave here and stay away. Now Nora, if you will help me for six months or if you will take him for a while and learn to love him you may keep him as long as you live and then I will see to him or if you will help me out for a while I will reward you for what you have done. My folks here need never know where you got him Nora. I won't feel hurt at you in the least if you don't do anything, but please help me if you feel like you can. Talk to Herman about this and see if he is will to help me out, if he isn't I wouldn't want you to take him. I will be to all expenses for the child. Now answer me as soon as possible for I must do something at once and if you will help us Mary will come and bring him soon and if you want to meet her at the depot she could turn right around and come home and if you should meet her on the way I will settle for your fare. Help is what I want Nora. I believe that it has a good mother. You know we are all likely to be misled. Now I will appreciate anything you can do, and if you cannot do anything I am not sore at you. I ask you to never mention this to any one but Mary and me would no where it was if you had him Nora. If you should take him for a while and get sick she will come and wait on you. Answer as soon as possible.

"Your brother,

Knowles."

Mrs. Moore and her husband replied to this letter consenting to receive and take the child into their home, and by arrangement met Mrs. Smith in Texarkana, where the child was delivered to them. The testimony shows that the babe was then in a very emaciated

condition, and there appeared to be little hope that it would live; but by careful nursing and prompt medical attention it soon gained strength and developed into a healthy child, and Mr. and Mrs. Moore became exceedingly fond of it.

After their marriage the complainants moved to a farm belonging to Smith near Mt. Vernon, Mo., where they have since resided. The record shows that during the next two months there was some correspondence between the parties regarding the condition and welfare of the baby. This correspondence discloses strong parental affection and a longing on the part of the mother to have the child with her. It was finally arranged that Mr. and Mrs. Moore should visit Mrs. Moore's relatives in Missouri and take the child with them. This they did about June, 1913. When complainants saw their child, they requested that they be allowed to keep it, and that Mr. and Mrs. Moore surrender whatever claim they had to it. Mrs. Moore declined, claiming that the complainants had agreed when she took charge of the child that she might keep it permanently in the event she learned to love it. It appears that an altercation followed between Mrs. Moore and Knowles Smith, in which the latter used some violence towards his sister. The witnesses differ as to just what took place at the time, but it is admitted that Mr. and Mrs. Moore finally agreed to surrender the custody of the child if they were permitted to take it back to their home in Texas and explain to their friends why they did not keep it. There was testimony showing that this course was the result of a family conference participated in by the father and mother of Mrs. Moore and Smith and one of their sisters. Moore and wife, however, testified that they gave their consent under coercion; that at the time they had no intention of keeping the promise to send the child back, but had agreed to do so through fear of Smith because of threats of personal violence made by him. Upon the arrival of Mr. and Mrs. Moore at their home, the latter wrote the following letter:

"Marshall, Texas, June 16, 1913.

"Knowles and Mary: We arrived in home yesterday at three o'clock everything here looked good to us, had a very hard trip home, little Herman was sick all the way with a hot fever. Every one on the train was nice to us. He is much better to-day, meant to have the Dr. this morn, but don't think he needs him, gave him a dose of castor oil last night. Well every one was glad to see us home again and say don't know how we will get along without the boy, he was so glad to get home, he knew just as well as we did he was home, has been so sweet and good ever since we came. Herman was sick last night, didn't go to work this morning. Knowles I do sincerely hope you and Mary are feeling better than when we were there, I am not sorry now I came home for it would have had to be settled some time, but now I feel like I have done all that I can do and when you all feel like you can do without him no longer, you and Mary come and make us a visit and we will make it as pleasant for you as we can and have no hard feelings towards each other."

About a month later she wrote another letter to her brother, positively declining to surrender the child, saying that she had consulted a lawyer since reaching home and was advised that she could not legally be deprived of the child's custody. This letter also conveyed the information that after returning to Marshall they had adopted the child. It further referred to a balance of \$115 due them for money which they had expended for the benefit of the child. It appears that Smith had agreed some time previous to reimburse them for such items, but had theretofore sent only \$35. Smith subsequently through an agent made formal demand for the child, and at the same time tendered this balance. Both the request for the child and the tender of the money were refused, and this suit followed. After a full hearing, the court below refused the prayer of Smith and wife, and directed that the child remain in the custody of the appellees.

[1] The court filed his findings of fact, in which he embodied, in substance, those which have been stated. He found in addition, however, that Mary Smith, the mother, had declined to further care for her child when it was delivered to the defendants at Texarkana, and that this virtually amounted to an abandonment on her part and that of her husband; that Moore and wife took the child with the understanding that if they learned to love it it was to be theirs for all time. He concluded as a matter of law that the best interests of the child—moral, physical, and from an educational standpoint—demanded that it remain in the custody of the foster parents. Complainants' counsel requested the court to make further findings of fact, and to that end propounded a series of questions, which were answered. The last probably furnishes the true reason for the judgment rendered, and is as follows:

"The court is of the opinion that Mary Smith would be a proper party to have charge of this child, so far as her part of such an undertaking would be concerned—at least so if not under the influence of her husband. But the conduct of Knowles Smith in this whole matter has been of such a character that the court is of the opinion that the welfare and best interests of the little boy asked for by the plaintiffs demand that he be not placed in the custody of Knowles Smith and his wife, Mary Smith, but in the care and custody of Nora and Herman Moore, and it is so ordered."

The testimony is uncontradicted that Knowles Smith is a young man between 30 and 40 years of age and bears an excellent reputation in the community where he resides. He is a farmer and a deputy sheriff, owns his own home, consisting of about 80 acres of land and worth between \$4,000 and \$5,000. He also owns the necessary stock, farm supplies, and implements required to operate a plantation of that size. His income is said to be about \$100 per month. There is nothing whatever in the record to question his fitness in any respect to have the custody of the child, unless it be certain transactions

to which Mrs. Moore testified. She stated that during her visit to Missouri in June, 1913, Smith became angered with her because of her refusal to part with the child, and struck her in the mouth with his fist, knocking her down, after which he choked her. Her father and sister, who were present at the time, deny that violence to that extent was used, and give a different account of the affair. They say that Smith became angered with his sister because of her conduct in failing to burn some letters which he had written her; that her manner was such as to irritate him; and that he struck her on the mouth with two of his fingers. They deny that he knocked her down or choked her. According to their version, she was the aggressor. Mrs. Moore admits that both her father and sister are good people and bear good reputations. These two witnesses are corroborated by Smith himself and his wife. Mrs. Moore further testified that about three years prior to the trial her brother told her that on one occasion he had taken his father by the collar and threatened to kill him. These were the only circumstances, aside from the unfortunate transaction preceding the birth of the child, which in any way reflected upon the fitness of either Smith or his wife to have its custody. Mrs. Moore admitted that Smith was "all right when unmolested." She doubtless meant that he was a good man when not angered or aroused by some cause. The testimony shows that Mr. and Mrs. Moore are both good people and bear excellent reputations in their community. They have been married a number of years, and have no children of their own. They own property estimated at about \$2,000 in value. Mr. Moore is employed in the railway shops at Marshall, Tex., as a carpenter, and earns a monthly salary of from \$70 to \$85.

[2] Taking the evidence in its entirety, the fitness of the complainants to rear the child is fully equal to that of the respondents; in fact, in some respects better, if we compare their financial conditions. Under these facts, we think the court erred in not awarding them the custody of their child.

We are referred to the following Texas cases as supporting the judgment rendered in the court below: *Legate v. Legate*, 87 Tex. 252, 28 S. W. 281; *Peese v. Gellerman*, 51 Tex. Civ. App. 39, 110 S. W. 197; *Plahn v. Dribred*, 36 Tex. Civ. App. 600, 83 S. W. 867; *Pittman v. Byars*, 45 Tex. Civ. App. 46, 99 S. W. 1033; *Schneider v. Schwabe*, 143 S. W. 265; *Ball v. Smith*, 156 S. W. 570. These have all been carefully examined, and we do not think they warrant the judgment rendered.

In *Peese v. Gellerman*, *Plahn v. Dribred*, and *Ball v. Smith*, the mothers of the children had died, and their fathers were making applications for custody after second marriages. In each instance the court found

as a fact, upon evidence the sufficiency of which was not questioned, that the moral surroundings of the child in the home of the parent, either on account of the character and reputation of the father or of the step-mother, would not be good.

In *Pittman v. Byars* the court does not state the facts with sufficient fulness to enable us to determine just what was the controlling reason.

In *Schneider v. Schwabe* the mother had married a second time, and sought the custody of her two children after several years of separation only as a pretext, so the court found, for securing the control of a small amount of money belonging to them. It was further shown in that case that the mother had married a second husband, and a large family of children had accumulated, and the income of the husband was inadequate for their proper maintenance and education. The court concluded that the children in question would probably be neglected if given into the charge of the mother and stepfather.

The *Legate Case* was presented on certified questions, and among those propounded was the following:

"Where the father and mother have, by written agreement, fully and finally relinquished their right to the custody of their infant daughter, three months old in favor of another, at a time when the mother was unable to give proper attention to the child on account of illness from which she was expected to die; and the child has been formally adopted by the person to whom such custody was given; and where, on habeas corpus trial, it is shown that the person having custody of the child is in every respect qualified to care for the child and provide for it; and it is also shown that the father and mother are also qualified in every way to care for and raise the child—should the child, after it has been cared for tenderly and lovingly for nearly two years by its foster parents, be taken from their custody and given over to the custody of the natural father and mother?"

After holding that the custody of a child is not legally a subject-matter of contract, and that the state, though recognizing the parents' natural right to its custody, has the superior right to determine where the child shall be placed, Judge Denman, who rendered the opinion, said that such matters were to be determined by the trial court upon the issues of fact in each particular case. He says:

"Ordinarily the law presumes that the best interests of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another. Where, however, a parent, by writing or otherwise, has voluntarily transferred and delivered his minor child into the custody and under the control of another, as in the case at bar, and then seeks to recover possession of the child by writ of habeas corpus, such parent is invoking the exercise of the equitable discretion of the court to disrupt private domestic relations which he has voluntarily brought about, and the court will not grant the relief, unless upon a hearing of all the facts it is of opinion that the best interests of the child would be promoted thereby."

The facts of that case, as stated in the opinion of the Court of Civil Appeals, which is reported in 29 S. W. 212, show that the child in controversy was the infant of parents who were very poor; that the mother at the time she parted with its custody was in a bad state of health and was not expected to live. Her health to some extent was subsequently restored, but still remained delicate, and she was unable to perform all of the duties that would be required of her in the care and attention of the child in connection with her other domestic duties. The foster parents of the child, on the contrary, were shown to be people of excellent moral and social standing, and were well able to give the child many advantages which it could not obtain if placed in the custody of its parents. Judge Finley, among other things, said this in referring to Mr. and Mrs. Wheeler, the natural parents:

"But, owing to their strained financial circumstances, the nature of Mr. Wheeler's employment, and the condition of Mrs. Wheeler's health, these opportunities and advantages will necessarily be limited, and her life will be to some extent one of privation and toil; and, unless Mrs. Wheeler is relieved to some extent of the burden of household labors and cares that are already too heavy for her weak condition, \* \* \* the child will, in all probability, within a few years, be without the constant personal parent's care that she will with reasonable certainty receive until her maturity in the home of the Legates."

It will be observed that there the ability of the parents to provide for the welfare of the child was called in question and furnished the chief reason for refusing them its custody.

The last expression of our Supreme Court to which our attention has been called is found in *State ex rel. Wood v. Deaton*, 93 Tex. 243, 54 S. W. 901. In that case a mother had parted with her child soon after the death of her husband, solely on the ground of her inability to provide for it. She subsequently married, however, and then sought to recover possession of her child. The testimony showed that the foster parents took the child with the understanding that they were to keep it, and they had retained its custody for several years; that they were people of exemplary habits and were well able to care for and educate the child and to give it such advantages as its social condition demanded. It was also shown that the mother and stepfather of the child were people of good reputation and standing, and were also willing and able to give the child all needed advantages. The facts presented a case in which there was probably an equality of fitness in the contending parties to discharge all the duties required for the welfare of the child. The question then was: To whom should the court, in the exercise of its discretion, award the custody? The district court refused the prayer of the natural parents and awarded the child to the foster parents. This judgment was affirmed by

the Court of Civil Appeals. The Supreme Court, however, reversed and rendered judgment directing that the child be delivered to its mother. In the course of the opinion, which was rendered by Justice Brown, the Legate Case is referred to and discussed. While not overruling that opinion, it is said that a careful examination will show that it was not there intended to justify the holding of the trial court in the case then being considered. Justice Brown then quotes at some length from *State v. Richardson*, 40 N. H. 275, which we think lays down the principle that should govern in this case. He announces the conclusion that where all things are equal, although the natural parent had voluntarily parted with her child, she should be given its custody.

[3] In legal effect the facts in this case are much like those in *State ex rel. Wood v. Deaton*. The finding of the court that Smith was an unfit person is not only unsupported, but is opposed to the undisputed evidence. Neither is the finding that the child had been virtually abandoned by its parents when turned over to Moore and wife at Texarkana supported by the record. The evidence does show that soon after its birth the complainants endeavored to conceal that fact from Smith's family, and it was for that purpose only that they called upon Mr. and Mrs. Moore to take charge of the child. It is undisputed that Smith had determined to sell out his property in Missouri and take his wife to some distant country where the illegitimacy of the child would not be known, but that he failed to find a purchaser and finally concluded to remain at his old home. It is also shown that his relatives soon became aware of the birth of the child, and there appeared to be no further effort to conceal it. According to Moore's testimony, he and his wife took the baby reluctantly and told the mother at the time that she could have it back if she called for it within six months. According to the testimony of Mrs. Smith, she did not intend to part with her child for all time; she regarded its custody by Mr. and Mrs. Moore as only temporary, and was looking forward to the time when she and her husband would move to some other country and take the child with them. In saying that the welfare of the child will be consulted in disposing of its custody, the courts do not mean that no consideration whatever will be given to the claims of the parents. The attachment of foster parents is based almost entirely upon association; that of the natural parents upon a God-given instinct. Parental affection, which finds its chief reward in the care and society of the offspring, has some claim on the conscience of courts.

The judgment of the district court is therefore reversed, and judgment here rendered awarding the custody of the child to the appellants.

**PRINCE et al. v. TAYLOR.** (No. 352.)†  
(Court of Civil Appeals of Texas. El Paso.  
Nov. 12, 1914. On Rehearing, Dec. 24,  
1914.)

**1. MASTER AND SERVANT (§ 305\*)—INJURY BY AUTOMOBILE—AGENCY OF DRIVER.**

If a chauffeur, acting within the scope of his general employment, as driver, undertook to operate a family car, through the owner's inexperienced son, though instructed not to, it is the act of the owner, and in a suit for resulting injury it is unnecessary to further show the son's agency than to show that the chauffeur permitted and assisted him to drive at the time and place of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 305.\*]

**2. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—INSTRUCTIONS.**

In a suit for injury to a pedestrian by an automobile, defended on the ground of contributory negligence, defendants could not complain of an instruction in their favor if plaintiff stepped back to avoid a street car, and so put himself in the path of the automobile so that those in charge could not, by exercise of ordinary care, stop it and guide it away before he was struck, as on these facts defendants would not have been entitled to a verdict without a further finding that his stepping back was the proximate cause of the injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**3. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—INJURY BY AUTOMOBILE—INSTRUCTIONS.**

In a suit for injury to a pedestrian by an automobile, the court was requested to tell the jury to find for defendants if, as the automobile rounded the curve at a street intersection, a street car started to make the turn and the rear end swung outward toward a woman causing her to step back into the path of the automobile, and the driver to avoid striking her turned the car and struck plaintiff, and if the street car causing her movement was the sole proximate cause of plaintiff's injury to find for defendants, regardless of defendants' negligence in driving the automobile, so as to necessitate a sharp turn from the woman. *Held*, that it was not error to refuse the request because it withdrew the issue as to whether defendants were negligent in driving at all at that place under the circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**4. TRIAL (§ 260\*)—REQUEST FOR CHARGE—ISSUE PRESENTED BY GENERAL CHARGE.**

No error can be predicated on the refusal of a request as to an issue sufficiently presented by the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**5. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS—INJURY BY AUTOMOBILE—MISTAKE OF JUDGMENT AS DEFENSE.**

A mistake of judgment as to the competency of the driver of an automobile, however honestly made, is not a defense to a suit for injury caused by his negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

**6. DAMAGES (§ 208\*)—PERSONAL INJURY—QUESTION FOR JURY.**

Evidence of personal injury, from which it may be inferred from an opinion of a physician

that plaintiff could not do active work, justified submission of future diminished capacity to earn money as an element of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

Appeal from District Court, Harris County; N. G. Kittrell, Judge.

Suit by Joe H. Taylor against H. Prince and another. From a judgment for plaintiff, defendants appeal. Affirmed, and motion for rehearing overruled.

Andrews, Streetman, Burns & Logue, Fisher, Campbell & Amerman, W. L. Cook, and Jno. A. Mobley, all of Houston, for appellants. Gill, Jones & Tyler, of Houston, for appellee.

**WALTHALL, J.** In this case the plaintiff in the trial court, Joe H. Taylor, now appellee, sued the defendants, H. Prince and his son, Harry Prince, appellants, for damages for personal injuries which he alleges he sustained by reason of the negligence of the defendants proximately causing his injuries. Briefly stated, the plaintiff alleges in his petition that he was struck by an automobile owned by defendant H. Prince, which at the time of the accident was being driven on Texas avenue in the city of Houston, or just at the corner of Main street and Texas avenue in said city. The petition alleges that his being struck by the automobile and the consequent injuries to him, of which he complains, were caused by negligence for which H. Prince would be liable, upon the following grounds: That at the time of the accident the car causing the injury was being driven by Harry Prince, son of H. Prince, either upon his own responsibility or under the direction of one Schell, whom H. Prince had employed as chauffeur and placed in charge of the automobile, with authority to drive same upon the streets of Houston, for the use and benefit of H. Prince's family, of which it was alleged Harry Prince was a member, and that Harry Prince was likewise placed in charge of the machine by H. Prince, with authority to operate it. The petition alleged that Harry was an inexperienced and incompetent driver of the machine, and that Schell, in charge of the machine, negligently turned the car over to Harry and permitted him to operate same with resultant injury to plaintiff. The petition alleges that the injuries to plaintiff were proximately caused by negligence in one or more of several respects: (1) By Harry, as H. Prince's agent, negligently operating the car, either in violation of the city ordinance, or by failure to exercise ordinary care; (2) by Schell, the chauffeur, and H. Prince's agent, participating in such negligent operation of the car; (3) by negligence of the chauffeur in turning the car over to Harry Prince, an incompetent and inexperienced operator. The damages claimed are predicated upon suffering, mental and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Writ of error pending in Supreme Court.

physical, lost time, and diminished capacity to labor and earn money.

Defendant H. Prince answered by general demurrer, general denial, and special pleas, in substance: (a) That, if plaintiff was struck by an automobile owned by H. Prince, same was intrusted exclusively into the hands of a competent chauffeur, and, unless at the time of the accident same was being operated by said chauffeur, it was not being operated under the authority or for the use and benefit of H. Prince; (b) that plaintiff was himself guilty of negligence contributing to cause his injuries; (c) that the injuries to plaintiff were proximately caused by an intervening agency, in that, it being Saturday afternoon, with the streets crowded, a street car of the Houston Electric Company had been stopped at the corner, or near thereto, just before making the turn from Texas avenue into Main street, which street car prevented the passage of pedestrians who were going in the direction in which plaintiff was going; and that said street car suddenly started around the curve at that point, causing persons who were then and there near said street car to suddenly step backward or otherwise in the path of the moving automobile, in order to avoid the rear end of said street car, which swung outward toward such persons as the street car took the curve; and that the driver of the automobile, under such circumstances, undertook to turn said automobile so as to avoid striking and injuring such persons so moving out of the path of said street car; and that in doing so said automobile was caused to come in contact with plaintiff, if plaintiff was struck by said automobile. It was alleged that the starting of the street car, with the consequent moving of pedestrians to avoid its outward swing, was the sole proximate cause of injuries to plaintiff; there being no negligence of any persons for whom the defendant H. Prince would be liable on the occasion.

After a careful examination of all of the evidence offered on the trial, we find that the following facts appear without dispute: First. That appellee was injured, and that his injuries were due to the collision of an automobile with his person on the date alleged. Second. That the accident occurred at the intersection of Main street and Texas avenue in the city of Houston, about 7 o'clock in the evening on a Saturday, a time when that place was and is always the most crowded place in the city, both in the matter of moving people and moving vehicles. Third. That the automobile which injured plaintiff was owned by H. Prince, was then being driven by his son, Harry Prince, under the supervision and direction of the chauffeur of H. Prince. Fourth. That the automobile had been purchased by H. Prince for the use of his family, and he, his wife, and his son Harry constituted his family. That his wife and son and two guests were taking a pleasure ride on the occasion in question. Fifth.

That the car and chauffeur were subject to the wife's orders. Sixth. That, for about two weeks, Harry had been learning to drive the car under the immediate tutelage of the chauffeur, and that on the occasion of the accident the chauffeur was sitting beside Harry, advising and directing him, and sounding the horn for him on occasion. Seventh. That defendant H. Prince knew that Harry was learning to drive the car, and that he had been running the car, was present a number of times when the fact of Harry's running the car was mentioned; had ridden in the car on at least one occasion when Harry was driving, and made neither protest nor comment. Mrs. H. Prince had ridden a number of times when Harry drove, advising and directing him. Eighth. The legal limit of speed on Main street at and near the point of the accident was eight miles per hour, which had to be reduced to four miles per hour in turning corners. Ninth. It is undisputed that in turning the corner the automobile was exceeding the speed limit for turning corners, the speed being placed by Harry and the chauffeur at from five to six miles an hour, and the other witnesses varying up to twenty miles per hour. Tenth. It was undisputed that it was the moving automobile that injured plaintiff. Eleventh. The automobile was a five-passenger Packard, with a wheel base of 129 inches, which, with its overhang, would give the machine a total length of more than 12 feet. Twelfth. At the time of the accident, plaintiff had walked up Main street on the eastern sidewalk, and had just started across Texas avenue, toward the Binz Building, in the same direction and on the same side of Main street, when he was struck by the automobile, just as it turned the corner. Thirteenth. He was rolled or dragged several feet by the machine. The machine ran from 50 to 75 feet beyond the point of collision before the driver was able to stop it. Fourteenth. A lady, named Mrs. Walker, was badly injured by the same machine at the same time and place.

[1] Appellant's first assignment of error complains of the tenth paragraph of the court's general charge, in that said paragraph instructs the jury that H. Prince would be liable for the negligent acts of Harry Prince, if any, in the operation of the automobile, without properly submitting to the jury anywhere in the charge the question of whether or not there were such relations between H. Prince and Harry Prince as would amount to an agency, permitting the application of the doctrine of respondeat superior. The paragraph of the charge complained of reads as follows:

"Guided by these instructions, if you believe from a preponderance of the evidence that the automobile was being run at such rate of speed and under such circumstances as, you have heretofore been instructed, constituted negligence, and you further believe that plaintiff was struck by an automobile belonging to defendant

H. Prince, and that plaintiff was injured by being so struck, and believe that the negligence of those in charge of the car, or of either the chauffeur or Harry Prince, if negligence you find, was the proximate cause of plaintiff's being injured, the plaintiff is entitled to recover; and, unless you find for defendants upon instructions given in other parts of this charge, you will return your verdict in his favor against either H. Prince or against Harry Prince, or against both, according as you find liability under instructions hereinafter given."

The three propositions under this assignment are to the effect that, before H. Prince could be held liable for any negligence of Harry Prince, the evidence must either show as a matter of law, or raise the issue as a fact, that Harry was H. Prince's agent, acting within the scope of his agency, in the operation of the car, and that the fact of Harry's agency was an issuable fact and not undisputed to be stated by the court as a matter of law, and that it was prejudicial error, as the charge nowhere else presented to the jury appropriate instructions correctly informing them as to the circumstances under which H. Prince might be held liable for negligent acts of Harry Prince. If it were a necessary fact, to be shown before H. Prince could be made liable for the negligent act of Harry Prince in driving the car at the time and place of the accident, that H. Prince should have given Harry permission to drive the car, or should have given Schell, the chauffeur, permission to let Harry drive the car, the assignment would present a serious question, as both appellant's answer and his evidence on the trial dispute the question as to his permission to any person other than the chauffeur to drive the car. However, he admits his ownership of the car; admits that Schell was his chauffeur, and at the time and place of the accident was in charge of the car; admits that the car was a family car, and that the family used it altogether, and that at the time of the accident the car was in charge of the chauffeur, and that his wife and Harry, with friends, were in the car and taking a drive; admits that the chauffeur was invariably under the instructions of his wife. Appellant defends the action against his liability for Harry's negligence on the ground that he had given his chauffeur a general charge that no one else should drive the car.

In the case of *Burnett v. Oechsner*, 92 Tex. 590, 50 S. W. 563, 71 Am. St. Rep. 880, the court, quoting from *Railway v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902, states the law to be that:

"To hold the master liable for the act of his servant, it is not necessary that the servant should have the authority to do the particular act. The act of the servant may be contrary to his express orders, and yet the master may be liable. But the act must be done within the scope of the general authority of the servant. It must be done in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed. For the mode in which the servant performs the duty he is engaged to perform, if wrongful and

to the injury of another, the master is liable, although he may have \* \* \* forbidden the particular act."

To operate the family car of H. Prince on a pleasure drive for the family was admitted to be within the scope of the general authority of the chauffeur, Schell. If he (Schell), acting within the scope of his general employment, as driver of the car, undertook to operate the car through Harry Prince, although instructed by H. Prince not to do so, it would still be the act of H. Prince, and it would not be necessary to further show the agency of Harry Prince than to show the agency of Schell, that he permitted and assisted Harry Prince, as the undisputed evidence shows, to drive the car at the time and place of the accident. The above principle is further illustrated in the case of *Reid Auto Company v. Gorsczya*, 144 S. W. 688. Could the owner of a car relieve himself of liability by instructing his driver not to drive the car at an excessive rate of speed and to exercise ordinary care or to drive on certain streets and not to drive on others, if a failure to obey instructions caused injury to others? We think not. No more could he by instructing his driver not to permit an inexperienced person to drive the car.

If we eliminate from the case the idea that the general instruction of the owner of the car to his chauffeur to the effect that no other person should operate the car, we then have presented the question of the owner's liability for injury inflicted to another through the negligence of one put in charge of the car by the servant to perform the duties of the servant. It seems to us that the act of the servant in doing so would go to the mode in which the servant performs his duty to the master.

From the principles announced in the cases above quoted, we think it quite clear that to render H. Prince liable for an injury inflicted on the appellee through the negligence of Harry Prince, in driving the car, with the knowledge, consent, and under the direction of Schell, and while performing Schell's duties, it would not be necessary that the evidence show agency of Harry Prince, separate and apart and independent of the agency of Schell. We overrule appellant's first assignment of error.

The authorities above quoted, as we construe them, render it unnecessary for us to further discuss appellant's second, third, and fourth assignments of error.

[2] Appellant's fifth assignment of error complains of the fourteenth paragraph of the court's general charge, but copies the twenty-fourth paragraph. It is true, as stated in the assignment, that the paragraph complained of (the twenty-fourth) tells the jury to find for both defendants, if they should find that plaintiff stepped back to get out of the way of the swing of the car and that, in doing so, he put himself in the path of the approaching automobile, and at a time and place when

and where those in charge of the car could not by exercise of ordinary care, in the employment of the means at hand, stop the car or guide it away from the plaintiff, before he was struck, without submitting to the jury the question for them to determine whether the stepping back by plaintiff was the proximate cause of plaintiff's injury. The charge was one of which the plaintiff might have complained, but not the defendants. The defendants would not have been entitled to a verdict if the jury had found for them every fact submitted to them in the paragraph, but the plaintiff would, in addition, be entitled to have the jury say, before they could find for the defendants, that the stepping back was the proximate cause of his injury. The assignment is overruled.

[3] The sixth assignment complains of the refusal of the court to give requested charge No. 12. There was no error in refusing to give the charge. The charge requested the court to tell the jury to find for the defendant if they should believe from the evidence that, as the automobile was rounding the curve at the intersection of the streets, a street car then and there started in motion to make the turn from Texas avenue into Main street, and that the rear end of the street car swung outward toward Mrs. Walker, causing her to step back into the path of the moving automobile, and that the driver, in an effort to avoid striking Mrs. Walker, turned the car from her and struck the plaintiff, and, if the jury should find that the start of the street car causing the movement of Mrs. Walker was the sole proximate cause of plaintiff's injuries, the jury would return a verdict for defendants, and that regardless of any question of negligence on the part of defendants in driving the automobile at that time and place, so as to necessitate the sharp turn of the car from Mrs. Walker. The jury might have thought that it would not be in the exercise of ordinary care for defendants to undertake to drive the car at all at that place under the circumstances then existing. They would be the sole judges, and the charge, if given, would have withdrawn the issue from them.

[4] The seventh assignment complains of the refusal of the court to give requested charge No. 6, to the effect that, unless they found that the speed of the car at the time and place of the accident was the proximate cause of plaintiff's injury, it would be immaterial that the car was then exceeding the speed limit. The requested charge announces a correct principle of law; but we believe that paragraphs 10 and 11 of the general charge taken together sufficiently presents the issue to the jury, and the assignment is overruled.

[5] Defendant in his eighth assignment complains of the court's refusal to give requested charge No. 7 to the effect that, if the accident causing the injury arose out of Harry Prince's improper and unsafe operation

of the automobile, resulting from his inexperience as a driver, and not from his want of ordinary care in an effort to properly operate the car, and that Schell believed him to be competent, and that a person of ordinary prudence would have considered him competent under the same circumstances and permitted him to drive the car, plaintiff could not recover of appellant. The assignment is based on the theory that Harry was an employé of appellant, and that appellant exercised ordinary care in selecting Harry as a driver of the car, and that the injury to appellee was occasioned wholly through Harry's incompetence as a driver of the car at the time and place of the accident.

The plaintiff's answer does not tender such an issue as a defense, neither does the evidence. The plaintiff did assign as a ground of negligence Harry's incompetence as a driver, and the court submitted that issue to the jury in the seventeenth and eighteenth paragraphs. If the law was as appellant suggests in the assignment, it would make appellee's rights to recover depend entirely on what Schell thought of the competency of Harry as a driver of the car. Suppose the appellant had thought himself competent to operate the car, but in fact was not, and that his incompetence caused the injury, could it be said that his mistake of judgment as to his competence, however honestly made, would alone be a complete defense to an action for damages caused? We think not.

[6] We think the evidence of the plaintiff as to his present physical condition as a result of the injury, and Dr. Howard's opinion, to the effect that if appellee's knee at the time of the trial was still sensitive upon use, and that if appellee has to rest it upon a pillow at night, he could not do active work, the court was not in error in submitting the matter of future diminished capacity to earn money as an element of damage as a probable result.

Finding no reversible error, the judgment is affirmed. Affirmed.

#### On Rehearing.

Appellant H. Prince, in his motion for a rehearing, earnestly insists that this court was in error in overruling each of their nine assignments of error, and in their motion to reassert the same propositions contended for in their very able and exhaustive brief filed in this case. We have again reviewed the questions presented, but reach the same conclusions as in our former opinion, and, but for the fact that some of the statements made in the opinion are not as clearly stated as they might have been, we will further state some of the conclusions reached:

Appellants' contention, as stated in their motion for rehearing, is that the fact of ownership of an automobile will not be a ground of liability, nor will the fact that such automobile was being used by the immediate

family of a defendant be a ground of liability. That such use by the members of the immediate family might be a circumstance to be taken into consideration by a jury in determining the question of agency, but would constitute no independent ground of liability. If appellant's statement contained all or even the salient facts shown in the record, we would concede the correctness of his proposition. The record shows, as stated in the original opinion, some facts additional, which appellants seem to have either overlooked or deemed unimportant. The courts in many cases have held, as stated by appellant, in his motion, that if a member of the family, although operating the family vehicle, was operating it in his own behalf, and not in any of the uses for which the car was furnished by the father, and used without his consent, the father would not be liable for damage caused while being so used, on the ground solely that the car was a family car and that the driver was a member of the family. There would be two essential elements absent—agency and the business of the father. In our original opinion, the undisputed evidence stated in the opinion discloses the facts that appellant had furnished the car as a family car; that appellant, his wife, and Harry constituted the family; that appellant knew that Harry was learning to run the car on pleasure drives for the family, and made no protest; and that at the time of the accident the car was being used for the purpose for which the car was furnished by appellant. The chauffeur was employed by appellant, and, if the chauffeur had himself been driving the car, and in the use of the family at the time of the accident, there could be no question of the correctness of the charge, as to the chauffeur. The only question presented arises on the agency of Harry: Do the undisputed facts disclose that Harry was the agent of appellant, so that the fact of his agency could be assumed as a fact proved?

We need not here more fully restate the evidence or the facts which the undisputed evidence disclose. It would not only be unnecessary, but improper, for the trial court in the charge to have stated to the jury the undisputed evidence, or the facts established by the undisputed evidence. If, under the undisputed evidence, Harry was his father's agent or servant in operating the car at the time of the accident, whether his agency arose independently of the chauffeur or was imputed to him through the chauffeur or the fact of his mother's presence in the car and her necessarily implied consent to his driving the car, it would be immaterial. The paragraph of the court's charge complained of could have assumed the fact of his agency, and need not have stated that the evidence established his agency, any more than it would have been necessary to tell the jury that the chauffeur was the agent or servant

of appellant. It is true that agency is a question of fact to be found by the jury like any other fact; but if the elements which enter into and constitute agency are admitted, or the undisputed evidence disclose it, the fact of agency may be assumed or stated as a fact just as any other fact. Do the facts necessarily show Harry's agency? In the case of *Allen v. Bland*, 168 S. W. 38, in which a writ of error was refused, the Court of Civil Appeals for the Seventh District quoted with approval the case of *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59, as follows:

"It (the automobile) was being used in furtherance of the very purpose of his ownership and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. In running his vehicle, she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule *respondent superior*."

Again, in the same case:

"It (the charge then being commented on) declared the use of the machine for the purpose for which it was owned, by the person authorized by the owner to so use it, a use in the owner's business. It seems too plain for cavil that a father, who furnished a vehicle for the customary conveyance of the members of his family, makes their conveyance by the vehicle his affair—that is, his business—and any one driving the vehicle for that purpose with his consent, \* \* \* express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it and the agency is present in the use of it by one as well as by all."

In *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224—a case somewhat analogous in facts to the case before us—the Supreme Court of Kentucky, speaking through Justice Winn, uses this language:

"The car, at the time of the accident, was driven by Robert Stowe, the 18 year old son of the appellant. With him in the car were his sister (and others named) friends of his sister. \* \* \* The car was kept by the father for the comfort and pleasure of his family, including his son and daughter. They had the right to use it as often as they liked."

The court held that the son, in using the car for the pleasure of himself and sister, with whom were friends, was a servant or agent of the father, not performing an independent service of his own, but the business of the father, making his father liable for his negligence in driving the car. The liability was not put on the ground of non-age of the son, but on the ground that the use of the car was in the furtherance of the father's business and for which the car was used.

We construe *Dally v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, to state the same principal, that is, that, regardless of the age of the son running the family vehicle for the pleasure of the family, with the consent of the father and within the scope of the family uses, would constitute the one operating the car the agent and servant of the father. In our original opinion, we stated that the fact of the agency of Harry would be imputed to him through the chauffeur; that is, that the chauffeur was simply operating the car through Harry, and that with the knowledge and consent of appellant, the trial court, in the paragraph complained of, may have assumed the agency of Harry on the ground stated in the cases above referred to. In the *Allen v. Bland* Case, above referred to, the court, after quoting from the *Birch v. Abercrombie* Case and each of the others to which we have referred, uses this language:

"We think the authorities quoted above announce the correct rule of liability, and they are cited and adopted as announcing the law applicable to the facts of this case."

We think there can be no question of the agency of Harry Prince under the undisputed facts, and adhere to our former ruling. If we are not in error in the view above expressed, we think the trial court correctly stated the law in the other paragraphs of the charge to which appellants' motion applies.

We overrule the motion.

# CITY OF KAUFMAN v. FRENCH. (No. 7137.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 14, 1914. Rehearing Denied  
Dec. 19, 1914.)

## 1. DEDICATION (§ 1\*)—ACTS CONSTITUTING—EXPRESS AND IMPLIED DEDICATION.

Common-law dedications are divided into express and implied dedications, and in both there must be an appropriation of land by the owner to public uses, in the one case by some express manifestation of such purpose, and in the other by some act or course of conduct from which the law will imply such an intent.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 8, 10-12; Dec. Dig. § 1.\*]

## 2. DEDICATION (§ 15\*)—REQUISITES—INTENT.

To constitute a dedication it is essential that the donor should intend to set apart and appropriate the land to a public use, which intent must not be a secret one, but expressed by the visible conduct and open acts of the owner inducing the belief that he intends to dedicate it to a public use, and where action is taken by the public or individuals, as if there had been in fact a dedication, the law will not permit the donor to deny the intent to dedicate.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.\*]

For other definitions, see Words and Phrases, First and Second Series, Dedication.]

## 3. DEDICATION (§ 19\*)—ACTS CONSTITUTING—DESIGNATION ON MAPS AND PLATS.

A dedication may be established against the owner of land by showing that he has platted it as an addition to a city by a map placed on the public records, and has sold lots by deeds

referring to the map in the description thereof, or that he has adopted a map or plat made by another person, the rule of construction in such case being to give effect to the intention manifested by such acts.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

## 4. DEDICATION (§ 15\*)—EVIDENCE—PRESUMPTIONS.

The doctrine of a presumed dedication from unequivocal acts or declarations upon which the public or those interested in the dedication have acted, rests upon the principle that a man is presumed to intend the usual and natural consequence of his acts; but where a dedication was not manifested by acts and declarations which would lead an ordinarily prudent man to infer an intent to dedicate, or where the donor's acts and declarations forbade the inference of such intent and he was without negligence, he might show his mistake and avoid the dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.\*]

## 5. DEDICATION (§ 19\*)—ACTS CONSTITUTING—REFERENCE TO MAPS AND PLATS.

Where a map and plat of land showing streets was made by one other than the owner and filed as a public record, the owner's subsequent deeds calling for and referring to the map for the description of the land, in the absence of evidence rebutting the presumption that he intended what his acts indicated, constituted a dedication of the land to public use, which, if acted upon by the city or by the grantees, made the owner's intent immaterial.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

## 6. DEDICATION (§ 15\*)—REFERENCE TO PLAT—KNOWLEDGE OF GRANTEE—ESTOPPEL.

Where the owner of land, of which a third person had made a map or plat showing streets and filed it as a public record, did not intend by her conveyances referring to the map for description to dedicate the land to a public use, and the grantees were so informed or necessarily must have known when they purchased that she did not intend a dedication to public use, there was no dedication, since if the person against whom dedication is asserted was ignorant of his rights and free from negligence there would be no implied dedication; but even if ignorant of his rights the owner, if guilty of culpable negligence, would be estopped against those misled thereby.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.\*]

## 7. JUDGMENT (§ 256\*)—CONFORMITY TO VERDICT.

In an action to enjoin a city from claiming land for a street under a dedication by plaintiff's mother, a finding that she intended to dedicate the land in controversy to public use could not be ignored by the trial court, and judgment rendered for the plaintiff; but the court, if of opinion that the evidence showed that she did not intend to dedicate the land, should have granted a new trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.\*]

## 8. LIMITATION OF ACTIONS (§ 6\*)—RETROACTIVE OPERATION OF STATUTE.

In an action to enjoin a city's use of land for a street, where the asserted dedication, if any, was made by deeds of plaintiff's ancestor executed in 1883, referring to a map or plat showing streets, limitations in favor of the plaintiff could not run after the statute of 1887 (Acts 20th Leg. c. 41) exempting municipalities from limitations, and where less than five years elapsed between the alleged dedication and the

statute, the city's claim of right to open the street was not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. § 6.\*]

**9. DEDICATION (§ 31\*)—REQUISITES—ACCEPTANCE.**

Proof of a city's acceptance of land dedicated by a map or plat and by reference thereto in deeds was not necessary.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.\*]

**10. TRIAL (§ 398\*)—FINDINGS—CONFLICT.**

In an action to enjoin a city's claim to land for a public street under an alleged dedication by plaintiff's mother, a finding that her grantees did not know of her intention that the land should not be opened for street purposes was in conflict with a finding that plaintiff at the time of such deeds informed the grantees that he reserved the land as a part of his home place.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.\*]

**11. DEDICATION (§ 44\*)—SUFFICIENCY OF EVIDENCE—RESERVATION BY GRANTOR.**

In an action to enjoin a city's claim to a street under an alleged dedication, evidence held insufficient to sustain a finding that plaintiff had informed all the purchasers, by deeds referring for description to a map and plat of the land filed as a public record, that the land in controversy was reserved.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action for injunction by W. A. French against City of Kaufman. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Charles Ashworth and Lee R. Stroud, both of Kaufman, for appellant. Huffmaster & Huffmaster, of Kaufman, for appellee.

**TALBOT, J.** This is an action brought by the appellee, W. A. French, to enjoin the appellant, city of Kaufman, from removing his fences and opening a street through the inclosure constituting his homestead in said city. The tract of land upon which his improvements are situated contains about 2½ acres, and is described by metes and bounds as follows: Beginning 120 feet south of the J. C. Cole league line on Jackson street, in the city of Kaufman, and on the east side of said street; thence north 450 feet; thence east 200 feet; thence south 450 feet; thence west 200 feet to the place of beginning. This land, being a part of a larger tract, was acquired by appellee's father and mother in 1858 or 1859, and since that time has been under fence and constituted a part of their homestead. After the death of appellee's father, appellee's mother continued to occupy the premises as her homestead. Appellee became the owner of the land, took actual possession of it in July, 1891, later built a residence house upon the 2½ acres of about the value of \$5,000, and thereafter occupied the premises as the home of himself and family. On August 25, 1881, during the life-

time of Mrs. L. J. French, appellee's mother, and under whom he claims, L. H. Bryant caused to be recorded in the office of the county clerk of Kaufman county, in vol. 30, page 144, of Deed Records, a map or plat of 13 acres of land belonging to the said Mrs. French, including the land involved in this suit, as an addition to the city of Kaufman, to be known as the "French Addition." Upon this map certain blocks, lots, and streets were delineated, one of said streets being called Seago street. This map was recorded not only without the consent of Mrs. French, but over her emphatic protest. By deed dated April 13, 1883, Mrs. L. J. French conveyed to Julia Cree, for a recited consideration of \$200, "block No. 26 in L. J. French addition to the town of Kaufman, being 200 feet square, and bounded on the north by Temple street and on the east by Madison street, on the south by Ann street and on the west by Washington street." The block 26 and the streets called for in this deed are in fact a part of the "French Addition" as platted and recorded by L. H. Bryant in 1881. By deed dated February 20, 1888, Mrs. L. J. French conveyed to J. A. Marshall a certain lot or parcel of land, described, among other descriptions given in said deed, as a "part of block No. nineteen (19), as shown and described on a map or plat of the town of Kaufman made by L. H. Bryant and duly recorded on the 25th day of August, A. D. 1881, in Book 30, page 144, of the records of deeds for said Kaufman county, to which reference is made." On February 16, 1889, Mrs. French conveyed to W. S. Broughton a tract of land described in the deed as follows:

"Situated within the corporate limits of the town of Kaufman, and being a part of the 13-acre tract owned by the said L. J. French, the land herein conveyed beginning at the N. W. corner of block No. 27; thence east 18 feet to the N. E. corner of the said 13-acre tract; thence south 100 feet to corner on E. B. line of said 13-acre tract; thence west 16 feet to W. B. line of said block No. 27; thence north 100 feet to the beginning; being 1,600 sq. feet."

There are no streets called for in this deed and no reference made therein to any map, but the land described is doubtless a part of the tract covered by the Bryant map. Again, on the 30th day of April, 1891, Mrs. French deeded to her daughter and son-in-law, Anna L. and John C. Graves, a tract of land described thus:

"Lying and being in the town of Kaufman, \* \* \* and being a part of the J. B. Cole 26 labor league survey, and a part of block No. 1 originally on the south side of the original plat of the town of Kaufman, with following boundaries, to wit: Beginning 50 feet south of the southeast corner of block No. 45, being 661 feet south of the north corner of block No. 17 on the public square of said town, corner post; thence south 200 feet corner; thence west 100 feet corner post; thence north 200 feet to corner post on south line of street; thence east 100 feet to the place of beginning; containing the

last half of block No. 17 of the addition to the town of Kaufman on the south, which is recorded in vol. 30, page 144, of Deeds for Kaufman county."

On July 7, 1891, Mrs. French deeded to her son, the appellee in this suit, "all that part of block 42 on the J. B. Cole 26 labor survey, and all of block No. 33 (thirty-three), situated in said town of Kaufman, in said addition, on the south of the original plat of said town of Kaufman, and being a part of said 13-acre lot on the J. B. Cole survey." On the 5th of August, 1913, after appellee had been in the peaceable and adverse possession of the  $2\frac{1}{2}$  acres of land mentioned, using it as his homestead, the appellant, acting by and through its duly elected council, passed an ordinance commanding appellee to open up Seago street as delineated on the Bryant map, between blocks Nos. 42 and 43 of the French addition, within 15 days from that date, and providing that, in the event appellee failed to open up said street, it should become the duty of appellant to open it. Appellee failed and refused to open up Seago street as ordered by the ordinance, and, at the time this suit was instituted, appellant was threatening to do so. Appellant concedes in this court, in view of the evidence and finding of the jury, that L. H. Bryant made and recorded the map creating the French addition to the city of Kaufman, without the consent of Mrs. L. J. French, but contends that, by the deeds above mentioned, she dedicated to public use all the streets delineated on said map, including the said Seago street, and that notwithstanding the appellant had not, for the great length of time shown, attempted to have Seago street opened for the use of the public, appellee could not complain of the enforcement of the ordinance requiring it to be done. The evidence is undisputed that the strip of land sought to be appropriated by appellant to street purposes constitutes a part of appellee's homestead, and that he had and held actual, peaceable, and adverse possession of it, under fence, for more than 10 years prior to the institution of this suit, the date of ordinance referred to, and the date of the threats made by appellant to disturb his possession; that appellant, at the time appellee built his residence house upon the  $2\frac{1}{2}$  acres of land, of which the strip in controversy is a part, and during all the time said land has been in the possession of appellee, knew that it was being used as a part of his homestead; that appellant never exercised any control or authority whatever over said strip of land, and never threatened or attempted to do so until the passage of the ordinance in 1913, and just before the bringing of this suit; that Bryant's map was made and recorded contrary to the express wishes of Mrs. L. J. French. The evidence further shows that the taxes were assessed against the  $2\frac{1}{2}$  acres of land, including that portion now claimed to have been dedicated to street pur-

poses, and collected by appellant from appellee's mother, and after appellee became the owner of the property from him from 1881 to the date of the trial of this suit; that appellant, about the year 1902, bought from one George Phillips a strip of land which was marked on the Bryant map as a street, and bought from Mrs. L. J. French about the same year strips of land also marked a street upon said map and designated thereon as Jackson street. Appellee contends that under these and other facts there was no dedication of the land in controversy to street purposes, or that if appellant ever had any right to run a street across his land, designated as Seago street, upon the grounds asserted by it, such right had long since been abandoned, or that it was now estopped from the exercise of that right. The case was submitted to the jury on special issues, and, among other things, they found that Mrs. L. J. French, at the times she executed the deeds, referring to the map made and recorded by Bryant, had no verbal understanding with the grantees in said deeds, and that there was no intention on the part of Mrs. French that the land in controversy should never be opened as a street. They further found that Mrs. French did not intend to ratify and adopt the Bryant map by the execution and delivery of said deeds, but that the reference to said map in said deeds was merely for the purpose of description of the property conveyed. Upon the findings of the jury, judgment was rendered for the appellee, and the appellant appealed.

It is assigned that "the court erred in rendering judgment for the plaintiff, and not defendant, because the findings of the jury on special issues and also the proof, both show a dedication of the property in controversy to the city for street purposes by numerous deeds referring to the map and to Mrs. L. J. French's addition thereon, wherein and whereby she conveyed the lots according to such map and plan." The proposition asserted is that "a map of an addition to a town, made and placed of record without the consent of the owner of the land platted, does not bind the owner, but if such owner afterwards executes deeds conveying lots or blocks calling for such map to purchasers from time to time, such deeds made in accordance with the plat or map will convey to the purchasers and the public, and to the city in trust, the right to have the map so recited in the deeds sustained, and such conveyances from time to time will constitute a dedication of the streets according to such map and the general plan," and that such a dedication is as binding as if the owner had authorized the map to be placed of record in the first instance and irrevocable by such owner.

There are two general kinds of dedication, namely, statutory and common-law. It is of the latter that we are here called upon to

treat and no further reference to statutory dedications need be made.

[1] Common-law dedications are subdivided into two classes, express and implied. In both it is necessary that there should be an appropriation of land by the owner to public use, in the one case by some express manifestation of his purpose to devote the land to the public use, in the other by some act or course of conduct from which the law will imply such an intent. Elliott, *Roads and Streets* (2d Ed.) § 121.

[2] Mr. Elliott further says:

"It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. \* \* \* If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent." Section 124.

[3] It has been held in this state, and very generally so we think, that dedication may be established against the owner of the land by showing that he has laid off and platted the ground into lots, blocks, and streets as an addition to a city by a map placed on the public records, and has sold lots by deeds referring to the map in the description thereof, or by showing that he has adopted a map or plat made by another person. But the cardinal rule of construction upon the subject of dedication by maps or plats is that which prevails respecting ordinary grants, and that is to discover and give effect to the intention of the party as manifested by his acts.

[4] So, where the dedication is manifested by unequivocal acts or declarations upon which the public or those interested in such dedication have acted, the fact that the owner may have entertained a different intention from that manifested by his acts or declarations, or acted under a mistake, is of no consequence. The doctrine rests upon the sound general principle that a man is presumed to intend the usual and natural consequence of his acts. So that, if a man "by his conduct has induced rightful action upon the part of others, he must be held to the consequences of that which his own acts made appear to the minds of men of fair prudence to have actual existence." If, however, the dedication claimed is not manifested by such acts or declarations—that is, if the acts of the owner were not such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, or if his acts or declarations were of such a character as to

forbid the inference of such intent and he was without negligence—then he would not be precluded from showing his mistake and avoiding the dedication.

In the case before us it is conceded by appellant that the map made and placed of record by Bryant was without the consent of Mrs. L. J. French, and that the question of dedication turns upon the effect to be given the deeds subsequently made by her referring to and calling for said map in the description of the several parcels of land conveyed by said deeds. In *city of Corsicana v. Johanna Zorn*, 97 Tex. 317, 78 S. W. 924, it was held that, where the husband of Mrs. Zorn caused a subdivision and survey of a tract of land situated in said city belonging to Mrs. Zorn to be made and placed on the county records of deeds with her consent, conveyances subsequently made and duly acknowledged by Mrs. Zorn and her husband of certain lots in such subdivision, calling for the map and for streets and alleys as shown on said map, operated as a dedication to the public of such streets and alleys, and empowered the city authorities to open them to the public, over the protest of the grantors, as the growth of the city required. This decision was made on certified questions, the first of which was:

"Can a married woman make a valid dedication of her separate realty to public use? If so, is it necessary for her to execute a deed for that purpose and privily acknowledge the same as required by statute for other conveyances by her?"

The second of these questions was:

"If, in answering the above, you hold that she can make such dedication without the statutory acknowledgment, do the facts as above stated show a dedication to public use of the streets and alleys designated on said map?"

In answering these questions the Supreme Court, after calling attention to the law of this state which prescribes that when a married woman conveys land, her separate property, she must acknowledge the deed as prescribed to give it effect as a conveyance, said:

"When the deed has been executed and acknowledged as the law requires, there is no difference in its effect as a conveyance from that of a feme sole or of a man"; that, "if Mrs. Zorn had been a feme sole, the effect of her deeds would be to convey to each one of the purchasers of lots a right to have all the streets and alleys represented upon the map or plat kept open for public use," and that "her deeds duly executed must be given their full effect."

There was nothing in the record in the case the Supreme Court here had under consideration tending to show an intention on the part of Mrs. Zorn and her husband different from that manifested and to be inferred from the execution of the deeds, and hence the effect of said deeds "was to convey to such purchasers the right that they and all persons should be permitted to use the streets and alleys for the purposes designated upon the said plat for all time." In other words, the deeds executed by Mr. and Mrs. Zorn were

acts clearly and unequivocally evidencing an intention to set apart the streets and alleys delineated on the map for public use, and, in the absence of proof of a contrary intention and knowledge on the part of the purchasers at the time of their purchase, they conclusively established the dedication. In the case under consideration the jury found that Mrs. French in the year 1883 and in other years thereafter executed certain of the deeds introduced in evidence by appellant, which called for or referred to the Bryant map or the addition called the "French Addition"; that she did not, at the time she executed either of said deeds, have any verbal agreement or understanding with the purchaser named in the deed that the strip of land in controversy should never be opened up and made a part of Seago street; that there was no intention at the time of such sales on the part of Mrs. French that said strip of land should never be opened as a street, and that no intention on the part of Mrs. French to the effect that said strip should not be opened as a street was expressed to or made known to the purchasers. The jury further found, however, that the Bryant map was made and placed of record without the consent and over the protest of Mrs. French, and that at the time she executed the deeds referred to she did not intend by their execution to ratify and adopt said map, but that the reference to said map or plat in said deeds was intended by her merely for the purpose of description of the property conveyed; that at the time said deeds were made Mrs. L. J. French was in the actual possession of said strip of land, the same being inclosed by a fence, claiming it as her own, and that W. A. French (appellee) "at the time of the sales to various purchasers of the French land informed them that he reserved the land now included in his inclosure as a home place."

[5] It seems clear that under the decision made in *City of Corsicana v. Zorn*, supra, and other decisions, the execution and delivery by Mrs. French of the deeds calling for and referring to the Bryant map, in the description of the land in said deeds conveyed, in the absence of evidence rebutting the presumption that Mrs. French intended what her acts in making said deeds indicated, constituted a dedication of the land in controversy to public use, and, if the appellant or interested purchasers have acted upon those acts, it is immaterial that Mrs. French may have entertained a different intention from that manifested by such acts.

[6] If, on the other hand, Mrs. French did not, at the time of the execution and delivery of said deeds, intend to dedicate said land to public use, and the grantees in said deeds were informed, or from the acts or declarations of Mrs. French must necessarily have known at the time they purchased, that she did not intend to dedicate the particu-

lar strip of land in controversy to the use of the public by the execution of said deeds, then there was in fact no dedication of said land to such use, and appellant has no right to take possession of said land and open it up as a public street of the city of Kaufman. This is true for the reason that the law is that if the person against whom the dedication is asserted was ignorant of his rights, and was free from culpable negligence and evil motive, there would be no implied dedication, especially so if the person claiming it had full knowledge of all the facts. But, even if ignorant of his rights, the owner would be estopped, if guilty of culpable negligence, as against those misled thereby. Elliott, Roads and Streets, § 129.

[7] Whether Mrs. French intended to dedicate the land in controversy in this suit to public use, and whether, if she did not so intend, the grantees in the deeds by which appellant claims a dedication was made knew that fact, were vital questions for the determination of the jury in the court below, and the first question seems to have been decided in appellant's favor. A contrary finding upon this issue was so essential to appellee's right to the relief sought by him that it could not be ignored by the trial court and judgment rendered upon the special verdict of the jury upon the findings favorable to him. It is well established in this state that in trials by the jury the verdict must form the basis of the judgment, and the trial court cannot, in rendering judgment, disregard a finding on a material issue, even though such finding has no support whatever in the testimony. So, when a special verdict has been returned, the court must either set aside the verdict and grant a new trial or render judgment upon and in conformity with the verdict. If, therefore, the trial court was of opinion that the evidence in this case clearly showed that Mrs. French did not intend to dedicate the land in controversy to public use, and that the grantees in the deeds executed by her referring to the Bryant map had notice or knowledge of that fact at the time they purchased, the proper course to pursue was to set aside the verdict of the jury and order a new trial of the case. *Scott v. Farmers' & Merchants' Nat. Bank*, 66 S. W. 485; *Clark & Loftus v. Pearce*, 80 Tex. 146, 15 S. W. 787. This is true even though there may be some conflict in the jury's finding that Mrs. French did not intend that Seago street should not be opened through the land in controversy, and their finding that by the deeds executed by her she did not intend to adopt and ratify the Bryant map, but referred to it in said deeds for description of the land in said deeds conveyed.

[8] Judgment, it seems, was not authorized in favor of appellee either upon the ground of limitation, estoppel, or nonacceptance of the alleged dedication. The dedication, if

any, was made by the execution of the deeds referring to the Bryant map, and the earliest of these deeds was the one made to Mrs. Cree in 1883. By the statute of 1887 (Acts 20th Leg. c. 41), municipal corporations were exempted from the operation of the statute of limitations, and hence limitation in favor of appellee could not run after the passage of that law, and, less than five years having elapsed from the date of the supposed dedication and the taking effect of said statute, appellant's claim of right to open the street in question was not barred. Nor were the facts sufficient to constitute an estoppel.

[9] In regard to appellee's contention that the evidence failed to show an acceptance on the part of appellant of the claimed dedication, it may be said that, even though no act of the appellant indicating an acceptance was shown, proof of acceptance, under the decision rendered by the Supreme Court in *City of Corsicana v. Zorn*, supra, was not necessary. We will take occasion to say, however, that there is an apparent conflict in this case and the cases of *Gilder v. City of Brenham*, 67 Tex. 345, 3 S. W. 309, *City of Galveston v. Williams*, 69 Tex. 449, 6 S. W. 860, and *City of San Antonio v. Sullivan*, 23 Tex. Civ. App. 619, 57 S. W. 42, on the subject. In all three of the last-mentioned cases it seems to have been held that, in order to make a dedication complete on the part of the public as well as the owner, there must be an acceptance. Mr. Elliott, in his works on *Roads and Streets*, also lays this down as the rule. In *City of San Antonio v. Sullivan*, supra, in which a writ of error was denied, the court said:

"It is essential to every valid dedication that it should conclude the owner, and that, as against the public, it should be accepted by the proper local authorities or by general public users."

The holding in *Zorn's Case*, however, is, so far as we are aware, the last expression of our Supreme Court on the subject, and should be followed now as the law of this state.

[10, 11] There is also an apparent conflict in the findings of the jury on the question of whether or not the grantees in the deeds made by Mrs. French, and relied on as showing a dedication of the land in controversy, were informed by appellee, at the time said deeds were executed, that the land in controversy was reserved as a part of the home place. As pointed out above, they found, in effect, in answer to one of the questions propounded to them, that said grantees were not informed of an intention on the part of Mrs. French that the strip of land in question should not be opened up for street purposes, and, in answer to another question propounded to them, they answered that W. A. French, at the time of the sales to various purchasers of the French land, informed them that he reserved the said land as a part of his home place.

This last-mentioned finding is doubtless broad enough to indicate that all the purchasers of land from Mrs. French were informed, at the time of their respective purchases by appellee, that the land in controversy was to be reserved as a part of his home place; but an examination of the statement of facts leads us to the conclusion that the evidence was insufficient to support such a finding, or at least to create a doubt as to its sufficiency to do so; and, further, that probably all the available testimony upon the question was not developed on the trial of the case. It appears that appellee, after the death of his mother, Mrs. L. J. French, deeded land situated in what is called the French addition to W. Franklin and J. J. Patterson, and that he testified:

"When I talked to Franklin and them I told them I was reserving that piece of land over there for my home. The part on that side has always been reserved."

This is all the evidence we have discovered bearing upon the question, and is, it occurs to us, insufficient to support the finding of the jury under consideration. Appellee further testified, however, that he attended to all of his mother's property from 1873 or 1874 down to the date of her death, which occurred in 1894, and that, in making sales of any property, he never did represent to any purchaser that the strip of land in controversy would be opened up for street purposes. It may be that, had the question been asked, he would have said that he represented his mother in making the sales to Mrs. Cree and others, and that he stated, in substance, to her and the other purchasers that the particular strip of land involved in this suit was reserved as a part of his mother's home, and that Seago street would not be extended through or over it. We are not, therefore, prepared to say that the facts of the case in the respect just mentioned, and perhaps in other respects, have been so fully developed as to authorize us to reverse the judgment of the court below and render judgment here in favor of appellant. The judgment of that court is, therefore, for the reasons indicated, reversed and the cause remanded.

Reversed and remanded.

MARTIN v. STIRES et al. (No. 5356.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 25, 1914. On Motion for Rehearing, Dec. 23, 1914.)

1. APPEAL AND ERROR (§ 759\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.

Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, § 1612), providing that errors assigned in the motion for new trial shall constitute assignments and need not be repeated by the filing of assignments of errors, and that an assignment directing the attention of the court to the error complained of is sufficient, does not require the Courts of Civil Appeals

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to consider an assignment not copied in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3094; Dec. Dig. § 759.\*]

**2. APPEAL AND ERROR (§ 724\*) — QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.**

An assignment of error failing to direct the court's attention to any error will not be considered in view of Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, § 1612), which declares that an assignment directing the court's attention to the error complained of is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997–3001, 3022; Dec. Dig. § 724.\*]

**3. APPEAL AND ERROR (§ 722\*) — QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.**

An assignment of error predicated on the admission of evidence of an assignee of a lessee in an action for rent, which is followed by an excerpt from the testimony and the objection thereto, is not a proposition of law, but will be considered in view of Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, § 1612), providing that an assignment directing the attention of the court to the error complained of is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990–2996; Dec. Dig. § 722.\*]

**4. LANDLORD AND TENANT (§ 208\*)—ASSIGNMENT OF LEASEHOLD—RIGHTS AND LIABILITIES OF ASSIGNEE.**

An assignee of a leasehold interest takes the place of the lessee with all his rights and subject to his liabilities, and must pay the stipulated rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 787, 821–831; Dec. Dig. § 208.\*]

**5. WORDS AND PHRASES—"ASSETS."**

The "assets" of a company occupying premises as a tenant include the leasehold interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assets.]

**On Motion for Rehearing.**

**6. LANDLORD AND TENANT (§ 79\*)—ASSIGNMENT OF LEASEHOLD INTEREST—LIABILITY OF ASSIGNEE.**

Where a lease terminable at the end of any quarter was assigned, the assignees could terminate the lease at the end of any quarter; and thereby escape liability for rent, though unable by the act of the landlord to remove their property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244–253; Dec. Dig. § 79.\*]

**7. TRIAL (§ 250\*) — ISSUES — SUBMISSION TO JURY.**

A case should be submitted to the jury on the issues raised by the pleadings and evidence, and the jury should not be permitted to dispose of a case on pleadings unsupported by evidence or evidence not supported by pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. § 250.\*]

Appeal from Bexar County Court for Civil Cases; John H. Clark, Judge.

Action by George S. Martin against Vernon S. Stires and another. From a judgment granting insufficient relief, plaintiff appeals. Reversed and remanded, and motion for rehearing overruled.

Leo Tarleton, of San Antonio, for appellant. Phil H. Shook and S. C. Eldridge, both of San Antonio, for appellees.

FLY, C. J. This is a suit for rent, accompanied by a distress warrant, instituted by appellant in the justice's court, who claimed \$175. In the justice's court appellant obtained judgment for \$175 and a foreclosure of his lien. The cause was appealed to the county court, and in a trial by jury a verdict was rendered for \$42.50 in favor of appellant.

[1, 2] By the act of April, 1913, it is provided that the errors assigned in the motion for new trial shall constitute assignments and need not be repeated by the filing of assignments of errors, and that an assignment shall be sufficient which directs the attention of the court to the error complained of. Gen. Laws 1913, p. 276 (Vernon's Sayles' Ann. Civ. St. 1914, § 1612). Liberal as that law is, it does not require Courts of Civil Appeals to consider an assignment that is not copied into the brief. The first assignment is:

"Plaintiff's motion for new trial in paragraphs 1, 2, 3, 4, and 5, embraces one subject, and are here submitted and prayed to be taken as one assignment of error. Trans. pp. 16, 17."

That assignment fails to direct the attention to any error. It will not be considered.

[3] The seventh assignment of error is the next found in the brief, and is as follows:

"The seventh assignment of error is predicated on the bill of exceptions included in the statement of facts, page 7, and was to that part of the testimony of Stires, defendant."

And then follows an excerpt from the testimony of Stires and the objection to the testimony, and after that it is stated:

"This is a proposition within itself, as the terms and conditions of the assignee's holdings were in law conclusively the same as his assignor, and it matters not whether he even knew of such terms or not, he was bound in law by them."

There is no proposition of law whatever in the assignment of error, and the proposition stated as being embodied in the assignment is not contained therein; but it may be that, under the charitable cover of the law of 1913, the statement which follows the assignment, when read in connection with the testimony and objections embodied in the assignment, is sufficient to direct the attention of the court to the error complained of. Very liberally construed, the assignment of error assails the action of the court in permitting Stires to swear that he had never agreed to pay the rent.

[4] The facts are that appellant had rented a piece of land adjoining the building he was occupying to the Schuler Company to be used for advertising purposes at the rate of \$55 in advance for each three months; that the Schuler Company sold out their business to appellees, and they entered into possession of the premises, but refused to pay

any rent to appellant, and under the terms of the contract with Schuler Company \$105 was due for rent. The Schuler Company asked appellant if he would take Stires as his renter, and appellant swore that this was done in the presence of Stires. Time and again the rent was demanded of Stires, but he refused to pay on the ground that the rent was too high.

The Schuler Company transferred to appellees their entire interest in the lease of the premises, and, whether they agreed to pay the rent or not, they became the tenants of appellant and liable to him for the rent in the same amount that the Schuler Company was paying. Appellees were the assignees of the leasehold interest and put themselves in the place of the Schuler Company, with all its rights and subject to its liabilities. *Tiffany, Landlord and Tenant*, p. 908; *Harvey v. McGrew*, 44 Tex. 413; *Le Gierse v. Green*, 61 Tex. 128; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481.

[5] The rental contract made by the Schuler Company became the contract of the Stires Company when they became the assignees of the lessees' leasehold interest. The evidence shows that the Schuler Company sold its entire leasehold interest in the property to appellees, and they became liable on all the covenants of the original lease. The jury evidently found that appellees were in possession of the space by finding against them for some rent. Stires admitted that he bought all of the assets of the Schuler Company, and undoubtedly the leasehold interest was a part of the "assets."

The tenth and eleventh assignments of error raise the questions hereinbefore discussed and are sustained. Whether Stires agreed with appellant to pay the rent or not, he became liable when he purchased the leasehold interest of the Schuler Company.

The judgment is reversed, and the cause remanded.

#### On Motion for Rehearing.

No issues were submitted to the jury. The court gave no instructions whatever, and we are unable to determine upon what issues the jury found for appellees. Appellees did not defend on the ground that they were prevented from removing their property and terminating the lease at the end of a quarter, and neither that issue, nor that as to the ordinance of the city prohibiting the placing of signs where they were placed, is made by the pleadings. The testimony on those points was without pleadings to sustain it. The jury were left at sea as to the law and rendered a verdict without any pleadings or evidence to sustain the same.

[6, 7] If appellees bought the leasehold interest of the Schuler Company, they were bound for the rent he had agreed to pay so long as they occupied the rented space, un-

less they were prevented by appellant from moving from the land at the end of the quarter for which the Schuler Company had paid. The Schuler Company, or its grantee, had the right to terminate the lease, under the terms of the lease, at the end of any quarter, and, unless it had been terminated by appellees repudiating the lease and endeavoring to remove their property, they would be liable for the rent, provided they were not prevented from removing the property by appellant. The cause should be submitted to a jury on the issues made by both pleadings and evidence, and the jury should not be turned loose without rudder or compass to wander through the mazes of pleadings unsupported by evidence, or evidence not supported by pleadings.

The motion for rehearing is overruled.

ANDREWS v. JETER & CO. (No. 5376.)  
(Court of Civil Appeals of Texas. San Antonio. Dec. 9, 1914.)

RECEIVERS (§ 174\*)—ACTION AGAINST RECEIVER—PERMISSION OF COURT.

A consignee's cause of action to recover for loss of a consignment of goods not growing out of or connected with the carrying on of the business of a railway as to which the receiver may be sued under Act March 3, 1911, c. 231, § 66, 36 Stat. 1104 (U. S. Comp. St. 1913, § 1043), providing for suits against a receiver appointed by any court of the United States without leave of court, subject to the general equity jurisdiction of the court, but accruing before his appointment, could not be maintained without previous permission of the court appointing him.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 333-343; Dec. Dig. § 174.\*]

Appeal from Refugio County Court; Leslie Adkins, Judge.

Action by Jeter & Co. against Frank Andrews, receiver. Judgment for plaintiff in justice's court was affirmed on appeal to the county court, and defendant appeals. Reversed, and cause ordered dismissed.

Claude Pollard, of Kingsville, and Robt. W. Stayton and David M. Picton, Jr., both of Corpus Christi, for appellant.

CARL, J. Appellee, Jeter & Co., sued Frank Andrews, receiver of the St. Louis, Brownsville & Mexico Railway Company, on December 15, 1913, in the justice's court to recover \$196.30 on a claim for loss of part of a shipment of goods which arrived at Refugio March 6 or 7, 1913. The value of the goods lost is placed at \$154.70, \$1.60 proportionate amount of freight paid on same, and \$40 for loss of sales or profit on same. Jeter & Co. recovered the full amount in that court, and, on appeal to the county court, again prevailed for the full amount claimed.

The goods claimed to have been lost were a part of a larger shipment alleged to have been consigned to appellee by Curlee Clothing

Company of St. Louis, Mo., about February 21, 1913.

Frank Andrews was shown, by a certified copy of the order and decree of the District Court of the United States for the Southern District of Texas, at Houston, in equity cause No. 36, to have been appointed receiver of the St. Louis, Brownsville & Mexico Railway Company on July 5, 1913; and it is plain that the cause of action here sued upon accrued prior to that date. It is clear that the claim sued upon is not such a one growing out of or connected with the carrying on of the business of the railway as is provided the receiver may be sued on under the U. S. Statutes of March 3, 1911, § 66, but is a cause of action against the railway company accruing before the appointment of the receiver. No permission of the court appointing the receiver was obtained before bringing the suit; nor, indeed, has that ever been done. This being true, this suit could not be maintained. It is not necessary to say more in this opinion than that this case is fully covered by the case of St. Louis, Brownsville & Mexico Railway v. Knowles, 171 S. W. 245, decided by this court on November 11, 1914, and not yet officially reported.

The judgment is reversed, and the cause ordered dismissed.

**BAILEY v. WESTERN UNION TELEGRAPH CO. (No. 1340.)†**  
(Court of Civil Appeals of Texas. Texarkana. Oct. 29, 1914.)

**1. COMMERCE (§ 8\*)—INTERSTATE COMMERCE—REGULATION BY STATES.**

The states have no power to control, beyond their own limits, the conduct of corporations and individuals engaged in interstate commerce, and any legislation to that end is void as creating an unwarranted burden thereon.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 27\*) — TRANSPORTATION OF INTERSTATE MESSAGES—LIABILITY.**

A telegraph company receiving an interstate message in Tennessee for delivery in Texas is liable for damages for mental anguish caused by its failure to deliver the message in Texas.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 80; Dec. Dig. § 27.\*]

**3. COMMERCE (§ 8\*)—TRANSPORTATION OF INTERSTATE MESSAGES—LIABILITY—"COMMON CARRIER."**

The amendment June 18, 1910, c. 309, § 1, 36 Stat. 544 (U. S. Comp. St. 1913, § 8563), to Interstate Commerce Act, Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, whereby telegraph companies are made "common carriers" within the act, does not supersede the laws of a state permitting recovery for mental anguish for failure to deliver a message, notwithstanding Carmack Amendment June 29, 1906, c. 3591, § 7, pars. 11 and 12, 34 Stat. 595 (U. S. Comp. St. 1913, § 8592), which applies only to carriers of property transported as freight.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

**4. TELEGRAPHS AND TELEPHONES (§ 54\*) — CONTRACTS FOR TRANSPORTATION AND DELIVERY OF INTERSTATE MESSAGES—STIPULATIONS—VALIDITY—"COMMON CARRIER."**

A stipulation, in a contract for the transmission and delivery of an interstate message by a telegraph company, made a common carrier by the act of Congress of 1910, making the Interstate Commerce Act applicable to telegraph companies, that the company shall not be liable for damages beyond \$50, at which amount the message is valued, unless a greater value is stated in writing at the time of the offering of the message for transmission and an additional sum paid or agreed to be paid based on such value, is invalid as permitting the company to limit its liability for its negligence in the performance of a duty to the public as a common carrier.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 54\*) — CONTRACTS FOR TRANSMISSION AND DELIVERY OF MESSAGES—LIMITATION OF LIABILITY—VALIDITY.**

The stipulation is also void because unreasonable.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.\*]

Appeal from District Court, Bowie County; W. T. Armsted, Special Judge.

Action by T. C. Bailey against the Western Union Telegraph Company. From a judgment granting insufficient relief, plaintiff appeals. Reversed and remanded.

Mahaffey, Thomas & Hughes, of Texarkana, for appellant. Chas. S. Todd, of Texarkana, for appellee.

**HODGES, J.** The appellant sued the appellee to recover damages resulting from mental anguish suffered by reason of the negligent failure to deliver a death message. On April 13, 1913, R. L. Bailey, the father of the appellant, sent the following message to the appellant at New Boston, Tex., from Bethel Springs, Tenn.: "John at Bethel Springs dangerously sick. Typhoid pneumonia." "John" referred to in the message was the brother of the appellant. He died the next day, and was buried at about 1 o'clock on the 15th. The message reached New Boston, but was never delivered, and the appellant did not know of his brother's illness and death until he received a letter from his father several days after the burial.

After a general denial, the appellee specially pleaded the following provision printed upon the back of the blank on which the message was written:

"Send the following message subject to the terms on back hereof, which are hereby agreed to. \* \* \* In any event the company shall not be liable for damages for any mistakes or delay in the transmission or delivery, or for the non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the company for transmission, and an additional sum paid or agreed to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Writ of error pending in Supreme Court.

paid, based on such value, equal to one-tenth of one per cent. thereof."

R. L. Bailey, the sender of the message, testified substantially as follows: That he delivered the telegram to the Western Union Telegraph Company at about 8:40 o'clock a. m. on April 13, 1913. He paid the agent \$3.65, of which 65 cents was the message fee, and the remainder was for special delivery. At the time the message was tendered to the agent at Bethel Springs, he told the agent that T. C. Bailey, the addressee, lived from four to six miles distant from New Boston in the country; he did not know the exact distance. He also notified the agent of John Bailey's illness and of the relationship to the plaintiff. The appellant testified that he never received the message and knew nothing of his brother's illness and death until some days afterwards, when he received a letter from his father. He lived in the vicinity of New Boston, about five or six miles in the country; had been living there for a number of years; was acquainted with Mr. Roberts, the agent of the telegraph company at New Boston; had been with him in the Masonic Lodge at that place. He further testified that if he had received the message on the 13th of April he would have gone back to Tennessee to see his brother; he was financially able to make the trip, and was familiar with the route.

The appellee offered in evidence the original telegram and the printed provision set out in its answer. It also offered in evidence certain orders made by the Interstate Commerce Commission, which will be referred to later.

At the conclusion of the testimony the court instructed the jury upon the issues of fact involved in the case, and in addition thereto gave the following on the measure of damages:

"Should you find for the plaintiff, you will assess his damages at the sum of \$50, which was the value of said message agreed upon and fixed in the contract between the parties when it was given and received for transmission."

The jury returned a verdict in favor of the appellant for the sum of \$50. From the judgment entered the plaintiff below has appealed, and assigns as the principal ground for which the case should be reversed the giving of the charge referred to. He contends that the stipulation contained in the printed matter on the back of the telegram blank, which undertakes to limit the liability of the telegraph company to \$50, is unreasonable and void.

This being an interstate message, the first question to be decided is: Was mental anguish a proper element of damages to be considered by the jury? If it was not, then the question as to the validity of the stipulation limiting the amount of the recovery to \$50 is of no importance, and the judgment of the court below should be affirmed on the ground that no other damages were proven.

[1] In his oral argument, counsel for the appellee called attention to the case of *W. U. Tel. Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457. In that case the message was sent from a point in South Carolina, addressed to Wm. Brown in Washington, D. C. It was forwarded to Washington without delay, but through the negligence of the agents of the telegraph company in Washington was not delivered. The message read as follows: "Come at once. Your sister died this morning." Brown subsequently filed suit in the court of common pleas in the state of South Carolina and recovered a judgment for damages based upon mental anguish. That judgment was affirmed by the state Supreme Court, and a writ of error prosecuted to the Supreme Court of the United States, where the case was reversed upon grounds heretofore stated. From the facts set out in the opinion it appears that the suit was based upon the statute of South Carolina which provided that damages for mental anguish were recoverable in such cases. It also appears that under the ruling of the courts of the District of Columbia mental anguish was not regarded as a proper element of damage in such suits. Justice Holmes, who rendered the opinion in the *Brown Case*, held that the action was one of tort; that, the misconduct having occurred in the District of Columbia, the question of liability must be determined by the laws of that place. Upon that proposition he said:

"Whatever variations of opinion and practice there may have been, it is established as the law of this court that, when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery."

After quoting several authorities, he continues:

"The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a state attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail."

Inasmuch as damages based upon mental anguish are recoverable both by the laws of Tennessee and of Texas, that particular ground for reversing the judgment does not exist in this case. But upon another proposition he uses this language:

"What we have said is enough to dispose of the case, but the act (referring to the statute of South Carolina) also is objectionable in its aspect of an attempt to regulate commerce among the states. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one state to another or to this district by determining the consequences of not pursuing such conduct, and in that way encounters *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347 [7 Sup. Ct. 1126], 30 L. Ed. 1187, 1 Interst. Com. R. 306, a decision in no way qualified by *W. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31

Sup. Ct. 59, 54 L. Ed. 1088 [36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815]."

Counsel for the appellee contends that this last quotation is an unequivocal holding that mental anguish is not a proper element of damages to be considered in any suit involving an interstate message, for the reason that to do so would be to impose a burden on interstate commerce.

In the case of *W. U. Tel. Co. v. Compton*, 169 S. W. 946, the Supreme Court of the state of Arkansas took that view, and upon that ground alone granted a rehearing, reversed and remanded a case which had been previously affirmed by it. If Justice Holmes intended to announce a ruling so far reaching in its effects as that contended for, the language he employed in connection with the cases to which he referred left the matter in some doubt, at least. Until there is some clear and unequivocal declaration of such a doctrine by the federal Supreme Court, we do not feel justified in departing from the rule so long recognized by the state courts. The facts of this case are in some material respects different from those of the *Brown Case*. Here the misconduct, or tort, occurred in the state of the forum, and the effort is to apply those laws in measuring the liability of the wrongdoer. There the action was instituted in a state where the tort had not occurred, and the liability of the wrongdoer was determined by the laws of the forum, which were different from those of the place where the wrong was committed. This was an attempt to enforce the South Carolina statute beyond the limits of that state and bring it into conflict with the laws of the District of Columbia. We are strongly inclined to believe that this is what Justice Holmes referred to when he used the language quoted. This is made more apparent by an examination of the *Pendleton Case*, to which he refers as supporting the ruling made. That was a suit by *Pendleton* against the Western Union Telegraph Company to recover a penalty of \$100 prescribed by a statute of Indiana for failing to deliver at Ottumwa, Iowa, a message received in Indiana for transmission to that place. The statute required telegraph companies, on payment or tender of the usual charge, to transmit messages with impartiality and good faith and in the order of time in which they were received, under penalty, in case of failure to transmit, or if postponed out of such order, of \$100 to be recovered by the person whose dispatch was neglected or postponed. It contained also this additional proviso:

"That arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others."

Justice Field, who rendered the opinion of the court in that case, held that these provisions exceeded the authority of the

state in so far as they applied to interstate messages. He said:

"The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states if each state was vested with power to control them beyond its own limits. (Italics ours.) The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each state. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other states, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other states might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives."

There, as in the *Brown Case*, an effort was made to give extraterritorial effect to a state statute. No doctrine, probably, is better settled by the decisions of the Supreme Court of the United States than that the states have no power to control beyond their own limits the conduct of corporations and individuals engaged in interstate commerce. Such legislation has uniformly been held to be void as creating unwarranted burdens on that species of commerce. It was that character of legislation which was condemned in the *Pendleton Case*, and we think Justice Holmes was applying the same rule to a similar state of facts when he used the language last quoted. To give that language a different application would make that decision repugnant to the oft-approved case of *W. U. Tel. Co. v. James*, 166 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105.

In the last-mentioned case, David W. James sued the telegraph company in the state courts of Georgia to recover the sum of \$100 as a penalty for the failure of the company to promptly deliver a telegraphic message addressed to him at his residence in Blakely in the state of Georgia. The message was sent from Eufaula in the state of Alabama. The only question before the court was whether the statute of the state of Georgia providing for the recovery of such a penalty was a valid exercise of the power of the state in relation to messages by telegraph sent from points outside to some point within the state of Georgia. The validity of that statute was upheld upon the ground that it was but a proper exercise of the police power of the state, in the absence of any opposing congressional legislation on that subject.

In *W. U. Tel. Co. v. Commercial Milling Co.*, referred to by Justice Holmes in the *Brown Case*, the court had a similar question under consideration; and, after quoting from numerous authorities, the same principle was announced. Both the *James* and the *Pendleton Cases* are referred to and harmonized. Of the *James Case* it is said:

"A statute of Georgia which required telegraph companies having wires wholly or partly within the state to receive despatches, transmit, and deliver them with due diligence under the penalty of \$100, was sustained as a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state. It will be observed that this case in some particulars exhibits a contrast to *Western U. Tel. Co. v. Pendleton*, and yet they are entirely reconcilable, having a common principle. In the latter case the law passed on clearly transcended the power of the state, because it directly regulated interstate commerce, as we have already shown. In the *James Case* the power of the state was exercised in aid of commerce. In the latter case prior cases were reviewed, and the principle determining the validity of the respective statutes was declared to be whether they could be 'fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states.' It was said that a statute of that kind, as it would 'not unfavorably affect or embarrass' the telegraph company, in the course of its employment, should be held valid 'until Congress speaks upon the subject.'"

Referring to the facts of the case then being considered, the court continued:

"The telegraph company in the case at bar surely owed the obligation to the milling company to not only transmit the message, but to deliver it. For the failure of the latter it sought to limit its responsibility, to make the measure of its default not the full and natural consequence of the breach of its obligation, but the mere price of the service, relieving itself, to some extent, even from the performance of its duty; a duty, we may say, if performed or omitted, may have consequence beyond the damage in the particular instance. This the statute of the state, expressing the policy of the state, declares shall not be. For the reasons stated, we think that this may be done, and that it is not an illegal interference with interstate commerce."

[2] If a state may by statute impose a penalty on interstate carriers for their failure to perform within its limits their common-law duties, it may with equal propriety make mental anguish an element of damages for such misconduct committed within those limits. The principle upon which this proposition rests would be the same whether mental anguish was made recoverable by virtue of a statutory enactment or was founded upon a rule of common-law construction adopted by the state courts. It is urged, however, that since the rendition of the decisions referred to Congress has entered and covered that particular field of legislation, and that the rules there announced are no longer applicable.

[3] In 1910 the Interstate Commerce Law was amended, and telegraph companies doing an interstate business were made subject to its provisions so far as the same were ap-

plicable. The material portions of the enactment relating to this subject are contained in section 1 of the Interstate Commerce Law, and are as follows:

"Sec. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodities except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act. \* \* \* All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, un-repeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

See U. S. Compiled Stat. 1913, § 8563.

It appears from these extracts that the extent to which Congress has gone is merely to declare that telegraph companies shall be considered common carriers, and to require them to make and observe reasonable rates and charges for the services which they perform, and to permit them to divide their messages into classes, presumably as a basis for rates. The mere fact that Congress has enacted some legislation on this subject does not of itself signify a purpose to monopolize the field and exclude the states entirely. *M., K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377; *Atl. C. L. Ry. Co. v. State of Georgia*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312.

After the adoption of the amendment referred to above, the Interstate Commerce Commission promulgated the following orders:

"(1) Each and every telegraph and telephone company which transmits messages over its line, or lines, from a point in one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, is subject to the provisions of the act.

"(2) If a telegraph or telephone company, the line of which is wholly within a single state, or territory, or district of the United States, receives a message within such state, territory, or district of the United States, for transmission to a point without the state, territory, or district of the United States, which it transmits over its line to another point in the same state, territory, or district of the United States and there delivers it to an interstate line for transmission to destination, the first-named company by virtue of its participation in this transaction, is not made subject to the provisions of the act; unless there be an arrangement between that company and its connection for through continuous transmission of such message, in which latter case all of the participating compa-

nies in such through continuous transmission are subject to the provisions of the act.

"(3) If two or more lines are connected so that a person within one state, territory, or district of the United States talks with a person at a point without such state, territory, or district of the United States, or so that a message is transmitted directly from a point within a state, territory, or district of the United States to a point without the same, the transmission or message in this manner constitutes commerce and brings all of the participating lines within the purview of the act.

"(4) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof requiring that all their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section.

"(5) Such telegraph and telephone companies subject to the act are also governed by the provisions of section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the commission made pursuant to the provisions of section 15 of the act, and also of section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the commission.

"The commission at this time withholds expression of its views regarding other questions which have arisen with respect to the amenability of these carriers to the provisions of other sections of the act."

In the case of *M., K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, the Supreme Court of the United States had under consideration a provision of a Texas statute allowing the recovery of \$20 as attorney's fees for the collection of claims not exceeding \$200 against railroads. It was there contended that in its application to the collection of claims based upon interstate shipments this statute was void for the reason that the state had no authority to legislate upon that subject; Congress having enacted laws regulating that species of interstate commerce. After quoting numerous decisions, Justice Pitney, in rendering the opinion, said:

"These cases recognize the established rule that a state law enacted under any of the reserve powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded."

Continuing, and quoting from a decision rendered by Justice Harland in *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, he says:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that, in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserve power, the repugnance or conflict

should be direct and positive, so that the two acts could not be reconciled or consistently stand together."

To the same effect is *At. O. L. Ry. Co. v. State of Georgia*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312.

Applying the test here laid down, would there be any repugnancy between these congressional provisions and those of a state law permitting the recovery of a penalty, or damages for mental anguish, for a failure to deliver a message? We fail to discover any. The question is not one relating to rates or the classification of messages, but to liability for negligence. Neither do we think that by the passage of the law quoted Congress has "clearly manifested" a purpose to supersede or suspend the exercise of the police powers of the states with reference to this particular subject. The only provision of the Interstate Commerce Act to which we are referred as evidence of the fact that Congress has undertaken to legislate upon this is what is commonly referred to as the Carmack Amendment. We quote so much of that provision as is claimed to be applicable:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

This provision evidently applies only to carriers of property transported as freight. It was made a part of the Interstate Commerce Act some time previous to the adoption of the amendment making that act applicable to telegraph and telephone companies, and at a time when carriers of passengers and freight were the only transportation companies sought to be regulated by that act.

In *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, Justice Mathews, in rendering the opinion of the court, says:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of non-feasance or misfeasance committed within its limits. If he failed to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or, if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law gives the right to redress those wrongs as being an unconstitutional regulation of commerce by the state."

Our conclusion is that in using the language he did in the latter portion of the opinion in the *Brown Case* Justice Holmes merely intended to reiterate the rule announced in the *Pendleton Case* and apply it to a similar state of facts.

[4] Turning, then, to the consideration of the next question: Did the appellee have the right to limit the extent of its liability for its negligence in failing to deliver the telegram in the manner attempted in this instance? While this identical question has never been passed on by any of the courts of last resort, so far as we have been able to find, similar provisions have been held unreasonable and void by the Supreme Courts of both Texas and Tennessee. *Marr v. W. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *W. U. Tel. Co. v. Rosentreter*, 80 Tex. 416, 16 S. W. 25; *W. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 559.

Counsel for the appellee contends that, since the amendment of the Interstate Commerce Act making telegraph companies subject to its provisions, the conditions expressed in the printed blanks of the company and the rates specified have become the lawful rates based upon those conditions and stipulations. The only evidence offered in the trial below of any established classification of messages for the purpose of fixing rates as permitted under the acts of Congress was that of the agent at New Boston before referred to.

It appears from orders made by the Interstate Commerce Commission that no ruling has yet been made by that body determining whether or not those provisions of the Interstate Commerce Act requiring carriers to file with the commission a tariff of rates and charges apply to telegraph companies. The wording of section 6, where this provision is found, warrants the inference that Congress had no such intention; and the fact that the commission, when called upon to pass upon the applicability of other sections, expressed no opinion as to that section, strongly indicates the same view. In any event, there is before us no evidence that the appellee has ever filed with the commission any classification of messages or system of rates. We must therefore assume that the classification of rates now in use is that which the company has adopted and is observing without the formal approval of the Interstate Commerce Commission.

But the question before us is, not whether the rate stipulated in this instance was unjust or unreasonable, but was the limitation which it sought to ingraft a valid exercise of its right of contract? Considering the printed matter contained in those telegraph blanks as parts of a contract between the sender and the telegraph company regarding the particular service undertaken, the conditions under which it is to be performed, and fixing the maximum amount of damages recoverable in the event of failure to deliver the message within the proper time, is such a contract valid and enforceable? Aside from the question as to whether or not the stipulation is reasonable or may be enforced against the addressee of this message, we think it is subject to the objection that it is an effort on the part of the telegraph com-

pany to limit its liability for its own negligence and that of its servants. Congress has definitely fixed the legal status of telegraph companies engaged in interstate commerce by declaring them to be common carriers, thereby making them subject to the same restrictions upon the right of contract that applies to other common carriers. It is their common-law duty to receive, transmit, and deliver messages with impartiality, in good faith, and with due diligence. This obligation grows out of their relation to the public, and for a failure to perform it they are responsible in damages to the injured party—whether it be the sender of the message or the addressee. Negligence is ordinarily, as in this case, the basis of their liability. Any agreement, stipulation, or condition in the terms upon which a message is received for transmission, which in effect relieves the company from liability for the full measure of the damages inflicted by the negligent failure to discharge its duty, is within the legal inhibition. It is not necessary that the agreement or stipulations, in order to be subject to this objection, provide for entire immunity from the consequences of such misconduct. It is sufficient if they provide for only a partial exemption. Nor does it matter that the agreement is founded upon a consideration. *K. C. S. Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683. If it be true that the evidence in this case justified a finding by the jury that the appellee was guilty of negligence in failing to deliver the message to the appellant, and that by reason thereof he sustained damages in excess of the sum of \$50, the only defense interposed against a full recovery is the alleged contract stipulating that in just such a contingency that sum is the maximum that may be recovered. It is insisted, however, that a legitimate exercise of the freedom of contract permits telegraph companies to adjust their rates according to the risk assumed, and that this right involves the collateral right of graduating their charges with reference to the maximum of liability that may be incurred. In support of that contention we are referred to the following line of cases: *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *M., K. & T. Ry. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *K. C. S. Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683. To which the following might be added as reiterating the same rule: *G. N. Ry. Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 381, 58 L. Ed. 703.

In the *Croninger* Case the Supreme Court had under consideration a clause in a receipt issued by an express company stipulating that the value of the property was fixed at \$100, and providing that this sum should be the measure of the express company's liability in case of loss. It was held that this was a valid stipulation. The other cases

cited involved similar provisions in bills of lading issued by railway companies. In the *Carl Case* the railway company had issued a bill of lading in which the value of the property was stipulated, and it was agreed that the carrier should not be liable in case of loss for the value of such property beyond the sum fixed. The question as to whether or not such contracts were contracts against negligence was referred to, and Justice Lurton, who rendered the opinion of the court, said:

"Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for a part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable."

Continuing he quotes with approval the following from *Hart v. Railway Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717:

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. The valuation declared or agreed upon, as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. In saying this we lay on one side, as not here involved every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate. Where there are two rates based upon valuation, he must take notice of the rate applicable. An actual want of knowledge is no excuse."

In the *Harriman Case* the same judge said:

"The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes that valuation to be one made for the purpose of applying the lower of two rates, based upon the value of the cattle."

Again he says:

"When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valua-

tion, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkin Act of February 19, 1903 (U. S. Comp. St. 1913, § 8597)."

These decisions, we think, make it clear that in sustaining the right of the carrier to invoke the limitations based upon an agreed valuation of the property received for shipment there was no recognition of a right to limit ultimate liability to less than the actual value of the property, but merely the announcement of a rule of public policy which estops the shipper from denying the truth of the fact which he has solemnly stated for the purpose of obtaining the service of the carrier. He will not be permitted to value his property at one sum for the purpose of shipment when it enables him to secure a reduction in the freight rate, and at a higher sum when he seeks to recover damages for its loss. The law contemplates that the receipt or bill of lading, when issued and accepted by the shipper, shall state the true value of his property; and in order to circumvent the perpetration of a wrong both against the carrier and the public, in a suit for damages for the loss of the property, it conclusively presumes such is the case. It is true that, when the shipper undervalues his property in the bill of lading and is held to that valuation in case of loss resulting from the negligence of the carrier, the latter does by virtue of that stipulation secure partial immunity from liability for its negligence. But such consequences are only incidental, and are not contemplated as the primary object of the contract. They occur only when the shipper has in the first instance made a false statement. There is an obvious distinction between the stipulations sustained in the cases referred to and those here under consideration. There the contracts merely attempted to fix the value of the property to be transported, which does not in itself measure the limit of liability in the event of loss or damage. It not infrequently happens that there are other and special damages which far exceed the value of the property and which may be considered in determining the full amount of the ultimate recovery. Such damages were not controlled or attempted to be controlled by the receipts and bills of lading involved in the cases cited. Telegraph companies not being required to file their rates with the Interstate Commerce Commission for its approval, the appellee is not in a position to claim that its rates have been established by law and that to allow the appellant to claim a sum in excess of \$50 would be according him an illegal advantage over other patrons of the company. Neither is it in a position to invoke an estoppel against the appellant, as was done in the railway and,

express cases cited. There the shipper in legal effect declared a fact to be true, and upon that declaration legal rates and liabilities were adjusted. Here there is no statement of a fact. The valuation of the message can be regarded as nothing more than a pledge that no more than the sum named will be claimed as damages in the event the message is negligently delayed or not delivered. This at most is but a covenant on the part of the sender, and not the statement of a fact. The liability of telegraph companies is always limited to such damages as might reasonably be expected to result from the conditions and relations of which they have notice. That rule relieves such companies from consequences resulting from conditions of which they are ignorant or about which they have been misled. To give effect to the stipulations here relied on would be permitting the appellee, through the medium of a low rate, if such a rate be lower than that commonly charged for death messages between the same points, to purchase immunity from the consequences of misconduct amounting to a tort. We therefore conclude that the stipulation is void and should have been so held by the trial court. The same conclusion was reached by the Supreme Court of Arkansas in *W. U. Tel. Co. v. Compton*, 169 S. W. 946, recently decided. That case, however, as before stated, was reversed upon other grounds.

[8] We are further of the opinion that the stipulation here under consideration is void

because it is unreasonable. Telegraph companies are agencies for the rapid transmission of messages in emergencies which do not permit the slow process of the mails. Such companies are frequently employed as means of communication between utter strangers who know nothing of each other's situations or surroundings. To require the sender of an important telegraphic message, under such circumstances, to value the contract, or, in other words, to fix the limitation of damages that should be recoverable by any of the parties interested on account of the failure of the company to perform its duty, would be to demand that such a party enter upon the most uncertain of speculations. To even require him, as a condition to the acceptance of the message, to fix a limitation upon his own claim, would be little less absurd and unreasonable. The public have a right to demand the carriage of messages without any such limitation whatever. Yet in the printed stipulations on the message offered in evidence as a sample of the regulations which have been adopted by the appellee no such option is given to the public. Unless the sender in every instance fixes some value or limitation upon his future claim for damages, the company reserves the right to fix it for itself at a sum not exceeding \$50. This is an arbitrary denial of a right of which the public cannot be deprived in such a manner.

The judgment is reversed and the case remanded.

LOUISVILLE & N. R. CO. v. JOHNSON'S  
ADM'X.(Court of Appeals of Kentucky. Dec. 18,  
1914.)1. MASTER AND SERVANT (§ 137\*)—INJURY TO  
SERVANTS—NEGLIGENCE.

A railroad company, when shunting on tracks in railroad yards where many employes are at work, must anticipate their presence on the tracks in the discharge of their duties or in going to or from their work, and must run cars at a reasonable speed and under control, and have some person in a suitable position to warn employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

2. MASTER AND SERVANT (§ 137\*)—INJURY TO  
SERVANTS—NEGLIGENCE.

The same degree of care should be exercised in the movement of cars and engines in railroad yards occupied by a large number of employes as is required in their movement in populous communities, except that employes, who are themselves charged with a duty of looking out for the movement of engines and trains, are not entitled to this protection, but where employes are not specially charged with the duty of looking out for engines and trains, the railroad company must exercise reasonable care to protect them from injury, whether the injured employé is directly engaged at his work, or is moving about in the yards not immediately connected with his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

3. MASTER AND SERVANT (§ 150\*)—INJURY TO  
SERVANTS—NEGLIGENCE.

Where a section crew had been directed by the foreman to go behind or in front of or between cars to relieve their bladders, or it was customary for the men so to do, and the custom was known to the foreman, and the foreman knew that a member of the crew had gone between cars for that purpose, and he saw, or in the exercise of ordinary care could have seen, an approaching car in time to have given warning, it was his duty to exercise ordinary care to warn the member of the danger he was in, and on his failure to do so the railroad company was liable for injury to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.\*]

4. DEATH (§ 95\*)—FEDERAL EMPLOYERS' LI-  
ABILITY ACT—MEASURE OF DAMAGES.

The damages recoverable under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) are such as will compensate his surviving relatives for actual pecuniary loss from his death, to be apportioned among them according to the loss of each.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.\*]

5. MASTER AND SERVANT (§ 213\*)—INJURY TO  
SERVANT—LIABILITY.

Where a switchman in railroad yards was standing between box cars and could not be seen by a brakeman on cars moving on the same track, the switchman assumed the risk of injury by the movement of the other cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.\*]

6. MASTER AND SERVANT (§ 250¼, New, vol. 15  
Key-No. Series)—DEATH OF SERVANT—FED-  
ERAL EMPLOYERS' LIABILITY ACT—ACTIONS  
IN STATE COURTS.

State courts in administering the federal Employers' Liability Act will follow the practice and procedure in the trial of common-law actions generally, except in so far as modified by the act.

7. MASTER AND SERVANT (§ 284\*)—DEATH OF  
SERVANT—FEDERAL EMPLOYERS' LIABILITY  
ACT—NEGLIGENCE—QUESTION FOR JURY.

In an action under the federal Employers' Liability Act for the death of a railroad employé, evidence will be sufficient to take the case to the jury where it would have been sufficient if the action had been brought under the state law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.\*]

8. TRIAL (§ 139\*)—EVIDENCE—SUBMISSION OF  
ISSUE TO JURY—"SCINTILLA RULE."

A common-law case must be submitted to the jury where there is evidence conducing to support the petition, though the weight of the evidence, both materially and in probative value, may be with defendant, but where, admitting plaintiff's evidence and every fair inference reasonably deducible therefrom to be true, he has failed to make out a case, the court should direct a verdict, the "scintilla rule," as applied in practice, meaning that when there is some evidence to support plaintiff's case, the court cannot determine its weight or sufficiency, but must submit the case to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

For other definitions, see Words and Phrases, First and Second Series, Scintilla of Evidence.]

9. EVIDENCE (§ 539¼\*)—OPINION EVIDENCE—  
COMPETENCY OF WITNESS.

One who from experience or observation is qualified to describe unusual speed of railroad cars, or the condition of rails, may testify that a car was running at an unusual speed, and may describe the slippery condition of the rails on account of rain.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539¼.\*]

10. EVIDENCE (§ 185\*)—BEST AND SECONDARY  
EVIDENCE—FOUNDATION FOR SECONDARY  
EVIDENCE.

A party desiring to introduce evidence of written rules promulgated by the adverse party must give notice to produce a copy for use on the trial, and only on the failure so to do may the contents of the rules be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642-660; Dec. Dig. § 185.\*]

Appeal from Circuit Court, Rockcastle County.

Action by John H. Johnson's Administratrix against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

B. D. Warfield, of Louisville, J. W. Alcorn, of Stanford, and J. W. Brown, of Mt. Vernon, for appellant. C. C. Williams and L. W. Bethurum, both of Mt. Vernon, and Chapeze & Crawford, of Louisville, for appellee.

CARROLL, J. In this suit, brought under the federal Employers' Liability Act, by the administratrix of John H. Johnson, to recover

damages for his death, alleged to have been caused by the negligence of the appellant railroad company, there was a verdict and judgment for \$5,000.

Several questions are raised by counsel for appellant that we do not think it necessary to consider in this opinion, as it is not probable they will occur on a retrial of the case, and so we will go at once to the principal grounds relied on for reversal, which are that the trial court erred in refusing to direct a verdict for the railroad company and in giving instructions.

The facts developed by the evidence, and about which there is no material dispute, are, in substance, these: The railroad company, at the time Johnson came to his death, was engaged in interstate commerce, and Johnson was employed by it in such commerce. He was a section hand or trackman, engaged with a crew of men in repairing the track in the yards of the railroad company at East Louisville, Ky. These yards are occupied by a large number of tracks, used by the company, some of the witnesses estimating the number of tracks at 25, and others at 50 or 75. These tracks were used for purposes connected with the movement of cars and the making up of trains; and there was employed by the company, in and about these yards in various duties concerning the repair of tracks and cars and the movement of trains, from 300 to 500 men. The duties in which these men were engaged required them to be at different parts of the yard, and they were constantly crossing and recrossing these tracks.

On the day Johnson was killed he was engaged, as one of a crew of men, in repairing what is known as track No. 9 in these yards. Running parallel with track No. 9 was track No. 8, and on track No. 8, at or near the place where this gang of men was working, there stood an open box car. Shortly before Johnson was killed it commenced raining, and the men went into this car to get out of the rain. After remaining in the car a short while they were directed by the foreman to go to work, and all of them left the car for this purpose. Immediately after leaving the car, Johnson, while standing urinating on track No. 8, was struck and killed by the movement of cars on this track. At this point the evidence diverges and conflicts. The evidence for the plaintiff tended to show that the foreman of the crew with which Johnson was working had directed or requested the men not to go to a closet, which was some 300 or 400 yards distant, when they wanted to urinate but to go behind or in front of cars standing near by, in order to save the time that would be required to go to the closet; and it was further shown that it was usual and customary for the men to do this, and that this custom and usage was known, not only by the foremen of section crews, but by all the men operating and controlling the movement of cars

in the yards. It further appears from this evidence that when the men left the car to go to work, Johnson and the foreman walked together from the door of the car out of which they had come in a northerly direction between tracks Nos. 8 and 9 until they reached the north end of the car, when Johnson left the foreman and went to the north end of this car with his face toward the car and his back toward the north, for the purpose of urinating, the foreman continuing in a northerly direction between the two tracks, and that at this time there were no cars on track No. 8 north of the car in front of which Johnson was standing; that when Johnson had been standing in this way for a few moments a coal car that had been disconnected from the engine some distance from where Johnson was, by the method known as a "running switch," came down on track No. 8 from the north and collided with the car at the end of which Johnson was standing; that he was caught in this collision and killed almost instantly; that there was no person on this coal car to give warning of its approach or presence or to control its movements; and that it was running at a speed of about 20 miles an hour when it struck the car in front of which Johnson was standing. These witnesses further said that when the rapidly moving coal car struck the standing car it made a great noise, and the force was such as to lift the end of the standing car from the track and drive it forward some distance. It was further shown by plaintiff's evidence that it was usual and customary, in moving cars as this coal car was moved, to have some person on the front end of the car for the purpose of giving warning of its approach and to control, if necessary, its movements and the rules of the company so provided, and, further, the custom of the foreman of the gang of men to keep a lookout for moving cars like this and warn the men of their approach, and that the foreman who was walking with Johnson when Johnson left him to go in front of the car continued walking north between tracks 8 and 9 and was passed by this coal car when it was about 30 yards from where Johnson was standing, but that he did not give Johnson any warning of its approach. The evidence in behalf of the railroad company tended to show that a urinal or closet had been provided for the use of the sectionmen and other employees and that it was not usual or customary for the sectionmen to go between or in front or behind standing cars for the purpose of urinating, nor were they requested or directed so to do by the foreman; that there was standing on track No. 8, when the men came out of the car into which they had gone to get out of the rain, several box cars, some of them coupled together and others standing several feet apart, and that Johnson, for the purpose of urinating, went between these box cars, and his view of the north end of track No. 8 was

obstructed by the box car standing between him and the north end of this track, and likewise this box car hid Johnson from the view of any person on the north end of this track; that while he was thus standing between these box cars, a cut of cars was shunted in on track No. 8 from the track with which it connected, by the method known as a "running switch," and that these cars so shunted in, after they were cut loose from the engine, moved south on track No. 8, toward the cars between which Johnson was standing, at a speed of from four to six miles an hour; that there was on the front car of this cut of cars a brakeman stationed at the brake for the purpose of warning persons of the approach of the cut of cars, and to control their movements, which he could have done by the application of the brake had it become necessary; that when this cut of cars struck the box car, it pushed the box cars a short distance, and Johnson was killed by being crushed by the two box cars between which he was standing; that the brakeman on the cut of cars did not know that Johnson was standing between the cars, nor did the section foreman know that he was there.

It will thus be seen that, according to the evidence for the railroad company, it was not guilty of any act of negligence that caused or contributed to the death of Johnson, as under its evidence the cut of cars that came in on track No. 8 was under control, running at a slow rate of speed and in charge of a brakeman in a position to give warning of its approach, while Johnson was between standing cars where he could not be seen by the brakeman. On the other hand, the evidence for the plaintiff made out a case of negligence entitling the jury to determine the issue and award damages.

With the evidence in the condition stated the court gave to the jury seven instructions. Instruction No. 1 reads:

"If you believe from the evidence in this case that the defendant caused, suffered, or permitted a cut of cars to run over the defendant's track at the time and place mentioned in the evidence, without any person or persons in a position on said cut of cars to maintain a lookout and give warning of their approach, and to control their movements, and that said cars ran over and against the deceased, Johnson, and killed him, by reason of said failure to have a person or persons in a position on said cars to give warning of the approach and control their movements, and but for such failure the accident would not have occurred, then this is negligence, and you should find for the plaintiff."

In instruction No. 2 the jury were told, in substance, that if they believed from the evidence that Johnson stepped behind a box car to urinate in the presence of the foreman, and that it was the custom of the sectionmen so to do, or that in so doing he was acting under the orders of the foreman, and that while in the act of urinating, a cut of cars ran upon him, inflicting injuries from which he died, and the foreman negligently failed to ascertain the approach of the cars

or to give notice to Johnson of their approach, if it was reasonably within his power to do so without endangering his own life, they should find for the plaintiff. They were further told that, unless they believed that the death of Johnson was brought about by the state of facts set out in instructions 1 and 2, they should find for the defendant.

Instruction No. 4 submitted the measure of damages allowable under the federal Employers' Liability Act.

Instruction No. 5 was on the subject of the contributory negligence of Johnson, and in instruction No. 6 the jury were told that: "If you believe from the evidence that deceased, when he received his injuries, and was killed, was between two box cars, then you will find for the defendant."

In the other instructions negligence and ordinary care were defined, and directions given as to the verdict if it was for the plaintiff.

It will be observed that under instruction No. 1 the jury was directed to find for the plaintiff if they believed his death was brought about by the act of the company in permitting a cut of cars to run without any person in a position on the cars to maintain a lookout and give warning of their approach. In giving this instruction the court evidently had in mind the evidence of the plaintiff to the effect that Johnson was standing at the north end of the car on track No. 8 in a position where he could be seen and warned by a person on the front end of the cut of cars shunted in on this track. In instruction No. 6 the court submitted the company's theory of the case that Johnson was standing between two box cars hidden from view, and consequently there should be a verdict for the defendant.

[1] In yards like the one here in question, occupied by a large number of employes moving about in the performance of their various labors, we think it was the duty of the railroad company, when it shunted the cut of cars or a single car in on track No. 8, to have a person on the forward end of the front car for the purpose of giving warning of its approach and to control its movement, and that it should have been run at such a rate of speed as to enable the person in charge to give effective notice of its presence to any person on the track. Therefore in place of instruction No. 1, the jury should have been instructed, in substance, that if they believed from the evidence that the tracks and yards were used by so large a number of employes as that the railroad company, in the exercise of ordinary care in the movements of its cars and engines, should have anticipated the presence of employes on the tracks in the discharge of their duties, or standing or moving about in the yards or going to and from their work, it was the duty of the company, in the movement of the cut of cars mentioned in the evidence, to run them at a reasonable speed, have them under control, and have

some person in a suitable position to warn employes of their approach, and if they believed from the evidence that the company failed to perform these duties, or any of them, and further believed from the evidence that Johnson was in a position where he could have been seen by a brakeman, if there had been one on the front end of the cut of cars, in time to have averted, by the exercise of ordinary care, the injury to him, they should find for the plaintiff.

This view of the duty of a railroad company in the movement of its cars and engines in yards occupied by such a number of employes as to put upon the company, in the movement of its cars and engines, the duty of anticipating their presence upon the track, and of exercising ordinary care to prevent injury to them, is, we think, well supported by the opinions of this court in cases arising under states of fact such as were shown to exist by the evidence in this case.

Thus in *L. & N. R. Co. v. Lowe*, 118 Ky. 280, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122, it appears from the opinion that Lowe was an assistant inspector of trains in the yards of the railroad company at Lebanon Junction, and that while in the discharge of his duties as such inspector, he was struck by a backing engine, the tender of which had been piled so high, with coal as to obstruct the engineer's view of the track in front of the moving engine, and that no warning was given of its approach by ringing the bell or sounding the whistle. Under this evidence it was insisted on behalf of the company that it did not owe Lowe the duty of keeping a lookout or giving him warning of the approach of the engine, but the court rejected this view, and in the course of the opinion, after quoting with approval a number of cases pointing out the measure of care railroad companies are required to exercise in the movement of cars and engines at places where the presence of persons on the track must be anticipated, said:

"In towns and cities where the presence of persons on the track of the railroad may be rightfully anticipated, a due regard for human life requires that a lookout should be maintained in the operation of engines and trains. This has been often declared. The place where the injury sued for occurred was in a town, and at a place which was used, not only by the numerous employes of appellant, but by other persons, in passing from the station to the coal yards, and from one portion of the town to another. The presence of persons on or about the track at the point where the injury occurred should reasonably have been anticipated, and it was incumbent on those operating the engine in question to keep a lookout."

In *Shelby's Adm'r v. Cincinnati R. R.*, 85 Ky. 224, 3 S. W. 157, 8 Ky. Law Rep. 928; *Conley's Adm'r v. Cincinnati R. R.*, 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602; *L. & N. R. R. v. Potts*, 92 Ky. 30, 17 S. W. 185, 13 Ky. Law Rep. 344; *Barber v. Cincinnati R. R.*, 21 S. W. 340, 14 Ky. Law Rep. 869;

*Cason's Adm'r v. Covington R. R. Co.*, 93 S. W. 19, 29 Ky. Law Rep. 352; *L. & N. R. R. v. Bays' Adm'r*, 142 Ky. 400, 134 S. W. 450, 34 L. R. A. (N. S.) 678; *C., N. O. & T. P. Ry. Co. v. Mullane's Adm'r*, 151 Ky. 499, 152 S. W. 555; *C., N. O. & T. P. Ry. v. Ackerman*, 148 Ky. 435, 146 S. W. 1113—and in many other cases the rule has been distinctly announced and uniformly adhered to by this court that in places where the presence of persons on railroad tracks must, in the exercise of ordinary care, be anticipated, it is the duty of the railroad company, in the movement of its cars and engines, to keep a lookout, observe a reasonable rate of speed, and have some person in a position where he can control the movement of the cars or engines.

[2] The argument, however, is made that in this line of cases, and others presenting like states of fact, the rule of care stated was laid down as to persons not employes who were injured at highway crossings, or in cities or towns or populous communities, or as to employes who were engaged in work requiring their attention and presence on or about the track occupied by the moving car or engine that caused the injury complained of, and so is not applicable to the facts of this case. Generally speaking this is true of this line of cases, but we are unable to perceive any good reason why this humane and wholesome rule, established for the protection of life and limb, should not be extended to embrace employes in yards where such a number of employes are engaged as to put upon the company the duty of anticipating their presence upon the tracks. There is no reason why the same degree of care should not be exercised in the movement of cars and engines in such yards as is required in their movement in populous communities or in towns and cities, except, of course, that employes who are themselves charged with the duty of looking out for the movement of engines and cars are not entitled to this protection. *C., N. O. & T. P. R. R. Co. v. Swann*, 160 Ky. 458, 169 S. W. 886. But in all yards like the one where Johnson was killed, there are numbers of employes who are not especially charged with the duty of keeping an eye on the movements of cars and engines for the protection of other persons or property, and as to this class of employes the railroad company is under a duty to exercise the care indicated to protect them from injury; and this is so whether the injured employe belonging to this class is directly engaged at his work or is standing or moving about in the yards on some matter not immediately connected with his work, because all of the employes in the yards, with the exception of those noted, have the right to depend upon the company exercising the measure of care we have laid down and to govern themselves accordingly.

It is said, however, that this is a departure

from the rule announced by this court in *L. & N. R. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, 23 Ky. Law Rep. 982, 1274. In that case Hocker, a telegraph operator, located in a yard of the company at Latonia, was injured when a cut of cars ran against two coupled cars between which he was standing urinating. In holding that the company was not liable, this court put its decision upon the ground that Hocker went between these cars for his own convenience, and not in the discharge of any duty that he owed to the company, and really occupied the attitude of a trespasser, saying:

"The law is well settled, both in this state and elsewhere, that a railroad company is not under obligation, in moving its engines and cars in its own switchyard, to take special precautions or give special warnings to avoid injuring any unauthorized person who may, for his own convenience, go therein, until the presence of such person in a situation of danger has been discovered."

In that case it does not appear that there was any evidence of the number of employés who used the yard, nor did the court undertake to lay down any general rule to be observed by the company, in the movement of its cars and engines, for the protection of employés. The law was announced with reference to the particular facts of that case; and, as the record we have develops a very different state of facts from those appearing in the *Hocker Case*, we do not regard it as controlling our decision in this case.

The cases of *Age's Adm'r v. L. & N. R. R.*, 148 Ky. 219, 146 S. W. 412, *L. & N. R. R. v. Hunt's Adm'r*, 142 Ky. 778, 135 S. W. 288, *Blankenship's Adm'r v. N. & W. R. Co.*, 147 Ky. 260, 143 S. W. 995, and *C. & N. O. & T. P. Ry. Co. v. Harrod's Adm'r*, 132 Ky. 445, 115 S. W. 699, are also relied on by counsel for the railroad company, but the case we have is, on the facts, readily distinguishable from this line of cases, and we think the instruction we have indicated should, on another trial, be given in lieu of instruction No. 1.

[3] In lieu of instruction No. 2 the jury should have been told, in substance, that if they believe from the evidence that the section crew with which Johnson was working had been directed or requested by the foreman to go behind or in front of or between cars for the purpose of urinating, or that it was usual and customary for sectionmen to do this, and this usage or custom was known to the foreman of Johnson's crew, and the foreman of this crew knew that Johnson had gone in front of or between cars for the purpose of urinating, and he saw, or, in the exercise of ordinary care, could have seen the approaching car, or cut of cars, in time to have given warning, it was his duty to exercise ordinary care to warn Johnson of the danger he was in, and if he failed to give such warning, the jury should find for the plaintiff.

The court should also give for the defend-

ant the converse of instructions Nos. 1 and 2.

[4] On the measure of damages, in lieu of instructions Nos. 4 and 5, the court should give the approved instruction in cases arising under the federal Employers' Liability Act. *C. & O. Ry. Co. v. Dwyer*, 157 Ky. 590, 163 S. W. 752; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *American R. Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

If the plaintiff's theory of the case as supported by the evidence is correct, the negligence of the railroad company was the sole cause of Johnson's death, and if the company's theory supported by its evidence is correct, the act of Johnson in going between the cars was the proximate cause of his injury and death, and this view is fully presented in instruction No. 6 directed to be given. If, however, the company asks an instruction in the ordinary form on the subject of contributory negligence, it may be given.

[5] Under the railroad company's theory of the case, Johnson was standing between two box cars, where he could not be seen by the brakeman who its evidence showed was on the cut of cars, and if this was true, of course the brakeman, if one was there, could not have given Johnson warning to get out of the way or have averted the injury. The company had the right to put cars in on this track and to push them against other cars standing on the track, and so an employé situated as the company says Johnson was assumed the risk of being injured by the movement of other cars.

The case of *C. & N. O. & T. P. R. Co. v. Helm*, 149 Ky. 340, 148 S. W. 25, presented such a state of facts. Helm when injured was between cars and could not be seen, and in holding that there could be no recovery, we said:

"We have held in a number of cases that cars should not be turned loose with no one upon them to keep a lookout or to control their movement, in yards where the presence of persons on the track may be anticipated. But, in this case, if a person had been on the car keeping a lookout, he would not have been able to see Helm, who was between the second and third car standing on the house track, for he was completely shut out from all view by the cars between which he was standing. A lookout would have been wholly unavailing as to him, and he, therefore, cannot complain that a lookout was not maintained. The switching crew were using the house track and had a right to use it. They had a right to run the car they returned to that track, against the cars standing on the track, as they had no reason to anticipate that any one would be on the cars. Helm had concealed himself between the cars and intentionally kept the persons in charge of the yards in ignorance of his whereabouts and of what he was doing. There cannot therefore be any recovery against the company on the ground that the car was run against the other car."

If, however, the foreman knew Johnson was between these cars and knew, or in the exercise of ordinary care could have known,

of the approach of the moving cut of cars in time to have warned Johnson of the danger, there should be a verdict for the plaintiff, because under the evidence for the plaintiff it was not only usual and customary for employes to go between cars as Johnson did, as the foreman well knew, but they were directed and requested so to do by the foreman. So that in lieu of instruction No. 6 the jury should be told, in substance, that if they believe from the evidence that when Johnson was killed he was standing between two box cars, where he would be concealed from the view of a brakeman in charge of the cut of cars, they should find for the defendant, unless they believed that it was usual and customary, and so known to be by the foreman of Johnson, for employes to go between cars for the purpose of urinating, or that they were directed or requested so to do by the foreman, and the foreman knew where Johnson was and knew, or in the exercise of ordinary care could have known, of the approach of the cut of cars in time to have warned Johnson of the danger, and if they so believed they should find for the plaintiff.

[6] It is further contended by counsel for the company that, in cases arising under the federal Employers' Liability Act, the jury should be instructed that they cannot find for the plaintiff unless they believe from a preponderance of the evidence that his theory of the case as averred in the petition is true. In other words, it is said that, although the jury may believe from the evidence that the facts upon which the plaintiff relies to recover are true, they cannot yet find for him unless they believe that these facts have been proved by a preponderance of the evidence. In administering the federal Employers' Liability Act in our courts we think the practice and procedure followed in the trial of common-law actions generally should be observed in the trial of cases arising under this act. *C. & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736. In other words, except in so far as the act itself modifies or changes rules of practice and procedure or substantive law, cases arising under the act should be heard and determined in the state courts in the same manner as would like cases arising under the law prevailing in this state.

[7] If the evidence in a case heard and determined under this act would be sufficient to take the case to the jury and support the verdict if the suit had been brought under the state law, it would be sufficient to take the case to the jury and support the verdict if it was brought under the federal act.

[8] And it is the well-settled practice in common-law actions in this state that the case should go to the jury if there is evidence conducing to support the averments of the petition constituting the grounds of action relied on for recovery, although the weight of the evidence, both numerically and in probative value, may be with the defendant.

This rule of evidence is sometimes called the "scintilla rule," and, being called the "scintilla rule," is frequently the subject of much criticism, as well as censure, from those members of the profession who are not favorably disposed towards our practice in this respect. The word "scintilla," however, as applied in our practice does not mean that the case should be submitted to the jury when there is merely a "spark" or a "glimmer" of evidence, but means that when there is some evidence to support the plaintiff's case, the court will not undertake to determine either its weight or sufficiency by taking the case from the jury, nor will the court, upon all the evidence, take the case from the jury merely because the evidence on one side may be stronger, both numerically and in probative value, than the evidence on the other side, but will, when there is conflict in the evidence, leave the disputed question of fact to the jury. If, however, it should appear that, admitting the plaintiff's testimony and every fair inference that is reasonably deducible from it to be true, he has still failed to make out his case, then there could be no conflict in the evidence and the court should take the case from the jury. *Shay v. R. & L. T. P. Co.*, 1 Bush, 108; *United Shakers v. Underwood*, 11 Bush, 205, 21 Am. Rep. 214; *L. & N. R. R. v. Howard*, 82 Ky. 212; *Baumelster v. Markham*, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. Law Rep. 308, 72 Am. St. Rep. 397; *Thompson v. Thompson*, 17 B. Mon. 23; *Dallam v. Handley*, 2 A. K. Marsh. 418.

[9] It is further urged that it was not competent to permit witnesses to testify that the coal car was running at an unusual or high rate of speed, or to describe the slippery condition of the rails on account of the rain; but we think this evidence, if proffered by persons who from experience or observation were qualified to describe unusual speed or the condition of rails, was admissible.

[10] It is also argued that it was error to permit witnesses for the plaintiff to give evidence as to written rules that had been promulgated by the company regulating the movement of cars in yards, and this upon the ground that the written rules themselves were the best evidence of their contents. Undoubtedly the written rules were the best evidence, if there were in fact written rules regulating the movement of cars in yards, established and published by the company. The correct practice is that, when a party to a suit desires to introduce as evidence relevant rules that have been published and promulgated by the adverse party or to prove their contents, the party who desires to do so should give notice to the adverse party that he wishes a copy of the rules to use on the trial, and if the party requested fails to produce the rules, then their competent contents may be shown by qualified persons. For example, in this case the rules desired by

the plaintiff were in the possession of the railroad company, and if the plaintiff desired to introduce these rules as evidence, notice should have been given to the company or its attorney to produce them for such use, and if the rules were not produced in response to the notice, then witnesses who had knowledge of the rules could testify concerning them.

For errors in instructions, as well as for some other errors that we have not noticed because there is no reason why they should appear on a retrial, the judgment is reversed, with directions for a new trial not inconsistent with this opinion.

### LOUISVILLE & N. R. CO. v. HEINIG'S ADM'X.

(Court of Appeals of Kentucky. Dec. 18, 1914.)

#### 1. MASTER AND SERVANT (§ 243\*)—DUTIES OF SERVANT.

It is the duty of a railroad engineer to examine bulletins posted to give orders to trainmen as well as to examine orders actually delivered to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.\*]

#### 2. MASTER AND SERVANT (§ 142\*)—INJURIES TO SERVANT—RULES.

Where the rules as to the use of tracks at a point where there were four tracks clearly showed by reference to the tracks, which was to be used for passing, and an engineer was ordered to meet another train at that point, the rules as to the passing of the trains were sufficiently explicit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 285; Dec. Dig. § 142.\*]

#### 3. MASTER AND SERVANT (§ 137\*)—INJURIES TO SERVANT—NEGLIGENCE.

Where two trains were to pass at a given point, the failure of those in charge of the train which first reached the point and took the siding to close the switch was not negligence where the train had been there only a few seconds.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

#### 4. MASTER AND SERVANT (§ 139\*)—INJURIES TO SERVANT—NEGLIGENCE.

Where two trains which were to pass at a given point collided, though the waiting train took the siding sufficiently far away to have escaped the passing train if the switch had been closed, the collision was not a result of the negligence of those in charge of the waiting train in taking the siding too near the end.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275, 282, 289, 296; Dec. Dig. § 139.\*]

#### 5. MASTER AND SERVANT (§ 112\*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

On a single-track railroad it is not practicable to place passing tracks out in the open in all cases, so it cannot be held negligence for a railroad company to place a passing track at a point on a curve where the view was obstructed by trees and an embankment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218-223; Dec. Dig. § 112.\*]

#### 6. MASTER AND SERVANT (§ 210\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

An engineer who had seen long service on a railroad assumes the risk of injury from the company's negligence in placing passing tracks on a curve where the view was obstructed by trees and an embankment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556; Dec. Dig. § 210.\*]

#### 7. MASTER AND SERVANT (§ 210\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

An experienced engineer who knew that the line of the defendant railroad company was not provided with a block-signal system assumes the risk of injury from collision resulting from the failure of the company to so equip its line.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556; Dec. Dig. § 210.\*]

#### 8. MASTER AND SERVANT (§ 228\*)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

The contributory negligence of a deceased servant does not bar recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) where defendant's negligence contributed to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.\*]

#### 9. MASTER AND SERVANT (§ 248\*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

The rules of a railroad company required the conductor to listen for meeting-point signals and to stop his train in case of failure to hear them. The engineer in charge of a train which was to pass another at a siding failed to give the meeting-point signals or to bring his train under control. Held that, though the negligence of the engineer brought about a condition which resulted in the collision, recovery for his death might be had under the Federal Employers' Liability Act, where the conductor's observance of the rules would have prevented the accident, for the rule was for the benefit not only of passengers but of all persons on the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. § 248.\*]

#### 10. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—JURY QUESTION.

In an action under the Federal Employers' Liability Act for the death of a railroad engineer killed in a collision, the question whether the conductor was negligent in failing to stop the train when he did not hear the engineer give meeting signals, etc., held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

#### 11. APPEAL AND ERROR (§ 1169\*)—REVERSAL—PREJUDICIAL ERROR.

In an action under the Federal Employers' Liability Act a verdict for plaintiff must be reversed where the jury based their verdict on several grounds of negligence, only one of which should have been submitted to them, for, as the deceased servant was guilty of contributory negligence which would diminish recovery, the improper submission of additional grounds of negligence probably affected the amount of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.\*]

### Appeal from Circuit Court, Whitley County.

Action by Eugene R. Heinig's Administratrix against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Hiram H. Tye, of Williamsburg, Chas. H. Moorman and Benjamin D. Warfield, both of Louisville, and J. W. Alcorn, of Stanford, for appellant. Popham, Trusty & Roose, of Louisville, and J. O. Byrd, of Williamsburg, for appellee.

CLAY, C. Eugene Heinig was an engineer in the employ of the defendant, Louisville & Nashville Railroad Company. On December 20, 1907, he was killed in a wreck. His widow and administratrix, Catherine D. Heinig, brought this action against defendant to recover damages for his death. The jury awarded damages in the sum of \$21,000, which sum was apportioned equally to the widow and six children of the decedent. The defendant appeals.

At the time of the accident Heinig was the engineer in charge of north-bound passenger train No. 32, which collided with south-bound passenger train No. 33 at Savoy.

The trial court gave to the jury 19 instructions, in which were submitted for its determination the following grounds of negligence: (1) The meeting point at Savoy was changed without notice to the decedent. (2) Failure to provide sufficient rules, orders, methods, and appliances to make the meeting point of the two trains reasonably safe. (3) Failure of the employés of south-bound train No. 33 to change the switch in time to prevent the collision. (4) The failure of the conductor to angle-cock the train after the failure of Heinig to indicate by proper signal that he had the meeting point in mind, and intended to stop there. (5) Failure of defendant to adopt and have in use the block-signal system.

In the event it found for plaintiff, the jury was told to state in its verdict under which instruction or instructions its finding was made. In response to this direction, the jury stated that its finding was under instructions Nos. 5, 6, and 12. Instruction No. 5 submitted the question of the conductor's failure to angle-cock the train. Instruction No. 6 submitted the question of defendant's failure to adopt and have in use the block-signal system. Instruction No. 12 defined contributory negligence, and told the jury that under the Federal Employers' Liability Act contributory negligence did not defeat a recovery, but simply diminished the amount of the recovery, etc. The petition also charged that defendant was negligent in permitting the trains to meet at Savoy, because of the topographical conditions there existing; and defendant was further negligent because those in charge of the waiting train No. 33 permitted it to stop too near the

switch. These grounds of negligence, however, were not submitted to the jury.

Savoy is a telegraph station about a mile from Williamsburg. There is one switch north of Savoy. About 100 feet south of Savoy is the Pine Mountain Spur main. There are two other switches, Nos. 1 and 2, south of the station next to Pine Mountain Spur. Beginning a few feet south of the station, and extending for a distance of several hundred feet, was another track which had a capacity of about 50 cars. The main track curves at a point a short distance below the south switch of this passing track. There are also some trees and a large embankment near the switch point. Prior to November 29, 1911, the Pine Mountain Spur was used as a passing track at Savoy. On that date the trainmaster issued Bulletin Board Order No. 277, the material parts of which are as follows:

"All Concerned: Effective at noon Monday, December 4th, the tracks at Savoy will be used as follows:

"The track south of depot as a passing siding. This track has a capacity of 50 cars, and derail will be removed from this track.

"Track north of depot and parallel with main line, as a north-bound storage, having a capacity of 32 cars.

"Track No. 1, next to Pine Mountain main, as a storage for Pine Mountain cars, this track having a capacity of 49 cars.

"Track No. 2, which is parallel with No. 1, as a storage for south-bound leads; capacity 49 cars.

"Derailers have been placed at clearance points on north end of Nos. 1 and 2 tracks."

This bulletin was posted at passenger stations and roundhouse at Corbin and Etowa, at the yard offices at Corbin and Etowa, the general foreman's office at West Knoxville, and at the passenger station at Knoxville. For a portion of the time after this bulletin was posted decedent was running between Marysville and Knoxville. Savoy was not on that line. At the time of the accident decedent had been employed on the main line, where Savoy was located, for a little less than two weeks. He was making his ninth single trip. On each trip he passed by Savoy in the daytime. The rules require the engineer to examine the bulletin board before going out on his trips. There was some evidence to the effect that, where the time is not sufficient to apprise trainmen of a change, it is customary to send out a special telegraphic bulletin order. On the day of the accident decedent and the conductor of train No. 32 received a 31 order to meet No. 33 at Williamsburg and No. 37 at Rockhold. When the train reached La Follette the engineer and conductor were each handed a 19 order, directing train 32 to meet train 33 at Savoy. In approaching the switch of the passing track at Savoy it was the duty of the decedent to have his train under control. He did not reduce the speed of the train, but at a point about 500 feet south of the switch was going in the neighborhood of 35 miles an hour. Nor did the

decident blow the meeting signal. When the fireman discovered they were approaching the meeting point he "hollered" to Heinig. Heinig then jumped off his seat, and blew three blasts of the whistle and drew off all the air. The purpose of these three blasts was to have the other train back up. It was then too late to stop the train, and there was a front-end collision between it and train 33. There was also evidence to the effect that 33 had just come to a stop about four car lengths from the switch. It had probably stopped for 50 or 60 seconds.

It further appears from the rules of the company that while both conductors and engineers are responsible for the safety of their trains, and must take every precaution for their protection, the general direction and government of the train is vested in the conductor. He is held responsible for its safe and proper conduct, and the men employed on the train are required to yield willing obedience to his proper orders.

Another rule provides:

"90 (f) Enginemen of passenger trains approaching sidings at which they are to meet or be passed by trains of the same or superior class, either by schedule or right, or inferior class trains by right, will immediately after sounding the station whistle (Rule 14m), give one short sound of the whistle (Rule 14a).

"Conductors will place themselves in position to hear these signals, and failing to clearly hear and understand them, must stop their trains.

"The proper place for enginemen to sound station whistle (Rule 14m) is at a point one-half mile from the headblock of first passing siding switch."

There was evidence tending to show that the decident did not blow either the station whistle or the short whistle for the purpose of indicating that he was approaching a meeting point. There was also evidence to the effect that the conductor did not attempt to angle-cock the train until just about the time of the collision.

Plaintiff also introduced a number of witnesses who testified to the value of the block-signal system as a safety device. This system was in use by a number of roads, and, if it had not rendered collisions practically impossible, it had materially reduced the number of accidents of that kind. This system is used principally in the North. It is in use on certain portions of defendant's lines. Perhaps only about 10 per cent. of the roads of the South use this system.

Though the jury based its verdict on the failure of the defendant to equip its road with the block-signal system, and the failure of the conductor to angle-cock the train, we deem it necessary, in view of another trial, briefly to discuss the other grounds of negligence relied on.

[1, 2] (1) With respect to the claim that the meeting point at Savoy was changed without notice to decident, and that defendant was negligent in not having sufficient rules to give notice to decident of the change in the meeting point, the following facts appear:

The bulletin making the change in the passing track at Savoy was posted at several places. Every witness who testified, saw it at some one of these places. At certain of these places it was seen after the accident occurred. The evidence leaves no doubt that, if the decident had looked, he too would have seen the bulletin. It is no answer to this proposition to say that his conduct shows that he did not know of the bulletin. It was his imperative duty to look, and he is charged with knowing that which an examination of the bulletin would have disclosed. The charge that the bulletin was itself indefinite, in view of the conditions existing at Savoy, is more imaginary than real. It is true that there are four tracks south of Savoy. A change was made from the Pine Mountain Spur to the track south of Savoy, which was capable of holding 50 cars. Pine Mountain Spur was thereby excluded. Tracks 1 and 2 adjoining the Pine Mountain Spur were likewise excluded, for they were set apart by the bulletin as storage tracks, and provided with derails. This left only the fourth track, which is the one set apart as a passing track. For the purpose of fitting this up as a passing track certain changes were made. Out of all the witnesses examined in the case, no one claims that the bulletin board order was indefinite, or that he did not clearly understand which track was indicated as a passing track. Furthermore, the 19 order, which was handed to the decident and the conductor of train 32, which changed the meeting point of trains 32 and 33 to Savoy, was clear and explicit, and susceptible of only one construction. The passing track at Savoy having been fixed by the bulletin, the direction to meet at Savoy necessarily meant that the two trains should pass each other on the passing track. Being charged with the duty of knowing that which an examination of the bulletin boards would have disclosed, and with the further duty of knowing the contents of the 19 order, which was clear and explicit, we think it necessarily follows that decident was not only apprised of the meeting point of the two trains, but that the rules and methods provided for notifying decident of these facts were reasonably adequate for the purpose intended, and would have been effective had it not been for decident's failure to exercise that degree of care that a person of ordinary prudence would have exercised under similar circumstances. Instead of following the bulletin board order and the 19 order, and instead of complying with the rules requiring him to give the meeting point signal, and to have his train under reasonable control, decident approached the passing track with his train going at the rate of 35 miles an hour, and when his attention was called to the necessity of turning in at the passing track it was then too late for him to avoid the accident.

[3] (2) There was proof that it was cus-

tomary for the employes of the waiting train to set the switch so that the approaching train could pass on the siding. It is true that one witness says that the waiting train had stopped for perhaps 50 or 60 seconds when decedent's train approached. All the circumstances, however, show that the waiting train had just come to a stop. Certainly it had stopped only for a few seconds. The statement that it had stopped for 50 or 60 seconds was a mere estimate or guess. No signal of the approaching train had been given, until the train was about 500 feet from the switch. The engine of the waiting train had stopped about four car lengths from the switch. The employes of the waiting train, having the right to rely on proper signal of the other train's approach being given, and on the fact that it was under reasonable control, were not required to rush immediately to the switch, when they had no reason to anticipate that the other train was so near, or that its speed had not been slackened. When they were apprised of the approach of the other train, and of the speed at which it was going, that train was about 500 feet away, and it was then an absolute impossibility for them to go two or three hundred feet, as the case might be, and change the switch in time to prevent the accident.

[4] For the same reason, there is no merit in the contention that the waiting train stopped too near the switch. It was sufficiently far from the switch to clear an approaching train had it taken the siding, and its employes had the right to anticipate that proper notice of the other train's approach would be given in time to enable them to change the switch. The waiting train was on the main track at a reasonable distance from the switch. Even if it had been a little further away, it is doubtful if the accident could have been prevented.

[5, 6] (3) Another ground of negligence relied on is, that, because of its topographical conditions, Savoy should not have been selected as the meeting place for trains. This position is based on certain evidence to the effect that the switch point of the passing track was near a curve, and was obscured to a certain extent by an embankment and trees. We are unable to perceive how defendant was negligent in the respect indicated. On a single-track road it certainly conduces to safety to have as many passing tracks as possible. In rough country, where there are necessarily embankments and trees, it is not always practicable to place passing tracks out in the open, where a clear view may be obtained. Furthermore, the operation of certain trains affects all the other trains on the line, and meeting points of particular trains have to be arranged with regard to other trains. It is therefore impossible to fix these meeting points so as to afford an unobstructed view. In addition to these considerations, the topographical conditions

were well known to decedent, who had been in defendant's employ for a number of years. Any danger therefrom was known to him, and was necessarily one of the ordinary risks incident to the business in which he was engaged. Furthermore, if the view of the switch point was obscured, and he knew this fact, there was all the greater reason why he should approach this point with his train under control.

[7] (4) By instruction No. 6 the jury were told, in substance, that if they believed from the evidence that for a reasonable time prior to the collision in question the block-signal system was in general use on railroads in the United States of like character, in respect to construction and amount of traffic, as that portion of defendant's road complained of, and they further believed that said system was, and was recognized by said railroads and railroads generally, as a device reasonably calculated to prevent collisions of the kind in question, and was used by such railroads for such purpose, and that the use of such block signal at the time and place in question would have prevented the death of Heinig, and that the exercise of ordinary care on the part of defendant for the reasonable safety of its employes in charge of said two trains required the use of said block signals at the time and place in question, and if they further believe that defendant knew, or by the exercise of ordinary care could have known, of such fact a reasonable time before the collision in question, and that defendant's failure to have such block signals, either in whole or in part, caused the collision or the death of Heinig, they should find for the plaintiff. By instruction No. 7 the jury were told, in substance, that if they believed from the evidence that the exercise of ordinary care required the defendant to have block signals, and that the absence of such signals increased the danger of the meeting and passing of said two trains, and if they further believed from the evidence that the increased danger by reason of the absence of such signals was such that a person of ordinary prudence, situated as Heinig was, would not have encountered, and if they further believed from the evidence that on the occasion in question Heinig knew that his train was to meet and pass the other train at the point where the collision occurred, and he also knew of the absence of block signals at such a place, and of the increased danger therefrom, then he assumed the risk of such danger, and the jury should find for the defendant. We deem it unnecessary to discuss the question when or under what circumstances a railroad company is required to adopt the block-signal system for the safety of its employes. Here it is admitted that Heinig had been in defendant's employ as an engineer for several years. He was thoroughly instructed in his duties, and passed a creditable examination. It is not shown that defendant was negligent in the

operation of the two trains in question, or in the method adopted by it for the operation of trains generally. The means adopted were well known to decedent, and, if obeyed, were reasonably well calculated to secure the safety of employes, including the decedent. There being no federal statute requiring railroads to use the block-signal system, the common-law doctrine of assumed risk applies. *Chesapeake & Ohio Railway Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062. Decedent knew that the block-signal system was not in use by defendant. Being a practical railroad man of long experience, he also knew and fully appreciated the danger growing out of the fact that it was not in use. Under these circumstances, the risk was one that ordinarily and usually attended the business in which he was engaged, and was necessarily assumed by him. As the question is one about which reasonably prudent men can entertain no difference of opinion, the trial court, instead of submitting the question to the jury, should have so held as a matter of law.

[8-10] (5) The next question concerns the conductor's failure to angle-cock the train, and the question whether or not if he was negligent in this respect, defendant is liable. In the recent case of *Pennsylvania Co. v. Cole*, 214 Fed. 948, 131 C. C. A. 244, the plaintiff was a rear brakeman and flagman on defendant's east-bound freight train. While his train was standing, about midnight, on the main track to take water, it was run into from the rear by another train, consisting of an engine and caboose. The caboose in which plaintiff was asleep was set on fire, and plaintiff thereby severely injured. It was plaintiff's duty to flag the following train, and instead of doing so he went to sleep in his own caboose. A recovery was allowed on the ground that the evidence showed that those in charge of the following train could, by the exercise of reasonable care, have discovered the presence of the forward train in time to avoid the collision. In discussing the question the Circuit Court of Appeals, speaking through Judge Knappen, said:

"But it is strongly pressed upon us that plaintiff's negligence in going to sleep in the caboose while on duty, and thus in failing to flag the following train, was negligence so gross and so proximate in its effect as to preclude all right of recovery. The danger to the interests of the traveling public from failure to enforce such rule is strongly urged. There can be no doubt, at the common law, such would have been the effect of plaintiff's alleged negligence; but the Employers' Liability Act expressly abrogates the common-law rule, under which action was barred by the negligence of the plaintiff proximately contributing to the accident, and substitutes therefor the rule of comparative negligence. Under this act no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery; for, as said in *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S. 114, 122, 33 Sup. Ct. 654, 657 (57 L. Ed. 1096, Ann. Cas. 1914C, 172),

the direction that the diminution shall be in proportion to the amount of negligence attributable to such employé means that: 'Where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.'"

In the case of *Grand Trunk W. R. Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168, the United States Supreme Court, speaking through Mr. Chief Justice White, quoted with approval the following language of the Circuit Court of Appeals for the Seventh Circuit:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." *Grand Trunk Western Ry. Co. v. Lindsay*, 201 Fed. 844, 120 C. C. A. 174.

In view of the above decisions, it cannot be said that the decedent's negligence, even though the proximate cause of his death, was the sole cause of his death, if, as a matter of fact, the conductor, notwithstanding decedent's negligence, could, in the exercise of ordinary care, have known that decedent had failed to give the meeting-point whistle, or had failed to take steps to stop his train, and have stopped the train in time to avoid the collision. Rule 90, above set forth, imposes on the conductor the duty of placing himself in a position to hear the meeting-point signals, and, failing to clearly hear and understand them, to stop his train. All the witnesses agree that it was the conductor's duty, when the decedent failed to give the meeting-point signal, and failed to slacken the speed of his train, to apply the angle-cock and stop the train. We are not disposed to take the narrow view that the rule in question was adopted solely for the protection of passengers, or solely for the protection of employes who were not themselves negligent. It was intended for the protection of the train and everybody on it. It imposes a duty the breach of which is negligence, and an employé's contributory negligence does not, under the Federal Employers' Liability Act, deprive him of the benefit of the rule, where its violation would be negligence as to any one else on the train. Notwithstanding the fact that decedent's negligence created a condition where the rules required the conductor to act, the accident might have been avoided if the conductor had, under the circumstances of the case,

used ordinary care in the application of the angle-cock. The case is not different in principle from that of *Pennsylvania Co. v. Cole*, supra, and we therefore conclude that if, as a matter of fact, the conductor was negligent in failing to stop the train, plaintiff may recover notwithstanding his contributory negligence. On the question of the conductor's negligence, there was sufficient evidence to take the case to the jury. It follows from what we have said that the case should not have gone to the jury on any other ground than the alleged negligence of the conductor in the respect indicated.

[11] As before stated, the jury based its finding both on alleged negligence of the conductor and the failure of defendant to have in use the block-signal system. It may be contended that, as the verdict was proper on one of these grounds, the fact that the jury based its finding on an insufficient ground was not prejudicial. As this action is brought under the Federal Employers' Liability Act, that contention cannot be upheld. That act introduces the rule of comparative negligence. Where the causal negligence is partly attributable to the decedent and partly to the carrier, his administratrix cannot recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. *N. & W. R. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654,

57 L. Ed. 1096, Ann. Cas. 1914C, 172. In comparing the negligence of the decedent and the carrier the jury may have concluded that because plaintiff was negligent in one particular, while the carrier was negligent in two particulars, the negligence of the carrier was much greater than that of decedent, and the carrier should therefore be required to bear the greater part of the entire loss. Where, therefore, the amount of the verdict necessarily depends on the amount of negligence attributable to the carrier, a finding based on negligence not authorized by law is prejudicial, even though based on another and sufficient ground.

On another trial the court will exclude all evidence bearing on the grounds of negligence other than that of the conductor, and will submit the case to the jury on that ground alone. Instead of leaving the question of decedent's contributory negligence to the jury, the court will tell the jury that decedent was guilty of contributory negligence, and at the same time direct the jury in conformity to the rule laid down in *N. & W. R. Co. v. Earnest*, supra, how to apportion the damages in the event they believe that defendant's conductor was negligent in failing to stop the train.

The foregoing conclusion makes it unnecessary to determine whether or not the verdict is excessive.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

**WESTERN UNION TELEGRAPH CO. v. JOHNSON. (No. 50.)**

(Supreme Court of Arkansas. Dec. 7, 1914.)

**COMMERCE (§ 28\*)—TELEGRAPH MESSAGE—RECOVERY FOR MENTAL ANGUISH.**

An action for mental anguish under the law of Arkansas will not lie for the failure to deliver an interstate message.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 22; Dec. Dig. § 28.\*]

Appeal from Circuit Court, Crittenden County; W. J. Driver, Judge.

Action by T. P. Johnson against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and cause dismissed.

Geo. H. Fearons, of New York City, Chas. S. Todd, of Texarkana, Tex., and Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellant. L. P. Berry and S. V. Neely, both of Marion, for appellee.

SMITH, J. On the 23d day of March, 1913, appellee sent, from appellant's office at Earle, Ark., to one W. T. Ratcliff, at Blue Mountain, Miss., the following telegram:

"Dear Home Folks: Our little Pauline died at midnight. We will be home on evening train via Middleton. Have everything prepared."

Mr. Ratcliff was the grandfather of the little child, and failed to make any arrangements for the funeral because the telegram was never delivered; and, as a result of this failure to deliver the telegram, certain circumstances arose causing mental anguish. A charge of 80 cents was made and paid for the transmission of the message, but no recovery of that money was asked.

The evidence in this case is sufficient, at least, to raise the question of negligence on the part of the telegraph company in the failure to deliver the telegram, and to have supported a finding that mental anguish to compensate for which this action was brought was suffered as a result of this failure. In such cases we have heretofore sustained judgments for damages in cases free from prejudicial error; but hereafter such recoveries cannot be sustained where the message is an interstate one. This is true because the Supreme Court of the United States is the final arbiter in all matters relating to commerce between the states, and that court has held that such actions cannot be maintained.

In the recent case of *Western Union Tel. Co. v. Compton*, 169 S. W. 946, we affirmed such a judgment; but, while that case was pending before us on a motion for rehearing, the opinion of the Supreme Court of the United States in the case of *Western Union Tel. Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, was handed down. Following the opinion in the *Brown* Case, as we were required to do, a rehearing was granted

in the *Compton* Case, and in the opinion granting the rehearing the following language was quoted from the opinion in the *Brown* Case:

"What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the states; that is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one state to another, or to this district, by determining the consequences of not pursuing such conduct, and in that way encounters *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347 [7 Sup. Ct. 1126, 30 L. Ed. 1187], a decision in no way qualified by *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815]."

It is true that in the *Compton* Case a judgment was entered for \$50; but this was done because, under the pleadings in that case, the telegraph company had only sought to limit its liability to that amount. But here there is a denial of any liability, and if it be true, as decided in the *Brown* Case, *supra*, that acts of the Legislature which confer the right to sue for mental anguish are objectionable as an attempt to regulate commerce among the states when applied to interstate messages, then no cause of action arose under the facts in this case, the message being an interstate message.

The judgment of the court below is therefore reversed, and the cause dismissed.

**ST. LOUIS, I. M. & S. RY. CO. v. BRUNDIDGE et al. (No. 11.)**

(Supreme Court of Arkansas. Nov. 30, 1914.)

**1. WITNESSES (§ 372\*)—CROSS-EXAMINATION—INTEREST.**

Where a witness for plaintiff, suing for the flooding of her land by a railway embankment, had testified on cross-examination that his sister owned land similarly situated, it was not error to sustain an objection as to whether she intended to bring a similar suit, since the witness' testimony had already shown any interest he might have.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

**2. EVIDENCE (§ 113\*)—VALUE OF LAND—DAMAGES.**

In an action for the flooding of plaintiff's land by the construction of a railroad embankment in 1910, testimony that the former owner of the land offered to rent it to the witness for two years, if the latter would fence it, is inadmissible, where the only evidence as to the time of the statement was that it was before 1910, and the conditions were not shown to have been the same.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

**3. EVIDENCE (§ 317\*)—HEARSAY—VALUE OF LAND.**

The statement of plaintiff's ancestor, who had died before the institution of the suit, as to the value of the land was incompetent, as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

**4. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—IMMATERIAL EVIDENCE.**

The statement by plaintiff's ancestor that he would rent the land in controversy to witness, if the latter would fence it, does not tend to prove that the land had no agricultural value, and its exclusion was not prejudicial, where the witness was elsewhere allowed to testify as to his opinion of the value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

**5. WATERS AND WATER COURSES (§ 178\*) — FLOODING OF LAND—EXCESSIVE DAMAGES.**

In an action for the flooding of 200 acres of land, part of which was clear and part wooded, where there was testimony that the land was thereby permanently unfitted for agricultural purposes, and that the cleared land before flooding had been worth from \$50 to \$100 per acre and the uncleared from \$25 to \$30 per acre, a verdict for \$4,000 was not excessive, although there was also considerable testimony that the land was valueless for agricultural purposes before it was flooded.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 251-255; Dec. Dig. § 178.\*]

**6. JUDGMENT (§ 598\*)—SPLITTING CAUSES OF ACTION.**

Where a railroad replaced a 500-foot trestle over a depression draining plaintiff's land with an embankment, leaving only 30-inch tile drains therein, insufficient to carry off the drainage, and located higher than the grade of the land, the injury to plaintiff's land by the flooding thereof was permanent, and all recoverable in one action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1113; Dec. Dig. § 598.\*]

**7. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.**

Error in an instruction allowing recovery in an action for injuries to land, not only for the permanent injury, but also for loss of rents for two years, was harmless where the jury found a verdict for the permanent injury only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Appeal from Circuit Court, Jackson County; R. E. Jeffery, Judge.

Action by Nellie Brundidge and another against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

On the 25th of August, 1913, the appellees instituted this suit against appellant to recover damages to certain lands. The appellees alleged that during the years 1911, 1912, and 1913, the appellant constructed an embankment on the east side of certain lands belonging to Wm. H. Morris. That appellees, Nellie Brundidge and Vannie Carpenter, were the sole heirs of Morris, who died intestate on or about the 1st of June, 1913. That appellant negligently failed to leave sufficient openings in the embankment to drain the land of the surface water, to appellees' damage, etc. The answer denied the material allegations of the complaint.

The facts, stated from the viewpoint of appellees, were substantially as follows: In the fall of 1910 the embankment was con-

structed by the appellant for the purpose of providing for a double track from the city of Newport to Diaz. The land in controversy lies just immediately outside of the city of Newport, north of the Iron Mountain and east of the Rock Island Railway. Prior to the year 1909, it was subject to overflow from the backwaters of White and Black rivers. This land, together with several thousand acres of other lands, was drained, before the construction of the embankment complained of, by what is known as Lye branch, a stream which ran southeast and emptied into Newport Lake south of the Iron Mountain Railway. When the appellant first built its railroad, the bed of this branch was filled, and a passage for the water was provided by constructing a trestle about 500 feet long. The land was drained by running a ditch from the bed of Lye branch down the west side of the railroad and through the trestle and thence into Newport Lake. When appellant constructed its embankment in 1910, it took out the trestle adjacent to the Morris land and filled this space with solid earth, except at each end of where the trestle formerly stood there were placed drain tiles about 30 inches in diameter. These tiles were placed above the level of the ground, and were so arranged that the inflow was higher than the outflow and were insufficient to carry off the ordinary rainfall, resulting in the overflow of over 200 acres of land belonging to the appellees, part of which was cleared land. The land, by reason of the overflow, was rendered unfit for agricultural purposes. The injury to the land was permanent.

The jury returned a verdict in favor of the appellees for \$4,000 damages, and, from a judgment for this sum, appellant prosecutes this appeal.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and Campbell & Suits, of Newport, for appellant. S. Brundidge, of Searcy, and Jno. W. & Jos. M. Stayton, of Newport, for appellees.

WOOD, J. (after stating the facts as above). [1] First. Witness Harris testified that prior to 1910 the land was good for agricultural purposes, but that since that time it was nonproductive by reason of the overflow from the water caused by a failure to leave sufficient openings in the embankment; that the drain tiles placed there by the appellant were not sufficient to carry off the water. On cross-examination he testified that his sister owned land similarly situated to the land owned by the appellees. He was asked: "Q. Do you know whether she is figuring on a lawsuit similar to this one?" Appellees objected to the question, and the objection was sustained. Appellant contends that this was error. There was no prejudicial error to appellant in the court's ruling. The witness

had already stated that the lands of his sister were similarly situated to that of the appellees. This revealed his relationship and any interest that he might have had affecting his credibility.

[2] Second. The appellant offered to prove by witness McLain as follows:

"Mr. Morris tried to rent me the lands and I didn't want to rent the lands; and he made me a proposition that if I would fence the land he would give me the use of it for one year. Well, then, later than that he was after me again about taking the place, and I wouldn't take it. And then he offered to give me the use of the place for two years to fence it up. And, of course, I refused that. I didn't consider it worth that. This was prior to 1910."

The court excluded the offered testimony and appellant assigns this as error, for which the judgment should be reversed. It was not shown when this alleged conversation between Morris and the witness took place, except that it was prior to 1910. How long prior to 1910, the appellant did not offer to show. For aught the record discloses, it may have been too remote to have had any probative force as to the value of the lands at the time the damage is alleged to have accrued. The conditions affecting value, at the time of this alleged occurrence between Morris and the witness, might have been entirely different.

[3] Moreover, it was hearsay and not competent to show what Morris had said in regard to the value of the lands prior to his death. Morris had died before the institution of this suit, and to attempt to prove his opinion as to the value of the land by the witness was but hearsay evidence.

[4] Moreover, the testimony, even if competent, did not tend to prove that the land had no agricultural value, and therefore it was not prejudicial to appellant to exclude it. So much of the offered evidence as tended to show the witness' own opinion as to the value of the land was covered by the testimony which was admitted without objection, for the witness stated further on in his testimony that the land "was very poor for agricultural purposes"; that he had never known a good crop raised on it, etc. The witness further stated "that prior to 1910, the cleared land and the uncleared land was worth \$10 an acre, and it was worth the same now."

[5] Third. The appellant contends that the verdict was excessive. There was testimony on behalf of the appellees tending to show that the land, before the obstruction and overflow caused by the appellant's failure to make sufficient openings in its embankment, was considered very valuable land; the uncleared or "woods" land being worth from \$25 to \$30 an acre, while the cleared land was worth all the way from \$50 to \$100 an acre. Several of the witnesses testified that it was worth from \$75 to \$100 an acre. While there was a sharp conflict in the testimony as to the value of the land and the

damages sustained, many of the witnesses on behalf of the appellant, testifying to the effect that the land was but of little value for agricultural purposes, still we are of the opinion that there was testimony to warrant the verdict. It was a question of fact for the jury, and we find no satisfactory basis in the evidence for disturbing the verdict as to the amount of the damages.

[6] Fourth. Appellant contends that the court erred in instructing the jury that the appellees could recover damages for a permanent injury to their lands, for the reason that the proof did not show that there was such an injury. The jury might have found from the testimony that the embankment, as constructed, would result in permanent injury to appellee's land. Before this embankment was built, the water had passed under a trestle 500 feet in length. This space was closed by the solid embankment, with the exception of two drain tiles 30 inches in diameter and placed above the natural level of the ground. The jury were warranted in finding from this that damage would necessarily result to the appellees' land by reason of the obstruction of the water, for the water could not flow out through the drain tile pipes until it had accumulated in a sufficient quantity to reach the mouth of these tiles, and that water that had before flowed through an open space of 500 feet would necessarily be obstructed when outlets of only 30 inches in diameter were provided for it, and consequently that same would be thrown back upon the appellees' land.

The case, on the facts, comes within the doctrine announced by this court in the recent case of *Railway Company v. Humphreys*, 107 Ark. 330, 155 S. W. 127, where all of our former cases upon the subject are cited. The question in that case was whether or not the statute of limitations was applicable to the facts, but the question of the measure of damages was necessarily involved; and the reasoning of the court in that case, in determining whether the damage was original, is applicable here in determining whether this obstruction was one that resulted in permanent injury to the appellees' land. There we held (quoting syllabus) that:

"When a railway company constructs a culvert so that damage to adjoining property by overflow must necessarily result, and the certainty, nature, and extent of the damage may be reasonably ascertained and estimated at the time of the construction of the culvert, then the damage is original and there can be but a single recovery."

Applying the same rule here, the jury were warranted in finding that the construction of the embankment in the manner indicated would necessarily result in a permanent damage to the appellees' land, which could be reasonably ascertained and estimated at the time the embankment was constructed.

[7] While the court, in the instruction, permitted the jury to take into consideration, in addition to the permanent injury, the

damages that had resulted on account of the loss of rents for certain years, the appellant was not prejudiced by this feature of the instruction, since the verdict of the jury was for "permanent damages" only.

Finding no error in the record, the judgment is correct, and it is therefore affirmed.

### CLABORN v. STATE. (No. 15.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

#### 1. WITNESSES (§ 293\*)—CONSTITUTIONAL AND STATUTORY PROVISIONS—SELF-INCRIMINATING TESTIMONY.

It is the policy of the law to protect all persons from criminal proceedings based upon their own evidence, unless voluntarily given, and such right is paramount to any public policy or necessity for punishing false swearing.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1009-1014; Dec. Dig. § 293.\*]

#### 2. PERJURY (§ 19\*)—INDICTMENT—VOLUNTARY CHARACTER OF TESTIMONY.

Under Const. art. 2, § 8, declaring that no person shall be compelled in any criminal case to be a witness against himself, an indictment for perjury for false swearing in a criminal proceeding pending before the grand jury against the one indicted was fatally defective, where it did not allege that accused voluntarily appeared before the grand jury to give the testimony upon which the indictment was predicated.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 65, 66, 70, 71; Dec. Dig. § 19.\*]

Appeal from Circuit Court, Sevier County; Jeff. T. Cowling, Judge.

Oscar Claborn was convicted of perjury, and he appeals. Reversed and remanded, with directions.

Appellant appeals from a judgment of conviction for the crime of perjury. The indictment, omitting the caption, is as follows:

"The said Oscar Claborn, in the county and state aforesaid, on the 27th day of January, 1914, on his examination as a witness before the grand jury, duly selected, impaneled, sworn, and charged, to inquire in and for the body of the county of Sevier, at the January, 1914, term of the circuit court of said county, to which said grand jury R. A. Gilliam was duly appointed foreman and duly authorized and empowered to administer oaths to witnesses before said grand jury; the said Oscar Claborn was duly sworn to testify the truth, the whole truth, and nothing but the truth, by the said R. A. Gilliam, as foreman of said grand jury, as aforesaid, on the examination of a certain matter and charge by the state of Arkansas against the said Oscar Claborn for carrying concealed weapons in the said county of Sevier on or about the 10th December, 1913, then pending before the grand jury aforesaid; the said Oscar Claborn feloniously, willfully, falsely, and corruptly testified that he did not have a pistol in his possession, on his person, nor on his saddle, or in his slicker at the dance given at the residence of George Priddy, in said county, on said date; the matter so testified to being material matter, and the said testimony being willfully and corruptly false, the said truth being that the said Oscar Claborn did have in his possession a pistol at said time and place, unlawfully against the peace and dignity of the state of Arkansas."

The appellant demurred to the indictment, on various grounds, among which is the following:

"11. That the indictment contains matter which is a legal defense and a bar to the prosecution in that the indictment states that the defendant Oscar Claborn was sworn to testify before the grand jury, on the examination of a certain matter, a charge of the state of Arkansas against himself, and that said testimony, if given by Oscar Claborn before said grand jury, cannot be used against him, and is a bar to the prosecution of a charge of perjury growing out of said evidence given by him."

The court overruled the demurrer, and appellant duly excepted to the ruling. He was tried and convicted, and alleges as the first ground of his motion for a new trial that the court erred in overruling the demurrer. The motion for a new trial was overruled, and appellant duly prosecutes this appeal.

Elmer J. Lundy, of Mena, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). Section 2286 of Kirby's Digest provides:

"A demurrer is proper \* \* \* Fifth, where the indictment contains matter which is a legal defense or bar to the prosecution."

Here the indictment shows that a charge by the state of Arkansas against Oscar Claborn was pending before the grand jury, "and that the said Oscar Claborn was duly sworn to testify the truth, etc., concerning such charge."

[1] Article 2, section 8, of our Constitution provides: "Nor shall any person be compelled in any criminal case to be a witness against himself." This language of our Constitution is similar to the language on this subject contained in the Fifth amendment to the Constitution of the United States. The Supreme Court of the United States, in *Counselman v. Hitchcock*, 142 U. S. 547-562, 12 Sup. Ct. 196, 198 (35 L. Ed. 1110), said:

"This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matter inquired of in the questions which he refused to answer, he himself was liable to prosecution under the act. The case before the grand jury was therefore a criminal case. \* \* \* The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

The court, after a review of the decisions of state courts construing similar provisions, held (quoting syllabus) that:

"It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his defense or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

See *State v. Quarles*, 13 Ark. 307; *United States v. Edgerton* (D. C.) 80 Fed. 374; *United States v. Bell* (C. C.) 81 Fed. 853.

In the latter case, the following language was used, which we approve, to wit:

"The right to protection is paramount to any public policy or necessity for punishing false swearing, and, like all other desirable ends in government and all other public policies, this must yield to a constitutional guaranty which protects the citizen against invasion of his privilege. The public policy of protecting him is as much cherished by English and American sentiment as is that which insists on the purity of oaths."

Even after an indictment is found, under our statute the person charged cannot be made a witness in the trial except at his own request. *Kirby's Digest*, § 3068. A confession of guilt cannot be used in evidence against a person charged with a crime unless it is first shown that such confession was freely and voluntarily made. See *Dewein v. State*, 170 S. W. 582. A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed. *Kirby's Digest*, § 2385.

A procedure compelling one to accuse or convict himself of crime is contrary to the genius of modern criminal jurisprudence, and harks back somewhat to the spirit and methods of the Spanish Inquisition. Our Constitution, statutes, and decisions show clearly that it is the policy of our laws to protect all persons from criminal proceedings of any character based upon evidence obtained from the persons themselves, unless such evidence has been freely and voluntarily given.

[2] An indictment for perjury, based upon alleged false swearing in a criminal proceeding pending before the grand jury against the person himself giving the alleged false testimony, is fatally defective, unless it alleges that the accused voluntarily appeared before the grand jury to give the testimony upon which the indictment for perjury is predicated. No such allegations are contained in the indictment under review, and it therefore fails to charge a public offense.

For the error of the court in overruling the demurrer, the judgment will be reversed, and the cause remanded, with directions to sustain the same.

#### LOCHRIDGE DRY GOODS CO. v. DANIELS TRANSFER CO. (No. 18.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

#### 1. JUSTICES OF THE PEACE (§§ 80, 174\*)—PLEADINGS—SUFFICIENCY OF ORAL PLEADINGS.

In proceedings before a justice of the peace, the pleadings may be oral, and no greater formality is required when the case reaches the circuit court on appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 806, 665-693; Dec. Dig. §§ 90, 174.\*]

#### 2. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—DEFENSE OF LIMITATIONS.

Though on an appeal to the circuit court from a justice court written pleadings were not required, a party wishing to rely on the defense of limitations was bound to specifically direct the court's attention to the fact that it pleaded the statute, in order that such plea might be available as a defense, and it was not sufficient to ask for a verdict in its favor.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

#### 3. APPEAL AND ERROR (§ 173\*)—REVIEW—QUESTIONS NOT RAISED BELOW.

Where the defense of limitations was not raised in the court below, it cannot be raised for the first time in the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1089, 1091-1098, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

#### 4. JUSTICES OF THE PEACE (§ 157\*)—APPEAL—AFFIDAVIT FOR APPEAL—WAIVER.

In a shipper's action before a justice of the peace for the value of sheeting which it directed a railroad company to deliver to T., but which the railroad company delivered to a transfer company authorized to receive shipments intended for T., or for the L. Company, against the railroad company, the transfer company, T., and the L. Company, the L. Company appeared before the justice of the peace, the case was tried on its merits, and judgment rendered against the railroad company. The shipper and the railroad company filed affidavits for appeal. In the circuit court, no motion to dismiss the appeal was filed, and no objection made to the jurisdiction of that court, and, all parties having appeared, the case was tried on the merits, and judgment was rendered in favor of the transfer company against the L. Company, to whom it claimed to have delivered the shipment. *Held*, that while the filing of an affidavit for an appeal is a prerequisite to the granting of an appeal by the justice, and where there is no waiver by the party against whom the appeal is taken the appeal should be dismissed on motion, the filing of an affidavit for appeal by the transfer company was waived by the L. Company by going to trial without objection, and after a trial on the merits it was too late to make the objection.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 534-542; Dec. Dig. § 157.\*]

#### 5. CARRIERS (§ 94\*)—MISDELIVERY OF SHIPMENTS—RECOVERY AGAINST PARTY RECEIVING SHIPMENT—EVIDENCE.

In a suit to recover the value of a shipment of sheeting which the shipper directed a railroad company to deliver to T., a merchant, but which it delivered to a transfer company authorized to receive shipments consigned to T., or the L. Company, another firm of merchants, evidence *held* sufficient to support a jury finding that the transfer company delivered the sheeting to the L. Company, and that the sheeting was used by it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

Appeal from Circuit Court, Polk County; Jeff. T. Cowling, Judge.

Action by the Ferguson-McKinney Dry Goods Company against W. W. Townsend and others, brought before a justice of the peace and tried de novo in the circuit court. From a judgment in favor of the defendant Daniels Transfer Company, the defendant Lochridge Dry Goods Company appeals. Affirmed.

The Ferguson-McKinney Dry Goods Company, a corporation of St. Louis, Mo., commenced this action before a justice of the peace against W. W. Townsend and the Kansas City Southern Railway Company to recover the value of a bale of sheeting. W. W. Townsend answered and denied liability and asked that Fred H. Daniels, doing business as the Daniels Transfer Company, be made a party defendant to the action, and that he have judgment against it if the plaintiff should recover judgment against him. The Daniels Transfer Company was accordingly made a party defendant, and subsequently the Lochridge Dry Goods Company was also made a party defendant. All of the parties appeared at the trial except the Kansas City Southern Railway Company, which made default. This fact is shown by the transcript of the justice of the peace. The justice's transcript also contains a recital as follows:

"This cause coming on to be heard on the 9th day of December, 1913, on the complaint of the plaintiff to recover \$73.35 alleged to be due on account for one bale of sheeting shipped by the plaintiffs from Laurel, Miss., to Mena, Ark., to the order of plaintiff, and which the plaintiff claims was delivered to W. W. Townsend, one of the parties defendant in this action. In the original suit the Daniels Transfer Company and the Kansas City Southern Railway Company were made defendants, and later Lochridge Dry Goods Company was made a defendant. All of the defendants except the Kansas City Southern Railway Company answered and were represented in court by counsel. This four-cornered case reminds us of the old game, 'Button, button, who's got the button?' Three of the four defendants appeared and each tried to escape liability for this elusive bale of sheeting; which was shipped by the plaintiff to itself."

The justice of the peace rendered a judgment in favor of the plaintiff against the Kansas City Southern Railway Company for \$73.35. The record shows that both the railway company and the appellant filed affidavits for appeal before the justice of the peace. The record does not show that any of the other parties defendant filed an affidavit for appeal. The case was tried de novo in the circuit court, and all the parties appeared, and the cause was tried on its merits.

The facts, briefly stated, are as follows: In November, 1910, the Ferguson-McKinney Dry Goods Company sold to W. W. Townsend, a merchant of Mena, Ark., two bales of sheeting. The bales of sheeting were shipped from the factory at Laurel, Miss., and were consigned to the Ferguson-McKinney Dry Goods Company at Mena. That company sent an order to the Kansas City Southern Railway Company to deliver the sheeting to W. W. Townsend. The Daniels Transfer Company operated a transfer line in the city of Mena and had authority from W. W. Townsend and from the Lochridge Dry Goods Company to receive at the railway station of the Kansas City Southern Railway Company all goods that were shipped to them and to deliver them at their respective places of busi-

ness in the city of Mena. The undisputed evidence shows that the Daniels Transfer Company received the bales of sheeting from the Kansas City Southern Railway Company and paid the freight therefor. It was the practice of the transfer company when goods were delivered to the merchant to have them check it and to collect the freight which the transfer company had already paid to the railway company. The merchant then kept the freight bill and presented it to the Ferguson-McKinney Dry Goods Company in order that it might receive a rebate on the freight from that company. The freight bill so paid was called an "expense bill." W. W. Townsend did not receive either bale of sheeting. Upon investigation afterwards it was discovered that one of these bales of sheeting had been delivered to the Lochridge Dry Goods Company, and the Lochridge Dry Goods Company turned the bale of sheeting over to the Daniels Transfer Company, together with the expense bill, and the transfer company in turn delivered the bale of sheeting to W. W. Townsend. The other bale of sheeting was not found. The evidence shows that it was not received by W. W. Townsend and the evidence on the part of the Lochridge Dry Goods Company shows that it was not received by that company. The freight or expense bill for the lost bale of sheeting was found in the possession of the Lochridge Dry Goods Company, and the undisputed evidence shows that it was the practice of the transfer company, when it delivered goods to Townsend or to the Lochridge Dry Goods Company, to also turn over to it the freight bill or expense bill. The court directed the jury to return a verdict in favor of the Daniels Transfer Company against the Lochridge Dry Goods Company. Other facts will be referred to in the opinion. From the judgment rendered, the Lochridge Dry Goods Company has duly prosecuted an appeal to this court.

J. I. Alley, of Mena, for appellant. W. M. Pipkin, of Mena, for appellee.

HART, J. (after stating the facts as above). [1-3] It is contended by counsel for appellant that the claim of the Daniels Transfer Company against the Lochridge Dry Goods Company is barred by the statute of limitations. No written pleadings were filed either in the justice court or the circuit court. It is well settled in this state that in proceedings before a justice of the peace the pleading may be oral and no greater formality is required when the case reaches the circuit court on appeal. When the case reached the circuit court, the defendant may have indicated orally what his plea was; but there is nothing in the record to show that appellant pleaded the statute of limitations. The fact that it asked for a verdict in its favor was not equivalent to pleading the statute of limitations. The court's attention should have been specifically directed to the fact

that appellant pleaded the statute of limitations in order that that plea might be available to the defendant as a defense to the action. This was not done, and it is settled that where the defense of the statute of limitations was not raised in the court below it cannot be raised for the first time in the Supreme Court. *Mt. Nebo Anthracite Coal Co. v. Martin*, 86 Ark. 608, 111 S. W. 1002, 112 S. W. 882.

[4] Again, it is contended by counsel for appellant that no appeal was taken by the Daniels Transfer Company from the judgment of the justice of the peace, and that therefore the circuit court acquired no jurisdiction to render judgment in favor of the Daniels Transfer Company against the Lochridge Dry Goods Company. It is true we have held that the filing of an affidavit is a prerequisite to the granting of an appeal by the justice, and that where there was no showing that it was waived by the party against whom the appeal is taken the circuit court should, on motion, dismiss the appeal. *Billingsley v. Adams*, 102 Ark. 511, 145 S. W. 190; *Merrill v. Manees*, 19 Ark. 647, and cases cited.

In the case before us no motion was made to dismiss the appeal because no affidavit for appeal was filed by the Daniels Transfer Company and no objection was made to the jurisdiction of the circuit court. All of the parties to the action appeared in that court and the case was tried on its merits. Therefore it may be considered that no affidavit for appeal was necessary on the part of the Daniels Transfer Company. It was waived by the Lochridge Dry Goods Company going to trial in the circuit court without any objections on that account.

Moreover, the transcript of the justice of the peace shows that the Lochridge Dry Goods Company was made a party defendant to the action instituted by the Ferguson-McKinney Dry Goods Company. At whose instance it was made a party is not shown. But the record does show that it appeared before the justice of the peace and that the case was tried on its merits. The record also shows that the Lochridge Dry Goods Company and the Daniels Transfer Company both appeared in the circuit court and that the case was there tried on its merits. The Ferguson-McKinney Dry Goods Company and the Kansas City Southern Railway Company against which judgment was rendered both filed affidavits for appeal. The justice of the peace had jurisdiction of the parties and of the subject-matter of the suit. The object of the appeal was to lodge the case in the circuit court for a trial de novo. As we have already seen, all of the parties interested appeared in the circuit court, and the case was there tried on its merits, without any objection being made as to the form or

method of procedure, and it is too late now to make such objection.

[5] The only contention made by the appellant in the court below was that there was not sufficient evidence to warrant a verdict against it. Appellant asked the circuit court to direct a verdict in its favor. This the court refused to do. No objection was made by the appellant to the instructions given by the court, and no exceptions were saved thereto. Therefore the only question for our determination on this appeal is whether or not there was sufficient evidence to warrant the verdict against appellant.

The undisputed evidence shows that the Ferguson-McKinney Dry Goods Company sold the bale of sheeting in question to W. W. Townsend, and shipped it to Mena over the line of the Kansas City Southern Railway Company. The Ferguson-McKinney Dry Goods Company consigned the goods to itself at Mena, Ark., and gave an order on the Kansas City Southern Railway Company for the delivery of the goods to Townsend. The Daniels Transfer Company had general authority to receive from the railway company all goods to be delivered to either Townsend or to the Lochridge Dry Goods Company. The undisputed evidence shows that the Daniels Transfer Company received the bale of sheeting in question and paid the freight thereon. It was the custom of the transfer company and their practice to deliver the goods to the merchants who had purchased them and at the same time to check up the goods so delivered with the freight bill and to deliver the freight bill, or expense bill as they called it, to the merchant who received the goods. Evidence was adduced by Townsend and by the Lochridge Dry Goods Company to show that they did not receive the bale of sheeting in question. But, as we have already seen, the testimony shows that the transfer company always delivered the freight bill or expense bill at the time the goods were delivered to the merchant. The expense bill for the bale of sheeting in question was afterwards found in the possession of the Lochridge Dry Goods Company. It was also shown that goods which were not ordered by Townsend or by the Lochridge Dry Goods Company were sometimes received by them, and that sometimes the wholesale merchant would substitute goods. The evidence also shows that another bale of sheeting which was shipped at the same time to Townsend by the Ferguson-McKinney Dry Goods Company was received by the Lochridge Dry Goods Company. Under these circumstances, we think there was sufficient proof to warrant the jury in finding that the bale of sheeting in question was received by the Lochridge Dry Goods Company and was used by it.

Therefore the judgment will be affirmed.

**POLK et al. v. SPARKS.** (No. 17.)  
(Supreme Court of Arkansas. Nov. 30, 1914.)  
**JUSTICES OF THE PEACE (§ 164\*)—APPEAL AND ERROR.**

An appeal will not be dismissed because the justice's transcript, required by Kirby's Dig. § 4670, was not filed on the first day of the next term of the circuit court, where less than 10 days intervened between the granting of the appeal and the commencement of the term, so that the case could not stand for trial in that term, as provided for by section 4578, and Acts 1911, p. 112, § 7.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

Appeal from Circuit Court, Clay County;  
W. J. Driver, Judge.

Action by W. D. Polk and others against J. M. Sparks. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. D. Polk, J. D. Polk, and S. P. Lindsey, pro se. J. S. Jordan, of Corning, for appellee.

HART, J. Appellee executed a mortgage to appellants on certain personal property to secure an indebtedness for \$250, due by him to them. This suit is an action of replevin by appellants against appellee to recover the property embraced in the mortgage. Appellant recovered judgment before the justice of the peace, and appellee appealed to the First division of the circuit court of Clay county for the Western district. The appeal was granted on the 27th day of March, 1912, and the First division of the circuit court of Clay county for the Western district convened on the 1st day of April, 1912, three days afterwards. The justice of the peace filed the transcript in the office of the clerk of the circuit court on the 28th of September, 1912. The next term of the First division of the circuit court after the one that convened on the 1st day of April, 1912, convened on the 28th day of October, 1912. Appellants, who were plaintiffs in the court below, filed their motion to dismiss the appeal, because the transcript of the justice of the peace was not filed in circuit court before it convened on the 1st day of April, 1912. The court overruled the motion, and the case was tried anew in the circuit court. There was a verdict and judgment in favor of appellee and, to reverse that judgment, appellants have prosecuted this appeal.

The sole ground relied upon by appellants for the reversal of the judgment is that the court erred in refusing to sustain their motion to dismiss the appeal. They rely on section 4670 of Kirby's Digest, which provides that on or before the first day of the circuit court, next after the appeal shall have been allowed, the justice shall file in the office of the clerk of such court a transcript of all the entries made in his docket relating to the case, together with all the process and all the papers relating to such suit.

It will be noted, however, that section 4678 of Kirby's Digest provides that all appeals allowed 10 days before the first day of the term of the circuit court next after the appeal is allowed shall be determined at such term, unless continued for cause.

Clay county is in the Second judicial circuit, and there is an act which regulates the practice in such circuit. Section 7 of such act provides that all appeals to the circuit court in said circuit shall stand for trial, in the proper division, 10 days after such appeal shall have been perfected. See General Acts of 1911, p. 112. It will be noticed that section 7 of the act regulating the practice in the Second judicial district is substantially the same as section 4678 of Kirby's Digest.

This court, in passing upon section 4670 of Kirby's Digest, has held that, when an affidavit for appeal from the judgment of a justice of the peace is filed, the judgment superseded, and the appeal is not perfected until the time prescribed by the statute has expired and a satisfactory excuse is not given for the delay, the judgment of the justice may be affirmed by the circuit court. *Hart v. Lequeu*, 161 S. W. 201, and cases cited; *Wilson v. Stark*, 48 Ark. 73, 2 S. W. 346.

It will be noticed that the first term of the circuit court of Clay county for the Western district convened three days after the appeal was granted by the justice of the peace. Under the practice act for that circuit, as well as section 4678 of Kirby's Digest, the case would not stand for trial at that term of the court, because 10 days did not elapse after the appeal was granted before the first term of the circuit court convened. When all the sections bearing on the question are considered together, it is evident that they mean that the circuit court, in a case where the appeal has been granted and 10 days has elapsed thereafter before the next term of the circuit court begins, shall, on motion, dismiss the appeal, unless a satisfactory excuse is given for the delay. But they do not mean that the circuit court shall dismiss the appeal when it is less than 10 days before the court meets, if the case does not stand for trial at that term of the court. Of course the appeal may be perfected and, by consent of the parties, the court may have jurisdiction to try the case at a term of the court where the appeal was taken less than 10 days before the term commenced, but in the absence of such consent the case would not stand for trial at that term of the court, and the court would not err in refusing to dismiss the appeal because it was not filed before the commencement of the term at which the case would not stand for trial.

In the case of *Vallens v. Hopkins*, 157 Ill. 267, 41 N. E. 632, the court held that under section 68, chapter 79, of the Revised Stat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

utes, no jurisdiction to proceed at the term is obtained by an appellate court of an appeal from a justices' judgment taken by filing the bond with the justice, unless the transcript is filed 10 days before the term begins. The Illinois statute is in all essential respects similar to section 4678 of Kirby's Digest and section 7 of the Acts of 1911, above referred to. In the Illinois case, the court quoted with approval from *Hayward v. Ramsey*, 74 Ill. 372, as follows:

"The language of this section so plainly excludes a trial of such an appeal perfected before a justice of the peace, unless there has intervened at least 10 days before the first day of the term to which the appeal is taken, that we are unable to see how any one could mistake its meaning. \* \* \* Although the parties are bound to follow their case to the circuit court where the appeal is perfected before the justice, without further notice, still there must intervene 10 days from the perfecting of the appeal until the first day of the next term of the appellate court."

We are of the opinion that the court did not err in refusing to dismiss the appeal because it was not perfected before the commencement of the term of the court at which it did not and could not stand for trial under the statute. Appellee perfected his appeal from the justice court in time to have the case noted for trial at the term at which it stood for trial.

Therefore the judgment will be affirmed.

# JACK BAYOU DRAINAGE DIST. v. ST. LOUIS, I. M. & S. RY. CO. (No. 62.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

## 1. DRAINS (§ 14\*)—DRAINAGE DISTRICT—ESTABLISHMENT—APPEAL—AFFIDAVIT.

Where, after the establishment of a drainage district by the county court, remonstrant filed an affidavit for appeal, stating that it was aggrieved by an order overruling its remonstrance, and the exceptions to the report of the commissioners assessing benefits against it, etc., and the record also showed that, after the judgment establishing the district was made, and on the same day, an appeal was prayed and granted, an objection that the circuit court was without jurisdiction because of want of an affidavit for, and an order granting, an appeal was unsustainable.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.\*]

## 2. DRAINS (§ 14\*)—DRAINAGE DISTRICT—ESTABLISHMENT—COUNTY COURT—JURISDICTION—STATUTES.

Laws 1909, p. 832, § 2, as amended by Laws 1911, p. 195, relating to drainage districts, provides that if, on a hearing, a petition is presented to the county court, signed by a majority, either in number, acreage, or value, of the holders of real property within the proposed district, praying that the improvement be made, it shall be the duty of the court to investigate and to establish the district, if it is of the opinion that the establishment will be to the advantage of real property therein. *Held* that, while such provision vests great power in the court, yet, in the face of a failure of petitioners to secure the signatures of a majority, either in number, acreage, or value, of the holders of real property in the proposed district the district should not be

established, unless the court is certain that its establishment will bring great benefit to the land therein.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.\*]

## 3. DRAINS (§ 14\*)—DRAINAGE DISTRICT—ESTABLISHMENT—APPEAL.

On appeal from a judgment establishing a drainage district, it was within the trial court's discretion, after the matter had been thoroughly developed, to refuse to hear further testimony.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.\*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Proceeding to establish the Jack Bayou Drainage District, to which the St. Louis, Iron Mountain & Southern Railway Company remonstrated. A judgment of the county court establishing the District was reversed on appeal of the Railroad Company to the circuit court, and the District appeals. Affirmed.

The county court of Lonoke county formed certain lands therein into a drainage district upon the petition of the property owners. There were several remonstrances filed to the granting of the petition. The St. Louis, Iron Mountain & Southern Railway Company, among others, remonstrated against the establishment of the district. Upon the hearing the court found in favor of its establishment, and from this finding the said railway company prayed and was granted an appeal by the county court, as shown by the amended record herein.

A great deal of testimony was introduced at the trial in the circuit court, and a great majority of the witnesses testifying stated that the benefits to be derived from the establishment of the district would not be in anything like fair proportion to the expense of the cost thereof. Some of them testified that the lands would derive no benefit whatever from the drainage; that most of them were of the pipe clay character that would not produce anything if they could be cultivated. Two of the commissioners testified that the improvement would greatly benefit all the lands in the district, and some others were also of that opinion. It was conceded that the petition did not contain a majority of the landowners, either in number, acreage, or value.

The court was asked to, and did, make the following findings of fact:

"First. Is it the opinion of the court that it would be to the best interest of owners of real property within the proposed district that the same become a drainage district? The court cannot find the facts as set out in the first clause, but finds that it would be a great benefit to some of them.

"Second. Is it the opinion of the court that the establishment of the proposed Jack Bayou drainage district would be to the advantage of the owners of real property therein? The court makes the same finding to this as the first.

"Third. Is it the opinion of the court that the cost of the proposed drainage is reasonable?

The court cannot find the facts as set out in third clause. \* \* \*

"Fifth. Is it the opinion of the court that the lands embraced in the proposed drainage district are in need of drainage? The court finds that some of the lands in the proposed district need draining, but a great majority of the landowners of the district are opposed to the proposed drainage, both in number and amounts of land owned by them, and it would therefore be unjust to force it upon them."

The court reversed the judgment of the county court establishing the district, and dismissed the petition, and from this judgment this appeal is prosecuted.

Trimble & Trimble, of Lonoke, and J. A. Watkins, of Little Rock, for appellant. E. B. Kinsworthy, R. E. Wiley, and T. D. Crawford, all of Little Rock, and Thos. B. Pryor, of Ft. Smith, for appellee.

KIRBY, J. (after stating the facts as above). The proceedings for the establishment of this drainage district were had under the provisions of the act of the Legislature of 1909, as amended by the act of 1911 (Acts 1909, p. 829; Acts 1911, p. 193).

[1] Appellant's first contention is that the circuit court erred in not dismissing the appeal from the county court for want of jurisdiction, claiming no affidavit had been made therefor and no order granting the appeal. The amended record shows, however, that an affidavit was made by the railroad company for appeal, stating it was aggrieved by the order of the court overruling its remonstrance and exceptions to the report of the commissioners assessing the benefits against it, etc., and the record also shows, after the judgment establishing the district was made, and on the same day, that an appeal was prayed and granted. The contention is therefore without merit, and the circuit court had jurisdiction of the cause.

[2] It is next contended that the court erred in stating in the discussion with the attorneys, after overruling the motion of the drainage district to dismiss the appeal, that plaintiff would have to show that a majority of residents and owners representing a majority of the acreage was in favor of the district; otherwise judgment would be in favor of the remonstrants and the finding of the county court reversed. It is insisted now that the trial court did not correctly understand the law relating to the establishment of drainage districts, as shown by said announcement, and therefore erred in its findings of fact and judgment thereon. It calls attention to section 2 of the Acts of 1909 as amended by the Acts of 1911 in support of this contention, which provides:

"If upon the hearing provided for in the foregoing section, the petition is presented to the county court signed by a majority, either in numbers or in acreage or in value of the holders of real property within the proposed district, praying that the improvement be made, \* \* \* it shall be the duty of the county court to investigate as provided in the preceding section and to establish said district if it is of the opinion

that the establishment thereof will be to the advantage \* \* \* of real property therein."

It is true, under the provisions of this law, that the county court had authority to investigate the conditions and to establish the district prayed for and create the improvement, if it was of opinion that the establishment thereof would have been to the advantage of the owners of real property therein. And while it is also true that the circuit court found that the improvement would be of great benefit to the owners of some of the real property within the district, and that some of the lands were in need of drainage, it found further that the cost of the proposed drainage district was not reasonable, that a great majority of the landowners of the district, both in number and amount of land owned, were opposed to it, and that the establishment of the district would be unjust to them, and reversed the judgment of the county court. The matter was for trial anew in the circuit court, which, of course, had the same power to establish the district as the county court had. This court said, relative to the exercise of the power given to establish a drainage district when not petitioned for by the majority in numbers, ownership, or acreage of the lands proposed to be included, in *Burton v. Chicago Mill & Lbr. Co.*, 106 Ark. 304, 153 S. W. 117:

"This is certainly a very great power vested in the court, and when exercised in the face of the failure of petitioners to secure the signatures of a majority either in number, or acreage, or value, there should be no uncertainty about it being to the advantage of the landowners; and under such circumstances an uncertainty should be resolved in favor of the owners of the property to be assessed, upon whose shoulders the burden of the improvement will rest."

And this statement is now reaffirmed.

Without doubt, great uncertainty existed about the establishment of the district being to the advantage of the landowners, which the court properly resolved in favor of the owners of the property to be assessed and against the establishment of the district proposed.

There was much testimony showing that a great portion of the lands included in the district were composed of, or underlaid with, a whitish pipe clay and so unfertile as to be of little use for agricultural purposes. The evidence is amply sufficient to sustain the finding and judgment of the circuit court.

[3] Neither is there any merit in appellant's contention that the court erred in announcing that the case was sufficiently developed and in declining to hear more testimony. Much testimony had already been introduced disclosing fully the condition, and, after the matter had been so thoroughly developed, it was within the discretion of the trial judge to decline to hear further testimony. It was a public matter being investigated, and after the great amount of testimony was heard that the record shows to have been introduced, other testimony would

have necessarily been along the same lines, and the court was not required, in the exercise of a sound discretion, to continue the investigation until every landowner in the district could be heard.

We find no prejudicial error in the record, and the judgment is affirmed.

## ST. LOUIS, I. M. & S. RY. CO. v. MIDDLETON. (No. 54.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

### 1. APPEAL AND ERROR (§ 1062\*)—PREJUDICIAL ERROR—INSTRUCTIONS.

Where, in an action for personal injury, the court over objection submitted three grounds of negligence, if testimony was wanting as to any one of them, it was prejudicial error, as it cannot be told on which act the verdict was based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

### 2. TRIAL (§ 141\*)—ISSUES—SUBMISSION TO JURY—PREJUDICIAL ERROR.

In an action for personal injury, where there was no evidence of negligence of the employer in failing to furnish a helper, it was error to submit that issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.\*]

### 3. MASTER AND SERVANT (§ 213\*)—INJURY TO SERVANT—RAILROADS—SKILLED WORKMEN—ASSUMED RISK.

Where a skilled machinist desiring to face the other side of a heavy rod brass of an engine endeavored to turn it around and put it back in the jaws which held it in place in the lathe, without calling for help, he assumed the risk of injury by having it fall on his finger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.\*]

### 4. MASTER AND SERVANT (§§ 286, 288\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—SUBMISSION TO JURY.

In an action for personal injury from failure to furnish a safe place to work, evidence held to warrant a submission of the master's negligence and the servant's assumption of risk to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1068-1088; Dec. Dig. §§ 286, 288.\*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by Mrs. M. J. Middleton, administratrix of William Middleton, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. B. Kinsworthy, R. E. Wiley, and T. D. Crawford, all of Little Rock, for appellant. Manning, Emerson & Morris, of Little Rock, for appellee.

McCULLOCH, C. J. This is an action against the railway company to recover damages for personal injuries alleged to have been sustained by plaintiff's intestate while working in the shops of defendant in Ar-

genta. Deceased, William Middleton, was a machinist, and while working at one of the machines in the shop, handling a heavy metal appliance of a locomotive engine which he was repairing, it fell on his hand and mashed the flesh from one of his fingers. Blood poisoning resulted from the injury, and the injured man died from it. The piece of machinery he was working on was a part of an engine used by the railway company in interstate commerce, and the action is based upon the federal statute which provides for compensation for employes of common carriers who are injured while engaged in interstate commerce. The appellant concedes that, under the facts of the case, the deceased was employed in interstate commerce, and that if there is any liability at all it falls within the terms of the federal statute.

Deceased was an experienced machinist, having served an apprenticeship of several years, and when he received his injury had been working in the shops as a fully equipped machinist for six or eight months. He worked under a foreman of the department named Harris, and was accustomed to working at any machine to which he was assigned. He had worked at the particular machine where he was injured several times before this occasion. The machine he was working at was a 36-inch turning lathe, and he was engaged in boring a heavy metal appliance called the rod brass of an engine. This appliance weighed from 100 to 125 pounds, and was placed in the lathe for the purpose of boring a hole in it to fit the pin, and face off the side. It was held in place in the lathe by three jaws, which were tightened up by means of a screw and nut. The job was what was termed a rush order, which we understand to mean that it was work to be done, not necessarily with special haste, but that it was to have precedence over other work. Another man was on the job and had placed the brass in the lathe, when he was called off, and Middleton was assigned to complete the job. He went to work at it and worked there for a period of time, when he completed one side of it, and it became necessary to loosen up the jaws, remove the brass from the lathe, and turn it around, and put it back in the lathe so as to face the other side. He removed it from the lathe and, while attempting to put it back, after having turned it around, it slipped out of the jaws and, when it fell to the platform on which the machine rested, it struck one of his forefingers and mashed off some of the flesh. The only witness who stood near Middleton, and was able to describe the way in which the injury occurred, says that Middleton had taken out the brass and turned it around and put it back in position, and was holding it there in place with one hand while attempting to screw down the nut, so as to tighten the jaws, with his other hand,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the brass appeared to slip out of the jaws and fall.

There are three allegations of negligence in the complaint: One that the employer failed to furnish sufficient helpers to the mechanics, and particularly that no helper was furnished to Middleton to aid him in handling the brass; next, that the jaws of the lathe were permitted to become worn smooth so that they would not hold the piece of brass, but would allow the same to slip out; and, third, that shavings and dirt were allowed to accumulate around the screw with which the jaws of the lathe were tightened, so that when Middleton attempted to screw down the nut it would not work and tighten the jaws, and that Middleton was thus misled into believing that the nut had gone down far enough to tighten the jaws, whereas it had been retarded and stopped by the dirt and metal shavings around the screw. The plaintiff was awarded damages by the verdict of the jury, and the defendant has appealed.

The case was submitted to the jury on an instruction with respect to the acts of negligence named in the complaint in failing to furnish sufficient help, and also in failing to exercise care in furnishing a safe place to work, in that the jaws were allowed to get smooth and out of repair, and that the shavings and dirt were allowed to accumulate around the screw.

[1] It is insisted by counsel for defendant that, according to the undisputed evidence, there was no negligence of the employer in any of the particulars named, and that, even if there was, Middleton assumed the risk of the danger. Inasmuch as the court, over the objection of the appellant, submitted to the jury for consideration all of the alleged acts of negligence, if it be found that testimony was wanting with respect to any of them then the error of the court was prejudicial, and calls for a reversal of the case, for we have no means of determining which one of the acts of negligence the verdict of the jury was based upon.

[2] After a careful analysis of the testimony in the case, we are of the opinion that there was no evidence sufficient to warrant a submission of the alleged act of negligence of the employer in failing to furnish a helper, and that the court erred in submitting that issue to the jury.

[3] We are also of the opinion that, even if there had been evidence on that issue, the deceased assumed the risk of the danger and cannot recover. The testimony is conflicting as to the number of helpers furnished in that department, and whether the number furnished was sufficient, but we do not regard that point as material. In doing the work assigned to him on this particular occasion, Middleton did not need help, except when it came time for him to shift the brass piece in the lathe. He worked on it

for a considerable time, boring the hole for the pin and facing the surface of the brass, and when it became necessary to change it he needed help to lift it out of the lathe and put it back. It was not necessary, nor, according to the testimony, was it usual, for a helper to stand in waiting when not needed, and from this state of facts it necessarily follows that it was the duty of Middleton to seek help, or call on his foreman for it, when he needed it. The testimony discloses no competent evidence to establish the fact that he called on the foreman for any help. The only testimony on the subject is that of two witnesses, one of whom was a brother of Middleton, who was also a machinist in the shop; and these witnesses testified, over the objection of defendant's counsel, that Middleton spoke to his brother about needing help and that his brother told him to go to see Harris, the foreman, about it, and that they (the witnesses) saw him go over to Harris in another part of the room, but they could not hear what was said between the two. Harris denied that deceased had any conversation with him at all about help. The plaintiff sought to discredit the testimony of Harris by showing contradictory statements, but if it be conceded that Harris' testimony was so discredited that the jury had the right to disregard it, the record is still left without any affirmative testimony to the effect that deceased ever called upon Harris for help, or communicated to him the necessity for the services of a helper at that time. It is purely a matter of conjecture, too vague to base a verdict upon, that deceased when he went across the room made a request upon Harris for help. If the statements of deceased to his brother are admissible for any purpose, they are certainly not admissible to establish the independent fact that he called upon Harris for help. In addition to that, we are, as before stated, convinced that, under the law, even if deceased called upon Harris for help, which was denied, he assumed the risk by proceeding with the work of lifting the metal piece out of the lathe. It must be remembered that he was a skilled workman and had worked several times at this particular machine. He knew the weight of the metal piece and he knew his own strength and capacity for handling it. Those matters were entirely within his own knowledge, more so than within the knowledge of the foreman. He was not, according to the testimony, compelled to proceed with his work, but had the right to wait for a helper when he needed one. Therefore, if he was refused help and proceeded with the work of attempting to handle the heavy piece of metal without help, he assumed the risk to himself and cannot complain. That he appreciated the danger of handling the heavy piece of metal by his own effort, and without help, is too plain for controversy. This, of course, leaves

out of the question the act of negligence of the master in permitting the lathe to get out of repair and become unfit for reasonably safe use in doing that work. Of course, if there was negligence in that respect, it presents another phase of the case upon which a recovery may be based. But, so far as the mere failure to furnish help in lifting the piece out of the lathe, deceased assumed the risk by attempting to proceed without the assistance of a helper. This is so because, as we have already said, he was a skilled machinist, was fully advised as to the size and weight of the piece to be removed, and knew of his own strength and capacity to handle it.

[4] So far as the issue concerning the alleged act of negligence of the master in allowing the jaws of the lathe to become smooth, so that the heavy piece of metal was likely to slip while the screws were being drawn, we think there was sufficient evidence to warrant a submission to the jury, both as to the act of negligence and the question as to assumption of risk. Witnesses testified that the jaws were made with a rough surface, having ridges, so that heavy pieces of metal would not slip while being put into the lathe or taken out, and that the jaws had become smooth. Middleton and the other machinists were shifted about frequently from one machine to another and it was not the duty of each of them to see that every machine in the shop, or any one of them so far as that is concerned, was kept in repair. As a matter of fact, the testimony shows that Middleton did not work regularly at this machine, but that there was another man who worked regularly there, Middleton only being substituted occasionally. When he was called to finish up the job at this machine, the piece of metal was already in the lathe, and he had no opportunity at that time to discover whether or not the jaws of the lathe were in reasonably safe condition. It is true he might have examined and discovered the condition when he lifted the piece out of the lathe, but he was not bound to inspect the machine, but was only held to ordinary care to take notice of obvious dangers. And it was a question for the jury to determine whether he was guilty of contributory negligence in proceeding with his work without discovering the condition of the jaws, or whether he assumed the risk by proceeding after he discovered their condition. We cannot say as a matter of law that the danger from proceeding with the work was so obvious that Middleton is deemed to have assumed the risk, even if he did observe the condition of the appliance. We are of the opinion, therefore, that that question presented an issue for submission to the jury.

It is not so clear that the allegation of negligence with respect to allowing to be-

come clogged the screws which were used in tightening the jaws of the lathe is supported by evidence sufficient to warrant its submission to the jury. There is sufficient evidence, it is true, that the screws were clogged up with metal shavings, which probably prevented the tightening of the jaws, but it appears from the testimony of witnesses, as we interpret it, that it is the duty of the machinist while operating the machine to see to freeing the screws from such obstacles, inasmuch as the screws were liable to be clogged up at any time by the shavings falling from the metal as the work proceeded. The testimony is that it was customary to strike the lathe heavily with a hammer from time to time so as to jar the shavings out, and cause them to fall from around the screws. Now, if it be true, as that testimony tends to show, that it was the duty of Middleton himself to see that the screws were kept free from such obstacles, then it follows that an act of negligence on the part of the master or fellow servant cannot be predicated upon the presence of such obstacles around the screws. These observations concerning this branch of the case are thrown out for guidance in another trial of the case, when this branch of it may be more clearly and definitely explained in the testimony.

For the error of the court in submitting the issue of negligence of the defendant's foreman in failing to furnish a helper, the judgment is reversed, and the cause is remanded for a new trial.

STATE ex rel. NORWOOD, Atty. Gen., v. NEW YORK LIFE INS. CO. (No. 55.)†

(Supreme Court of Arkansas. Dec. 14, 1914.)

1. CONSTITUTIONAL LAW (§§ 13, 14, 15\*)—RULES OF CONSTRUCTION.

In construing a Constitution, unambiguous words need no construction, words must be given their natural meaning, the provisions under consideration must be construed with reference to every other provision, and the intent of the framers gathered both from the letter and the spirit of the instrument is the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9-11; Dec. Dig. §§ 13, 14, 15.\*]

2. TAXATION (§ 193\*)—EXEMPTION—CONSTITUTIONAL PROVISION.

In Const. 1868, art. 10, § 17, providing that the General Assembly shall tax all privileges and occupations that are of no real use to society, and that all others shall be exempt, the exemption of useful privileges is as express and binding as the right to tax the useless one.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.\*]

3. TAXATION (§ 193\*)—EXEMPTION—"PRIVILEGE."

A franchise to exist as a corporation and the right of a foreign corporation to do business within the state are privileges within provisions of Const. art. 10, § 17; since they are rights peculiar to the persons or classes on whom they

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For modification of opinion, see 173 S. W. —.

are conferred, and are not possessed by others (citing Words and Phrases, "Privilege").

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.\*]

**4. TAXATION (§ 193\*)—EXEMPTION—CONSTITUTIONAL PROVISION—CONSTRUCTION—"PURSUIT"—"OCCUPATION"—"PRIVILEGE."**

The words "pursuit" and "occupation," as used in Const. 1868, art. 10, § 17, exempting from taxation privileges, pursuits, and occupations that are of use, are synonymous with each other, and denote the business, vocation, employment, calling, or trade of individuals, but the word "privilege" is not synonymous with them, and is not to be construed as limited to privileges conferred on individuals; the doctrine of ejusdem generis not applying in such a case (citing Words and Phrases, "Privilege." See, also, Words and Phrases, Occupation; Pursuit).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.\*]

**5. TAXATION (§ 193\*)—EXEMPTION—CONSTITUTIONAL PROVISIONS.**

The provisions of other Constitutions of the state empowering the General Assembly to tax hawkers, peddlers, ferries, exhibitions, and privileges does not indicate that the term "privilege," in Const. 1868, art. 10, § 17, was not intended to include the right of a foreign corporation to do business within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.\*]

**6. CORPORATIONS (§ 636\*)—FOREIGN CORPORATIONS—RIGHT TO ENTER STATE.**

In the absence of a constitutional limitation or inhibition, the Legislature has supreme power to grant or withhold from foreign corporations the privilege of exercising their corporate powers within the state, and can exclude them entirely or admit them upon such terms as they deem proper.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. § 636.\*]

**7. TAXATION (§ 193\*)—EXEMPTIONS—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.**

Const. 1868, art. 10, § 17, exempting useful privileges from taxation, when construed in the light of the circumstances under which it was adopted, at a time when the industry of the state was disorganized by the war, and foreign capital was needed to rebuild it, was intended to exempt from taxation the privilege of a foreign corporation to do business within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.\*]

**8. TAXATION (§ 230\*)—EXEMPTIONS—CONSTITUTIONAL PROVISIONS—INSURANCE.**

The right of a foreign insurance company to do business within the state is a privilege that is of real use to society, so as to be exempt from taxation under Const. 1868, art. 10, § 17.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 370; Dec. Dig. § 230.\*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by the State, on the relation of Hal Norwood, Attorney General, against the New York Life Insurance Company to recover certain taxes. Judgment for the defendant, and the relator appeals. Affirmed.

Wm. L. Moose, Atty. Gen., Jno. P. Streepey, Asst. Atty. Gen., and A. W. Dobyns, W. G. Riddick, and Wm. H. Rector, all of Little Rock, for appellant. Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, for appellee.

WOOD, J. This suit was brought by the Attorney General, on behalf of the state, to recover of appellee certain excise taxes alleged to be due under the act of April 25, 1873 (Laws 1873, p. 248), and certain property taxes alleged to be due under the act of February 27, 1875 (Laws 1875, p. 190). The Attorney General in his brief contends here that the act of 1875, under which he seeks to recover property taxes, is unconstitutional and void, and he asks only for a decree recovering the excise taxes alleged to be due under the act of 1873, which is as follows:

"It shall be the duty of every company or association of another state, authorized to transact business in this state, to make report to the auditor in the month of January of each year, under oath of the president, secretary or agent thereof, showing the entire amount of premiums of every character or description received by said company or association in this state during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits or any other substitute for money, and pay into the state treasury a tax of three per centum upon said premiums, and the auditor shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury." Kirby's Dig. § 4365.

Article 10, § 17, of the Constitution of 1868, under which the act was passed, provides as follows:

"The General Assembly shall tax all privileges, pursuits and occupations that are of no real use to society; all others shall be exempt, and the money thus raised shall be paid into the treasury."

[1] In *State v. Martin*, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153, we said:

"We must keep to the front certain familiar, but unvarying, rules when we come to interpret the provisions of any section of a Constitution: (1) Unambiguous words need no interpretation. (2) Where construction is necessary, words must be given their obvious and natural meaning. (3) The words or provisions under consideration must be construed with reference to every other provision, so as to preserve harmony in the whole instrument. (4) The intent of the framers, gathered from both the letter and spirit of the instrument, is the law."

[2] Applying these familiar rules in the construction of the section of the Constitution under consideration, there can be no doubt as to its meaning. The language is really so plain that it needs no interpretation. It is a positive command to the General Assembly to tax "all privileges, pursuits, and occupations that are of no real use to society," and as positively inhibits the Legislature from taxing those "privileges, pursuits and occupations" that are of real use

to society; for, after saying that the General Assembly shall tax "all privileges, pursuits and occupations that are of no real use to society," it expressly provides that "all others shall be exempt." The section contains a mandate and an inhibition. The one is as express and positive as the other.

[3] Corporations are creatures of the state. But they are composed of, and are owned, controlled, and managed by individuals. The special right or power conferred upon individuals to organize themselves into a corporation and to transact business in the form and under the name of a corporation is a privilege.

In *International Trust Co. v. American Loan & Trust Co.*, 62 Minn. 501, 65 N. W. 78, 632, Judge Mitchell, speaking for the court, defined a "privilege" as follows:

"A 'privilege,' as distinguished from a mere 'power,' is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with 'franchise,' and means a special privilege conferred by the state which does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority."

See, also, 19 Cyc. p. 1452, and authorities cited in note 12; Words and Phrases, "Privilege."

A foreign corporation has no right to carry on an insurance business for which it may be organized in common with domestic corporations and the citizens of this state. If it is permitted, or granted a franchise or license, to do business in this state, such permission or license to exercise its corporate powers is a privilege.

[4] Learned counsel for appellant contend that the word "privileges," as used in the Constitution of 1868, is limited by the words "pursuits" and "occupations," which follow it, and has something of the general meaning of those terms, and that the Legislature had in mind "privileges," "pursuits," and "occupations" of individuals, and not corporations. The plain language of the section under consideration does not warrant such construction. The words "pursuits" and "occupations" are synonymous, and are used in their common acceptation to denote the principal business, vocation, employment, calling, or trade of individuals that, but for some constitutional or statutory inhibition, could be exercised and enjoyed as of common right. But the word "privileges" is not used in the Constitution in the same sense as the words "pursuits" and "occupations," and it has an entirely different meaning. The word "privilege" is not defined by any literary or legal lexicographer as synonymous with the words "pursuits" and "occupations." See "Privilege," Black's, Anderson's, Rapalje's, and Bouvier's Law Dictionaries; Words and Phrases; Funk & Wagnall's Standard Dictionary; Webster's Dictionary; Century Dictionary. Then, what sanction have we for

saying that the framers of the Constitution of 1868 used the word "privileges" in a sense different from both its literary and legal meaning. To give the word "privileges" a different meaning from that already expressed would be doing violence to the familiar and fundamental rules of construction above referred to. The rule of *ejusdem generis* does not apply. The language "all privileges" is exceedingly comprehensive, and we do not feel justified in saying that it is limited to privileges enjoyed by individuals, and that it does not contemplate the franchise or privilege granted to corporations to transact business in the state.

[5] Nor, under this broad and all-embracing language, are we authorized to hold that the framers of the Constitution did not have in mind to limit the power of the Legislature to tax foreign corporations for the "privilege" of doing business in this state. To so hold would be far away from the plain language in which the provision is couched. Our present Constitution and the Constitutions adopted before the Constitution of 1868 contain, in substance, the following provision:

"The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper." Article 16, § 5, Const. 1874; article 7 (Revenue) § 2, Const. 1836; article 7 (Revenue) § 2, Const. 1861; article 9 (Revenue) § 2, Const. 1864.

Counsel contend that, if article 10, § 17, of the Constitution of 1868 was a limitation upon the power of the Legislature to prescribe the terms and conditions upon which corporations might operate in this state, that the provision of the Constitutions above quoted is a like limitation. Non sequitur.

In *Baker v. State*, 44 Ark. 134-137, Judge Cockrill, citing and speaking of the cases in which this court had passed upon the provision of the Constitutions above mentioned giving to the General Assembly the power to "tax merchants, hawkers, peddlers, exhibitions, and privileges," said:

"All of the cases in this court before and since *Washington v. State*, supra [13 Ark. 752], concede that the Legislature can restrain or prohibit the use of any property or the exercise of any business or calling, if deemed to be against good policy or injurious to the public morals, but in the case last mentioned it was said that this restraint could not be exercised for the purpose of raising a state revenue by means of a license, because the act of licensing would admit that it was neither immoral nor injurious. The idea that the state necessarily lends its countenance to everything that is licensed or taxed rests upon an apparent fallacy, for these are among the surest means of burdening recognized evils beyond existence, or by severe discipline holding them within bounds, and the authority of the case in this respect has been disregarded by this court. We do not understand this case, reading it all together, to limit the power of legislation for state purposes to the taxation of such privileges as were technically known as such at the common law, notwithstanding an expression to that effect occurs in the opinion. We think the Legislature is not restrained by anything in the organic law from

laying a tax on the franchise of a corporation, and the reasoning of the learned judge who delivered the opinion in *Washington's Case*, supra, leads to that conclusion."

"The corporation owes its existence to the state, and the right to enjoy this privilege is the subject of taxation."

"In the case of a foreign corporation the tax or license is paid for the privilege of exercising its corporate powers in the state."

Thus the court held, under a constitutional provision granting to the General Assembly the power to tax "privileges," that the Legislature could lay a tax on the franchise of a corporation; that the right to enjoy the privilege was the subject of taxation; that the tax or license is paid for the "privilege" of exercising its corporate powers in the state. This decision is authority for holding, as we do, that the franchise or license of a foreign corporation is a privilege, and cannot be taxed under the provisions of a Constitution expressly exempting all "privileges" from taxation. The difference between the provision of the Constitution of 1868 under review and that of the present Constitution and the Constitutions prior to 1868, above referred to, is as wide as the poles. Under the Constitution of 1868 all the "privileges" that are of real use to society are exempt from taxation; whereas, under the provision of the present Constitution and the Constitutions prior to 1868, the General Assembly was expressly granted the power to tax "privileges," and under this power the court held, of course, that the Legislature "is not restrained by anything in the organic law from laying a tax on the franchise of a corporation"; that such privilege is subject to taxation. But, conversely, the reasoning shows that if the court had been considering the provisions of a Constitution expressly prohibiting the taxation of privileges, as we have here, the holding would have been that the Legislature did not have the power to tax the franchise or privilege of a corporation to do business in the state.

[6] Now, in the absence of constitutional limitation or inhibition, the Legislature had supreme power to grant to or withhold from foreign corporations the privilege of exercising their corporate powers within this state. They could have excluded them entirely or admitted them upon such terms as they deemed proper. *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348. We must assume that the framers of the Constitution were familiar with this well-established principle. We must assume also that they were familiar with the provisions of prior Constitutions, particularly the one then in existence, on the subject of revenue, which Judge Cockrill in *Baker v. State*, supra, said did not restrain the Legislature "from laying a tax on the franchise of a corporation." Then if the makers of the Constitution of 1868 did in-

tend to grant to the General Assembly the power to lay taxes on the franchise of corporations, why did they not copy the provisions of the then existing Constitution on that subject? Or why were they not silent, in which event the Legislature would have had the power? It is no answer to these questions to say that the framers of the Constitution, by the use of the words "all privileges," did not have in mind the laying of taxes on the franchise of corporations; for, as Judge Cockrill says, "the right of the corporation to enjoy this 'privilege' is the subject of taxation." It necessarily follows that when the framers of the Constitution declared that "all privileges" of real use to society "shall be exempt" that they meant what they said, and intended thereby to exempt "privileges" of corporations that were of real use to society.

[7] So much for the very letter of the Constitution. But if the letter were doubtful, then we should look to the spirit, and may consider the history of the times—the environment of the convention—to ascertain its intention. *Hartford Fire Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42. Only three years before the state had emerged from a maelstrom of desolating war, in which her capital was engulfed, her industries destroyed, and by which her people were impoverished to the last degree. To stimulate the influx of foreign capital, in order to restore and increase her financial enterprises, and to again put her people on the road towards a permanent prosperity, the framers of the Constitution under these circumstances wrote into the organic law the exemption from taxation of all "privileges" that were of real use to society. Such was their manifest purpose to rehabilitate the state as soon as practicable in her financial resources and to lift her from the fearful ruin that the war had wrought.

[8] That the franchise or privilege of conducting an insurance business is a useful occupation is not open to question. A business which provides indemnity to widows and orphans or other relatives for the loss occasioned by the death of one upon whom they are dependent and a business that provides indemnity for the loss of property by fire or other casualty must be considered by all reasonable minds as of real benefit to society, and the Legislature could not arbitrarily determine otherwise.

Our conclusion, therefore, is that the provision of section 10 of the act of April 25, 1873, is unconstitutional and void. Having reached this conclusion, it is unnecessary to discuss other questions.

The decree is therefore affirmed.

MCCULLOCH, C. J., and KIRBY, J., concur in judgment.

**POINSETT LUMBER & MFG. CO. v.  
BOARD OF DIRECTORS OF ST. FRANCIS  
LEVEE DIST. (No. 19.)**

(Supreme Court of Arkansas. Nov. 30, 1914.)

**LEEVEES (§ 23\*)—LEVEE TAXES—PROPERTY LI-  
ABLE—"TRAMROAD."**

Under Acts 1893, p. 27, as amended by Acts 1903, p. 104, providing that the board of levee directors may assess taxes on all lands, railroads, and tramroads within the district, a road constructed in the same manner as railroads, and used to transport logs, which was owned by a lumber company and located upon its own land, is subject to taxation as a "tramroad," although it was the company's intention to remove the road when the lumber should be exhausted; for the expression "tramroads" popularly means logging roads, and the Legislature used the expression in that sense.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 23; Dec. Dig. § 23.\*]

Appeal from Poinsett Chancery Court;  
Chas. D. Frierson, Chancellor.

Suit by the Board of Directors of the St. Francis Levee District against the Poinsett Lumber & Manufacturing Company. From a decree for plaintiff, defendant appeals. Affirmed.

Allen Hughes, of Memphis, Tenn., for appellant. H. F. Roleson, of Marianna, for appellee.

HART, J. The board of directors of the St. Francis Levee District instituted this action in the chancery court against the Poinsett Lumber & Manufacturing Company to collect levee taxes alleged to be due it for the year 1912. The facts were agreed upon and are as follows: The Poinsett Lumber & Manufacturing Company owns and operates three miles of tramroad, main line, and three miles of side track, all situated within the boundaries of the St. Francis Levee District. The tramroad is constructed like an ordinary railroad, with ties and steel rails spiked down upon the ties. The tramroad is used exclusively for the purpose of hauling logs to the sawmill of the company. It is the intention of the owners of the tramroad to take it up and remove it as soon as the timber is cut off of the land. The tramroad is constructed on lands belonging to the lumber company. The lumber company has paid the levee taxes assessed against the land on which the tram is built. The chancellor held that the tramroad was taxable separate from the land, and from the decree entered the defendant lumber company has duly prosecuted an appeal to this court. The original levee act provides:

"That for the purpose of building, repairing, and maintaining the levee aforesaid and for carrying into effect the objects and purposes of this act, the board of levee directors shall have the power, and it is hereby made their duty, to assess and levy annually a tax not exceeding

five per cent. of the increased value or betterment estimated to accrue from protection given against floods from the Mississippi river by said levee, on all lands within said levee district." Acts of 1893, page 27.

In 1903 an amendment was passed in which the same language was used, except that the designation of the property to be assessed is "all lands, railroads and tramroads within the said levee district." See Acts of 1903, page 104. This feature of the statute was amended in 1907, so as to read, "all lands, town lots, blocks, railroads, and tramroads within said levee district." Acts 1907, page 492.

It is the contention of counsel for the defendant that because the tramroad was constructed on lands belonging to the defendant and because it was the intention of defendant to take up the tramroad as soon as the timber on its lands was cut off, the tramroad under the act cannot be separately taxed. We cannot agree with them in this contention. The term "tramroad" has no settled or well-defined meaning. It is sometimes applied to street railways and sometimes to railways which are built generally along the surface of the ground, where no particular attention is paid to a uniform grading of the roadbed. It is a matter of common knowledge that in this state the term "tramroad" is usually applied to roads constructed with rails spiked down on it like a railway, such roads being used generally for hauling lumber or for transporting coal from mines which are owned and operated exclusively for the benefit of persons who own the timber or the product of the mines, and which are not operated as a common carrier. We are of the opinion that it was the intention of the Legislature to use the term "tramroad" in this sense in the act under consideration. It can make no difference that the road was constructed on lands belonging to the lumber company. It is a matter of common knowledge that a railroad is often, in part, constructed over lands belonging to the railway company, and it cannot be said that the road, on that account, ceases to be a railroad or a common carrier. We are of the opinion that the Legislature had in mind that lumber companies situated within the boundaries of the levee district owned and operated tramroads for the exclusive purpose of hauling logs to be manufactured into lumber by it, and of then hauling the lumber to a railway. The Legislature could have exempted from the provisions of the act tramroads. But it did not see fit to make such exceptions, and the courts can make none.

We are of the opinion that the decree of the chancellor was correct, and it will be affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ST. LOUIS, I. M. & S. RY. CO. v. SCHULTZ.  
(No. 2.)

(Supreme Court of Arkansas Nov. 23, 1914.)

1. MASTER AND SERVANT (§ 278\*)—ACTION FOR DEATH OF EMPLOYÉ — EVIDENCE OF NEGLIGENCE—SUFFICIENCY.

In an action for the death of an employé who fell from a ladder, evidence held to show that defendant owed him no duty, either to keep it in a safe condition, or to warn him that it was unsafe, so that negligence could be predicated thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

2. MASTER AND SERVANT (§§ 101, 102\*)—SAFE PLACE TO WORK.

It is the duty of the master to exercise ordinary care to make safe the place designated for the servant to work, but this extends only to such part of the premises as are designated and prepared for him while performing his work according to methods prescribed, and to such other parts of the premises that the master knows, or by ordinary care should know, the servant is accustomed to use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

3. MASTER AND SERVANT (§ 107\*)—SAFE METHODS AND PLACES TO WORK.

Where a servant for his own convenience adopts methods of work contrary to those expressly prescribed, and occupies places in performing his duties the master could not reasonably anticipate he would occupy, the master owes him no duty to make such places or methods safe, and failure to do so is not actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

4. MASTER AND SERVANT (§ 265\*)—ACTION FOR EMPLOYÉ'S DEATH—BURDEN OF PROOF.

In an action for death of an employé, the burden is on plaintiff to prove negligence as alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by O. W. Schultz, administrator of Luther Schultz, deceased, against the St. Louis, Iron Mountain & Southern Railway Company, for the death of plaintiff's intestate. From a judgment for defendant, plaintiff appeals. Reversed, and action dismissed.

Luther Schultz was in the employ of the appellant as an apprenticed electrician. He was fatally injured while engaged in cleaning globes of arc lights attached to the east and west sides of a coal chute in the shop-yards of appellant in the city of Argenta. About 40 feet from the ground on the east and west sides of the chute there was a running board or platform 46 inches wide, which sloped slightly to turn the water. At the south end of the chute there were four flights of stairs leading up into the chute. At the top of the third flight of stairs there was a small ladder running up to the running board

on the west side of the chute at the south end. From the top of the running board at the south end on the west side there was a ladder with 17 rungs, leading up to the main roof of the coal chute. On the north end of the running board on the east side was a ladder like the one on the south end on the west side, running from the roof down to the top of the running board. To light the building there were four large arc lights, two on the west side and two on the east side; there was a light hanging from each end of the running boards. There were a number of small incandescent lights in the chute, running along overhead. The appellee, as the administrator of the estate of Luther Schultz, brought this suit to recover damages for the injury and death of his intestate. He alleged, among other things, that his intestate, while in the performance of his duty, "climbed up the ladder on the west side of said coal chute, for the purpose of getting to the arc lights on the opposite side, and when he reached the rung of the ladder next to the top of said ladder, said rung broke, and he fell, and in falling he caught with his hand the next or third rung from the top, which rung also broke, and on account of said rungs breaking, he was hurled to the ground, a distance of about 65 feet, receiving fatal injuries"; that these injuries were caused through the negligence of appellant in permitting the rungs of the ladder to become rotten so that they were not sufficiently strong to hold the weight of a person who used the ladder; that his intestate did not know and could not have known, of this rotten condition of the ladder; that there were no written or printed notices that the ladder was in an unsafe condition; that no one warned him not to use the ladder. He alleged that because of the negligence of the appellant in the particulars mentioned, Luther Schultz fell and was injured in such way that he died in about two hours thereafter, having endured excruciating pain and mental anguish. Appellee prayed for damages in the sum of \$15,000 for the benefit of the estate, and for the benefit of E. E. Schultz as the father and next of kin in the sum of \$25,000. Appellant answered, denying the allegations of negligence, and alleging that the appellee's intestate was killed by reason of his own negligence "in going upon the ladder and the roof of the coal chute where he had no business, no duty to perform, and no right to be." After the testimony was adduced the appellant asked the court to instruct the jury to return a verdict in its favor, which instruction the court refused, and to which appellant duly excepted, and made the refusal of the court to give this instruction one of the grounds of its motion for a new trial. Appellant also alleged as one of its ground for a new trial that the verdict was contrary to the evi-

dence. In addition to the facts already stated, showing how the coal chute was constructed, etc., other facts will be stated in the opinion. From a judgment in favor of appellee in the sum of \$5,000 this appeal has been duly prosecuted.

E. B. Kinsworthy, R. E. Wiley, and T. D. Crawford, all of Little Rock, for appellant. Hoeppner & Young and W. H. Pemberton, all of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). [1] The only grounds of negligence alleged in the complaint are that the appellant failed to keep the ladder from which Schultz fell in a safe condition, and failed to warn him of such unsafe condition. The uncontradicted testimony shows that the rungs of the ladder were rotten and in an unsafe condition, and there was testimony tending to show that no warning was given to Schultz of the unsafe condition of the ladder. So, if appellant owed any duty to Schultz to keep the ladder in a safe condition or to warn him of such condition, then the allegations of negligence have been fully sustained. But, as we view the uncontradicted evidence, no negligence could be predicated upon the failure of appellant to keep the ladder from which Schultz fell in a safe condition, nor upon its failure to warn him of the danger of using the same; for the undisputed evidence shows that appellant owed no duty to Schultz either to keep the ladder in a safe condition or to warn him that the ladder was unsafe. The duties of Schultz at the coal chute were to trim the lamps and clean the globes. The lamps were hung on brackets. The brackets were about 18 inches below the running board or ledge, and it was about 12 inches from the top of the bracket down to the lamp. It was about two feet from the building out to the lamp. A pulley was attached to the bracket. The lamp was hooked on the pulley with a chain. The chain ran through the pulley, and was fastened to the lamp by a hook. The chain came down and was hooked to one of the posts, about four or five feet above the ground. One in cleaning the lamps would use a rope, attaching it to the chain that extended from the lamp down near the ground. The weight of the lamp would cause it to come to the ground to be cleaned. The electrician under whom Schultz worked testified that he instructed him about the lights on the coal chute. He told him that it was his duty to trim the lights and wash the globes, and showed him how to do it, according to the method above stated. He told Schultz that if there was anything wrong at those junction boxes to let witness or the other electrician know. He showed Schultz how to do his work. Another witness, who had charge of the electric equipment and of the lights at the coal chute, testified that if the electric wiring was out of

fix and anything had to be done to the lights except to clean them, the electrician would look after that. Schultz was not expected to look after the repairs. All he had to do was to clean the globes and look after the lights around the coal chute. He was to clean the lamps, clean the globes, and repair the extension lights that were about the power house. The testimony does not show that it was the duty of Schultz to fix or clean the incandescent lights, or that the incandescent lamps were out of repair. There was testimony on behalf of the appellee tending to show that the lamp at the southwest corner would not let down because the pulley was gone, and there was nothing but the bolt left for the chain to run on, and the chain would not run on it. The evidence was sufficient to warrant a finding that the chain which was used for the purpose of lowering the lamp at the southwest corner on the day that Schultz received his injury would not work because of the fact that the pulley was gone, and on that account the lamp could not be raised or let down. There was also testimony on behalf of the appellee tending to show that the hangings of the lamps that were of metal were badly bent, that they had been repaired a number of times, and that they were in a very insecure condition, but there was no testimony on his behalf to the effect that the lamps on the east side were in such condition that they could not be let down to the ground. There was testimony by witnesses on behalf of the appellee tending to show that at times they saw Schultz on the running board or roof of the coal chute, engaged in trimming and cleaning the lamps. One witness testified that he saw him on the running board three or four different times, working on those lights, cleaning the globes, and putting in carbons. Another witness testified that on the morning of the day that Schultz was injured the witness saw Schultz on the lower running board on the west side of the coal chute, fixing lights. He was cleaning a globe. Still another testified that he saw Schultz—"lots of times working on both sides of the chute. He would work the lights on one side and go up the side and work the other side on that platform. He would go up the ladder and come to this end and down that ladder and work that way. All I ever saw him do would be to go from one light to the other to fix his light."

Another witness testified that he had seen the lights cleaned from the running board, and that was the only place he had seen them cleaned. He was asked how many times he had seen them cleaned from the running board, and stated that he "made no memorandum of that." He saw Schultz cleaning them from the running board but one time. It thus appears from the undisputed evidence that the method adopted by the appellant for cleaning the lamps was by letting the same down to the ground by a chain, in the manner above described, and that when for any

reason the lamps could not be let down for cleaning by this method because of any defect, it was the duty of Schultz to notify one of the electricians in charge, so that such defect could be repaired; that it was not the duty of Schultz himself to make these repairs. Schultz was only an apprentice. While the evidence shows that Schultz went upon the running board three or four times for the purpose of cleaning the lamps, and that Schultz and others were seen "lots of times" cleaning and working about the lamps from the top of the running board, there is no evidence whatever tending to show that this method of cleaning the lamps, adopted by the employes themselves, was brought to the knowledge of any division electrician, the electric engineer, or electricians who had the work in charge and whose duty it would be to see that the methods adopted by the appellant for doing the work were followed by its employes, or, if not followed, to report the matter to their superiors charged with the duty of enforcing the methods adopted for the safety of the employes whose duty it was to trim the lamps, clean the globes, etc.

There is no testimony, in the first place, sufficient to warrant a finding that the employes had established a custom for cleaning the lamps, globes, etc., contrary to the method that had been prescribed by the appellant for doing that work; and, in the second place, there was no evidence whatever to show that the method adopted by Luther Schultz was brought to the knowledge of the superior officers of the appellant over Schultz so as to make appellant liable for a failure to provide a safe place for doing the work in the manner that he was performing the same at the time of his injury. The method adopted by Schultz is not shown to have been so general and continuous as to warrant a presumption of fact that the agents of appellant charged with the duty of directing Schultz knew of the method he had adopted for cleaning the globes, and that they had acquiesced therein. On the contrary, the testimony of the agents and servants of appellant was to the effect that the only method for the cleaning of these globes and repairing the lights known to them was that of letting the same down to the ground in the manner described, that the ledge or running board was not built for the purpose of having them cleaned or repaired thereon, that it was dangerous to clean them in that way, and that it could not be done. Some of them stated that one could not stand on the ledge or running board and repair any of the lights or wires; that they could only be cleaned and repaired by letting them down. There was testimony to the effect that the ladder from which Schultz fell was put there for the use of the carpenters, and that it was not intended to be used by any one else.

[2] The master owes to the servant the duty of exercising ordinary care to make safe the place designated for the servant to do his work, but this duty extends to such parts of the premises only as the master has designated and prepared for the occupancy of the servant while performing his work according to the methods prescribed for doing the same, and to such other parts of the premises as the master knows, or by the exercise of ordinary care should know, that the servant is accustomed to using while performing his duties.

[3] But where the servant adopts methods for his own convenience contrary to the methods expressly prescribed by his employer, and where the servant occupies places about the premises in the performance of his duties that the master could not reasonably anticipate that the servant would occupy, then the master owes the servant no duty to make those places or methods safe, and his failure to do so is not actionable negligence. See *Pioneer Mining & Mfg. Co. v. Talley*, 152 Ala. 162, 43 South. 800, 12 L. R. A. (N. S.) 861, and note; *Triangle Lumber Co. v. Acree*, 166 S. W. 958; 4 Labatt, Master & Servant, § 1558B, note 8; *Gillette v. General Electric Co.*, 187 Mass. 1, 72 N. E. 255.

[4] The burden was on the appellee to prove that appellant was negligent as alleged in his complaint. This he has failed to do. The judgment must therefore be reversed, and, as the case seems to have been fully developed, the cause will be dismissed.

#### KENNEDY v. STATE. (No. 28.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

#### 1. CRIMINAL LAW (§§ 763, 764\*) — INSTRUCTIONS—WEIGHT OF TESTIMONY.

An instruction that, while accused cannot be convicted on the uncorroborated testimony of an accomplice, the amount of corroboration is for the jury, and it is sufficient if there is any such evidence to warrant a conviction, provided it, taken with all the evidence in the case, convinces the jury of guilt beyond a reasonable doubt, is not on the weight of the testimony, but leaves to the jury the question of the weight and sufficiency of the testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.\*]

#### 2. CRIMINAL LAW (§ 780\*)—ACCOMPLICE'S TESTIMONY—CORROBORATION—INSTRUCTIONS.

An instruction that, while accused cannot be convicted on the uncorroborated testimony of an accomplice, the amount of the corroborating evidence is for the jury, and it is sufficient where there is any such evidence to warrant a conviction, provided it, taken with all the evidence in the case, convinces the jury of accused's guilt beyond a reasonable doubt, does not authorize a conviction solely on the testimony of an accomplice as to the connection of accused with the commission of the offense and is not erroneous as defining the kind or quality of corroborating testimony necessary to sustain a conviction, but only conveys to the jury the meaning that there

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

must be corroborative testimony, and that the jury is the judge of its weight and sufficiency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

**3. CRIMINAL LAW (§ 780\*)—ACCOMPLICE'S TESTIMONY—INSTRUCTIONS—REQUESTS—NECESSITY.**

Accused is entitled, on request, to an instruction in the language of Kirby's Dig. § 2384, that a conviction cannot be had in a felony case on the testimony of an accomplice unless corroborated by other evidence connecting accused with the commission of the offense, and that the corroboration is not sufficient if it merely shows the commission of the offense and the circumstances thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

**4. CRIMINAL LAW (§ 1137\*)—INSTRUCTIONS—REQUISITES—OBJECTIONS.**

Where the court gave an instruction on the subject of accomplice testimony, as requested by counsel for accused, accused could not complain because the instruction was not in accordance with Kirby's Dig. § 2384, providing that a conviction cannot be had in a felony case on the testimony of an accomplice unless corroborated by other evidence connecting accused with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

Will Kennedy was convicted of larceny, and he appeals. Affirmed.

W. P. Feazel and D. B. Sain, both of Nashville, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Defendant, Will Kennedy, was convicted of the crime of grand larceny, under an indictment charging him with stealing a cow, the property of Mrs. J. A. Parker. The evidence tends to show that the defendant and Mack Craig, who were separately indicted for the same offense, took the cow of Mrs. Parker out of the range and carried it up to the house of one Purcell and butchered it. Purcell was a witness in the case, and gave damaging testimony against the defendant. His own testimony tended to show that he accepted some of the meat from the butchered animal, but refused to accept money for the price of his participation, or rather his silence as to the commission of the crime.

[1, 2] The ground principally urged for reversal is that the court erred in giving an instruction on the subject of the statutory necessity for corroboration of the testimony of an accomplice. The instruction reads as follows:

"No. 3. While the defendant cannot be convicted on the uncorroborated testimony of an accomplice, the amount of such corroborating evidence which should be required is a question solely for the jury and it is sufficient, if there is any such evidence, to warrant you in convicting the defendant, provided, it, taken with all the

other evidence in the case, convinces you of his guilt beyond a reasonable doubt."

It is contended that this instruction is erroneous and prejudicial for two reasons: First, that it authorizes a conviction solely upon the testimony of an accomplice as to the connection of the defendant with the commission of the offense; and, second, that the instruction amounts to a charge of the court upon the weight of the testimony. We do not think the instruction is open to either of these objections. Certainly not to the one that it is a charge upon the weight of the testimony. On the contrary, it expressly leaves to the jury the question of the weight and sufficiency of the testimony and does not in any wise invade the province of the jury in that respect.

The contention is that under this instruction the jury might have understood that any corroborating evidence at all was sufficient, even though it did not tend to connect the defendant with the commission of the offense, and that the jury might determine for itself what character of corroborating evidence was sufficient. The instruction does not, we think, reach to the question of the character of the corroborating testimony, and does not undertake to define what kind or quality of corroborating testimony is necessary to sustain a conviction. It only conveys the meaning to the jury that there must be corroborating testimony and that the jury is to judge of its weight and sufficiency.

[3] Of course, the defendant was entitled to an instruction telling the jury, in the language of the statute (Kirby's Digest, § 2384), that a conviction cannot be had in a felony case upon the testimony of an accomplice "unless corroborated by other evidence tending to connect the defendant with the commission of the offense," and that "the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." Such an instruction was not requested by defendant and he cannot complain that the court did not give one.

[4] The instruction which the defendant requested on that subject was given by the court, but it was not in accordance with the statute. However, that is a matter of which the defendant cannot complain, as the court gave the instruction on the subject which his counsel requested.

It is also urged that the testimony is insufficient to sustain the verdict, in that it fails to show knowledge on the part of the defendant that the cow did not belong to Craig, who employed the defendant to assist in taking it from the range and butchering it. The testimony is not entirely clear, as it appears to us in the record, but it is legally sufficient to sustain a finding that the defendant and Craig were both guilty of the crime charged against them.

The judgment is therefore affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**ROBERTSON v. SISK. (No. 23.)**

(Supreme Court of Arkansas. Nov. 30, 1914.)

**1. WITNESSES (§ 405\*)—CROSS-EXAMINATION—CONCLUSIVENESS OF EVIDENCE—CAUSE OF INJURY.**

In a civil action for assault and battery, where plaintiff had testified that certain injuries from which he was suffering resulted from the beating he received, and on cross-examination denied that they resulted from a previous fight which he had had, his denial did not relate to a collateral matter, so as to be conclusive, but other evidence could be introduced by defendant to show that plaintiff suffered from such injuries prior to the beating.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.\*]

**2. ASSAULT AND BATTERY (§ 43\*)—CIVIL ACTIONS—INSTRUCTIONS—JUSTIFICATION.**

Where defendant admitted attacking plaintiff, and stated that he struck plaintiff to keep from being assaulted, but the only acts of the plaintiff testified to by defendant were that plaintiff inferentially stated that defendant lied and shook his finger angrily in defendant's face, although about four feet away from him, plaintiff was entitled to an instruction that the assault was admitted, and that no complete justification therefor was shown.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57-59, 61, 62; Dec. Dig. § 43.\*]

**3. ASSAULT AND BATTERY (§ 43\*)—CIVIL ACTIONS—INSTRUCTIONS—CAUSE OF INJURY.**

Where defendant admitted that he knocked plaintiff down, bruised his eye, and caused him to bleed profusely, but denied that the plaintiff thereby received the injuries which he claims, it was error to instruct the jury that before they could find for the plaintiff for any amount they must find that the injuries alleged were the direct result of the blows of the defendant; since the plaintiff was entitled to recover something for the admitted assault without proof of the more serious injuries.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57-59, 61, 62; Dec. Dig. § 43.\*]

**4. ASSAULT AND BATTERY (§ 26\*)—CIVIL ACTION—BURDEN OF PROOF.**

Where the commission of an assault and battery is admitted by the defendant in a civil action, the burden is upon him to prove justification, unless the evidence establishing the assault also shows justification.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 36; Dec. Dig. § 26.\*]

Appeal from Circuit Court, Independence County; R. E. Jeffery, Judge.

Action for assault and battery by L. Robertson against John Sisk. Judgment for the defendant, and plaintiff appeals. Reversed and remanded.

Appellant sued to recover damages on account of an assault committed upon him by appellee, and he prayed for damages, both compensatory and punitive. In support of the allegations of his complaint he offered evidence tending to show that he was 62 years old, blind in one eye, and weighed only 118 pounds, and that he was assaulted and badly beaten by the appellee, who was a strong athletic man, weighing about 175 pounds, and very much younger than appel-

lant. Appellant was poundkeeper for a fencing district, and, in performing his duties, some differences occurred between him and a negro named Noah Magness, and appellee was present in a blacksmith shop where appellant was narrating his differences with this colored man, whereupon appellee remarked that he thought more of the negro than he did of a lot of white people, and that he believed this negro would tell the truth quicker than a whole lot of white people, and, in that connection, charged appellant with having gone into appellee's pasture after his hogs in order that he might impound them. Appellant stated, "Now, that's another one;" whereupon appellee knocked him down twice, and, after knocking him down the second time, he stamped upon him and kicked him and inflicted personal injuries of a very serious character. The evidence on the part of appellant tends to show that the assault was a brutal one and that appellee was the aggressor throughout.

The evidence upon the part of appellee was to the effect that he heard appellant talking about the colored man and of his differences with him, whereupon one of the bystanders said, "You know I wouldn't hardly believe that old negro;" and appellee said, "No; I don't expect he would tell the truth, but I would believe him about as quick as I would some white people;" whereupon appellant said, "You are throwing that at me, I suppose;" and appellee said, "No, Mr. Robertson; I am not throwing that at you, only you didn't treat me hardly right when you tried to get Louis Clark's dog to dog my pigs;" and appellant said, "Now, that is another one you have told;" and that he pointed his finger at appellee when he made this statement; that appellant repeated for the third time the statement, "That is another one you have told," and did this after appellee had asked him not to make that statement, whereupon he struck him, and in that connection he made the statement, "I hit Mr. Robertson because he disputed my word." Appellee stated that appellant had shaken his finger in his face angrily, but he admitted that appellant was more than four feet away when this was done, and it was denied on appellant's part that he had shaken his finger at him at all. There was other evidence corroborating and contradicting these statements, and appellee admitted he had pleaded guilty to a charge of assault and battery and had been fined.

At the trial appellant testified to various ailments with which he was then afflicted, all of which he attributed to the beating he had received at the hands of appellee, and upon his cross-examination he was asked about statements which he had made in regard to these ailments; the purpose of the questions being to show that he had these afflictions before his difficulty with appellee. Among

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other questions, he was asked about a fight he had had something near 20 years previous, and he was asked if he had not stated that he had received certain injuries in that difficulty. Appellant having denied that he had sustained any of the injuries of which he complained in any manner except as the result of the assault upon him by appellee, the court permitted appellee to introduce evidence tending to show that appellant received certain injuries as the result of the difficulty 20 years previous, and, further, that he had stated he was suffering from some of these ailments prior to his difficulty with appellee. It is insisted that these questions were collateral, and that appellant's answers should have concluded the inquiry on those subjects.

Appellant requested the court to give instruction numbered 1A, which reads as follows:

"The evidence is undisputed as to the fact that the defendant committed an assault and battery upon the plaintiff, and no complete justification therefor has been shown; therefore your verdict should be for the plaintiff in such amount as you may find from a preponderance of the evidence as actual or compensatory damages suffered by him, under the other instructions herein given. The question of exemplary or punitive damages is submitted to you under the other instructions herein."

The court refused to give this instruction, and, over appellant's objection, gave instruction numbered 5, which reads as follows:

"Before you would be authorized in returning a verdict for the plaintiff in any amount, you should find by a preponderance of the evidence that the injury or injuries alleged were the direct result, and were occasioned solely by the blow or blows inflicted by the defendant, and, further, that the defendant was not justified under the law as given in the other instructions in this case in striking plaintiff."

There was a verdict and judgment for appellee, and this appeal has been duly prosecuted.

Campbell & Suits, of Newport, for appellant. Dene H. Coleman, of Batesville, for appellee.

SMITH, J. (after stating the facts as above). [1] We think the court committed no error in permitting the introduction of evidence tending to contradict appellant about the character and extent of his injuries and ailments and the length of time he had suffered from them. Appellant was undertaking to show that these ailments resulted from the assault of appellee and was asking compensation on that account, and it was therefore proper for appellee to offer evidence tending to show that appellant suffered from these troubles prior to the difficulty.

[2] We think the instruction 1A, requested by appellant, should have been given, and that the instruction numbered 5, given at the request of appellee, should have been refused. The appellee offered no evidence

tending to wholly justify himself in striking appellant. Appellee does testify that appellant disputed his word and inferentially accused him of having told a lie, and he also testified that appellant shook his finger at him angrily, but he offered no evidence tending to show that appellant was about to assault him and that it was necessary, or appeared to be necessary, for appellee to strike appellant to protect himself from bodily harm. Appellee did testify that he struck appellant to prevent being assaulted, but it is clear from appellee's own statement that he was really under no such apprehension, and that no attempt was being made on appellant's part to assault him.

[3] We think the fifth instruction was wrong, because it told the jury that, before they would be authorized in returning a verdict for the appellant in any amount, they were required to find, by a preponderance of the evidence, that the injuries alleged were the direct result of, and were occasioned solely by, the blows inflicted by the defendant. It is undisputed that appellant was twice knocked down, and bled profusely, but this instruction told the jury that no compensation could be awarded for that fact, unless the injuries and ailments of which appellant complained were occasioned thereby. It is undisputed that appellant's eye was badly bruised as the result of one of appellee's blows, and although it may be true that none of the serious ailments of which appellant complained resulted therefrom, it does not follow on that account that no damages could be awarded. The jury should have been told to return a verdict for appellant in some sum, and, in addition, should have been given the instructions which were given on the question of compensatory and punitive damages. The question of whether appellant should have recovered anything for punitive damages was, of course, one for the determination of the jury, as was also the question of the amount of compensatory damages, if the jury found that appellant was entitled to anything more than nominal damages. But certainly a man cannot knock another man down, except to defend himself from bodily harm, without being liable for damages.

[4] The question of the burden of proof as to the justification for the assault was also raised at the trial. And upon that question we think the law is that, it having been shown that appellee assaulted and beat the appellant, the burden was upon appellee to show that he was justified in his action. Presumptively no man has the right to inflict an act of physical violence upon another, and, where it is shown that he has done so, the burden is upon him to excuse his act in so doing, unless the evidence which shows the commission of the assault also shows facts which justify it.

For the errors indicated, the judgment will be reversed, and the cause remanded.

**HAYS v. WILLIAMS. (No. 21.)**

(Supreme Court of Arkansas. Nov. 30, 1914.)

**1. TRIAL (§ 296\*)—IMPROPER INSTRUCTION—DEGREE OF PROOF—CURE BY OTHER INSTRUCTION.**

An instruction that, before plaintiff could recover, he was required to "satisfy" the minds of the jury by a "fair" preponderance of the evidence that his property was destroyed by some act of negligence on defendants' part as alleged, operating as the proximate cause of the destruction, and, though the jury might find by a preponderance of the evidence that defendants were guilty of some one or all of the acts of negligence complained of, yet if they were not the proximate cause of the loss plaintiff could not recover, while improper in form in the use of the words quoted, was cured by other instructions plainly charging that the burden was on plaintiff to establish his right to recover and the extent thereof by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**2. APPEAL AND ERROR (§ 231\*)—REVIEW—INSTRUCTIONS—SPECIFIC OBJECTION.**

Plaintiff could not object on appeal to an instruction requiring him to "satisfy" the minds of the jury by a "fair" preponderance of the evidence, where no specific objection was made to the words quoted at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

**3. NEGLIGENCE (§ 140\*) — DESTRUCTION OF PROPERTY—FIRE—PROXIMATE CAUSE.**

In an action for destruction of plaintiff's property by fire, consuming the building in which the property was located, an instruction that, if the jury found defendants guilty of the negligence complained of, plaintiff, to recover, must go farther and show that there was a direct connection between such negligence and the injury complained of, which must be something more than one of a series of antecedent events without which the injury would not have happened, and if, subsequent to the original act of negligence, a new cause had intervened, of itself sufficient to cause the injury, the original act was too remote and would not amount to a cause of action, was not improper as a submission of the issue of proximate cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 378-381; Dec. Dig. § 140.\*]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Action by N. B. Hays against J. M. Williams, trustee, etc. Judgment for defendant, and plaintiff appeals. Affirmed.

Appellees were the owners of a three-story brick veneered building in the city of Fayetteville which was destroyed by fire on the 10th day of January, 1914. The first story was used for business houses, the second for offices, and the third as a hall or lodgeroom. Appellant had his law offices in the second story thereof, and brings this suit for damages for the destruction of his library and office furniture in the fire.

The complaint alleges that the only entrance to the second floor of the building was from the south on Center street by a flight of steps, and the only entrance to the third

floor was by a stairway leading from the second; that at the time of the fire there were several vacant rooms on the second floor, and that the defendants had control of the stairway, hall, toilet, and vacant rooms; that they negligently allowed and permitted inflammable and combustible material to accumulate in the parts of the building in their possession and control, negligently left the doors thereto unlocked and unfastened day and night, and permitted the public the use thereof both day and night, and by the concurring negligence of appellees and some one in their building, because of their negligence, inflammable material was set on fire and the building and property of plaintiff destroyed. The second paragraph of the complaint alleges that at the time he rented his office some of the tenants in said building were gamblers and known to be such by the defendants, or could by the exercise of ordinary care on their part have been known by them, and that after he became a tenant they rented rooms to others known to be gamblers and put them in the building; that the gambling and immoral and criminal classes of the city through the negligence of defendant had access to all parts of the building in the possession and under the control of defendants, and that they met therein and frequented said parts of the building; that the presence of the idle, immoral, and gambling classes in said building, and the inflammable material permitted to accumulate, constituted a nuisance by reason of which nuisance and the negligence of the defendants, and the concurring negligence of those in the building by their negligence, the inflammable material was set on fire and the building destroyed and plaintiff's property. In the third paragraph it is alleged that the plaintiff was an entire stranger and had no knowledge of the reputation of the building or of the tenants therein; that he believed the building was a brick building when he rented offices, when in fact it was only veneered with brick; that he was ignorant of the uses to which some of the offices were put, and the use and management of the building by defendants; that all these facts were known to the defendants, and it was their duty to disclose them to plaintiff, but they negligently concealed them from plaintiff, thereby misleading and deceiving him; that the construction of, the presence of the gambling and immoral classes in, said building, and the uses to which portions thereof were put, together with the manner in which it was kept and controlled, were all latent defects and dangers of which plaintiff was ignorant, and could not by the exercise of ordinary care have discovered; and that by reason of such latent defects and dangers, together with the concurring and continuing negligence of the defendants, the building and plaintiff's property were destroyed by fire.

The defendants admitted that they were the owners of the building; that it was three stories; that the first floor was used as business houses, the second as offices, and the third as a hall and lodgeroom; that it was veneered with brick; and that plaintiff rented an office therein and occupied it from about September 1, 1913, until it was destroyed by fire. They denied that they represented that the building was a brick building and each and every allegation of negligence charged, and alleged that if the character of the tenants, the condition of the rooms, stairways, toilet, hall, and doors of the building, and the accumulation and existence of debris, trash, and other inflammable substances were and did exist as alleged by plaintiff, the same was unknown to the defendants, and that plaintiff continued to occupy the building without objection or complaint to them of such conditions until it was destroyed by fire.

It appears from the testimony that the fire originated in what was called the "broom-room" on the second floor of the building, the door of which was across the hall from the head of the stairway. In this room was some old lumber and some half empty paint buckets and brushes, old papers, and filing cases, some of which belonged to plaintiff, and quite a lot of other stuff designated as junk by the witnesses. The brooms used in cleaning the building were also kept in this room, the door of which was fastened by an ordinary knob lock on the inside from which the knob had been removed, leaving a square hole through the door which was closed and locked by the pulling of it to. A square stick for opening it, by inserting in this hole and turning as a knob would have been turned, was kept over the door for the use of those having a right to enter therein. There were also some papers and other inflammable material in a closet or room under the stairway which was kept fastened. The testimony on plaintiff's part tends to show that the door to the broomroom was frequently left open; that the public had unrestricted access to it and the hallways, stairways, and toilet day and night; that the door to the stairway leading to the third floor or lodgeroom was frequently unfastened and open; and that the idle, immoral, and criminal classes of the city resorted thereto for gambling and other immoral purposes.

A specific instance of gambling in certain rooms on the second floor occupied by tenants as bedrooms was shown, also that certain women not the wives of the tenants had visited the room of one or two of them on at least one occasion when the caretaker or custodian of the building discovered them there upon returning from a fishing trip late at night. Appellant testified that he thought the building was a brick building, and did not learn it was only veneered with brick until after the fire. On the part of appel-

lees, the agent in charge of renting the building denied having represented that it was a brick building and any knowledge or information that it was frequented by the gambling and immoral classes of the city. He also, upon information that a certain man having the reputation of "a rounder and gambler" was sleeping in one of the rooms that had not been rented to him, caused him to vacate it. Several peace officers, the chief of police, the night watchman, and a deputy sheriff, testified that the building had no reputation as being used for gambling or immoral purposes or being frequented by that class of people; that they did not know of it being used for any such purpose; and it was also shown that, upon the report of the caretaker that the door leading into the lodge hall had been broken open, appellees had purchased and had put on a new Yale lock, that it could be fastened and they might know who had the keys thereto; that this was done every time any complaint was made or they had any knowledge that the door had been broken open or could not be fastened. On the night of the fire the chief of the fire department, who first reached the scene, testified that the door to the junk room where the fire originated was closed and fastened, that he could not open it, though he pushed against it strongly with his shoulder. The statement of the fireman with him was not definite as to whether the door was open or closed. The door to the stairway to the third floor was so securely fastened that it took two or three men to break it down.

Among others, the court gave the following instructions to the jury over appellant's objection:

"No. 2. I charge you that, before plaintiff would be entitled to a verdict at your hands, he must satisfy your minds by a fair preponderance of the evidence that his property was destroyed by some act of negligence on part of the defendants, as alleged in his complaint, operating as the proximate cause of the destruction of his property; and, although you may find by a preponderance of the evidence that the defendants were guilty of some one or all of the acts of negligence complained of, yet, if they were not the proximate cause of the loss of the plaintiff's property, he would not be entitled to a verdict against the defendants."

"No. 9. If you find that the defendants are guilty of the acts of negligence complained of, then, before you would be justified in finding a verdict for the plaintiff, you must go further and find from the evidence that there was a direct connection between such acts of negligence and the injury complained of; and such connection must be something more than one of a series of antecedent events without which the injury would not have happened. If subsequent to an original act of negligence a new cause had intervened, of itself sufficient to stand as the cause of the injury, the original act of negligence is too remote and will not amount to a cause of action."

"No. 10. If you find from a preponderance of the evidence that the defendants knowingly and negligently, by themselves or either of them, or by their agent, by any of the means alleged in plaintiff's complaint, negligently contributed to and caused the injury complained of by the

plaintiff, then you will find for the plaintiff in such sum as in your judgment will fairly compensate him for the injury sustained."

The jury returned a verdict in favor of the owners of the building, and from it appellant brings this appeal.

Jno. W. Grabel, of Fayetteville, for appellant. Walker & Walker, of Fayetteville, for appellees.

KIRBY, J. (after stating the facts as above). There are many alleged errors complained of in the voluminous brief of appellant which we do not find it necessary to discuss.

[1] Instruction numbered 2 is not in correct form and is open to some of the criticism directed against it by the appellant, and, if it was the only instruction upon the point, would call for a reversal of the case.

A plaintiff is entitled to recover upon making out his case by a preponderance of the testimony, and, when the jury find that the issue has been established by a preponderance of the testimony, that is all that is required, and it should be so instructed. In *Shinn v. Tucker*, 37 Ark. 589, the court said:

"Civil verdicts should be given on preponderance alone for the party whose evidence, considered altogether, outweighs that of the other as to the fact in issue; or against the one having the onus, if, on the whole, the weight seems balanced."

In *Railway v. Canman*, 52 Ark. 523, 13 S. W. 281, the court said:

"More appropriate words, however, and words adapted to express the idea intended, should have been used instead of the word 'satisfy.' In order to overcome the presumption of negligence, it was not necessary for the defendant to introduce evidence sufficient to convince the jury, beyond a reasonable doubt, that it had not been negligent. 'It is never necessary,' says the court in *Shinn v. Tucker*, 37 Ark. 589, 'in a civil case that a jury should be satisfied of the truth of their verdict, in the sense of resting upon it, confidently.'"

[2] The court charged, however, in the beginning of instruction No. 4 for appellees, "If you should fail to find by a preponderance of the evidence," etc., and in the latter half of instruction No. 8: "The burden is upon the plaintiff to establish his right to recovery and the extent thereof, by a preponderance of the evidence. If the evidence preponderates in favor of the plaintiff, you will find for the plaintiff. If the evidence preponderates in favor of the defendants, you will find for the defendants. If the evidence does not preponderate in favor of either the plaintiff or defendants, but equally balances between them, your verdict should be for the defendants;" and on its own motion gave instruction No. 10, already set out, beginning, "If you find from a preponderance of the testimony"—all of which unmistakably shows that the court understood the law, and intended to tell the jury only that the plaintiff was required to establish his cause by a preponderance of the testimony and entitled to recover upon doing so. The instruction itself

indicates this in the latter part, saying, "And although you may find by a preponderance of the evidence that the defendants were guilty of some one or all of the acts of negligence complained of, etc., 'yet if they were not the proximate cause,' etc. The court would doubtless have caused the objectionable words "satisfy" and "fair" to be eliminated from this instruction if a specific objection had been made thereto, and, it not having been made then, it cannot be availed of here. *Railway v. Sparks*, 81 Ark. 187, 90 S. W. 73.

[3] Instruction No. 9 is complained of because it told the jury that if they found the defendants guilty of the negligence complained of, before they would be justified in finding a verdict for plaintiff, "they must go further and find from the evidence that there was a direct connection between such acts of negligence and the injury complained of, and such connection must be something more than one of a series of antecedent events without which the injury would not have happened; if subsequent to an original act of negligence a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original act of negligence is too remote and will not amount to a cause of action."

In *Pittsburg Reduction Co. v. Horton*, 87 Ark. 579, 113 S. W. 848, 18 L. R. A. (N. S.) 905, in discussing the proximate cause of the injury the court said:

"As was said by this court in *Martin v. Railway*, 55 Ark. 510 [19 S. W. 314], later approved in *James v. James*, 58 Ark. 157 [23 S. W. 1099], there must be a direct connection between the neglect of the defendant and the injury. That its connection must be something more than one of a series of antecedent events without which the injury would not have happened."

And continuing:

"It is a well-settled general rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote."

*Thompson on Negligence*, supplement to section 48, says:

"The 'proximate cause' is not necessarily the one nearest to the event, but the primary cause may be the one proximately responsible for the result, although it may operate through one or more successive instruments. If the primary cause was so linked and bound to the events succeeding it that altogether they create and become one continuous whole—the one event so operating upon the others as to tie the result to the primary cause—the latter will be the proximate cause."

In *Pulaski Gas & Light Co. v. McClintock*, 97 Ark. 584, 134 S. W. 1192, 32 L. R. A. (N. S.) 825, the court said:

"The primary cause may be the proximate cause of disaster, though it may operate through successive instruments."

And quoting from *Railway v. Kellogg*, 94 U. S. 476 [24 L. Ed. 256]:

"But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate

mate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

This instruction does not say, and of course cannot mean, that the negligence was required to be a direct cause of the fire, nor the one nearest in time to it, but only that it was so linked and bound to the events succeeding it, so directly connected that altogether they create and become one continuous whole; the one event so operating upon the others as to tie the result to the primary cause making it appear that the injury was the natural and probable consequence of the negligence alleged.

Instruction No. 10 is not open to the objection made against it by plaintiff, and the word "knowingly" would doubtless have been eliminated if specific objection had been made. It was only the court's intention to say that if the things done complained of as negligence were known to defendants or their agent, or by the exercise of ordinary care could have been known, that they were liable. A specific objection should have been made to avail of the error if one had been committed.

The question of the negligence of appellees in the control and possession of the office building destroyed by fire in which appellant's loss occurred was submitted to the jury upon instructions fairly presenting the issues and they have found in favor of appellees.

We find no prejudicial error in the record, and the judgment is affirmed.

### CUNNINGHAM v. STATE. (No. 20.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

#### 1. BANKS AND BANKING (§ 84\*)—BANKERS—OFFENSES—INSOLVENCY—ACCEPTANCE OF DEPOSITS—"DRAFT."

The word "draft," as used in Kirby's Dig. § 1814, providing that no bank shall accept or receive on deposit any money, bills, or drafts circulating as money or currency, when the bank is insolvent, and making a violation thereof a felony, includes checks and other orders drawn for the payment of money.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

For other definitions, see Words and Phrases, First and Second Series, Draft.]

#### 2. BANKS AND BANKING (§ 84\*)—INSOLVENCY—OFFENSES—RECEIPT OF DEPOSIT.

Where the cashier of a bank, with knowledge of the bank's insolvency, received a check drawn on the bank and payable to a depositor, whereupon he charged the check to the drawer's account and credited the depositor with the amount thereof, such transaction constituted the receipt of a draft on deposit with knowledge of the bank's insolvency, prohibited by Kirby's Dig. § 1814, though no new money came into the bank pursuant to such transaction.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

#### 3. BANKS AND BANKING (§ 85\*)—INSOLVENCY—OFFENSES—RECEIPT OF DEPOSIT—EVIDENCE.

In a prosecution of the cashier of a bank for receiving a deposit on July 1, 1912, with knowledge that the bank was insolvent, evidence as to loans made by the bank to the cashier's brother within a month, together with the amount of money in the bank when it passed into the hands of a receiver, was admissible on the question of the insolvency of the bank at the time the deposit was received.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 212, 214-217; Dec. Dig. § 85.\*]

#### 4. CRIMINAL LAW (§ 1137\*)—INVITED ERROR—RULINGS ON EVIDENCE.

Where certain evidence with reference to a memorandum attached to a note was given by a witness in response to a question asked by defendant's attorney, error in permitting it to stand, if any, was invited, and defendant could not assert error thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

#### 5. BANKS AND BANKING (§ 85\*)—INSOLVENCY—OFFENSES—RECEIPT OF DEPOSIT—OVERDRAFT.

In a prosecution of a bank cashier for receiving a deposit with knowledge of the bank's insolvency, evidence that the cashier's account was short was admissible on the issue whether the bank was solvent or insolvent at the time the deposit was made.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 212, 214-217; Dec. Dig. § 85.\*]

#### 6. BANKS AND BANKING (§ 85\*)—INSOLVENCY—OFFENSES—RECEIPT OF DEPOSIT—EVIDENCE.

In a prosecution of a bank cashier for receiving a deposit with knowledge that the bank was insolvent, it also appearing that defendant's father and brother were largely indebted to the bank for loans made to them, evidence of the bank's receiver, that he had talked with them, and that they had admitted that their home was mortgaged, and that he had investigated their solvency and found them insolvent, was admissible, as bearing on the insolvency of the bank at the time the deposit was received.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 212, 214-217; Dec. Dig. § 85.\*]

Appeal from Circuit Court, Scott County; Daniel Hon, Judge.

W. R. Cunningham was convicted of receiving money in a bank for the credit of a depositor with knowledge that the bank was insolvent, and he appeals. Affirmed.

W. R. Cunningham was indicted for the offense of receiving money in a bank for the credit of a depositor with the knowledge that the bank was insolvent, contrary to section 1814 of Kirby's Digest.

The facts are as follows: Some time in the early part of the year 1911, I. H. Cunningham, brother of the defendant, approached R. A. McEachin, cashier of the Bank of Midland, for the purpose of buying the bank. No agreement was reached on that date. The defendant was not present. I. H. Cunningham, in company with his brother, the defendant, on the 14th day of May, again approached the cashier of the bank for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purpose of buying it. The bank was organized with an authorized capital of \$10,000, of which \$3,312.50 had been paid. McEachin had been cashier of the bank for about four years, and during that time the bank had not made a profit, but had lost about \$1,500. The bank had on hand \$13,200 in cash and in exchange on other banks. This was money which had been deposited in the bank. At that time the cashier of the bank explained fully to I. H. Cunningham the condition of the bank, including its assets and liabilities, and the defendant was present during that conversation.

McEachin had purchased his stock in the bank from Bache & Denman, former owners of it, but had not paid for it, and the stock had not been issued to him. That was also explained to Cunningham. Cunningham bought the stock of the cashier and of one Quinley at 73 cents on the dollar. He paid the cashier \$1,800 for his stock and Quinley the sum of \$475. The amount which they received for their stock was deposited in the bank to be paid to Bache & Denman, with the understanding that Bache & Denman would then transfer the stock to Cunningham. Cunningham took charge of the bank as soon as the sale was made. The defendant became cashier. The defendant continued as cashier of the bank until the 22d day of July, at which time he became sick and did not thereafter have charge of the bank. On the 6th day of August, 1912, the bank closed its doors, and a receiver was appointed for it. An examination of the books of the bank was made, and the evidence shows that the books showing the daily balances and the condition of the bank were lost after they had been examined by the receiver. On May 15, 1912, I. H. Cunningham borrowed from the bank \$5,000. No note was taken therefor, but a memorandum was made showing that amount of money had been given to him. Among the notes found in the bank after it became insolvent were the following:

Gertrude and I. H. Cunningham, May 25, due six months after date.....	\$ 350
P. W. Cunningham, June 30, due January 1, 1913.....	500
I. H. Cunningham, August 5, due on demand.....	3,000
I. H. Cunningham, June 20, due January 1, 1913.....	1,000
I. H. Cunningham, June 5, due December 5, 1912.....	1,000
I. H. Cunningham, June 20, due January 1, 1913.....	2,000
P. W. Cunningham, July 2, due on demand.....	950
I. H. Cunningham, August 12, 30 days after date.....	1,084

The books also showed that \$3,000 was borrowed from the bank at Ft. Smith and \$4,800 in notes was put up as collateral to secure the loan.

On the 1st day of July, 1912, James A. Harris, treasurer of Sebastian county, received a check on the Bank of Midland from T. A. Norris, as collector of Sebastian county

for \$1,437.51. He mailed the check to the bank and they sent him a receipt for it, signed by W. R. Cunningham, cashier. Mr. Norris had more than that amount of money to his credit in the bank, and the defendant, when he received the check, placed it to the credit of Mr. Harris and charged it to the account of Mr. Norris. After the bank went into the hands of the receiver, and an inventory was made, it appears that the bank had the notes of the Cunninghams to the amount of more than \$9,800. There was also \$1,000 or \$1,100 in other notes in the bank which were practically worthless, the receiver being able to collect only about \$250 of the amount. The cash on hand was \$10.87. There was a typewriter worth \$50 and a bank safe worth \$125. The desk and bank furniture were valued at \$125. There was an adding machine worth \$25 and a printing outfit, carried on the books of the bank at \$400, which was worth \$50. Other notes were also deposited in two other banks as collateral security, and the value of these notes was very little more than sufficient to pay off the indebtedness for which they were put up as security.

An examination of the affairs of the bank also showed that the cashier was short more than a thousand dollars, and that I. H. Cunningham signed a note for that amount. The receiver investigated the solvency of I. H. Cunningham and the latter told the receiver that he had no property and that there was a mortgage on his home.

P. W. Cunningham was the father of I. H. Cunningham and the defendant. He also stated to the receiver that there was a mortgage on his home. The receiver also talked with other parties and made an investigation of the solvency of the Cunninghams and found that they were insolvent.

The defendant testified in his own behalf and said that on the 1st day of July, 1912, he received through the mail from James A. Harris a check for \$1,437.51, signed by T. A. Norris, tax collector, that Mr. Norris had more than that amount of money in the bank at the time, and that when he received the check he placed it to the credit of Mr. Harris and charged it to the account of Mr. Norris. He further testified that he had no interest in the note, and that the loans to his brother and father were made at the instance of I. H. Cunningham; that he took sick on July 22d and was not at the bank after that date; that, so far as he knew, the bank was in good condition on the 1st day of July, 1912, and that there was more money on hand at that time, by several thousand dollars, than there was when he went into the bank; that he kept a book of daily balances in which he entered up the checks, deposits, and capital stock; that the object in keeping the book of daily balances was to show the condition of the bank each night; that he does not know where the book is now, but that it was at the bank

when he became sick. Other facts will be referred to in the opinion.

Holland & Holland, of Ft. Smith, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

HART, J. (after stating the facts as above). [1] The defendant was indicted under section 1814 of Kirby's Digest, which is as follows:

"No bank shall accept or receive on deposit, with or without interest, any money, bank bills or notes, or United States treasury notes, or bills or drafts, circulating as money, or currency, when such bank is insolvent; and any officer, director, cashier, manager, member, party or managing party of any bank who shall knowingly violate the provisions of this section, or be accessory to, or permit or connive at the receiving or accepting on deposit of any such deposit, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state penitentiary not less than three years and not more than five years."

Statutes have been enacted in a number of states making it a crime to receive deposits into a bank if it is known by the officer receiving the deposits that the bank is in an insolvent condition. The purpose of these statutes is not only to protect innocent depositors, but to deter bank officials from so conducting the business of the bank as to endanger its solvency. Third Ruling Case Law, § 117, p. 490.

The word "draft," as used in the section of the statute above quoted, is a general term and includes checks as well as other orders drawn for the payment of money. State v. Warner, 60 Kan. 94, 55 Pac. 342.

[2] When the cashier in the instant case received the check he charged the account of Norris with the amount of the check and credited Harris with the amount thereof. It is claimed by counsel for the defendant that because no new money came into the bank that there was no violation of the statute. The money was in the bank, or was supposed to be there, and the transaction was considered and treated as though the cashier had actually paid over the money to Harris, and that Harris had immediately redeposited it in the same bank. The transaction was not essentially different from what it would have been had the whole amount of the check been received from other sources and then deposited in the bank. State v. Shove, 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142, 65 Am. St. Rep. 17.

In Third Ruling Case Law, § 123, p. 496, the author says:

"The deposit need not be a deposit of money, and although a portion of the money for which the certificate of deposit is issued by a bank consists of that represented by a prior certificate of deposit against the same bank and surrendered at the time that the last deposit is made, the last deposit and the certificate thereof must be treated as if the whole amount had been deposited in cash."

Therefore, we are of the opinion that the contention of counsel for defendant is not well taken.

[3] It is also contended that it was error to admit testimony of amounts loaned to I. H. Cunningham after the deposit in question was made on the 1st day of July, 1912. We do not agree with them in that contention. Under the statute, knowledge of the insolvency of the bank on the part of the defendant is made an essential element of the offense, and the question is ordinarily one for the jury. It is not essential that knowledge be proved by direct evidence of the defendant's state of mind, but it may be proved by circumstantial evidence. It appears from the evidence in the case that on August 6th, a short time after the deposit in question was made, that the bank was admittedly insolvent and that at that time it only had the sum of \$10 in money. The proof of the loans made to I. H. Cunningham, after the receipt of the deposit in question, was so near in point of time that it gave an indication to the jury as to whether or not the bank was insolvent on the 1st day of July, 1912, the date of the deposit in question. The defendant himself testified that at the time the deposit was received the bank was \$7,000 better off than it was when he took charge of it as cashier. It was competent to show the amount of money that was paid to different persons after the 1st day of July, 1912, in order to show how much was actually on hand on that date. It was also competent to show how much money was on hand when the bank went into the hands of the receiver, and, by taking all the facts and circumstances into consideration, the jury might determine how much money was on hand at the time the deposit was made. It is contended by counsel for the defendant that the bank was not insolvent at the time the deposit was made. It appears from the statement of facts that at the time I. H. Cunningham took charge of the bank that it had something over \$13,000 on hand, and that this money had been placed there by the depositors of the bank. The record does not disclose that the depositors drew any money out of the bank after the Cunninghams took charge of it, except the \$3,800 which was placed there by I. H. Cunningham a few days before the bank closed its doors.

The books of the bank show that it loaned to I. H. Cunningham and his father more than \$7,000 before the deposit in question was made; that there was about \$1,100 worth of notes on hand, but that these were of very little value, only about \$250 being collected on them by the receiver. It is true the bank had some other notes, but they had been put up as collateral security for loans, and were worth very little more than the amount of the loans. There were some furniture and fixtures belonging to the bank, but, as it will be seen from the state of facts,

they were of but little value. Therefore, it is plain that at the time the deposit was made the bank was due its depositors over \$13,000, and had only cash and assets to the amount of not exceeding \$7,000 with which to pay it. The defendant admits that he kept the books of daily balances which showed the condition of the bank and, although he stated that the bank was in a solvent condition, from the testimony introduced, the jury might well have inferred that he had knowledge that the bank was not solvent at the time he received the deposit.

[4] Counsel for defendant also assigns as error the action of the court in admitting in evidence a certain note signed by I. H. Cunningham for \$1,084.84, dated August 12, 1912, together with a slip of paper attached thereto bearing the words "shortage in cashier's account." The admission of the testimony occurred in this way: McEachin, the former cashier of the bank, testified that, after it closed its doors in August, he took charge of the affairs of the bank and had the accounts of the cashier audited. He was asked to state what the auditor's statement showed with reference to the cashier's account. The attorney for the defendant objected, on the ground that the statement should show for itself. McEachin was then asked if I. H. Cunningham had not signed a note for \$1,084.84, dated August 12, 1912, and replied that he did. He was then asked what the note was given for, and replied that it was given for a shortage that showed in the cashier's account. He further stated that W. R. Cunningham was the cashier referred to, and that the shortage covered the period from the time they purchased the bank until it failed. No objection was made by counsel for the defendant to this testimony. The attorney for the defendant then asked the witness why the defendant's name was not signed to the note, and the witness replied that he was sick at the time the note was given. He was then asked why he did not make the note show it was given for a shortage in his account, and the witness replied that the slip attached to the note showed that fact. The attorney for the defendant then objected to the introduction of the slip. The court then reminded the attorney that the witness had answered the question in regard to the slip as propounded by him. The attorney for the defendant then asked him again why he did not write in the note that it was given for a shortage, and the witness replied that there was a mortgage given to secure the note and that the slip was attached to the note for information. From this it will be seen that the admission of the slip in regard to what the slip attached showed was in response to a question by the defendant's attorney; and, as error, it was invited error and no error of the judgment can be had on it.

[5] It was competent to show that the cashier's account was short \$1,084.84, for the reason that it tended to show whether or not the bank was solvent or insolvent at the time the check from Norris to Harris was given. No objection was made to the testimony. If objection had been made to it, on the ground that it was only competent as tending to show the solvency or insolvency of the bank on the 1st of July, 1912, doubtless the court, at the request of counsel for the defendant, would have limited it to that purpose.

[6] It is also assigned as error, by counsel for the defendant, that the court admitted the testimony of the receiver to the effect that he had talked with P. W. Cunningham and I. H. Cunningham, the father and brother of the defendant, and that they admitted that their home was covered by a mortgage, and also testimony to the effect that he had investigated the solvency of these parties and found that they were insolvent. This testimony was competent as tending to show whether the bank was insolvent or not at the date the check from Norris to Harris was deposited in the bank; the Cunninghams being large borrowers from the bank at that time. From the close relationship and association of these parties with the defendant, the jury might have inferred that he knew of the fact of their insolvency.

The judgment is affirmed.

#### McEVOY v. TUCKER. (No. 24.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

#### 1. DEEDS (§ 211\*) — MENTAL CAPACITY OF GRANTOR — WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a suit to cancel a deed executed about six months before the death of the grantor, and about five months before he was declared incompetent by the probate court, evidence held to show by the clear preponderance thereof that the grantor was not of sound mind when the deed was executed, notwithstanding the chancellor's finding to the contrary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

#### 2. DEEDS (§ 68\*) — MENTAL CAPACITY—DEGREE OF CAPACITY REQUIRED.

To invalidate a person's deed or contract, such person must be unable to exercise a reasonable judgment regarding the matter involved in the conveyance or contract, and must be so insane as to be disqualified from intelligently comprehending and acting upon the business affairs out of which the conveyance or contract grew, and from understanding the nature and consequences of his act.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

#### 3. INSANE PERSONS (§ 61\*) — VALIDITY OF DEED—MENTAL INCAPACITY — INADEQUACY OF CONSIDERATION.

The conveyance of an insane person is void without regard to the adequacy of the consideration, though equity will more readily intervene to set aside the conveyance, if, in addition to mental incapacity, there is also inadequacy of consideration.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 93-99; Dec. Dig. § 61.\*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Ed F. McEvoy, executor of H. D. Parker, deceased, against O. D. Tucker. From a decree in favor of defendant, plaintiff appeals. Reversed and remanded, with directions.

On the 24th day of September, 1912, appellee, O. D. Tucker, purchased from H. D. Parker lot 3 of block 72 in the city of Little Rock, for a consideration expressed in the deed of "\$1.00 and other considerations," but which was, in fact \$7,500. Parker was an unmarried man, and his deed was a warranty deed in common form, and this suit was brought to cancel that deed on account of his mental incapacity at the time of its execution. There was an allegation in the complaint that fraud had been practiced by the grantee in the procurement of the execution of the deed, but no proof was offered in support of this allegation, except that the grantor was, in fact, insane, and that the land had been bought for a grossly inadequate consideration. The answer denied all the material allegations of the complaint, and alleged that a fair and adequate consideration had been paid for the property.

Parker died March 29, 1913, leaving a will, made in 1909, in which E. F. McEvoy was named as executor, and also as trustee of the property after the payment of a few legacies, with full power to manage the estate. On February 27, 1913, Parker was declared non compos mentis by the Pulaski probate court, and P. C. Ewing was appointed guardian. This suit was brought by Ewing as guardian under authority from the probate court, and, after the death of Mr. Parker, was revived in the name of McEvoy as executor and trustee. A tender of the consideration, with the interest thereon, was made by the executor; the estate being a valuable one.

Only one physician testified, and, while he did not undertake to qualify as a neurologist or alienist, he appears to have had very definite views of Mr. Parker's mental condition, which were formed under circumstances affording ample opportunity for observation and for the formulation of this opinion. This witness was Dr. W. B. Hughes, who testified substantially as follows: That he had been a physician for 21 years, and had known Mr. Parker for 35, and had been his physician for the last year or year and a half of his life, and saw him and prescribed for him a number of times; that another doctor who had been Parker's regular physician died in February, 1912, but before that time witness had treated Parker occasionally, and afterwards was his regular physician, and had prescribed for him at different times during the summer of 1912, and saw enough of him during the last year or more of his life to know what his mental condition was. And he stated that for the last year of Mr.

Parker's life his mental condition was bad, and that he did not think his capacity was such as to justify him in attending to business or attempting to attend to business, and that he did not regard him as capable of executing important papers, for the reason that he was incapable of exercising a rational judgment about such matters, and that he grew worse all the time. Witness did not undertake to state his condition on the date of the execution of the deed, as he had no reason to remember that date specially, but he did know what his condition throughout that month had been, and that this condition was one of senility, as he had broken down mentally and physically, and was incapable of doing physical work. He was asked to state what he meant by senility, and in answer said it was a deterioration both mental and physical, which condition had been brought about in Mr. Parker's case by long, continuous hard work without any rest or recreation and oncoming age. Witness stated further that Mr. Parker appeared to be unable to follow any continuous line of thought at all, and would frequently, in the midst of a conversation, break off and go to sleep—go to sleep in his chair; that he appeared to be very childlike, and would laugh at trivial things, and, in a general way, he noticed that he grew weaker, both mentally and physically, and for some months before his death had lost control of his bowel movements and of his bladder, and could not remember from one hour to another, as a rule, what he was doing. He stated, however, that at times he seemed much brighter than at other times, but that he was not at any time like he had been prior to his breakdown.

Sam W. Reyburn testified that he was president of the Union Trust Company, an institution with which Mr. Parker was connected during the last years of his life, and that at one time Mr. Parker had been a very astute, painstaking business man, and had been trust officer of that company; that witness saw him almost every day during the last two years of his life and observed a gradual wasting away of his old-time vigor and ability, and that he gradually reduced his duties until in August, 1911, there was practically nothing left for Mr. Parker to do, although for some time thereafter a few minor duties were assigned to him, but even when this was done some one was directed to keep right after him to see that no mistakes were made; that Mr. Parker was induced to take a vacation a time or two, which benefited him, but he would hold up only a few days, when he would become cross and irritable, and that this went on for almost a year, during which time there were two or three clients whose business Mr. Parker nominally attended to, but witness observed him closely to see that no mistakes were made, and that practically no duties were required of him during the last year of his life; that

in the summer of 1912 his condition appeared to get critical, after which his associates knew that his mind was affected, but they hoped and tried to believe that his condition was physical; that Mr. Parker would promise to do anything he was told to do about the office, but would forget and fail to do what he had promised; after the deed was made he was asked at what price he had sold the land, but declined to say; that one of the trust company's clients whose business had been looked after by Mr. Parker was a Mrs. Reid, and he had permitted her affairs to become involved, and they were straightened out only after some difficulty; that about the time of the sale Mr. Parker was the administrator of an estate, and had voluntarily paid large sums of money for the debts of that estate for which he was in no way personally liable, and which sums were later recovered by Mr. Parker's guardian. This witness stated that he last saw Mr. Parker before the execution of this deed about the 14th of September, 1912, at which time he considered him incapable of attending to his business or exercising a reasonable judgment in regard to his affairs, and that he gradually got weaker and worse, both physically and mentally, until his death. This witness stated that one talking to Mr. Parker casually might not notice that he was not at himself, and that witness did not regard Mr. Parker as insane on any particular subject, but just thought he had run down and played out, although he might have impressed a stranger who had not observed him closely that he still retained his faculties.

A number of the other officers and employees of the Union Trust Company who came in daily contact with Mr. Parker testified in substantial corroboration of Mr. Reyburn, and detailed a number of circumstances which indicated a growing mental infirmity and the final loss of his faculties.

Appellee testified in his own behalf that he had known Mr. Parker for a number of years, and had no intimation of any impairment of his mentality, and stated the fact to be that Mr. Parker's mental faculties were not impaired. One or two other witnesses testified as to certain conversations which they had had with Mr. Parker, and stated that they had not observed any lack of mental capacity; but these witnesses had had only a very limited association with Mr. Parker and no opportunity to observe him closely.

There was a wide conflict in the evidence in regard to the value of the property, and its value was placed at all the way from \$6,500 to \$14,000; but the great preponderance of the evidence is that the property was worth more than \$7,500 at the time of the execution of the deed. Appellee admitted that the property was worth considerably more than he paid for it, but he says this excess in value was due to certain improvements

and new buildings in the vicinity of this lot which were only prospective at the time of his purchase. The disparity between the purchase price and the value of the lot is not so great, however, as, of itself, to furnish any very satisfactory evidence of Mr. Parker's lack of mental capacity, although it is shown that some months prior to this sale he had expressed himself very emphatically as being unwilling to take less than \$12,000 for the property; and we think that the proof shows that the property could have been sold for a considerably larger sum than was received at any time within a year or so prior to the date of the sale.

The chancellor found that Mr. Parker was not non compos, and refused to set aside the conveyance.

Ratliffe & Ratcliffe, of Little Rock, for appellant. S. L. White, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). [1-3] The decision of this case turns upon the question of fact as to whether or not the chancellor's finding is contrary to the clear preponderance of the evidence; and we have concluded that it is. The test of mental capacity to execute a deed was stated by Justice Riddick in the case of *Seawel v. Dirst*, 70 Ark. 166, 66 S. W. 1058, in which case it was said:

"It follows, therefore, that the proof which is designed to invalidate a man's deed or contract on the ground of insanity must show inability to exercise a reasonable judgment in regard to the matter involved in the conveyance. \* \* \* To have that effect (i. e., to invalidate the deed), the insanity must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act."

When this test is applied to the evidence in this case, we feel constrained to hold that the deed in question should be set aside. It may be true that appellee was unaware of Parker's mental condition; but it is not essential that the proof show that he did, in fact, possess this information. And it may be true that persons who had only casual conversations with Mr. Parker may not have been impressed with his loss of mentality; but, while these things are so, it is also true that those witnesses who associated with him most intimately and had the best opportunity to observe him and form an opinion as to his sanity became impressed with the gradual loss of physical vitality and mentality and were all of the opinion that at the time of the execution of the deed he was non compos, and we conclude, therefore, that a court of equity should relieve against his irresponsible act in the execution of the deed. Having reached this view, it is immaterial whether the consideration was full and adequate or not, as the conveyance of an insane person is void without regard to the adequacy of the consideration. See note

13 Cyc. 574. But, as stated, we think the evidence in this case shows an inadequate consideration, and that is a circumstance to be considered in determining whether relief shall be granted in cases of this character; for if, in addition to mental incapacity, there is also inadequacy of consideration, equity will the more readily intervene to set aside a conveyance. *Kelly's Heirs v. McGuire*, 15 Ark. 555.

We have concluded, therefore, that the decree of the chancellor should be reversed, and it is so ordered, and the cause will be remanded with directions to the chancery court to enter its decree canceling and annulling the conveyance in question upon the payment to appellee of the consideration paid by him, together with interest at the rate of six (6) per cent., within some period of time to be fixed by the court.

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ST. LOUIS, I. M. & S. RY. CO. v. RUSSELL  
et al. (No. 40.)

(Supreme Court of Arkansas. Dec. 7, 1914.)  
LIMITATION OF ACTIONS (§ 55\*) — ACTIONS  
AGAINST RAILROAD.

A railroad crossed a stream on a trestle, leaving an opening for the stream. As shown by plaintiffs' evidence, the company placed some old cars near the end of the trestle, causing a sand bar to form there which was constantly increasing in size so as to obstruct the flow of water, and this increase in size had occurred within three years before plaintiffs' lands on the upper side of the railroad were overflowed. It might have been found that a clearing away of the sand bar and wreckage would give the water free course at any time, and thus remedy the cause of the trouble. *Held*, that a right of action for the injury was not barred by limitations, since, where a nuisance is not necessarily injurious, but may or may not be so, and if it proves to be injurious, the injury continues for a while, inflicts damage, and then entirely ceases, limitations run from the time the damage is done, and not before, and there may be as many successive recoveries as there are successive injuries.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.\*]

Appeal from Circuit Court, Hempstead County; Jacob M. Carter, Judge.

Action by Jeff Russell and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. B. Kinsworthy, R. E. Wiley, and T. D. Crawford, all of Little Rock, for appellant. Jas. H. McCollum, of Hope, for appellees.

HART, J. Appellees instituted this action against appellant to recover damages for injuries alleged to have been caused by appellant obstructing the natural flow of the water in a stream, thereby damaging the crops of appellees. They alleged that appellant carelessly constructed its embankment across the Terre Rouge creek without sufficient opening to permit the water to

flow off naturally, and also alleged that appellant negligently threw dirt and large timbers into the stream and suffered dirt, logs, and driftwood and wreckage to accumulate in the bed of said creek, thereby obstructing the natural flow of the water, and that in consequence thereof, on the 9th day of September, 1913, the water from said stream backed up over appellees' land for several days, destroying a portion of their crop. Appellant's answer contained a general denial, and also a plea of the statute of limitations.

The facts are as follows: Appellant's line of railway crossed the Terre Rouge creek over a trestle, and some 20 years or more ago it threw its embankment up along part of the trestle, but left an opening for the waters of the creek to pass through. The testimony on the part of appellees tends to show that since that time there has been an occasional overflow on their lands which are situated above the bridge or trestle, and that the opening left by the railroad company was sufficient to carry off the waters of the creek during most of the years since it was constructed. It further tends to show that about 10 years ago the railroad company deposited some old cars near the lower end of the bridge or trestle, and that these caused a sand bar to form there, and that finally willows began growing on the sand bar; that sediment and other wreckage which flowed down the creek was deposited on the sand bar, and that the sand bar has increased in size and extent until it has got up under the tracks of the railroad, and every year tends more and more to obstruct the flow of the water.

Appellees' testimony further tends to show that in September, 1913, a heavy rainfall occurred, and that the sand bar and wreckage just below and under the bridge obstructed the flow of the water and caused it to back up and overflow their lands, whereby their crops were destroyed.

The evidence for appellant tends to show that the bridge built over Terre Rouge creek was a permanent structure, and that it was just as apparent when it was erected as it is now as to the extent to which it would obstruct the flow of the water of the Terre Rouge creek. Its evidence also tends to show that the sand bar and wreckage on the lower side of the track which extends up under the track did not in any manner tend to obstruct the flow of the water, and that the water flowed around each side of the sand bar.

The jury returned a verdict in favor of appellees, and to reverse the judgment rendered appellant has appealed.

No objections are urged by counsel for appellant to any of the instructions given by the court. Therefore it is not necessary to consider or to discuss them. It is contended, however, by counsel for appellant

that the court erred in refusing to give instruction No. 14 asked by them, the instruction being as follows:

"If you believe from the evidence that the conditions of defendant's roadbed and the openings therein which the plaintiff now complains of in this action existed more than three years before plaintiff brought this action, and that such conditions were permanent in their nature—that is, would continue without change from any cause except human labor—and if such conditions were necessarily injurious, and if it was reasonably apparent that in seasons of heavy rainfall such conditions would cause plaintiffs' lands and crops to be damaged, then plaintiffs' action is barred by the statute of limitations, and your verdict should be for the defendant."

Counsel for appellant relies on the case of Chicago, Rock Island & Pac. Ry. Co. v. Humphreys, 107 Ark. 330, 155 S. W. 127, where the court held:

"When a railroad company constructs a culvert so that damage to adjoining property by overflow must necessarily result, and the certainty, nature, and extent of the damage may be reasonably ascertained and estimated at the time of the construction of the culvert, then the damage is original, and there can be but a single recovery, and the statute of limitations against such cause of action is set in motion on the completion of the obstructing culvert."

Counsel for appellant contend that the record in the case shows that the defendant's embankment and the bridge or trestle over Terre Rouge creek caused a permanent and original injury to the upper adjoining lands, for which recovery must be sought within three years of its construction. In making this argument, however, counsel for appellant have not taken into consideration the evidence of appellees to the effect that within the last three years before the injury complained of occurred the sand bar which had begun to form on the lower side of the bridge or trestle, and which had begun to extend up under the trestle, was increasing in size and extent, so that it obstructed the flow of the waters in the creek. It is true appellant introduced testimony tending to contradict the testimony of appellees, but we are of the opinion that the testimony of appellees brings the case squarely within the principles decided in the case of St. L., I. M. & S. R. Co. v. Hoshall, 82 Ark. 387, 102 S. W. 207, and cases of a like character. In that case the court quoted with approval from the case of St. L. S. W. Ry. Co. v. Morris, 76 Ark. 542, 89 S. W. 846, as follows:

"In cases where the nuisance is not necessarily injurious, but may or may not be so, and if it proves to be injurious, the injury continues for a while, inflicts damage, and then entirely ceases, the statute of limitations begins to run from the time the damage is done, and not before; and there may be as many successive recoveries as there are successive injuries, and the statute of limitations runs from the time each of such injuries occurs."

As we have already seen, the testimony on the part of appellees tended to show that the sand bar and wreckage which collected on the lower side of the bridge or trestle was

constantly filling up and increasing in size year by year, so that it obstructed the flow of the water in the creek, and that on the occasion in question the lands on the upper side of the railroad overflowed and those on the lower side did not. From this evidence the jury might have inferred that appellant was negligent in permitting this continuation of the obstructions to exist, and the jury might also have found that the injury complained of resulted in appellees' damage on account of this obstruction, and that a clearing away of the sand bar and wreckage might give the water free course at any time, and thus remove the cause of the trouble.

It follows that the judgment must be affirmed.

#### DRAINAGE DIST. NO. 1, CROSS COUNTY, v. ROLFE et al. (No. 42.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

#### APPEAL AND ERROR (§ 84\*)—ORDERS APPEAL- ABLE—"FINAL JUDGMENT."

Where the county court entered the nunc pro tunc order necessary to give the circuit court jurisdiction of an appeal from a judgment establishing a drainage district, no appeal from the action of the circuit court dismissing petitioner's appeal from the nunc pro tunc order of the county court will lie; for such order of the circuit court is not a "final judgment."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 523-547; Dec. Dig. § 84.\*

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

Appeal from Circuit Court, Cross County:  
W. J. Driver, Judge.

Proceedings for the establishment of Drainage District No. 1 of Cross County, in which F. D. Rolfe and others lodged a transcript in the circuit court. From a judgment of the circuit court dismissing an appeal from a judgment of the county court entering nunc pro tunc orders, petitioners appeal. Appeal dismissed.

L. C. Going, of Harrisburg, for appellants.  
O. N. Killough, of Wynne, and J. F. Summers, of Augusta, for appellee.

KIRBY, J. A full statement of this case is found in Drainage Dist. v. Rolfe, 110 Ark. 374, 161 S. W. 1034, where it was reversed; the court holding that the judgment of the circuit court was void for want of jurisdiction, there being no order of the county court granting an appeal to the circuit court in the record of the proceedings in that court. The court also held that, since the necessary orders granting the appeal had been entered by the county court nunc pro tunc and certified to the circuit court, it was within the power of that court to permit the record from the county court to be amended accordingly so as to show the necessary jurisdictional facts and remanded the case for further proceedings.

The drainage district appealed from the judgment of the county court entering the nunc pro tunc orders, to the circuit court, and that court dismissed the appeal, and from its judgment this appeal is prosecuted. The dismissal of the appeal from the judgment of the county court making the nunc pro tunc orders was in effect but a holding that such orders were properly made and an affirmance thereof, giving the circuit court thereby jurisdiction to hear and determine the cause. Said judgment was not a "final order or judgment" determining the rights and liabilities of the parties nor the merits of the cause, and cannot be appealed from. *Atkins v. Graham*, 99 Ark. 496, 138 S. W. 878; *McPherson v. Consolidated Casualty Co.*, 105 Ark. 324, 151 S. W. 283.

Its only effect was to hold that the circuit court had jurisdiction to determine the controversy, and, if we should affirm the court's judgment, it would leave the entire cause pending there and undetermined.

The judgment not being final, the appeal was premature and must be dismissed. It is so ordered.

#### MEYER v. HOLLAND. (No. 22.)

(Supreme Court of Arkansas. Nov. 30, 1914.)

#### 1. BROKERS (§ 48\*)—COMMISSION—SUFFICIENCY OF SERVICES.

Where an owner expressly promised to pay a broker's commission if he traded with E. for any lands owned by or listed with him for sale, and a trade was made for land listed with E. when the promise was made, the broker was entitled to his commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 65; Dec. Dig. § 48.\*]

#### 2. APPEAL AND ERROR (§ 907\*)—PRESUMPTION—INSTRUCTIONS.

Where the instructions given are not set out on appeal, it will be assumed that the case went to the jury under instructions correctly declaring the law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

Appeal from Circuit Court, Garland County; Calvin T. Cotham, Judge.

Action by Arthur Holland against S. Meyer. Judgment for plaintiff, and defendant appeals. Affirmed.

C. Floyd Huff, of Hot Springs, for appellant. Rector & Sawyer, of Hot Springs, for appellee.

SMITH, J. Appellee recovered judgment for commissions claimed by him upon a sale of real estate owned by appellant.

The evidence is not abstracted fully by appellant, but his contention is that the evidence at the trial developed the following facts: That appellant listed certain lands with appellee, but reserved the right to sell the lands himself if he found a purchaser. That appellees showed the property to one Epps, who was himself a real estate dealer,

and subsequently introduced Epps to appellant. That appellant and Epps were unable to trade, but appellant listed his lands with Epps, who subsequently procured one Swan as a purchaser, with whom he traded.

[1] Appellee abstracts the testimony offered in his own behalf, and it appears that his testimony in the trial below was substantially as follows: That prior to November 11th appellant listed with him for sale certain real estate in Hot Springs, valued at \$11,000, and appellee was to find a purchaser for said property at that price, or for the consideration of \$6,000 and the assumption of an indebtedness secured by a deed of trust in the sum of \$5,000. That about the 15th of November Mr. Epps came to his office and said that he wished to buy or trade for a home in Hot Springs, that he had lands in this state and other states which he would be glad to exchange for property in Hot Springs, and that he had listed with him for sale real estate belonging to his clients, and that if none of his own lands would suit a customer he could possibly make a trade on some of the lands listed with him. Appellee told Mr. Epps about appellant's lots and stated to him that he thought he could negotiate a trade for some of his lands, and that he took him to the property, and Mrs. Meyer showed them through the house; that Epps was well pleased and he went with him to appellant's store and stated to him at the time that Mr. Epps owned lands in this and other states and wanted to trade for property in Hot Springs; that he had shown appellant's property to Epps and hoped they could get together on some of these lands, but if they could not, that Epps had lands belonging to others listed with him for sale or trade, and they could possibly find something that they could get together on; that he said to appellant at the time that, if he and Epps traded for lands owned by Epps or listed by others with him for trade, he would expect his commission, and appellant said: "I will take care of your commissions if Epps and I trade. I like to pay commissions"—and that he left appellant and Epps discussing certain lands in Kansas owned by Epps, and that some time thereafter he called appellant over the phone and asked him how the trade was progressing, and was told, "The man you brought me didn't trade for my property, but got me a man." Appellant traded with one A. D. Swan, who assumed the \$5,000 mortgage debt and conveyed to Meyer certain lands owned by him. Epps testified that at the time he first met Holland the Swan lands were listed with him, and had been for some time.

[2] Appellant has not set out the instructions given by the court in this case, and we must assume that the case went to the jury under instructions correctly declaring the law.

According to appellee's version of this transaction, there was an express promise on appellant's part to pay the commissions, the amount of which is not in controversy, if appellant traded with Epps for any lands owned by Epps, or listed with him for sale, and a sale was made by trading for certain lands owned by Swan, which were listed with Epps at the time the promise was made.

The judgment of the court is therefore affirmed.

**HORTON & CO. v. BEALL et al.** (No. 30.)  
(Supreme Court of Arkansas. Dec. 7, 1914.)

**BROKERS (§ 55\*)—RIGHT TO COMMISSION—CONTRACT—SUFFICIENCY OF SERVICES.**

Where an owner agreed to pay a broker a commission for bringing about or negotiating a sale or exchange of his land, reserving the right to place the lands with other brokers, and accepted a trade brought by another broker, acting independently of the first, and agreed to pay that broker a commission, the first broker was not entitled to a commission, as he did not bring about the exchange and as the contract was not broad enough to entitle him to a commission on the exchange made.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.\*]

Appeal from Circuit Court, Hempstead County; Jacob M. Carter, Judge.

Action by Horton & Co. against T. A. Beall and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Steve Carrigan, Jr., of Hope, and Etter & Monroe, of Washington, for appellant. O. A. Graves, of Hope, for appellees.

**McCULLOCH, C. J.** This is an action instituted by appellants against appellees to recover commissions alleged to be due on the sale of a plantation in Hempstead county, Ark., owned by appellees. Appellants are real estate brokers at Hope, and appellees entered into a contract with them, giving them exclusive right to sell the place for a commission during a period of six months. That period expired without any progress being made towards a sale, and thereafter appellees continued the authority of appellants to sell or exchange the property, and agreed to pay them a commission, but the agreement did not contemplate an exclusive privilege on the part of appellants. On the contrary, appellees reserved the right to list the lands for sale or exchange with other dealers, and did place them with other dealers. An exchange of the lands for other real estate was finally made with one Aiken, and the trade was brought about and consummated through Colter & Co., a firm of real estate brokers in Muskogee, Okl., with whom appellees had listed the lands. Some months prior to that time, appellants had corresponded with Colter & Co. with reference to an exchange of the lands for real estate in Muskogee owned by a man named Robinson, and Colter & Co. endeavored to bring about the

exchange, but failed. It was after the failure to effect that exchange (appellees having, after examining the Robinson property, declined to enter into the trade) that Colter & Co. brought appellees and Aiken together for the trade which was consummated. Appellees agreed to pay a commission to Colter & Co. and executed their note for the stipulated amount. When appellants asserted a claim to the commission, the note was held up until it could be determined whether or not they were entitled to the commission. Upon this state of facts, adduced in evidence at the trial, the circuit court peremptorily instructed the jury to return a verdict in favor of appellees, which was done, and judgment rendered accordingly.

The question for review is whether the testimony, in any phase of it most favorable to appellants, warranted a submission of the issues to the jury. Our conclusion, after considering the testimony, is that there was no evidence tending to justify a recovery by appellants, and that the court was correct in giving a peremptory instruction. The contract between appellants and appellees was that the latter should pay appellants a commission for bringing about or negotiating a sale or exchange of the lands, and it is undisputed that the exchange made with Aiken was not brought about through the efforts of appellants. In other words, they did not procure the exchange and are not entitled to a commission. We have had cases where the parties agreed that a commission should be paid if the broker procured a sale or procured some other person to bring about a sale, and in those cases we held that where one broker procured a sale or exchange through another broker, he was entitled to a commission. *Simpson v. Blewitt*, 110 Ark. 87, 160 S. W. 1067; *Meyer v. Holland*, 171 S. W. 893. There is no contention that such was the effect of the contract in this case between appellants and appellees, and in order to entitle them to a commission it must appear that they procured a sale or exchange for appellees. This they did not do. Appellees reserved the right, as before stated, to place the lands in the hands of other dealers for sale or exchange, and under this reservation they had the right to accept a purchaser brought to them by Colter & Co. or any other dealer, and pay the latter a commission, without becoming liable to appellants, even though the appellants originally brought that firm of brokers and appellees together. Colter & Co. were not acting as agents for appellants in negotiating the exchange between appellees and Aiken, but were proceeding independently. It may be that Colter & Co. did not act in good faith with appellants, and there is some testimony of admissions on the part of Colter & Co. which tend to establish that fact. But that does not render appellees liable, for they had the right to employ

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Colter & Co. to make the sale or exchange, and did so, and agreed to pay them a commission. So there is no theory deductible from the evidence in this case upon which appellants are entitled to recover from appellees a commission for the exchange made with Aiken. They did not bring about the exchange, and their contract with appellees was not broad enough to entitle them to a commission on an exchange brought about by Colter & Co., or any other brokers.

The judgment is therefore affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. v. MITCHELL. (No. 8.)

(Supreme Court of Arkansas. Nov. 23, 1914.)

### 1. RAILROADS (§ 313\*)—CROSSING ACCIDENT—SIGNALS — STATUTES — APPLICATION — "TRAIN."

Kirby's Dig. § 6607, providing that all persons running trains in the state shall keep a constant lookout for persons and property on the track and that railroad companies shall be liable for any damage done to any person or property by reason of failure to keep such lookout, and imposing on such companies the burden of showing that the duty was performed, is limited to the operation of trains as such, and does not apply to the operation on the track of a railroad motor car belonging to the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. § 313.\*]

For other definitions, see Words and Phrases, First and Second Series, Train.]

### 2. RAILROADS (§ 310\*)—CROSSING ACCIDENT—MOTOR CARS—OPERATION—CARE REQUIRED.

Where employees of a railroad company operated a motor car along the track and over crossings, they were bound to exercise reasonable care in so doing, whether commanded to do so by statute or not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 982-987; Dec. Dig. § 310.\*]

### 3. RAILROADS (§ 351\*)—CROSSING ACCIDENT—COLLISION WITH MOTOR CAR—OPERATIVES—CARE REQUIRED—INSTRUCTIONS.

In an action for injuries to plaintiff at a railroad crossing by being struck by a railroad motor car, the court properly charged that the operatives of the car were required to keep a lookout for persons crossing the track, and if their failure to use reasonable care in stopping the car constituted negligence plaintiff could recover unless he himself was negligent in failing to stop, look, and listen to see if a car or train was coming, under the rule that a railroad track is a warning of danger and that a person approaching it in the exercise of ordinary care must stop, look, and listen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\*]

### 4. RAILROADS (§ 350\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff by being struck by a railroad motor car at a crossing at night, the car following a train and approaching without lights, whether plaintiff was negligent in failing to observe the car before going on the track was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

### 5. ACCORD AND SATISFACTION (§ 26\*)—WHAT CONSTITUTES—EVIDENCE.

Plaintiff having been injured in a railroad crossing accident, defendant's claim agent offered him a draft for \$50 in settlement, agreeing also to pay plaintiff's attorney. Plaintiff testified that he took the draft because the agent told him he would never get anything else, but had no intention to cash it and did not do so. The railroad company made no attempt to settle with plaintiff's attorney and sought to excuse itself by stating that, suit having been begun on the same day the settlement was effected, it concluded that no settlement with him could be made. *Held*, that such facts were insufficient to establish an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 162-165; Dec. Dig. § 26.\*]

### 6. TRIAL (§ 257\*)—INSTRUCTIONS—REQUEST TO CHARGE—PRESENTATION—TIME.

Under Kirby's Dig. § 6196, subd. 5, providing that when the evidence is concluded either party may request instructions, which shall be given or refused by the court, etc., the trial judge has discretion to require that the instructions be settled before argument, and to that end may require that requests to charge be submitted before the opening argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 642-645; Dec. Dig. § 257.\*]

### 7. TRIAL (§ 207\*)—REQUEST TO CHARGE—TIME.

Where, in an action for injuries at a railroad crossing, a controversy arose during the argument over a statement made therein that defendant's offer to compromise was an admission of liability, defendant was then entitled to request and have the court give an instruction that such was not the effect thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.\*]

### 8. TRIAL (§ 194\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY

In an action for injuries at a railroad crossing, a request to charge that if the jury found that the original record of the movement of the railroad's trains had been proven they must accept it as they would any other written evidence made at the time of the transaction, and unless they had reason to believe that the record had been changed or tampered with they should find it to give the correct movement of the trains, was properly refused, since such record did not import verity and was entitled to no greater weight than other similar records.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

Appeal from Circuit Court, Prairie County; Eugene Lankford, Judge.

Action by P. M. Mitchell against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Appellee sued to recover damages to compensate for an injury sustained by him, and at the trial testified that on the 3d day of January, 1914, while proceeding with due care to drive his team across the appellant's road on a public highway, the employees of appellant in charge of a motor car negligently ran into appellee's wagon in which he was riding, threw him out of it, and seriously in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jured him. Appellant admitted that its hand car struck the appellee's wagon, but alleged that the collision was occasioned by reason of the failure of appellee to stop, look, or listen before undertaking to cross the track; and alleged, and offered proof tending to show, that its employes were proceeding with due care; and further that had appellee stopped and looked or listened he could and would have seen the approaching car in time to have avoided the collision, whereas its employes operating the hand car were unaware of appellee's proximity to the track and his consequent danger until the car was too near the wagon to avoid the collision. Appellee undertook to excuse his failure to stop, look, and listen by testifying that a freight train passed immediately in front of the hand car, and that the train made so much noise that he could not hear the car, and that he did not know that the hand car was following immediately behind the train, and, moreover, that the collision occurred just about dark, and there were no lights of any kind on the hand car. The proof showed that, some time after the injury complained of was inflicted, an agreement was entered into whereby appellee agreed to accept the sum of \$50 in satisfaction of all damages which he had sustained, and a draft for that amount was drawn in favor of and delivered to appellee. This draft was never cashed, nor presented for payment, although the proof showed that it would have been cashed had it been presented. A written release was signed, but the proof does not show that appellee's attorneys were parties to or were advised of it, and on the very day of its execution this suit was brought. It is admitted that, in addition to the consideration of \$50 evidenced by the draft, the railway company agreed to pay appellee's lawyer, and it was stated by the claim agent at the time that, as no suit had been brought, the fee would probably not exceed \$25; but the agreement was that the railway company should pay the fee, whatever it might be. There was no proof that any representative of the railway company ever conferred with appellee's attorney in regard to the fee, and no understanding was ever had in that behalf. The appellant tendered the \$50 recited in the release, and undertook to excuse its failure to pay the attorney's fee by saying that it knew it was useless to undertake to settle with the attorney after the institution of the suit.

Among other instructions, the court gave the following:

"(2) It is the duty of the servants of the railroad company operating a car to keep a lookout for people crossing the tracks, and if they fail to do that, or if they fail to use reasonable care in stopping the train or car, they would be guilty of negligence, and the plaintiff should recover, unless you find that he was guilty of contributory negligence and neglected to watch out for approaching cars. It is the duty of any one crossing the tracks to stop, look, and listen to see if car or train is coming."

The court refused to give the following instructions at the request of the appellant:

"(2) The jury is instructed that if they find from the evidence that the plaintiff and the defendant entered into an agreement to settle and compromise this cause, and that such agreement was reduced to writing, and that the defendant performed and was ready and willing to carry its agreement to completion by paying the draft and such other agreement as it would in reference to the settlement, then your verdict must be for the defendant.

"(3) The jury are instructed that an offer to settle this suit by the defendant is not an admission of its liabilities, and in ascertaining the fact as to whether the defendant is liable to the plaintiff for damages you cannot take into consideration any action or statement made by the claim agent in reference to a settlement or a compromise of the case in fixing the original liability of the defendant.

"(4) You are instructed that the railway company on account of the nature of its business keeps a record of the movement of all of its trains, and, if you find that the original record of the movement of its trains had been adduced in evidence, you must accept it as you would any other written evidence made at the time of the transaction, and, unless you have reason to believe the record of the trains had been changed or tampered with, you must find it to give the correct movements of the trains."

Other facts will be stated in the opinion.

Appellee recovered a substantial judgment, and this appeal has been duly prosecuted.

S. H. West, of St. Louis, Mo., and J. C. Hawthorne, of Jonesboro, for appellant. J. G. & C. B. Thweatt, of De Valls Bluff, for appellee.

SMITH, J. (after stating the facts as above).

[1] Instruction numbered 2 given by the court was evidently framed under the impression that section 6007 of Kirby's Digest applied to hand cars. But such is not the case. That section makes it the duty of all persons running trains in this state to keep a constant lookout for persons and property upon the track of any railroad, and further provides that the railroad company shall be liable for any damage done to any person or property by reason of the failure to keep this lookout, and imposes upon the railroad company the burden of showing that this duty has been performed. But this burden is imposed only upon persons running trains. The history of the section quoted is well known. It is Act No. 125 of the Acts of 1891, found on page 213 of the acts of that year, and has a preamble referring to the decision of this court in the case of *M. & L. R. R. v. Kerr*, 52 Ark. 162, 12 S. W. 329, 5 L. R. A. 429, 20 Am. St. Rep. 159. That case held that the extent of a railroad's duty to the owner of stock which had strayed upon its track was to use reasonable and ordinary care to avoid injuring it after discovering its presence on the track, and that it was not negligence for the railroad company to fail to keep this lookout for stock. This act was intended to impose a duty which the court had decided did not previously exist; but this duty was imposed

only on persons running trains; and a hand car, even though propelled by some mechanism or machinery, and not by hand, is not a train. This section (8607) was amended by Act No. 284 of the Acts of 1911, p. 275, by the addition of a proviso to the effect that the right to recover damages should not be defeated by the contributory negligence of the person injured where, if such lookout had been kept, the employes in charge of the train could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and imposed upon the railroad company the burden to show that its duty to keep this lookout had been performed. But, as thus amended, the section applies only to persons operating trains.

[2, 3] The duty of persons running a hand car to keep a lookout is therefore not a statutory one, but the duty to exercise reasonable care is a duty that does exist whether commanded by statute or not. However, while the instruction given is not correct as an abstract proposition of law under all circumstances, it was a correct declaration of the law as applied to the facts of this case. This court has held in numerous cases that one crossing a railroad track must look or listen, and that the failure so to do is contributory negligence, unless some circumstance in proof excuses the failure to perform this duty. The reason for the rule is that the track is a warning of danger and every one must know that trains run at all hours and are likely to pass at any time. And for the same reason we would hold, even in the absence of a statute imposing the duty upon persons running trains to keep a lookout, that the duty to keep a lookout exists, and that this duty is not limited to persons running trains, but rests upon all persons operating any agency which may be dangerous to persons at railroad crossings. All persons must know that railway crossings are liable to be used at any time. This knowledge is imputed as a matter of law, and, having this knowledge, this lookout must be kept at crossings, independently of any statutory requirement. In the Kerr Case, *supra*, it was said that there was an obligation due to persons from railroad companies to preserve a strict lookout while running their trains. The injury here sued for occurred at a crossing, and the instruction was therefore correct as applied to the facts of this case.

[4] The issue of contributory negligence was properly submitted to the jury, as the proof on the part of appellee was that the injury occurred about dark, when he could not see distinctly, and the car carried no lights, and the noise of its approach was drowned by the roar of the freight train which passed just ahead of the car.

[5] Appellant's instruction numbered 2 was 171 S.W.—57

properly refused. The instruction, as we understand it, told the jury that, if an agreement to settle had been made and reduced to writing, and had been performed in part by appellant, and a tender of performance of other parts had been made, and that appellant was ready to perform all other parts thereof, that a verdict should be returned for defendant; this being upon the theory that there was an accord and satisfaction. Appellee testified that he took the check because the claim agent told him he would never get anything else, but that he had no intention to cash it, and did not do so. And it is undisputed that the railway company did not settle with appellee's attorney, and has not attempted to do so, except that it expresses its willingness so to do in its answer. This is not an accord and satisfaction.

In 1 Corpus Juris, § 20, p. 363, it is said:

"Mere readiness to perform is insufficient, and while there are a few decisions which seemingly hold an accord, with tender of performance and refusal to accept, is equivalent to satisfaction, and may be so pleaded in bar of the action on the original claim, the great weight of authority is directly to the contrary. The majority of decisions are to the effect that tender of performance is in no case equivalent to performance, and therefore not a satisfaction of the original obligation. Nothing short of actual performance, meaning thereby performance accepted, will suffice. But this rule, as is elsewhere shown, would not apply in a case where a new agreement or promise, instead of the performance thereof, is accepted in satisfaction."

And sections 21 and 22, p. 364, of the same authority, read as follows:

"Sec. 21. Accord and part performance do not constitute a satisfaction. It is merely executory so long as by its terms something remains to be done in the future. If performed in part only, the original right of action remains, and the party to be charged is allowed what he has paid in diminution of the amount claimed."

"Sec. 22. Performance of part and readiness to perform the balance, or performance in part and tender of performance of the balance, are likewise insufficient to constitute a satisfaction."

This statement of the law is subject to the qualification that one may take such action, or accept such benefits, as to place it out of his power to abandon the contract of compromise, in which event his remedy is to sue on the agreement of compromise for damages for the part that remained unperformed. *Whipple v. Baker*, 85 Ark. 439, 108 S. W. 830. But that exception does not apply here.

See, also, *North State Fire Ins. Co. v. Dillard*, 88 Ark. 476, 115 S. W. 154; *Grimmett v. Ousley*, 78 Ark. 304, 94 S. W. 694.

The instruction was properly refused.

Instruction No. 3 asked by appellant is conceded to be a correct declaration of the law, but it is urged that it was not asked in apt time.

[6] Section 6196 of Kirby's Digest provides the order of trial after the jury has been sworn. Subdivisions 1, 2, 3, and 4 thereof cover the progress of the trial to the conclu-

sion of the evidence. The fifth subdivision of this section provides:

"(5) When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court, which instructions shall be reduced to writing, if either party require it."

The sixth subdivision relates to the argument before the jury.

We think the trial judge has the discretion to require that the instructions be settled before the argument begins and, as a means to this end, may require any special request for instructions to be made before the opening of the argument. Of course, this discretion is not an absolute one, for questions might be raised in the argument which would necessitate additional instructions by the court.

[7] At the conclusion of the court's instructions, appellant requested the court to give the instructions which it asked, except its instruction numbered 8, which last was not asked until after the opening argument had been made for appellee. The court refused to give these instructions, but granted permission to appellant to reduce them to writing. In the meantime, a controversy arose over a statement said to have been made in the opening argument in appellee's behalf, to the effect that the offer of compromise on the part of appellant was an admission of its liability. This argument is not reported in the transcript, but the record does show that this controversy arose, and the instruction was asked as soon as it arose, and was therefore asked in apt time.

Under the circumstances, we think appellant was entitled to have the jury specifically told that they should not consider the offer of compromise as an admission of liability. The case was a close one on the facts, and, in the absence of specific directions to ignore the evidence in regard to the settlement, in determining the question of liability, that evidence may have turned the scale in appellee's favor.

[8] We think no error was committed in refusing appellant's fourth instruction. There is nothing about these train records to import verity. Under some circumstances, their recitals might furnish evidence of a very satisfying character; but the court cannot say as a matter of law that these records were correctly kept, and that no agent has been mistaken in his report of the movement of any train, nor that the records have been properly kept so that all opportunity for mistake, or possible collusion, has been eliminated. Such evidence should be weighed by the jury like other evidence and given such weight as it appears entitled to have.

For the error in refusing appellant's third instruction the judgment will be reversed, and the cause remanded.

# SCHNEIDER v. COKER. (No. 29.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

## REPLEVIN (§ 126\*)—BONDS—SUMMARY JUDGMENT AGAINST SURETY.

Under Kirby's Dig. § 6871, authorizing a judgment against the plaintiff in replevin for the value of the property taken under the order of delivery, provided the same has not been surrendered to the defendant on bond, and permitting a judgment against the sureties on the bond of the plaintiff for the value of the property, a summary judgment may not be rendered against a surety on a replevin bond where defendant took possession on a retaining bond and plaintiff thereafter got possession of the property through a judgment of the justice of the peace in his favor, as summary proceedings can only be had when authorized by statute.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 505; Dec. Dig. § 126.\*]

Appeal from Circuit Court, Pulaski County; W. G. Hendricks, Judge.

Replevin by Mrs. Jennie Wallace against Mrs. Floyd Coker. From a summary judgment against C. Schneider, as surety on the replevin bond, he appeals. Reversed.

W. C. Adamson, of Little Rock, for appellant. Fred McDonald, of Argenta, for appellee.

McCULLOCH, C. J. This is an appeal by a surety on the plaintiff's replevin bond from a judgment against him and the plaintiff for the return of the property sued for or its value.

The plaintiff, Mrs. Jennie Wallace, instituted the action before a justice of the peace against the appellee to recover possession of certain personal property, and, after the order of delivery was placed in the hands of the sheriff, she executed and delivered to said officer a bond with appellant, Schneider, as security, as provided by statute (Kirby's Digest, § 6857), undertaking that the plaintiff should duly prosecute the action and perform the judgment of the court therein by returning the property, if a return thereof be adjudged, etc. The sheriff executed the writ by taking the property into his possession, but within two days, the defendant, as allowed by statute, gave bond to retain the property and the same was returned to her. These facts are recited in the return of the sheriff upon the writ, and both the bonds were returned. The trial of the cause before the justice of the peace resulted in judgment in favor of the plaintiff for the recovery of the property, and appellee appealed to the circuit court. When the case was called for trial in the circuit court, the plaintiff failed to prosecute, and judgment by default was rendered in favor of defendant and the surety on the plaintiff's bond, the judgment containing a recital that, according to the return of the sheriff, the property had been delivered to the plaintiff under the order of delivery issued at the commencement of

the action. At a subsequent term of the circuit court, appellant and appellee each filed a motion to amend the record of the judgment, and the court entered an order, nunc pro tunc, amending the record so as to strike out the recital to the effect that the return of the sheriff showed that the property had been delivered to the plaintiff, and to merely recite the fact that "the plaintiff is now in the possession of the property." This appeal was taken by appellant, the surety on the bond, within one year from the date of the original judgment, and by the appeal he challenges the authority of the court to render a judgment against him on the bond.

The judgment against the surety was rendered summarily by the court without any notice, except such as is constructively given to him by reason of him making himself a party to the record as surety on the bond. No additional notice was necessary if the judgment falls within the authority conferred upon the court by the statute. The appeal, however, brings up for review the entire record for the purpose of determining whether the judgment was authorized.

It does not appear from the face of the record by what means the property came into the possession of the plaintiff, but the presumption may be indulged that possession was obtained under the judgment of the justice of the peace. At any rate, the return of the sheriff shows that the property was not delivered to the plaintiff under the order of delivery, but that the same was surrendered to the defendant upon the execution of a retaining bond, in accordance with the terms of the statute.

The question presented, therefore, is whether or not, under those circumstances, the circuit court had authority to render a judgment against the surety for the return of the property. It is clear that the statute conferred no such authority. It provides that, if judgment be given for the defendant in the action, the court may render judgment against the plaintiff "for the value of the property taken under the order of delivery in the case, provided the same has not been surrendered to the defendant upon bond," and may also render judgment against the sureties on the bond of the plaintiff for the value of the property. Kirby's Digest, § 6871. It will be seen from a consideration of the terms of the statute that the court is authorized to render judgment against the surety only when the property has been taken by the plaintiff under the order of delivery, and such judgment is not authorized where the plaintiff has secured possession in some other way, as in this case, under the judgment of the justice of the peace. The bond of the plaintiff served its purpose when the property was taken by the sheriff and then returned to the defendant upon the execution of a retaining bond. The plaintiff was en-

titled to possession, which was adjudged to her by the justice of the peace, unless that judgment was superseded. A judgment in favor of the defendant in the circuit court entitled her to a return of the property, but not to a judgment against the surety. A court can only proceed summarily unless authorized by the statute. *Lowenstein v. McCadden*, 54 Ark. 13, 14 S. W. 1095; *Martin v. Tennison*, 56 Ark. 291, 19 S. W. 922; *Dillard v. Nelson*, 78 Ark. 237, 95 S. W. 460.

Our conclusion is that the judgment against appellant, as surety on the bond, was unauthorized. The same is therefore reversed and set aside.

# AMERICAN HARDWOOD LUMBER CO. v. T. J. ELLIS & CO. (No. 31.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

## 1. CORPORATIONS (§ 665\*)—ACTIONS AGAINST FOREIGN CORPORATION—JURISDICTION—STATUTE.

Kirby's Dig. § 825, requires foreign corporations to designate an agent upon whom service of process may be made, and authorizes service upon such agent. Section 834, which was adopted in 1899, provides that service upon the designated agent of a foreign corporation shall be sufficient to give jurisdiction over such corporation to any of the courts of the state, whether the service was had upon the agent within the county where the suit was brought or not. *Held*, that the latter section cannot be construed as giving the courts jurisdiction only over such cases as might be brought therein under the ordinary venue laws, since section 825 gave that jurisdiction, and therefore must be construed, to give it any meaning, as giving any court jurisdiction of such suit regardless of the nature of the action or the place where service was had.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.\*]

## 2. CONSTITUTIONAL LAW (§ 70\*)—WISDOM OF STATUTE—JUDICIAL POWERS.

The courts must give effect to the language of a statute, regardless of its harshness or the inconvenience which is likely to follow from it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

## 3. CORPORATIONS (§ 665\*)—ACTIONS AGAINST FOREIGN CORPORATION—STATUTES—IMPLIED REPEAL.

Act April 1, 1909 (Laws 1909, p. 298), providing that all corporations who keep a branch office in any county shall be subject to suit in such county, and that service may be made therein upon the employé in charge of the branch office, does not impliedly repeal Kirby's Dig. § 834, providing that service upon the designated agent of a foreign corporation shall be sufficient to give jurisdiction over such corporation to any of the courts of the state, whether the service was had upon the agent within the county where the suit was brought or not, but gives an additional remedy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.\*]

## 4. APPEAL AND ERROR (§ 195\*)—PRESENTING QUESTIONS IN LOWER COURT—AMENDMENT—NEW CAUSE OF ACTION.

Where defendant appeared specially to challenge the sufficiency of the service and declined

to plead further after its special plea had been correctly overruled, it cannot, on appeal, raise the question that an amendment to the declaration stated a new cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. § 195.\*]

Appeal from Circuit Court, Calhoun County; T. J. J. Gaughan, Special Judge.

Action by T. J. Ellis & Co. against the American Hardwood Lumber Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

J. W. Warren, of Camden, for appellant. C. L. Poole, of Hampton, for appellee.

MCCULLOCH, C. J. Appellant is a Missouri corporation and has complied with the laws of this state by designating an agent upon whom service of summons and other process may be made, in accordance with the statutes of this state which prescribe the terms upon which foreign corporations may transact intrastate business here. Kirby's Digest, § 825. The corporation maintains an office in Saline county, Ark., which is designated as its principal place of business, and the designated agent resides there. Appellee is doing business in Calhoun county in this state, and instituted this action against appellant in the circuit court of that county to recover on account for the price of car loads of lumber aggregating the sum of \$1,252.48, together with interest. Summons was issued, directed to the sheriff of Saline county, and the writ was by the sheriff of that county served upon the agent designated by appellant corporation. Subsequently appellee filed an amendment, exhibiting a further account for the price of another car load of lumber aggregating \$396.31, which fell due after the commencement of the action, and prayed for judgment for that additional amount. Appellant appeared by its counsel and put in a special plea, directed against the service of the summons outside of the county wherein the action was instituted, and, when the court overruled the plea, saved its exceptions. Appellant declined to plead further and, upon testimony being introduced in support of the account sued on, judgment was rendered in appellee's favor for the full amount set forth in the original complaint and the amendment thereto. Appellant filed its motion for a new trial, which was overruled, and an appeal was duly prosecuted.

[1] The contention is that the statute does not authorize the service upon the designated agent of a foreign corporation outside of the county where a transitory action is instituted, and that the service should have been quashed. The statute provides that service of summons upon the designated agent of a foreign corporation "at any place in this state shall be sufficient service to give jurisdiction over such corporation to any of the courts of this state, whether the service

was had upon said agent within the county where the suit was brought or is pending or not." Act March 18, 1899; Kirby's Dig. § 834. The contention, as we understand it, is that it was not intended by the lawmakers to give jurisdiction to any county in the state and authorize service of process in any other county, but it was intended that the venue as fixed by other statutes would still control, and that the service might be had upon the designated agent where the suit had been brought according to the venue prescribed by the other statutes. That is to say, where the action is local, it must be brought in the prescribed county, and service had anywhere in the state on the designated agent; but that where the action is transitory, as in this case, it must be brought in the county where service can be had. We do not think the language of the statute can be limited so as to give it only that effect, for the plain language used in the statute is that the service at any place in the state shall be sufficient to give jurisdiction "to any of the courts of this state, whether service was had upon said agent within the county where the suit was brought or is pending or not." To thus limit the language of the statute would be to destroy its effect entirely, for without giving it the effect according to the language used it would add nothing to the statute already in force.

Section 825 of Kirby's Digest prescribes a requirement that a foreign corporation shall designate an agent "on whom service of summons and other process may be made," and that it is sufficient to authorize service upon such agent. Therefore the lawmakers must have intended to add something by the act of March 18, 1899, in saying that the service should be sufficient to give jurisdiction to any of the courts of the state, whether had in the county where the suit is brought or is pending or not.

Similar language was employed in the act of 1887 (Laws 1887, p. 234) which provided that service upon the designated agent should be "sufficient to give jurisdiction over such corporation to any of the courts of this state," and this court, in an opinion by Judge Battle, in the case of Southern Building & Loan Association v. Hallum, 59 Ark. 583, 28 S. W. 420, clearly intimated that the proper construction of that statute was to hold that service on the designated agent was sufficient to authorize the suit in any of the counties of the state.

[2] We conceive it to be our duty to give effect to the language used by the lawmakers, and when this is done it means that under the statute now in force service on the designated agent, even outside of the county where the suit is brought, is sufficient. We have nothing to do with the harshness of the statute nor the inconvenience which is likely to follow from it. That is a matter which addresses itself entirely to the lawmakers.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] We do not, in the consideration of this question, overlook the later act of April 1, 1909 (Laws 1909, p. 293) which provides that:

"All foreign and domestic corporations who keep or maintain in any of the counties of this state a branch office or other place of business, shall be subject to suits in any of the courts in any of said counties where said corporation so keeps or maintains such office or place of business, and that service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employé in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this state held in the counties where said service \* \* \* is had."

This statute was dealt with and analyzed in the recent case of *Ft. Smith Lumber Co. v. Shackleford*, 171 S. W. 99. It may be urged with some plausibility that this statute was intended to displace or repeal the former one referred to above, but upon careful consideration we have reached the conclusion that it does not have that effect, and that it was merely intended to give the additional remedy of serving process upon at branch office or other place of business in the county where the same is located.

Our conclusion is that the service in this case was sufficient to authorize a judgment against the corporation.

[4] It is also insisted that the court erred in permitting the amendment bringing in a new cause of action which was not mature at the commencement of this action. It is sufficient, however, to say that that question was not raised in any manner below, and appellant is deemed to have waived the immaturity of the additional cause of action. *Ferguson v. Carr*, 85 Ark. 246, 107 S. W. 1177. It appeared specially for the purpose of challenging the sufficiency of the service of the summons in another county, and, as that plea was untenable, it should have raised objection to the bringing in of a new cause of action if it desired to take advantage of that point.

These are the only questions presented for our consideration; and, since they are determined against appellant's contention, the judgment is affirmed.

## WEIRLING v. ST. LOUIS, I. M. & S. RY. CO. (No. 36.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

### 1. CARRIERS (§ 281\*)—DUTIES TO PASSENGERS WHILE BEING TRANSPORTED.

A railroad company must bestow upon a passenger any special care and attention beyond that given to the ordinary passenger which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or that might have been reasonably anticipated from one in his mental and physical condition, tending to increase the danger to be apprehended and avoided, and if the employé of a railroad company, after discovering the condi-

tion of a passenger who became insane while on the train, failed to use such care when they could have reasonably done so, and thereby prevented her from jumping from the car window, the company was liable in damages for her death, caused by injuries thereby sustained.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1093-1097, 1241; Dec. Dig. § 281.\*]

### 2. CARRIERS (§ 321\*)—ACTIONS FOR INJURIES —INSTRUCTIONS.

In an action for the death of a passenger who became insane while riding on the train, and attempted, to the knowledge of the porter and brakeman, to throw her baby from the car window, and after being prevented from so doing, and after apparently quieting down, threw herself from the window, instructions held to have correctly declared the law and the measure of the carrier's duty toward the passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

Appeal from Circuit Court, Marion County; Geo. W. Reed, Judge.

Action by B. H. Weirling, administrator of Edna Weirling, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

On the 13th day of August, 1910, Mrs. B. H. Weirling was a passenger on appellee's train. She boarded the train at Aurora, Mo., and her destination was Yellville, Ark. Two or three years prior to that time she was physically broken down, but at the time she started on her journey she was apparently in good health. She was accompanied by her two children, Gertrude, who was six years of age, and Virginia, who was nearly three years old. She was sitting with her children on the right side of one of the day coaches, four or five seats from the end next to the sleeper. She was observed by passengers on the train to be very nervous. Her smallest child was lying on the seat in front of her, apparently in a comatose condition. Mrs. Weirling changed seats frequently. "She would sit in the front end of the coach awhile, and then move back, carrying the child in one arm and her suit case in the other." The train passed through two or three tunnels, and the gas was very disturbing in passing through them and seemed to distress Mrs. Weirling. A commotion was heard in the car, and passengers, on looking around, saw the little child in the seat crying and Mrs. Weirling standing up, partly between the seats, striking at the negro porter on the train, who was holding his hands in front of his face warding off her blows. Passengers gathered around them. Mrs. Weirling was talking excitedly, but the porter said nothing. The porter went to the rear of the coach. It was ascertained that Mrs. Weirling had endeavored to throw her baby out at the window and the porter had prevented her from doing so. A brakeman, who was a white man, came upon the scene during the trouble.

Mrs. Weiriling, who had resumed her seat in the meantime, when the brakeman arrived, arose and said to him, "You will be my friend." The brakeman assured her that he would, and she then sat down again. An old gentleman, a passenger on the train, sat down by Mrs. Weiriling and talked to her. The passengers closed the windows on the side of the coach where Mrs. Weiriling was seated. Things quieted down, and the passengers were of the impression that everything was all right. About that time, and after the brakeman had gone towards the front of the car, a passenger observed that Mrs. Weiriling had her baby apparently out of the window on the opposite side from where she had been sitting, with one hand on the sill and her knees on the seat. Passengers grabbed at her clothing, but it tore loose, and she plunged down over a trestle, still holding her child in her arms. She struck the trestle as she fell, and the child fell from her arms, both falling to the ground. Mrs. Weiriling died almost instantly, and the little child lived several hours.

After the train had passed through the tunnel, Mrs. Weiriling was heard to remark that she would never come over that road again on account of the gases being disagreeable. During the commotion occasioned by her attempt to throw her child out of the window, a lady passenger, one Mrs. Griffith, began talking to Mrs. Weiriling, and an old gentleman sat down by her, and she quieted down and it was thought that there was no further danger. After she had quieted down, the porter went away to get the conductor. At the time he left, Mrs. Griffith and the old gentleman were with her. The witness stated that he thought that she had quieted down and that he thought that all danger was over. If he had not thought so he would have stayed right with her himself.

One witness said that he had been in the car where Mrs. Weiriling was something like three or four minutes, and that there were people standing up in the aisle and seated in front of the seats where Mrs. Weiriling was located. He saw Mrs. Weiriling jump out of the window, and saw a gentleman grab her as she went out.

Other witnesses stated that when Mrs. Weiriling attempted to throw her child out of the window they saw the colored porter catch the child and pull it back. It was then that Mrs. Weiriling jumped up screaming and began hitting the porter in the face. The porter pulled the child back and laid it down on the seat. After this commotion, witnesses agree that the spell had seemed to pass off and that she stepped back in between the seats and took the child and seemed to be perfectly quiet. One passenger who was observing her says, that "she would close her eyes tight and then open them, but remained perfectly quiet." That he "saw her raise up deliberately with her child in her arms and

start across the car." He thought she had gotten up to warm. She walked deliberately between the seats, and all at once put her head down and jumped through the window with her baby. He saw what she was going to do and grabbed at her foot as she went out of the window, but failed to catch it. Another person grabbed her clothing, but it was not strong enough and gave way.

All agreed that, after Mrs. Weiriling had first attempted to throw her baby out at the window, she quieted down, and several passengers stated that they thought that all danger had passed. Mrs. Griffith testified that Mrs. Weiriling sat on the seat behind her for awhile. At the time of the accident she had two seats turned together, just in front of witness. Mrs. Weiriling spoke to some gentleman and asked about tunnels and asked if any one ever got killed going through them and he told her no. After that they passed through another tunnel, and witness' attention was called to Mrs. Weiriling by the little girl saying, "Mama, don't throw the baby out of the window," and just about that time the porter grabbed the baby and pulled it back in, and she began striking at the porter; but the porter acted very gentlemanly toward her and did nothing except to keep her from destroying the child. While she was striking the porter, witness went to where they were and began talking to Mrs. Weiriling. Witness told the porter to get the conductor, and the porter at once started for him. Witness offered to sit down with the lady and ride through the tunnel with her and help her with her baby, but she refused to allow witness to do so, and, as she quieted down, witness returned to her seat. When witness returned to her seat, after the porter had left, Mrs. Weiriling was perfectly quiet, and as witness was sitting down in her seat Mrs. Weiriling must have been going across the aisle. She saw her then go out at the window. At the time witness left Mrs. Weiriling, witness did not think that there was any danger of any further trouble.

The porter testified that, while passing through the coach in which Mrs. Weiriling was sitting, all at once she took her baby and threw it out of the window. He caught it by the leg and pulled it back. Then she struck him. He let the window down, and told her not to throw her baby out at the window. At that time she sat down, and a lady across the aisle and an old gentleman from the other end of the car came up, and the lady asked Mrs. Weiriling for her baby, and she refused to let her have the child, saying she could attend to her own children. A lady passenger and an old gentleman said, "Get the conductor." About the time they said this, the brakeman walked up. Then Mrs. Weiriling had sat down and was perfectly quiet. The lady passenger said to the witness: "Go and get the conductor; we will see after her." When witness got on the car

platform, he met the brakeman and the conductor on their way back to the car where Mrs. Weirling was. When the witness started away to get the conductor, Mrs. Weirling was sitting down perfectly quiet and had her eyes closed.

The conductor testified that the brakeman came after him, and both the porter and the brakeman told him about the peculiar conduct of Mrs. Weirling. The brakeman stated to him that a lady was acting very strangely in the day coach. He immediately went back to see about her. He saw the porter as he was going back to see what the matter was. By the time he got back to the coach where Mrs. Weirling was, she had jumped out of the window. He immediately stopped the train and went back for Mrs. Weirling and the child. He stated that the brakeman and the porter were under his control. If anything went wrong, it was their duty to notify the conductor. He was asked if it was the duty of both the brakeman and the porter to leave a crazy person trying to get out of the window to go and hunt up the conductor, and answered, "They would hardly have occasion for that." He said it was their duty to come at once and notify him when anybody got into trouble. He was asked: "Is it their duty for both to go and hunt you and tell you about it, to both come at once, is that right?" and answered, "No." He stated that it was their duty to notify him; it did not require both of them to come; all that was required was notice to him, and a passenger could come and tell him.

After a question was propounded in which the condition of Mrs. Weirling was recited, the conductor was asked the following question: "I will ask you whether or not there are any regulations of the railroad company or under any law, where the woman was in peril of the kind mentioned, if the brakeman and porter should walk off after she had tried to throw her baby out of the window, and leave the lady if that occurred, if you know?" and answered as follows: "Yes, in case of emergency in which they pulled that cord." He was further asked: "You stated a little while ago that there was no rule made for the porter and brakeman as to what to do at all times. No rule at all?" and answered, "No."

"Q. When troubles come up, of this kind, they are to exercise their own judgment, are they? A. Their own judgment in cases like that. Their own views fix it."

Upon the above facts, the appellant, as administrator of the estate of his wife, Edna Weirling, for the benefit of the estate and also for the benefit of himself, the next of kin, brought suit against the appellee, alleging that Mrs. Weirling became insane while she was a passenger on appellee's train, and that after this fact became known to the employes and agents of appellee in charge of the train they failed and neglected to use

ordinary care and prudence for her protection, but let her jump from a window, by reason of which she was mortally injured.

The appellee answered, denying the allegations of negligence.

After the above facts were developed by the evidence, the court instructed the jury, at the instance of the appellant, as follows:

"(1) I instruct you, gentlemen of the jury, if you find from a preponderance of the evidence in this case that Edna Weirling, deceased, was a passenger on defendant's train at the time and place mentioned in the complaint, and that while she was such passenger lost her mind and became deranged to such an extent as to render her incapable of caring for and protecting herself, and that the employes of the railway company knew of her condition, then I instruct you that it became their duty to bestow upon her any special care and attention beyond that given to the ordinary passenger which reasonable prudence and foresight demands for her safety considering any manner of conduct or disposition of mind manifested by her, or conduct or disposition that might reasonably be anticipated from one in her mental and physical condition which would tend to increase the danger to be apprehended and avoided. And if the agents and employes of the defendant, after discovering the condition of her mind, failed to use such care, when they could have reasonably done so, and by so doing they could have prevented the deceased from jumping from the car window, and you further find that by jumping from the car window she sustained injuries from which she died, your verdict should be for plaintiff."

The court refused to give appellant's prayer for instruction No. 3, which is as follows:

"Although you may find from the evidence in this case that Mrs. Edna Weirling was surrounded by passengers of mature age, discretion, and prudence, and that they knew the condition of Mrs. Edna Weirling as well as the porter and brakeman, and that she was left in the care and presence of said passengers by the porter and brakeman while they went for the conductor, still there would be no legal duty on the part of said passengers to protect her from harm, and the defendant could not relieve itself of liability in this case by its said employes leaving her in the presence and care of said passengers, provided that you find that the act and conduct of the porter and brakeman at the time and under the circumstances was a failure on their part to use the care and prudence due to a passenger in the condition and situation of the deceased, as explained in instruction one."

The court, at the request of the appellee, granted its prayer No. 4, which, in effect, told the jury that, even though the porter and brakeman may have thought or may have had reason to believe that Mrs. Weirling was insane, they should find for the appellee if they believed from the circumstances that the porter and brakeman thought the safest plan was to notify the conductor, and if under the circumstances they acted as reasonable and prudent persons in so doing, and that during their absence, while so doing, Mrs. Weirling was killed, they should find for the appellee.

In prayer No. 5, the court told the jury that if, under the circumstances, it was reasonable for the porter and brakeman to leave Mrs. Weirling in the care of the passengers

while they went for the conductor, their doing so was not an act of negligence.

In appellee's prayer No. 5½, the court told the jury that they should take into consideration the circumstances by which the porter and brakeman were surrounded, as they appeared to them acting as reasonable and prudent men at the time, and the impression such circumstances were likely to produce and did produce on said employes, and if, guided by such impressions, they, with due diligence, bestowed upon the deceased such attention as they, in good faith, believed her condition demanded, their verdict should be for the defendant.

And in appellee's prayer No. 11, the court told the jury that before they could find for the plaintiff they must believe from a preponderance of all the evidence in the case that the employes, knowing the mental condition of Mrs. Weiriling, failed to exercise such care and prudence as reasonably prudent persons occupying their positions would have used under the circumstances.

The verdict and judgment were in favor of the appellee, and this appeal has been duly prosecuted.

Hamlin & Seawel, of Springfield, and Jones & Seawell and Sam Williams, all of Yellville, for appellant. E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and McCaleb & Reeder, of Batesville, for appellee.

WOOD, J. (after stating the facts as above). [1] In *Price v. St. Louis, Iron Mountain & Sou. Ry. Co.*, 75 Ark. 479-491, 88 S. W. 575, 578 (112 Am. St. Rep. 79), we announced the duty which carriers owe to their passengers who are laboring under disability as follows:

"The railway company must bestow upon one in such condition any special care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to be apprehended and avoided. If its servants, knowing the facts, fail to give such care and attention, and injury results as the natural and probable consequence of such failure, the company will be guilty of negligence, and liable in damages for such injury. It is bound to exercise all the care that a reasonably prudent man would to protect one in such insensible and helpless condition from the dangers incident to his surroundings and mode of travel."

See, also, *St. L., I. M. & S. R. Co. v. Woodruff*, 89 Ark. 9, 15, 16, 115 S. W. 953.

In *Thompson on Carriers of Passengers*, § 5, pp. 270, 271, it is stated:

"It is consistent not only with common humanity, but with the legal obligations of the carrier, that if a passenger is known to be in any manner affected by a disability, physical-

ly or mentally, whereby the hazards of travel are increased, a degree of attention should be bestowed to his safety beyond that of an ordinary passenger, in proportion to the liability to injury from the want of it. But in order that the carrier may be invested with this duty, it is necessary that the condition and wants of the passenger in this respect should be made known to him or his servants." *Cincinnati, Ind. St. L. & C. Ry. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334.

See, also, *Robt. Croom v. Chicago, Mil. & St. P. Ry. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557; 4 *Elliot on Railroads*, § 1577, p. 371; 6 *Cyc.* p. 598, and note; *Adams v. St. L. S. W. Ry. Co. of Texas* (Tex. Civ. App.) 137 S. W. 437.

[2] The instructions of the court, considered as a whole, correctly declared the law. It is unnecessary to comment upon each one of the instructions. The measure of appellee's duty to Mrs. Weiriling was defined in conformity with the law as announced by this court in the cases mentioned in the first instruction given at the instance of the appellant. The court submitted the issue as to whether or not appellee was guilty of negligence in instructions which, when construed together, in effect, told the jury that, if the employes of appellee failed to exercise the care that a reasonably prudent person would have exercised under the circumstances to prevent the injury and death of Mrs. Weiriling, appellant would be guilty of negligence; otherwise it would not be.

The instructions are not open to the criticism which appellant's counsel make of them, and they fairly submitted the issue of negligence to the jury.

There was evidence to sustain the verdict. The judgment is therefore correct, and it is affirmed.

#### ARGENTA RETAIL LIQUOR DEALERS' ASS'N v. McCLURE. (No. 49.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

#### 1. INTOXICATING LIQUORS (§ 66\*)—PETITION FOR LICENSES—SUFFICIENCY.

A petition to the county court, under the Going Law (Laws 1913, p. 180), for the issuance of licenses for the sale of intoxicating liquors for a period authorized by law, is not insufficient for failure to allege the year the licenses are to issue, as it would be presumed that the signers wished immediate action of the court.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 66; Dec. Dig. § 66.\*]

#### 2. INTOXICATING LIQUORS (§ 66\*)—PETITION FOR LICENSES—NUMBER OF PETITIONS.

Under the Going Law (Laws 1913, p. 180), authorizing the county court to issue licenses for sale of intoxicating liquors for a period already provided by law, where a majority of the adult white inhabitants within the limits of any incorporated city shall have signed a petition to the county court asking that licenses be issued, the setting aside of a petition, after licenses had been issued in accordance therewith because of an insufficient number of signers, is

no bar to another petition during the same year.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 66; Dec. Dig. § 66.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Petition by the Argenta Retail Liquor Dealers' Association for leave to issue licenses for the sale of liquor. From an order granting a motion to quash the petition made at the instance of I. D. McClure, petitioner appeals. Reversed, and cause remanded, with directions to overrule the motion.

On the 16th of January, 1914, certain adult white inhabitants of the city of Argenta filed a petition in the Pulaski county court in an attempt to comply with the requirements of Act No. 59 of the Acts of 1913. Upon hearing this petition the county court found the fact to be that the petition had been signed by a majority of the adult white inhabitants of said city, and thereupon declared it lawful to issue license to sell liquor within the corporate limits of said city, and licenses were issued to a number of persons, authorizing them to engage in this traffic in said city. One I. D. McClure was made a party to this proceeding in the county court, and appealed from the order of the court declaring that the requirements of said act had been met, and this appeal was heard by the circuit court on the 21st day of September, 1914, at which time, after having taken testimony for a number of days, the circuit court found the fact to be that the said petition did not contain a majority of the adult white inhabitants of said city. The circuit court thereupon ordered that the prayer of said petition be denied and all licenses for the sale of liquor in the city of Argenta, issued by the county court by reason of the jurisdiction purported to have been conferred upon it by virtue of said petition, were declared void, and the judgment of the circuit court was certified to the county court and made the judgment of that court. On the 16th of October, 1914, a second petition was filed in the county court in the following language:

"We, the undersigned, state that we are adult white inhabitants living within the corporate limits of the city of Argenta, in the county of Pulaski, and state of Arkansas, and we do hereby ask and petition the county court of said county that license for the sale of intoxicating liquors of all kinds, including alcoholic, malt, vinous, and spirituous liquors of all kinds, and all compounds and preparations thereof, be issued for said city of Argenta."

This petition was signed by 2,460 persons.

The said I. D. McClure was made a party to this proceeding, and filed a motion to quash the petition for the following reasons:

"(1) Because a petition having been presented on the 1st day of January, 1914, praying for license for the year 1914, and a remonstrance against the granting of license for the year 1914 having been filed in connection therewith, the petition was heard and denied,

and the court is without jurisdiction to hear another petition for license in the present year. (2) That the petition filed herein is to indefinite, as it fails to state when the license prayed for is to be granted."

The county court overruled the motion to quash and, upon a hearing of the petition, ascertained the fact to be that it did, in fact, contain a majority of the adult white inhabitants of the city of Argenta, and adjudged that liquor license might be issued in said city. An appeal from this order was duly prosecuted to the circuit court, where the same motion to quash was again presented, whereupon the circuit court, after having heard the same, granted the prayer thereof, and denied the prayer of those who petitioned for the issuance of liquor license. The circuit court directed the cancellation of all liquor licenses which had been issued under the second judgment of the county court, and the petitioners for license under this second proceeding have duly prosecuted this appeal.

J. W. & J. W. House, Jr., of Little Rock, for appellant. Isgrig & Cannon, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). We have recently had occasion to construe the Act No. 59 of the Acts of 1913, commonly known as the "Going Law," and by which name it will hereinafter be designated. See *Havis v. Philpot*, 170 S. W. 1005; *Hickey v. State*, 170 S. W. 562; *McClure v. Topf & Wright*, 166 S. W. 174. In these cases it was decided that this Going Act did not provide for an election, nor did it undertake to prescribe any class of persons to whom license to sell liquor might be issued; but it was held in those cases that the state, in the exercise of its police power, had undertaken to prescribe a condition precedent for the issuance of liquor license to any one. This Going Act became effective on the 31st day of December, 1913, and by section 1 of that act it is made unlawful for any court, or town or city council, or any officer thereof, to issue any license, authorizing the sale of intoxicants, except upon the conditions prescribed by said act. Section 2 of said act states the conditions under which license may be issued to any one, and its provisions, so far as they need be considered here, are as follows:

"Sec. 2. When a majority of the adult white inhabitants living within the incorporated limits of any incorporated town or city in this state, shall have signed a petition to the county court of the county in which said town or city is situated, asking that license for the sale of intoxicating liquors be issued for that town or city, then the said county court may issue such license for a period already provided by law."

[1] It is true that the petition in this case did not state the year for which the petitioners desired the court to grant licenses for the sale of liquor. The presumption

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would be that petitioners desired immediate action of the court, and such action would, of course, cover the present year. Although the petition does not state the year, its very language indicates the desire of the petitioners to have action taken for the present year.

[2] But the principal question in this case, and the one upon which the court below based its finding, was that the Going Act contained no provision for the filing of a second petition in any given year. The finding of the court below was evidently based upon the view, nor urged upon us, that it is the policy of the law to have these questions settled, and that when petitioners have once invoked the action of the court, and have been unsuccessful because of their failure to secure the signatures of the requisite majority, the policy of the court thereby becomes fixed for the remainder of that year and the court is thereafter without jurisdiction to entertain a second petition. But such is not the language of the statute. Sections 5128-5132 of Kirby's Digest constitute what is commonly known as the "Three-Mile Law," and section 5129 of Kirby's Digest provides that "whenever" the adult inhabitants residing within three miles of any school, church, or institution of learning, shall desire to prohibit the sale or giving away of intoxicating liquors of any kind, they may file a petition with the county court of the county wherein such institution of learning or church is situated, praying that the sale or giving away of intoxicating liquors be prohibited within three miles of any such institution, and, upon the prayer of such petition being granted, it is made unlawful to sell liquor within three miles of the designated point for a period of two years and until upon a petition of similar requirements this prohibitory order is revoked. This three-mile statute has been construed by this court in a number of cases, all of which hold that the petition may be filed at any time and that the prohibitory order becomes effective whenever the prayer of the petition is granted.

It is thoroughly well settled by the decisions of this court that, notwithstanding license to sell liquor may have been properly granted, such license becomes void whenever it shall be adjudged that the requirements of this Three-Mile Law have been met, and that there is no limitation upon the frequency with which such petitions may be filed. *Alexander v. State*, 77 Ark. 294, 91 S. W. 181.

The Going Law is, in principle, the converse of the Three-Mile Law, and under its provisions the people who desire the sale of liquor become the petitioners, and the burden is upon them to secure the assent of a majority of the adult white inhabitants. No one can sell liquor until this assent has been secured and evidenced in the manner pro-

vided by the Going Act. But whenever that assent has been secured, the condition is then met which permits the county judge to exercise his discretion in the granting of liquor license for the remainder of the calendar year for which such petition was granted. This Going Law does not undertake to limit the number of petitions which may be filed, nor does it undertake to provide when they shall be filed; and we think the proper interpretation of the portion of section 2 above set out is that a petition may be filed at any time, and that adverse action upon one petition by the county court does not preclude the subsequent consideration of another petition. *Alexander v. Philpot*, 169 S. W. 1187.

The judgment of the court below is therefore reversed, and the cause will be remanded, with directions to overrule appellee's motion to quash appellant's petition.

#### ST. LOUIS, I. M. & S. RY. CO. v. DE WITT. (No. 45.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

##### 1. CARRIERS (§ 406\*)—CONNECTING CARRIERS—LIABILITY FOR LOSS OF BAGGAGE.

A passenger entitled by Kirby's Dig. § 6615, on paying fare, to transportation of his baggage on the same train bought tickets only over the line of the initial carrier, and informed the agent, who was too busy to check his baggage, that he intended to continue his journey, and was assured it would be checked to his destination and checks mailed, which was done. After laying over a day, he bought tickets and concluded his journey. *Held*, that the connecting carrier, responsible, under section 6617, for loss of baggage within 48 hours after it reaches its destination, was liable for its loss by fire within that time.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1550-1553; Dec. Dig. § 406.\*]

##### 2. CARRIERS (§ 387\*)—BAGGAGE—LIABILITY FOR TRANSPORTATION.

Carrying baggage is incident to transportation of passengers, and payment of fare is usually a necessary prerequisite to liability therefor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1505-1518; Dec. Dig. § 387.\*]

##### 3. CARRIERS (§ 387\*)—BAGGAGE—LIABILITY FOR TRANSPORTATION.

Becoming a passenger or purchasing a ticket entitles a passenger to have his baggage carried as well as himself, and it is immaterial whether or not it is transported on the same train, though he has a right to have it done under Kirby's Dig. § 6615.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1505-1518; Dec. Dig. § 387.\*]

##### 4. CARRIERS (§ 406\*)—BAGGAGE—LIABILITY FOR TRANSPORTATION—CONNECTING CARRIERS—AUTHORITY OF AGENT.

Though the agent of a connecting carrier, authorized to bind it by sale of through tickets, and to check baggage through as incident thereto, having a right to require payment of fare and to issue a check binding for its transportation to the end of the journey, exceeds his authority in issuing through checks on purchase of tickets on his own line only and the passenger's agreement to purchase tickets to complete the journey over the connecting carrier's line from the point of intersection, his act is within

the apparent scope of his authority and binding on it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1550-1553; Dec. Dig. § 406.\*]

**5. CARRIERS (§ 239\*)—WHO ARE PASSENGERS—PURCHASE OF TICKETS.**

Purchase of a ticket is not a prerequisite always to the relationship of passenger and carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.\*]

Appeal from Circuit Court, Garland County; Calvin T. Cotham, Judge.

Action by Chas. N. De Witt against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee brought suit against the railway company for damages for the loss of baggage, certain trunks and their contents, transported from Marshall, Ark., to Kensett, over the Missouri & North Arkansas Railroad, and from Kensett to Hot Springs over the line of the appellant company. He was moving to Hot Springs, and purchased tickets for himself and family at Marshall on the 3d day of September, 1913. They reached the station shortly before the departure of the train, appellee arriving before the ticket window was opened, and after repeated efforts succeeded in purchasing tickets, but not in getting their baggage checked. The agents were so busy that they could not check the baggage at the time, but agreed to check it through to Hot Springs and mail the checks to the appellee, which they did. Appellee purchased tickets only to Kensett, which fact the agent checking the baggage knew, in order to get the benefit of the two-cent rate over the appellant's line, agreeing to continue the journey from there over appellant's road, and, after arriving at Kensett, concluded to stay over night at Little Rock, and bought tickets over appellant's line to Little Rock, and on the next morning continued their journey over appellant's line to Hot Springs, after purchasing tickets. The trunks arrived at the depot at Hot Springs on the 5th day of September about 10 o'clock in the morning, and were destroyed by fire about 4 o'clock in the afternoon, in the general conflagration which burned up a large part of the town and the appellant's depot building. No effort was made to save the baggage in the baggage room after it became apparent that the fire would reach and destroy it, further than that the agent tried 10 or 15 minutes before the building caught on fire to employ some expressmen or others with wagons to recover the baggage, but could not do so.

Appellee stated:

"I wanted to get into Hot Springs the next day, and went to station ahead of my family some 35 minutes before the train came. The ticket office was closed, and I could not buy a ticket. In a few minutes afterwards some of the freight I was shipping came, and the agent's helper went to assist the drayman to check the

freight off for the local that was to arrive soon after the passenger train. I went to the ticket window and bought two tickets and told the agent I wanted a check for my baggage. It was then 15 or 20 minutes to train time, but as soon as he raised the window he said the helper would be in in a few minutes. I waited and asked again for checks for my baggage. He was busy writing, and merely nodded his head. I waited a few minutes and asked a third time for checks. The train whistled and the helper came, and I asked them for checks for my trunk. They only said, 'Get right on. We will check your trunks through.' I said, 'I have tickets only to Kensett.' He said, 'That is all right; we will check it to Hot Springs.' He told me if he sold tickets to Hot Springs he would have to charge three cents a mile, as the Missouri & North Arkansas charged that rate, so I only bought to Kensett, knowing that they sold tickets from there over the Iron Mountain for a less rate. I called his attention to the fact that I had tickets only to Kensett. He said, 'That is all right; we will check it on through and mail you the checks.' The helper took my address in Hot Springs, and we came on to Kensett. Bought tickets from there to Little Rock over the Iron Mountain Railroad, as my wife desired to stop over there to see her brother. From Little Rock we went over the Iron Mountain Railroad to Hot Springs the next morning, reaching Hot Springs the next afternoon. My trunks had not arrived then. The next day I went to look for them, and was told if I did not have the checks I could not get them. The checks not having arrived, I made no further inquiry then. The checks did not come until after the fire."

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and W. R. Donham, of Benton, for appellant. Scott Wood and A. J. Murphy, both of Hot Springs, for appellee.

**KIRBY, J.** (after stating the facts as above). [1] It is contended by appellant that the agent of the Missouri & North Arkansas Railroad was without authority to check the trunks of the appellee through from Marshall on its line of road over the appellant's line from Kensett to Hot Springs without the purchase and payment for tickets by appellee for the entire journey, and that it incurred no liability because of the issuance of checks therefor; the appellee not having first purchased through tickets to the point of destination.

[2] The carrying of baggage is an incident to the transportation of passengers, and the payment of the passenger's fare is usually a necessary prerequisite to the binding of the carrier to liability for the transportation of the passenger's baggage. Passengers are entitled to have their baggage transported over the railroads of the state on the payment of the requisite fare. Section 6615, Kirby's Digest, provides:

"Each passenger who shall pay fare at the rate specified — shall be entitled to have transported along with him on the same train, without any additional charge, 150 pounds of baggage, to consist of such articles as are usually carried by ordinary persons when traveling."

Appellee, at the time of purchasing his tickets, attempted to have his baggage checked, as he had a right to have done, but the

agents of the railroad company were so busy about other affairs that they could not attend to the checking of the baggage. They assured him however that the baggage would be checked through to Hot Springs, his destination, and took his address, agreeing to mail him the baggage checks, which was done. He told them at the time that he had only purchased tickets to Kensett, but intended to continue his journey on the Iron Mountain Railroad, appellant's line, and they said that would be all right, and the baggage would be checked through.

[3] Becoming a passenger or purchasing a ticket entitles a passenger to have his baggage carried as well as himself, and it makes no difference in these modern times whether or not the baggage is transported upon the same train with the passenger, although he has the right to have it done. Section 6615, Kirby's Digest; *Conhein v. Chicago G. W. R. Co.*, 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091, 124 Am. St. Rep. 623, 15 Ann. Cas. 389. Cyc. says:

"As to personal baggage of the passenger delivered to and taken possession of by the carrier, the liability of the latter is that of the common carrier of goods. It is immaterial whether the baggage is carried on the same train with the passenger or not." 6 Cyc. 662; *Warner v. Burlington, etc.*, R. R., 22 Iowa, 166, 92 Am. Dec. 389.

The railroad company is responsible as a common carrier for all baggage or goods checked by them as baggage for 48 hours after the baggage or goods checked as baggage has reached its destination. Section 6617, Kirby's Digest. Appellant, without doubt, would have been liable for the transportation and delivery of the baggage had the tickets been sold from the point of the beginning of the journey through to the passenger's destination at Hot Springs over its lines with the connecting carrier.

[4] The agent of the connecting carrier, having the authority to bind the appellant company upon the sale of such through tickets, and to check the baggage through as incident thereto, was expected, of course, to require the payment of the fare, and issue a check binding upon appellant for the transportation of the baggage over its lines to the end of the journey. Having this right, although he exceeded his authority in the issuance of the through checks on the baggage upon the purchase of tickets upon his own line and the agreement of the passenger to purchase tickets to complete the journey over the line of appellant from the point of connection, his act in doing so was still within the apparent scope of his authority and binding upon appellant; the passenger having, in fact, purchased tickets over its line of railroad in accordance with his agreement, and paid therefor to the end of the journey, the point of destination.

[5] The purchase of a ticket is not a prerequisite always to the relationship of pas-

senger and carrier. *Railway v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Railway v. Hammett*, 98 Ark. 418, 136 S. W. 191.

The appellant was liable for the baggage as a common carrier for 48 hours after its arrival at its depot in Hot Springs, and it is not disputed that it arrived on the morning of the day it was destroyed in the afternoon by fire.

Finding no prejudicial error in the record, the judgment is affirmed.

#### STUCKEY v. STEPHENS et al. (No. 46.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

#### 1. APPEAL AND ERROR (§ 847\*)—REVIEW—EXAMINATION OF EXHIBITS.

In a suit in equity the court may look to the exhibits to ascertain the nature of the cause of action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3367-3371; Dec. Dig. § 847.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 132\*)—POWERS—IMPROVEMENT OF REALTY.

An administrator with the will annexed, appointed after the executrix had been declared insane, had no power to build a family dwelling house on the land of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 437, 545; Dec. Dig. § 132.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 324\*)—EXPENSES OF ADMINISTRATION—ALLOWANCES TO WIDOW AND CHILDREN — LIEN AGAINST REALTY OF ESTATE.

An administrator with the will annexed, who paid only \$618 of probated demands and received in cash twice that amount, who built a family dwelling house on the land, and advanced to the widow and children large sums of money, so that the money expended exceeded that received by \$2,038, was not entitled to a judgment and a lien against the realty; since such expenditures were neither debts of the decedent nor expenses of administration authorizing the probate court or any court to order a sale of the land.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1337, 1338, 1342; Dec. Dig. § 324.\*]

Appeal from Jackson Chancery Court; Geo. T. Humphries, Chancellor.

Action by M. M. Stuckey against Elizabeth Stephens and others. From an order sustaining defendants' demurrer, plaintiff appeals. Affirmed.

Appellant brought suit against the widow and children of one J. W. Stephens, and alleged in his complaint that the said Stephens died testate on or about the 11th day of July, 1906. Mr. Stephens named his wife as the executrix of his will, but she had been adjudged insane, and on the 14th of July, 1906, appellant was appointed administrator with the will annexed and proceeded to administer on this estate. Attached to his complaint, and made an exhibit thereto, was an itemized statement of all sums of money which had come to his hands as ad-

ministrator, amounting to \$10,718.69, and there was also attached an itemized statement of all sums which he had expended in the course of his administration, amounting to \$12,751.61. The complaint alleged that appellant had filed a full and final settlement of his administration with the probate court of that county on the 6th of October, 1908, and that this settlement had been duly approved, and he was discharged as administrator and the sureties on his bond exonerated, and he was given judgment by the probate court against the estate in the sum of \$2,032.92. He alleged that in the course of his administration the entire personal estate had been exhausted, and there were no personal assets out of which his demand could be satisfied; but he alleged the fact to be that Stephens owned quite a large body of land at the time of his death, and he prayed that his judgment be declared a lien against said lands and the same ordered sold in satisfaction thereof.

It appears from the exhibit to the complaint that debts amounting to only \$618.58 were ever probated against the estate, and Stephens had twice that amount of money on deposit in bank at the time of his death. Certain orders of the probate court are also attached to the complaint as exhibits thereto, from which it appears that shortly after his appointment appellant applied to the probate court for an order directing him to finish cultivating and to gather the growing crop, and a considerable sum of money was thus expended under the direction of the probate court. Appellant also received directions from the court to lease the lands of the estate, and this was done, and in his settlement he charged himself with the rents which he received. One of the orders of the probate court, attached to the complaint, shows that the administrator received directions from the court to make certain repairs to the family dwelling house on the place, and also to make certain improvements in the way of fencing. The administrator took credit for a single item, covered by a voucher numbered 399, as follows: "To C. S. Maynard, balance in full payment for dwelling, \$3,250.00." And other large sums of money were spent in repairs on the place, for which credit was taken. In addition, it appears that the administrator made large advances to the children; that, indeed, he was very indulgent to them. And it also appears that he made large advances to the widow, or for her benefit, and these advances are largely in excess of the balance shown to be due the administrator. In his settlement the administrator made no charge of commissions against the estate.

Phillips, Hillhouse & Boyce and Jno. W. & Jos. M. Stayton, all of Newport, and Morris M. & Louis M. Cohn, of Little Rock, for appellant. Jones & Campbell, of Newport, for appellees.

SMITH, J. (after stating the facts as above). [1-3] We think the demurrer in this case was properly sustained. This being a suit in equity, we may look to the exhibits to ascertain the nature of the cause of action, and, having done so, it appears, as is shown in the statement of facts above, that a very valuable estate, consisting of more than \$10,000 in personal property, has been administered, and, while the good faith of the administrator is not called in question, it appears that, as a result of the administration, he has paid only \$618.58 of probated demands; in other words, Stephens only owed that amount of money at the time of his death, so far as the same is evidenced by probated demands, and the administrator received in cash a sum of money twice as great as all of these demands. It appears that the administrator has built a valuable home, and it also appears that he has advanced to the widow and heirs large sums of money. These expenditures are neither debts of the decedent, nor are they such expenses of administration as authorize the probate court, or any other court, to order a sale of the lands of the estate to pay. The administrator had no authority to build this house. *Doke v. Benton County Lbr. Co.*, 169 S. W. 327. Nor were the advances to the widow and children expenses of administration. In the case of *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773, this court quoted with approval the syllabus in the case of *Collins v. Paepcke-Leicht Lumber Co.*, 74 Ark. 81, 84 S. W. 1044, as follows:

"(1) Under Kirby's Digest, § 186, providing that 'lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate,' if there are no debts due by the decedent, there can be no sale of his real estate to pay expenses of administration thereon, unless it appears that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent. \* \* \* (3) An order of the probate court for the sale of lands of an estate which shows on its face that it was made to pay expenses of administration, and not debts of the decedent, without showing that the expenses of administration were incurred in the course of administering the estate to pay debts due personally by the decedent, is void, and no rights were acquired under it, although the sale was afterwards confirmed."

Those cases cite a number of others to the same effect.

It is not the policy of the law to encourage, or to permit, the administrator to expend the money of the estate for any purpose except to pay the debts of the decedent, or expenses incurred in the course of administering the estate to pay the debts personally due by the decedent. The administrator, as such, has nothing to do with the education of the children, nor the support of the widow, nor with the permanent improvement of the lands of the estate further than is necessary to make these lands a source of income for the payment of the debts. Indeed, under the statute he has no control what-

ever over the lands except for the payment of debts, and no necessity for any such control existed in the present case.

No question of the right of an administrator who has advanced money for the benefit of the widow or heir to subrogation is involved in this case. That is not the relief asked. The case is that of an administrator who has expended money without lawful authority so to do, who asks that a lien be declared upon the lands of the estate and those lands ordered sold in payment of the money thus expended. Such a proceeding is contrary to the policy of our administration law, and the chancery court was without jurisdiction to grant the relief asked, and the demurrer to the complaint was therefore properly sustained, and the decree is affirmed.

#### TEGARDEN v. STATE. (No. 47.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

#### FENCES (§ 28\*)—DESTRUCTION—CRIMINAL RESPONSIBILITY.

Kirby's Dig. § 1913, punishing the pulling down of the fence of another, protects inclosures, and where an occupant in possession of land will sustain damage by another pulling down a fence the offense is committed, but one entering on land for a lawful and necessary purpose to remove a fence not on the boundary line, but on his land, does not violate the statute.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 62-67; Dec. Dig. § 28.\*]

Appeal from Circuit Court, Marion County; Geo. W. Reed, Judge.

U. S. Tegarden was convicted of cutting a fence on the lands of another, and he appeals. Reversed, and information dismissed.

Appellant was convicted upon an information filed before a justice of the peace, in which it was charged that he unlawfully, willfully, and maliciously cut the fence of the inclosed lands of W. H. Bryant.

A question in the case is whether the prosecution was had under section 1913 of Kirby's Digest, or under Act 275 of the Acts of 1907. This last-named act provides that, if any one shall willfully and maliciously cut, or otherwise destroy, any barbed or woven wire fence, or break or burn the posts thereof, he shall be guilty of a felony, if the damage done to the fence and crops amounts to \$10, or more, and a misdemeanor if the damage is less than \$10. It is conceded by the state that appellant could not be convicted under this act, for the reason that the proof does not show that the act of cutting the fence was willful and malicious. Upon the contrary, it is denied that the conviction was had under this act, and it is insisted that the conviction was properly had under section 1913 of Kirby's Digest, the provisions of which, so far as they are applicable to the information filed in this cause, are as follows:

"If any person \* \* \* shall pull down or break the fence or leave open the gate of the farm, plantation or other inclosed ground of another, the party so offending shall be guilty of a misdemeanor. \* \* \*

The evidence upon the part of the state was to the effect that appellant and Bryant were the owners of adjoining tracts of land, and that each claimed title to their respective tracts by conveyances from a man named Hurst. The line between the two tracts of land was in dispute, and when a survey was made it was found that Bryant had his fence set over some distance on appellant's land. It had been agreed that the county surveyor should run this line, and the parties were present when he did so and located the corner which determined the boundary. Bryant, at the time, called attention to the fact that the corner had not been properly located, and, upon the verification of his calculation, the surveyor discovered that the corner had not been properly located, and a post which had been driven down to mark this corner was reset; but, even after it had been reset, it appeared that Bryant's fence was still some distance over on appellant's land. After this appellant undertook to agree with Bryant on the erection of a fence on the true line, but Bryant never assented to this, nor did he ever agree to resetting his fence, and he testified that he did not know that appellant was going to cut the fence until after he had done so.

The proof on the part of appellant is to the effect that a creek ran through this land near the disputed corner, and that it was necessary to cut this fence to drive upon appellant's land to distribute the posts for the erection of the new fence, and that, after Bryant refused to pay any part of the cost of a division fence, appellant erected a fence on his own land some distance back of the boundary line. There was no proof of any damage done to the crops or to the fence, except that it was cut at one post and turned back so that wagons might drive through the opening.

At the trial the court gave the following instruction at the request of the state:

"(2) You are instructed that one who has the possession, control, and use of land, as against the real owner and all others, is, in law, the owner of such lands within the meaning of the act under which defendant is charged."

Appellant requested the court to give an instruction No. 2, which reads as follows:

"(2) I charge you that if you should find from the testimony in this case that the words, acts, and conduct of W. H. Bryant were such as would lead a prudent man to believe, and that he did believe, that he was consenting to the defendant fencing the lands in question up to and at the time said fence was cut, and that the defendant in good faith believed that Bryant was consenting for said fence to be built, then you will acquit the defendant."

The court refused to give this instruction, and exceptions were saved to its refusal.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

S. W. Woods, of Marshall, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. (after stating the facts as above). The instruction numbered 2, given at the request of the state, was evidently copied from the statement of facts in the case of Wellington v. State, 52 Ark. 266, 12 S. W. 562. That instruction was not expressly approved in that case, although the judgment of conviction was affirmed, and in the opinion it was there said that the occupant of the land was the owner within the meaning of section 1669 of Mansfield's Digest, which is the section carried forward as section 1913 of Kirby's Digest.

The late case of Miller v. State, 109 Ark. 362, 159 S. W. 1125, was a prosecution for a violation of section 1913 of Kirby's Digest, in which the ownership of the property was alleged to be in one who proved to be only a tenant, but it was there said:

"As Smith had the land rented when the alleged trespass occurred, the land, for the purpose of this indictment, must be held as belonging to him."

It thus appears that the section above quoted was designed to protect inclosures, and that the occupant in possession of the land who would sustain the damage by pulling down or breaking the fence is the owner of the inclosed grounds within the meaning of the statute, and that an indictment is sufficient which alleges the ownership to be in him.

But this statute is not applicable to the facts in the present case. Appellant's entry upon the land was for a lawful and a necessary purpose and occurred only after a survey had been made by the county surveyor fixing the true line, at which survey the adjacent owner was present, and was fully advised of its purposes, and, as this adjacent owner did not question its correctness, he should, of his own motion, have vacated his possession of appellant's land. Appellant proceeded in a peaceable manner to ascertain his line, and only cut this fence when it became necessary for him to do so, to enter upon his own land, and that after Bryant had declined to unite with him in building a division fence.

The appellant's act was not an unlawful one, and the judgment of the court below is therefore reversed, and the information dismissed.

#### EZELL et al. v. BARNER. (No. 48.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

#### 1. CONTINUANCE (§ 33\*)—ABSENCE OF WITNESSES—ADMISSION OF STATEMENT AS DEPOSITION.

A continuance for the absence of a witness is properly denied under Kirby's Dig. § 6173, where the appellant is permitted to read as the

deposition of the witness the statement of what he expected to prove by him.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 113; Dec. Dig. § 33.\*]

#### 2. TRIAL (§ 267\*)—BROKER'S COMMISSIONS—ACTIONS—MODIFICATION OF INSTRUCTIONS.

Where, in an action by a broker for procuring a purchaser, it was not denied that plaintiff procured a purchaser and could recover commissions, unless he had waived the same, and the evidence sharply conflicted as to terms of the waiver, a requested instruction that, if plaintiff agreed to relinquish the commission "for making the sale," the verdict would be for defendant was properly modified by adding after the quoted words the words "without other conditions."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.\*]

Appeal from Circuit Court, Cross County; W. J. Driver, Judge.

Action by Mrs. F. M. Barner against J. B. Ezell and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Appellee instituted this suit against appellants to recover the sum of \$500. She alleged that appellants employed her to procure a purchaser for a certain tract of land owned by appellants, and agreed, in the event the land was sold to a purchaser procured by the appellee, that they would pay her 5 per cent. commission on the purchase price. She alleged that she procured a purchaser to whom appellants sold the land for the sum of \$10,000, and that appellants were therefore indebted to appellee in the sum of \$500, which they had refused to pay, and for which she prayed judgment.

Appellants answered, admitting that they owned the land mentioned in the complaint, but denied the other allegations of the complaint, and alleged the facts to be:

"That plaintiff agreed with one T. B. Martin, in writing, to purchase the lands owned by defendants at the town of Wynne, Cross county, Ark., at and for the sum of \$13,000; that said contract was entered into in writing on the 25th day of February, 1913. Defendants state that plaintiff and T. B. Martin failed and refused to keep said contract in any manner whatever. Defendants state that a short time after said written contract was entered into that these defendants, without the aid of plaintiff in any manner, sold said lands to T. B. Martin, and at the time of making said sale it was expressly contracted and agreed with plaintiff that plaintiff nor any one was to have any commission for the sale of said lands, and that said lands were sold by these defendants free from any right or claim on the part of the plaintiff or any one for her to claim any commission whatever."

Appellants filed a motion for continuance, in which they alleged that they could not safely go to trial on account of the absence of one Mrs. J. J. Henley, who was old and infirm, and therefore could not attend upon the court, and whose deposition would have to be taken; that she would testify that she was present on February 26, 1913, and heard the conversation and agreement between plaintiff and defendant J. B. Ezell and T. B. Martin, and that it was expressly agreed

between the plaintiff and said defendant that plaintiff was to have no commission on account of the sale of the lands then sold by defendants, J. B. and Mary A. Ezell, to said T. B. Martin. The motion alleged that the testimony was material, and set up facts supported by affidavit which showed that appellants had used due diligence to procure the testimony of the witness. When the trial was called, appellants' motion for continuance, without objection, "was read in lieu of the deposition." Appellants admitted at the trial that appellants employed the appellee to procure a purchaser for the real estate mentioned in her complaint, and that they were to pay her a commission of 5 per cent. on the land sold to this purchaser. It was admitted that appellee procured one T. B. Martin to purchase certain lands of appellants, for which he paid the sum of \$10,000, but that this sale was only negotiated after appellee had agreed to waive her commission if a sale was made on those terms, and only after the trade which appellee had negotiated had failed because of her own inability to raise the purchase money to pay for certain property embraced in the trade of which she was herself to become the purchaser.

At the trial appellants asked an instruction stating the issues in the case and their defense and theory of the case, which the court might very well have given; but the instructions which were given, when considered as a whole, presented the respective theories of the parties and the law applicable thereto. Appellants asked the following instruction:

"No. 4. If you find from the evidence in the case that, at the time of making the contract by which the defendants sold and conveyed to T. B. Martin the real estate and chattel property for \$13,000 on February 27, 1913, that plaintiff, Mrs. F. M. Barner, agreed to relinquish her commission for making said sale (without other conditions), then your verdict will be for the defendants."

The words "without other conditions" were inserted by the court, and appellants excepted to this modification.

Other exceptions were saved at the trial, but we have stated the points raised in the brief upon which appellants rely for a reversal of the judgment.

Other facts will be stated in the opinion.

S. R. Simpson, of Paragould, for appellants. Martin, Wootton & Martin, of Hot Springs, for appellee.

SMITH, J. (after stating the facts as above). [1] No prejudice resulted from the action of the court in overruling the motion for a continuance, because the court permitted appellants to read the statement of what they expected to prove by the absent witness as the deposition of that witness. The statute provides that in such cases con-

tinuances shall not be granted. Section 6173, Kirby's Digest.

[2] The modification of instruction No. 4 was necessary and proper to present the issue of fact in the case. It was admitted that appellee agreed to waive her commissions if the sale was made on certain terms, but she testified that her commissions were waived in the event only that the sale was made on these terms, but that that particular contract of sale was never made, and that therefore her agreement to waive her commissions never became effective. The evidence sharply conflicted as to the terms of this waiver; but the verdict of the jury has settled those questions. It is not denied that appellee procured the purchaser and was entitled to the commissions unless she had waived them in the course of the negotiations for the sale, and the correctness of the instructions submitting this issue to the jury is not questioned, except the modification to instruction No. 4 above set out, which, as we have shown, was proper under the circumstances in this case.

The judgment of the court below is therefore affirmed.

#### ST. LOUIS, I. M. & S. RY. CO. v. ENLOW. (No. 51.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

#### 1. EVIDENCE (§ 126\*)—RES GESTÆ—INJURIES TO PERSONS ON TRACKS.

A declaration made by one run down by a train, nearly a week after the accident, is not admissible as res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 372-376; Dec. Dig. § 126.\*]

#### 2. DEATH (§ 62\*)—EVIDENCE—HEARSAY—DYING DECLARATIONS.

A dying declaration of one run down by a train is not admissible in an action for his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 81; Dec. Dig. § 62.\*]

#### 3. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR.

Where the dying declaration of one run down by a train was the only evidence that he was in a position where the trainmen would have discovered him had they been keeping a lookout, the admission of the declaration in an action for his death was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by J. W. Enlow, administrator of the estate of Carl B. Emslie, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

E. B. Kinsworthy, R. E. Wiley, and T. D. Crawford, all of Little Rock, for appellant. Hoepfner & Young, of Little Rock, and W. R. Donham, of Benton, for appellee.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**McCULLOCH, C. J.** The plaintiff's intestate, C. B. Emsile, while on or near the tracks of the defendant in the city of Little Rock, was struck by a moving train of cars and injured, from which injuries he died a few weeks later, and this is an action by the administrator to recover damages for the benefit of the estate and for the next of kin.

The injury was inflicted by a train of cars being switched along a track which runs through an alley in the city of Little Rock with brick buildings on each side. There are two tracks, and the one on which deceased was injured ran within about two feet of the brick walls of the buildings abutting on the alley. It occurred about 3 o'clock in the morning, while it was dark and there were no lights of any kind in the alley. A string of five cars was being backed along the track for the purpose of spotting them at the warehouses where they were to be unloaded, and a brakeman was stationed as lookout near the end of the front car. He had a lantern in his hand, and testified that he kept strict lookout for objects on the track and failed to discover any one until he heard the cries of the deceased after the latter had been struck by the train. The foreman of the switch crew testified that he walked along the alley a short distance in front of the approaching cars for the purpose of superintending the spotting of the cars and that he did not see any one in the alley. The other trainmen testified, and it appears from their testimony, that a strict lookout was kept for persons on the track, and that none was discovered until the distress cries of the deceased were heard, when the train was immediately stopped. One of the wheels of the car struck the arm of deceased and pinched the flesh off from wrist to elbow, but no bones were crushed or broken or other injuries inflicted. Deceased was carried to a hospital where his wounded arm was dressed, and he remained there until he died. Death resulted from tetanus.

There was no witness who testified that he saw deceased on the track, and it is merely a matter of inference or conjecture as to when he went upon the track, or the position he occupied. The testimony of the trainmen is to the effect that they did not see him, and the conclusion to be reached from their testimony is that he was lying down on or near the track when the cars were backed into the alley, and that as it was dark at that place the man on lookout could not discover his presence.

[1, 2] The plaintiff introduced, over the objections of the defendant, testimony tending to establish a dying declaration of the deceased, to the effect that he was walking along by the side of the track when the train struck him. The ruling of the court in admitting this testimony is assigned as error, and it is quite clear to us that this assignment must

be sustained and the judgment reversed. The declaration is not admissible as a part of the *res gestæ*, for it was not made until about a week after the injury. It is well settled that dying declarations are not admissible, except in prosecutions for homicide where the cause of death is under investigation. *Haley v. State*, 99 Ark. 356, 138 S. W. 631. They are not admissible in civil cases even where the cause of death of the declarant is one of the matters under investigation. *Tiffany on Death by Wrongful Act*, § 184.

[3] The testimony was very material, for without it we are of the opinion that there is not enough to sustain a verdict in plaintiff's favor, and therefore the admission of the testimony was prejudicial. The plaintiff failed to adduce any testimony at all, aside from the dying declaration, tending to show that deceased was in such position, on or near the track, that his presence ought to have been discovered if a lookout had been kept. So the dying declaration constituted the only evidence of the fact that deceased was walking along the track and in a position in which the trainmen keeping a lookout would have discovered him. According to the undisputed evidence, it was dark in the alley, and unless it be shown that deceased was standing up or walking along, there was nothing to warrant the jury in disregarding the testimony of the switchmen to the effect that they looked and saw nothing of him on the track.

There are several exceptions in regard to giving and refusing instructions, but as the judgment must be reversed for the error indicated, we need not pass upon the correctness of those rulings.

Reversed and remanded for a new trial.

#### CHICAGO, R. I. & P. RY. CO. v. FLOYD. (No. 65.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

##### 1. CARRIERS (§ 269\*)—INJURIES TO PASSENGERS—MISREPRESENTATIONS AS TO CONNECTIONS.

Where a station agent informed plaintiff, when he sold him a ticket, that the train made connections with a motor car which would take him from the junction to his destination, when in fact the motor car service had been discontinued, and plaintiff was compelled to walk from the junction and was thereby made sick, the railroad is liable for such sickness.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1060–1063; Dec. Dig. § 269.\*]

##### 2. DAMAGES (§ 135\*)—EVIDENCE—MINIMIZING DAMAGES.

In an action for such injuries, evidence held not to show a failure on the part of the passenger to minimize his damages by seeking lodging at the junction point instead of walking.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 503–508; Dec. Dig. § 185.\*]

##### 3. DAMAGES (§ 214\*)—MINIMIZING DAMAGES.

Requested instructions that it was plaintiff's duty to remain over night at the junction point, if he could find lodging there, were properly refused, since the carrier was entitled to

nothing more than a submission of that question to the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 542; Dec. Dig. § 214.\*]

**4. TRIAL (§ 252\*) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.**

An instruction, given at a passenger's request, defining the duty of a carrier to its passengers in the operation of its train, was erroneous, as not applicable to the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

**5. APPEAL AND ERROR (§ 1064\*) — HARMLESS ERROR—INSTRUCTIONS—ERROR NOT AFFECTING RESULT.**

The error was harmless, where the carrier's negligence was not disputed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**6. CARRIERS (§ 277\*) — PASSENGERS — BREACH OF CONTRACT—EXCESSIVE DAMAGES.**

A verdict for \$350 damages in favor of a passenger who had been earning \$65 a month, and who was made ill by being compelled to walk five miles because of the misrepresentation of the carrier's agent as to connections, which illness lasted two months, one of which was spent in bed, during which time plaintiff suffered much discomfort and pain and expended \$12 for doctor's services, is not excessive.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.\*]

Appeal from Circuit Court, Hot Springs County; W. H. Evans, Judge.

Action by George M. Floyd, Jr., against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee recovered judgment for damages, and it is insisted that at the trial error was committed in the instructions to the jury, and that the evidence was insufficient to sustain the amount of damages recovered.

Appellee's theory of the case is indicated by the instruction No. 1, given at his request, which was substantially as follows: That, if the jury believed that appellee purchased a ticket from Hot Springs to Malvern, and at the time was informed by the agent who sold it that the railroad operated a motor car which made connection with the train on which appellee became a passenger at Butterfield, and that passengers would be carried on this motor car from Butterfield to Malvern, and appellee relied on this statement and bought a ticket and became a passenger, when otherwise he would not have done so, when, in fact, the railroad had discontinued the use of the motor car a few days prior thereto, and that appellee, relying upon the representation of the agent, took passage upon the train, which he supposed would make connection with the motor car, but which did not do so, and that he was compelled to walk to Malvern, and was made ill thereby, he would be entitled to a judgment to compensate for his illness, and other damages sustained. The second instruction was to the effect that a predisposition to colds on appellee's part would not prevent a recovery if

his illness was caused by appellant's negligence. The third, and the only other, instruction given at the request of appellee, except one on the measure of damages, defined the degree of care due a passenger by the carrier in the operation of its trains.

Four instructions were requested by appellant, but none of them were given. These instructions dealt with the measure of damages and the duty of appellee to minimize his damages.

Appellee testified that, when the train arrived at Butterfield, he and a companion, who was also going to Malvern, got off together, and found the depot at Butterfield closed; but, after waiting about two hours for the arrival of the motor car, they went to the telephone office and inquired of the appellant's agent at Malvern when the motor car would be due at Butterfield, and were told by this agent that the motor car service had been discontinued, and that they would have to walk to Malvern. Appellee had been at work at Hot Springs, and was anxious to reach Malvern, where his family resided, and which was only five miles from Butterfield, and he started, with his companion, to walk to that city and carry his grip. After walking about 100 yards, he concluded he could not carry his grip, so he decided to return and telephone for a conveyance. He met an acquaintance who told him where he thought he could secure a conveyance, and application was made there, but without success. There were no hotels in Butterfield, and no signs of any kind to indicate where one might secure lodging. The houses at that time were all dark and uninviting, yet appellee's companion went to the home of a man where he was told lodging might be secured, and hallooed there, but failed to arouse any one. The weather was cloudy and cool, but not cold. Appellee and his companion then started to walk home at about 11 o'clock, and when they had traveled about a mile appellee became sick, but finally reached his home about 2 o'clock in the morning. Appellee had a long spell of sickness following this walk, and there was evidence of a physician from which the jury no doubt found that this illness was caused by the exposure and midnight walk. Judgment was rendered for \$350.

Thos. S. Buzbee, Jno. T. Hicks, and C. L. Johnson, all of Little Rock, for appellant. J. C. Ross, of Malvern, for appellee.

SMITH, J. (after stating the facts as above). We think no prejudicial error was committed in the trial of this cause.

[1] The facts recited in instruction No. 1 constitute a cause of action, and appellee's evidence met its requirements.

[2, 3] We think, too, there is nothing in the evidence which shows any failure on appellee's part to minimize the damages. Appel-

lant suggests that appellee might have secured entertainment at Butterfield, and should have done so. The instructions requested by appellant did not submit to the jury the question whether, under the circumstances, it was reasonably prudent for appellee to attempt to walk to Malvern, but, upon the contrary, stated the law to be that, upon ascertaining he could not make connection from Butterfield, appellee should have made every reasonable effort to provide himself with entertainment and to avoid exposure to the weather, and that, if he elected to walk to Malvern, rather than to seek entertainment at Butterfield, when, by exercising reasonable effort, he could have obtained entertainment at Butterfield, then appellant would not be liable for damages resulting from the exposure. These instructions were properly refused, because, in effect, they declared the law to be that appellee was in duty bound to remain over night at Butterfield if he could secure entertainment there; whereas appellant, under the evidence in this case, was entitled to nothing more than a submission of that question to the jury. The law of this case is stated in *Louisiana & Arkansas Ry. Co. v. Rider*, 103 Ark. 558, 146 S. W. 849, and in the cases there cited.

[4, 5] The third instruction was erroneous and should not have been given. There was no question in this case about the negligent operation of trains. However, the instruction was harmless here, for the reason that the negligence of the railway company is not disputed, and the cause was tried almost entirely upon the issue of the measure of damages.

[6] And, finally, we think the damages are not excessive. Appellee was earning \$65 per month, and lost two months' time, one month of which was spent in bed, and during this time he suffered much discomfort and pain and incurred a doctor's bill of \$12.

The judgment of the court below is therefore affirmed.

#### ALEXANDER-AMBERG & CO. v. HOLLIS. (No. 53.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

#### 1. FORCIBLE ENTRY AND DETAINER (§ 29\*)— ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action of unlawful detainer to recover possession of premises which defendant had occupied as a tenant, *held* sufficient to sustain a verdict for possession with an award of \$170 damages.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 134-140, 147; Dec. Dig. § 29.\*]

#### 2. FRAUDS, STATUTE OF (§ 44\*)—INTEREST IN LAND—ORAL CONTRACT FOR LEASE.

An oral contract for the lease of lands for one year, to commence at a date subsequent to the contract, is not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

#### 3. CONTRACTS (§ 32\*)—MEETING OF MINDS— REDUCING TO WRITING.

The terms of an oral contract or agreement for a lease became effective, though it was further agreed that they should be subsequently embodied in a written signed instrument.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 159; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

Action by Alexander-Amberg & Co. against W. H. Hollis. Judgment for defendant, and plaintiffs appeal. Affirmed.

Alexander-Amberg & Co., pro se. S. R. Simpson, of Paragould, for appellee.

MCCULLOCH, C. J. [1] This is an action of unlawful detainer instituted by appellants against appellee, and possession of the premises was delivered to appellants under the writ at the commencement of the action. A trial of the case resulted in a verdict in favor of appellee for possession of the premises and an award of damages in the sum of \$170.

The only question presented on this appeal is whether or not the evidence is legally sufficient to sustain the verdict. Appellee occupied the lands in controversy, according to the undisputed evidence, as tenant of appellants, for and during the years 1910, 1911, and 1912, and remained in possession after the commencement of the succeeding year. He claimed the right to hold for the year 1913 under a new contract covering that period made with appellants' agent during the month of December, 1912. This claim is controverted by appellants, who deny that any contract for the year 1913 was made, and assert, on the contrary, that the tenancy expired on December 31, 1912. The testimony of appellee is not entirely satisfactory, but it is sufficient to establish an oral contract according to his contention in this case.

[2] An oral contract for the lease of lands for one year, to commence at a date subsequent to the making of the contract, is not within the statute of frauds. *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848. Appellee's testimony tends to show an oral contract, but that the same was to be subsequently reduced to writing.

[3] The terms of the contract were, according to the testimony, agreed upon, and it became effective, though it was further agreed that the terms of the undertaking were to be subsequently embodied in a written instrument and signed. *Friedman v. Schleuter*, 105 Ark. 580, 151 S. W. 696.

The evidence was also sufficient to sustain the verdict awarding damages in the sum named above. Appellee in his testimony put an extravagant estimate upon the rental value of the land, and the jury rejected it, and refused to allow him the amount claimed. But we cannot say that the jury were

unwarranted in accepting the estimate to an extent sufficient to base the award upon.

Judgment affirmed.

**WESTERN UNION TELEGRAPH CO. v. SCANLON. (No. 39.)**

(Supreme Court of Arkansas. Dec. 7, 1914.)

**1. CONTINUANCE (§ 22\*) — ABSENCE OF WITNESS—DISCRETION OF COURT.**

In an action for delay in transmission and delivery of a telegram addressed to plaintiff, the sender of the telegram, residing in another county, was present as a witness for plaintiff at the October term at which the case was set for trial, but at which a continuance was granted. Plaintiff subsequently served notice that they would take the deposition of such witness and other witnesses upon an agent of the telegraph company, who failed to transmit it to the telegraph company's attorney, and the attorney did not know until the trial that such deposition had been taken. *Held* that the court did not abuse its discretion in refusing to grant a continuance until defendant could secure the presence of such witness or have an opportunity to cross-examine him, as, under the express provisions of Kirby's Dig. § 3157, the witness could not have been compelled to attend, and plaintiff had a right to take his deposition, and it was due to its own agent's fault that its attorney did not know of the taking of such deposition.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 58-67; Dec. Dig. § 22.\*]

**2. EVIDENCE (§ 243\*) — ADMISSIONS — ADMISSIONS OF AGENT.**

In an action for delay in transmission and delivery of a telegram addressed to plaintiff, a written statement made by the sender of the telegram tending to contradict his deposition taken by plaintiff was not admissible against plaintiff as the admission of plaintiff's agent in sending the message, as when the message was sent his agency ceased, and no admission he thereafter made could bind plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 74\*) — ACTIONS FOR DELAY—INSTRUCTIONS.**

In an action for delay in transmission and delivery of a telegram addressed to plaintiff at H., an instruction, that if the sender when he tendered the message knew that the H. office was closed, to find for defendant was properly refused, where there was evidence that the sender delivered the message to the operator with instructions to transmit it immediately and that the operator agreed to do so, as the instruction ignored this testimony.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 159, 160; Dec. Dig. § 74.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 71\*) — DELAY IN TRANSMISSION AND DELIVERY OF MESSAGE—EXCESSIVENESS OF DAMAGES.**

A verdict of \$500 for delay in transmission and delivery of a telegram, informing plaintiff of the death of her sister, was excessive, where plaintiff had been with her sister in her sickness for some time and had rendered her every assistance possible and could have done no more, had she received the message promptly, than attend the funeral, and the recovery should be reduced to \$250.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 156; Dec. Dig. § 71.\*]

Appeal from Circuit Court, Hempstead County; Jacob M. Carter, Judge.

Action by M. V. Scanlon against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons, of New York City, Chas. S. Todd, of Texarkana, Tex., and Rose, Hemmingsway, Cantrell & Loughborough, of Little Rock, for appellant. Steve Carrigan, Jr., of Hope, for appellee.

HART, J. M. V. Scanlon instituted this action against the Western Union Telegraph Company to recover damages on account of the negligent delay of the company in transmitting and delivering to her the following telegram: "Mrs. M. V. Scanlon, Hope, Arkansas. Mrs. Sheppard died at 7 p. m. [Signed] Doctor Thompson." The message was written by Dr. Thompson on Sunday evening, June 29, 1913. Mrs. Sheppard died at Stephens, Ark., and Dr. Thompson testified that he delivered the message to Mr. Griffin, agent of the company, at Stephens, at 8 o'clock or 8:30 o'clock p. m. of that day. He testified that Griffin did not say anything about the message, except that he would get it through right away; that Griffin did not inform him that the telegraph company did not maintain a night office at Hope, Ark., and that the message could not be delivered to Mrs. Scanlon that night; that Mrs. Sheppard was buried about five o'clock on the evening of the 30th of June, and that the body could not be embalmed at Stephens and, therefore, could not have been kept any longer. He further stated that if he had known that the message could not have been got through that night that he would have got Mrs. Scanlon over the telephone and notified her of the death of her sister. It was shown by other evidence that the message could have been delivered over the telephone that night.

Mrs. Scanlon, the plaintiff, testified that she knew that her sister had been sick, had been with her in her sickness, and had helped to wait on her for 18 or 20 days; that she was called home on account of the illness of her daughter and did not return; that the message in question was not delivered to her until between 9 and 10 o'clock of the morning after it was delivered to the agent of the company at Stephens for transmission; that Stephens is in Ouachita county and Hope in Hempstead county, Ark.; that the two towns are about 60 miles distant; that if the message had been delivered to her on the night of the 29th she could have gone on the train which left Hope at 8 o'clock the next morning and would have arrived in Stephens in time for her sister's funeral, and that she would have done so; that she had great affection for her sister, and was very much grieved in not being able to attend her funeral.

T. C. Griffin testified: That on June 29, 1913, he was agent for the Western Union

Telegraph Company at Hope, Ark.; that he remembered distinctly Dr. Thompson's giving him the message in regard to the death of Mrs. Sheppard; that it was delivered at 8:30 o'clock on Sunday night, and that at that time the operators of the company are off duty except in the relay stations; that he tried to get Little Rock, and found that they had wire trouble; that he told Dr. Thompson that he better use the telephone, because he could not get Little Rock or any relay office on the circuit; that Dr. Thompson told him that he was in a hurry, and that if he could not get the message off by 8 o'clock next morning he would use the telephone; that he told Dr. Thompson that it was not possible to deliver the message at Hope that night; that it could not be delivered until the next morning, because the office at Hope closed at 6 o'clock p. m.

Other evidence for the telegraph company showed that the office at Hope is closed from 8 o'clock at night until 8 o'clock next morning, and that on Sundays the office is opened at 8 o'clock a. m. and is closed at 10 o'clock a. m. and then is opened again at 4 o'clock p. m. and is closed at 6 o'clock p. m.

The jury returned a verdict in favor of the plaintiff for \$500, and the defendant has appealed.

[1] The principal ground relied upon by counsel for the defendant for a reversal of the judgment is that the court refused the defendant a continuance on account of surprise at the testimony of Dr. Thompson. The suit was brought in the Hempstead circuit court and set for trial at the October term, 1913. When the case was called, Dr. Thompson, the sender of the message in question, was in attendance upon the court at the instance of the plaintiff, and the plaintiff announced ready for trial, and the defendant sought a continuance on account of the absence of T. C. Griffin, the agent of the defendant to whom the message was delivered for transmission, and the cause was continued until the April 1914, term of the court. Counsel for the plaintiff gave notice to the defendant that it would take depositions of witnesses on the 12th day of November, 1913, at Stephens, Ark., and this notice was served upon an agent of the company on the 3d day of November, 1913, but no notice of the taking of the depositions was given to the attorney of the defendant, who resided at Texarkana, Tex. It is not contended that the notice was not regular in form or that it was not served upon the proper agent of the plaintiff, and, on that account, the notice need not be set out. Pursuant to the notice, the deposition of Dr. Thompson and that of another witness, both of whom resided at Stephens, Ark., were taken on the 12th day of November, 1913, and the duly transcribed depositions were transmitted to the circuit clerk of Hempstead county.

On the 12th day of March, 1914, some three weeks before the April term of the

court convened, the attorney for the defendant wrote the clerk of the circuit court requesting him to send to him all the papers in the case. The clerk replied that the case would be called for trial on April 7, 1914, and advised the attorney that the judge of the circuit court had made an order forbidding the clerk to send any original papers out of the office. About the 17th day of March the attorney for the defendant received a letter from the attorney for the plaintiff advising him of the setting of the case, and about the 24th of March he received another letter from the plaintiff's attorney inclosing copy of an amendment to the complaint.

The attorney for the defendant testified that he never had any notice whatever that the deposition of Dr. Thompson would be taken or had been taken. He arrived at the county seat of Hempstead county on the day before the case was set for trial at the April 1914, term, of the court, and procured from the clerk what purported to be all the papers in the case, and took them to his hotel to examine them that night. He stated that he did not find the deposition of Dr. Thompson, or that of any other witness, among the papers. He announced ready for trial, on the presumption that Dr. Thompson would be present in court to give his testimony. After the jury had been impaneled and the plaintiff had been examined as a witness, plaintiff's attorney offered to read in evidence the deposition of Dr. Thompson. The attorney for the defendant then asked leave of the court to withdraw his announcement of ready for trial, and moved to postpone the trial of the case until he could secure the presence of Dr. Thompson or have an opportunity to cross-examine him. The court denied his motion. Attorney for the defendant then offered to read in evidence, in rebuttal of Dr. Thompson's testimony, a written statement signed by him, which had been given to one of the agents of the defendant and which tended to contradict the testimony given in his deposition. The court denied this motion and the case proceeded to trial.

We do not think the court abused its discretion in refusing to grant the defendant's motion for a continuance or postponement of the trial. It will be noted that the case was tried in Hempstead county, Ark., and that the deposition of Dr. Thompson was taken in Ouachita county, where he resided. It is true that Dr. Thompson appeared as a witness for the plaintiff at the time the case was set for trial at the preceding term of the court as a witness; but he could not have been compelled to attend the trial as a witness, because he did not reside in the county where the action was pending or in an adjoining county. See Kirby's Digest, § 3157.

It is conceded by counsel for the defendant that notice to take depositions was served upon the proper agent of the defendant on the 3d day of November, 1913, and that, pursuant to the notice, the deposition of Dr.

Thompson was taken on the 12th day of November, 1913, and duly transmitted to the clerk of the court in which the action was pending and published. Counsel for the plaintiff was not required to notify counsel for the defendant that he was going to take the deposition of Dr. Thompson; it was sufficient to give due notice that the deposition would be taken. It appears from the record that the agent upon whom the notice was served failed to send it to the attorney for the defendant and, on that account, the attorney for the defendant did not know that the depositions would be taken. This amounted to negligence, and the court did not abuse its discretion in failing to continue the case as requested by counsel for the defendant.

For the reason that the attendance of Dr. Thompson at the trial could not have been compelled, the plaintiff had a right to take his deposition. This her attorney proceeded to do, upon due and proper notice to the defendant. It is true it was through no fault of the defendant's attorney that he did not know that the depositions had been taken, but it was the fault of the defendant's agent upon whom the notice was served, and for this agent's negligence the defendant must suffer, and had no right to have the case postponed on account of its own agent's negligence.

[2] Again, it is insisted by counsel for the defendant that the court should have permitted him to introduce in evidence the written statement, which he says was given by Dr. Thompson to one of the defendant's agents, in which he made statements tending to contradict the testimony given in his deposition. Counsel claims that this written statement made by Dr. Thompson was in the nature of an admission, binding upon the plaintiff, because Dr. Thompson was the agent for the plaintiff in sending the message. But after that was done his agency ceased, and no admission made by him thereafter could be binding upon the plaintiff.

[3] It is next contended by counsel for the defendant that the court erred in refusing instruction No. 6, which is as follows:

"If you believe from the evidence that at the time he tendered the message, Dr. Thompson knew that it was Sunday, and that Hope office was closed, you will find for the defendant."

We do not think the court erred in refusing to give this instruction. It was erroneous, because it denied a recovery if the jury found that at the time Dr. Thompson tendered the message to the company he knew it was Sunday and that the Hope office was closed. The instruction in this form did not take into consideration the testimony of Dr. Thompson to the effect that the agent received the message and stated to him that he would send it immediately.

In the case of *Western Union Tel. Co. v. Duke*, 108 Ark. 8, 156 S. W. 452, it was admitted that the telegraph offices, both at the place where it was delivered for transmission

and the place where it was to be sent, were closed at the time the message was tendered for transmission, on account of it being a holiday, and that the sender of the message knew of this fact. We held that the circuit court properly ruled that the issue of negligence would be confined to the question of whether the defendant was guilty of negligence in handling the message after the hour at which the sender of the message knew that the office would be reopened for business. There no point was made that the agent received the message and undertook to send it regardless of whether the office was closed or not.

In the present case Dr. Thompson testified that he was not informed that the company did not have a night office at Hope, Ark., and that the message could not be delivered that night. He stated that he delivered the message to the operator with instructions to transmit it immediately, and that the operator agreed to do so. It is true that his testimony in this respect is contradicted by that of the telegraph operator, but this conflict of evidence was properly submitted to the jury under the instruction given by the court.

In the case of *Western Union Tel. Co. v. Harris*, 91 Ark. 602, 121 S. W. 1051, 24 L. R. A. (N. S.) 1283, the court held that the agent of a telegraph company to whom a message is offered for transmission is bound to take notice of the office hours of the company at the office to which the message is to be sent. The court held further:

"Where a telegraph company's transmitting agent knows, or under the circumstances should know, that on account of the receiving office being closed there will be delay in delivering an urgent message which is intended for immediate delivery, it is incumbent on him to so inform the sender; and if he fail to do so the company is liable for damages resulting from such neglect."

The instructions given by the court in the instant case followed the law laid down in that case and, after examining them, we are of the opinion that it may be said, without further discussion, that they fully and fairly presented the issues of fact to the jury.

[4] Finally, it is contended by counsel for the defendant that the verdict is excessive, and in this contention we agree with them. The counsel for plaintiff rely on the case of *Western Union Tel. Co. v. Webb*, 98 Ark. 88, 135 S. W. 366. In that case a son sued to recover, because, by the negligence of the telegraph company, he was not able to be present and assist in burying his mother. The love between mother and son is greater than that between brother and sister, and on that account greater damages are usually allowed in that class of cases. Every case must depend to a great extent upon the facts presented in it, and though, in some measure, like amounts should be allowed in similar cases, still the individual facts presented in each case must to a great extent govern. In the present case it was shown that the plain-

tiff had been with her sister a short time before and had helped nurse her for about 20 days and had rendered her every assistance it was possible for her to do. It was shown that the funeral could not have been delayed any longer, because there was no way at Stephens by which the body could have been embalmed. The plaintiff could have done no more than be present at the funeral had she received the message promptly. Under all the circumstances, as shown by the record, we think a verdict of \$250 was all she was entitled to recover.

Therefore the judgment will be reduced to the sum of \$250, and for that amount will be affirmed.

SNOWDEN et al. v. THOMPSON et al.  
(No. 52.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

1. EQUITY (§ 21\*)—FUNDS—DISTRIBUTION AMONG LANDOWNERS—JURISDICTION OF EQUITY—"TRUST FUND."

Unexpended funds of a drainage district are trust funds, and equity has jurisdiction to distribute them, at least in the absence of some adequate statutory provision therefor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 43, 49; Dec. Dig. § 21.\*]

For other definitions, see Words and Phrases, First and Second Series, Trust Fund.]

2. DRAINS (§ 20\*)—FUNDS—DISTRIBUTION AMONG LANDOWNERS—PLEADINGS.

A complaint in an action by an owner of land in a drainage district against the treasurer thereof for a distribution of unexpended funds, which merely alleges that bonds were issued and that out of the funds raised there was a specified surplus after paying for the improvement, does not warrant a distribution of the surplus, in the absence of any allegation that it is not needed to pay bonds as they fall due, in view of the statute authorizing bonds payable in installments, so that any unexpended funds from proceeds of a sale of bonds remain to apply on the bonds or interest as they fall due; and merely because there is no present application to be made of the funds, does not call for a distribution thereof.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 20.\*]

3. DRAINS (§ 19\*)—FUNDS—DISTRIBUTION AMONG LANDOWNERS—WHEN AUTHORIZED.

Landowners in a drainage district are entitled to a return of money raised by assessments on their lands and not expended, unless there is a future use for the funds, in which case they are not entitled to a return.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. § 19.\*]

Appeal from Greene Chancery Court; Chas. D. Frierson, Chancellor.

Suit by A. S. Snowden and others against W. C. Thompson and others. From a decree of dismissal, complainants appeal. Affirmed.

M. P. Huddleston, Robt. E. Fuhr, and J. M. Futrell, all of Paragould, for appellants.

McCULLOCH, C. J. A drainage district known as the "Swan Pond Drainage District No. 1" was, in the year 1907, formed in Greene

county under the general statutes of the state by an order of the county court. Assessments were levied on the lands in the district, and, in order to hasten the work of construction, bonds to the amount of \$50,000 were issued pursuant to an order of the county court authorizing the same; and after the improvement was completed and paid for there was a balance of \$4,330.68 left in the hands of the treasurer. This is an action brought in the chancery court by appellants, who were owners of lands in the district, against appellee, as treasurer, to require a distribution of said funds, pro rata, among the landowners. There was a demurrer to the complaint on the ground that the chancery court was without jurisdiction to determine the suit, and the court sustained the demurrer and dismissed the complaint.

[1] The statute in force at the time of the formation of the district contains no provision for distribution of unexpended funds, nor for general control of the county court over the settlements of the officers of the district with respect to funds coming into their hands. In other words, there is no statutory provision, either express or implied, concerning the distribution of unexpended funds. Such funds would, however, constitute a trust fund, and courts of equity have jurisdiction to require an accounting of the trust and distribution of the funds, at least in the absence of some adequate statutory provision.

[2] Conceding that the chancery court had jurisdiction in this case, it does not follow, however, that appellants have stated a case in their complaint. It is apparent that the facts set forth do not warrant any relief, for there is no allegation that the funds were not needed to pay bonds which were issued to raise funds to pay the improvement. The statements of the complaint are merely to the effect that bonds in the sum named were issued, and that out of the funds thus raised there was a surplus of \$4,330.68, after paying for the improvement. The bonds are, according to the allegation of the complaint, still outstanding, and assessments were levied for the purpose of paying the same as they fall due. The statutes authorize the issuance of bonds payable in installments, and any funds arising from assessments, or remaining unexpended from the proceeds of the sale of the bonds, necessarily remain in the hands of the treasurer for the purpose of applying on the bonds or interest as the same fall due. Merely because there is no present application to be made of the funds does not call for a distribution among the owners of the district.

[3] The landowners are only entitled to a return of money which has been raised by assessments on their lands and not expended for the purposes contemplated in the organization of the district. Where there is a future use for the funds, the landowners are not entitled to a return of them.

The decision of the chancery court was therefore correct, though based upon erroneous grounds.

Decree affirmed.

# JENNINGS v. FT. SMITH DIST. OF SEBASTIAN COUNTY. (No. 191.)

(Supreme Court of Arkansas. Oct. 26, 1914.)

## 1. COURTS (§ 183\*)—ARKANSAS—JURISDICTION OF COUNTY COURT.

The county court, being created and given jurisdiction for special purposes, can exercise only the powers expressly conferred upon it or arising by necessary implication from those expressly granted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 437, 439, 447, 449-455, 457, 458, 460-464, 467; Dec. Dig. § 183.\*]

## 2. COUNTIES (§ 124\*)—CONTRACTS—LIABILITIES.

The order of the county court appointing a commissioner for the erection of a courthouse provided for the institution of proceedings to determine the right of the district to erect the courthouse upon that part of the block designated or on any other part of the block selected. Kirby's Dig. § 1014, authorizes the county court to order the erection of any county building on land belonging to the county at the established seat of justice. An architect engaged by the commissioner knew that there was a controversy over the land selected as the site for the courthouse, and also knew that its erection on a part of the parcel was enjoined. Held, that as the county court, being one of special jurisdiction, could not exercise powers not conferred the architect was charged with knowledge that the court was without jurisdiction to direct the building of the courthouse on land not belonging to the county, and hence could not recover for services in planning a building where none of the parcel belonged to the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185, Dec. Dig. § 124.\*]

## 3. JUDGMENT (§ 743\*)—CONSIDERATION—VALUITY.

A judgment enjoining a district of a county from erecting a courthouse on part of a parcel of land is not an adjudication that the district had title to the remaining portion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275-1277, 1284; Dec. Dig. § 743.\*]

## 4. APPEAL AND ERROR (§ 884\*)—WAIVER OF ERRORS.

Where the county court at one term allowed appellant a sum for services rendered, and at the following term required him to verify his whole claim, and then allowed it in full, appellant, having acquiesced in the order setting aside the first allowance, cannot, on an appeal from a later order setting aside the allowance of the whole claim, complain that the order allowing a portion was final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3612-3616; Dec. Dig. § 884.\*]

McCulloch, C. J., dissenting in part.

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Claim by J. T. W. Jennings against the Ft. Smith District of Sebastian County. From an order overruling an order allowing the claim, claimant appealed to the circuit court, and, from that tribunal's judgment

affirming the order of the county court, he again appeals. Affirmed.

On the 6th of July, 1912, the county court of Sebastian county entered an order directing that a new courthouse be erected upon certain portions of block 515, which particular portion of the block was described by metes and bounds. The order directing the courthouse to be erected also contains this recital:

"It further appearing to the court that the city of Ft. Smith disputes the right of the said Ft. Smith district to erect a courthouse upon said premises, it is ordered that proper proceedings be forthwith instituted by said district against the said city of Ft. Smith in the proper courts for the purpose of determining the rights of the said district to erect the courthouse upon said premises, hereinbefore specifically described, or upon such other part of said block as said court may adjudge, and to quiet the title of the said Ft. Smith district thereto."

The order further directed that the courthouse commissioners "hereinafter named proceed to prepare and submit to the court the plans and specifications for the erection of said building upon the above-described ground, or upon such portion of said block as it may be hereafter determined the said district has a right to build upon." In the same order the appellant was named as one of the commissioners. The appellant resigned as commissioner, and the court thereupon entered an order discharging him and appointing Chas. J. Jewett as sole commissioner. Soon after his resignation, appellant was employed by Jewett, with the consent and approval of the then county judge, as architect for the proposed building, and as such he entered into a contract with the commissioner to provide plans and specifications and to superintend the construction of a new courthouse. Under his contract he was to be paid 3 per cent. for the plans and specifications when the contract was let and 2 per cent. for superintending the construction of the building, to be paid from time to time during the progress of the work. In pursuance of this employment he prepared plans and specifications which were filed in the county court July 29, 1912, and which were on that day accepted by the commissioner and approved by the county court. The commissioner testified that he had performed the work in good faith and had not been paid for the same; that the amount due him for preparing the plans and specifications, as agreed upon between himself and the commissioner and the county court, was \$5,820. On the contract which the commissioner entered into with appellant was this indorsement:

"It is agreed that Chas. J. Jewett assumes no personal liability by signing this contract, but signs it for the district only."

The commissioner did not institute proceedings "for the purpose of determining the rights of the said district to erect a courthouse upon the premises described or upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such other part of said block as said court may adjudge," as was directed by the order of the court; but afterwards the city of Ft. Smith instituted a suit in the chancery court against the county judge and Jewett, as courthouse commissioner, in which it was determined and decreed, in part, as follows:

"In any event the county has no estate in the northeast corner of the block named, and to begin the erection of the courthouse there would not only be a misapplication of the public funds, which is not within the powers of the county judge or county court, and vulnerable at the suit of a taxpayer, but, further, it would be a damage to the rights of the said city which could not be compensated, and as for which the city has no adequate remedy at law."

It was further decreed that the court had "no power to locate a public building upon the northeast corner of the square or block of ground named and because to attempt to do so would be an unlawful waste of public money." And the court entered an order permanently enjoining and restraining the defendants, the county court and commissioner, "from entering upon said ground for the purposes named, and from contracting with any persons, partnership, or corporation or otherwise for the construction or erection of a public building upon the northeast corner of said block or upon any other unoccupied portion of said block."

After this order restraining the county court and the commissioner was entered, the commissioner, on the next day, the 8th of August, awarded the contract for constructing the courthouse, not on the site directed by the order of the court, but on the site occupied by the present courthouse building; and on the 14th day of August the county court entered an order directing the commissioner to erect the courthouse on the site of the present building instead of on the northeast corner as designated in its former order, reciting that the chancery court had held that the district had no right to build upon the ground, but was the owner of the site of the present building. This order of August also directed that the courthouse be erected in accordance with the plans and specifications already approved (which were those prepared by appellant).

On the 27th of August suit was instituted by the city of Ft. Smith against the county judge, the commissioner, and the construction company to whom the contract had been let for building the courthouse, to enjoin them from tearing down the old courthouse and from the erection of the new courthouse on the site of the old, alleging that the city was the owner of the block. The defendants filed demurrer and answer, denying the allegations of the complaint, and made their answer a cross-complaint, and asked that title be quieted in the Ft. Smith District, etc., and that the city be enjoined from interfering with the possession or control thereof. A final decree was rendered October 21, 1912, by the chancery court, perpetually enjoining the district from con-

structing a courthouse on the present site and from tearing down the old courthouse. The county court directed an appeal to be taken to the Supreme Court from this decree, which was done.

After the term of office of the county judge who had entered an order directing the erection of a courthouse had expired, his successor, on January 10, 1913, entered an order directing that the appeals which had been taken by the district be dismissed. The appeals to the Supreme Court were, in accordance with such order, dismissed.

The appellant was not a party to any of the proceedings in the above cases.

On August 30, 1912, being a day of the July term of the county court, the court made an order allowing appellant \$1,200 for his services rendered under his contract for preparing plans and specifications for the courthouse. At the October term, 1912, an order was entered reciting that appellant had furnished plans and specifications for a courthouse for the Ft. Smith district, which contract had been approved by the court, and under which the sum of \$5,820 was due appellant for the plans and specifications, upon which \$1,200 had been allowed him, and allowed the balance of the money due, \$4,620, which, with the \$1,200 allowed him at the July term, made the total amount due appellant at that time on his contract. On October 30th the court set aside the order allowing \$1,200 to appellant at the July term and the order allowing \$4,620 at a former day of the October term, and an order was entered allowing him \$5,820, the amount due him under his contract, and warrants were ordered to be issued for said sum payable out of the general county fund. The county court on that day adjourned to the next day, and, a new judge having qualified to succeed the judge who had made the order allowing the appellant \$5,820 on the day before, this incoming judge, on the motion of a taxpayer, made an order setting aside the order of the judge made the day before allowing appellant's claim and disallowing the same. From this order the appellant prosecuted his appeal to the circuit court.

The appellant asked the trial judge to make certain findings of fact, to the effect that he was not a party to the proceedings to enjoin the county judge and the commissioner, and to have the title of the district quieted, and was therefore not bound by any of the proceedings in those cases, and to the effect that if the evidence showed that the appellant made the contract with the commissioner as claimed by him, which contract was approved by the county court, and the plans and specifications accepted, this was a binding agreement upon the Ft. Smith district, and that appellant was entitled to pay for his services according to the terms of the agreement. The court refused to find as requested, and at the re-

quest of appellee made the following declarations of law:

"(1) The order of the county court appointing the commissioner put all parties who contracted with him upon notice of his limitations with reference to the ability of the county judge to erect a courthouse upon block 515, and if, by reason of statutory or organic law, the county judge did not have this power, all contracts made with him or his agents looking to the building of a courthouse upon this site were void.

"(2) Any one who contracts with a municipal body or an agency of the people and taxpayers does so at their peril as far as the power exists in the said agent of the people to carry out his side of the contract.

"(3) The order appointing the commissioner directed him to bring an action to quiet the title to block 515, the proposed location of the proposed courthouse. The commissioner failed to perform his duty, and claimant is bound to take notice of the powers of the commissioner and of his failure to perform his duty. It was finally held in a court of competent jurisdiction that the title to the proposed site was not in the county. Hence all contracts entered into looking toward the building of a courthouse on this site were void.

"(4) If the claimant had followed the law and required the commissioner to test his (the commissioner's) powers as directed in said order before performing the work for him, he could not have been hurt. The claimant Jennings had at least constructive notice, if not actual notice, of the commissioner's duties, and his failure to perform them, and the claimant went ahead and performed the work with the knowledge that there was question as to the commissioner's powers which were decided by the courts against the commissioners and against the right of the claimant Jennings to recover.

"(5) The contract between the plaintiff and the commissioner being without authority, the ratification of it by the county judge did not make of it a legal contract binding on the Ft. Smith district of Sebastian county.

"(6) This is not a parallel case to a case where a county judge, from either his best judgment or a whim, changes his mind and makes the performance of the contract impossible. In this case the contract is void because at no time did the county judge have the power to locate the courthouse on block 515 where the order to build the courthouse located the same."

"(8) The proceedings and judgment of the two cases of the city of Ft. Smith against Harp et al. fixed the right of the county judge to locate the building on block 515, and held that such a right did not exist. Hence the claimant's contract with the commissioner was void from the beginning, and the claimant had constructive, if not actual, notice of the limitations of the powers of the agent of the county judge, to wit, the commissioner, from the date of the filing of the order appointing the commissioner. And a contract to build a courthouse on land where the county did not have authority to build is void, and the approval of such contract by the county court does not make it legal.

"(9) The decrees of the chancery court, whether right or wrong, are binding as long as they stand without reversal by the Supreme Court."

Appellant excepted to the rulings of the court in refusing to make the findings of fact requested by him, and excepted to the declarations of law announced by the court. The circuit court entered a judgment affirming the action of the county court in disallowing appellant's claim, and appellant appeals from that judgment. Other facts stated in the opinion.

Ira D. Oglesby, of Ft. Smith, for appellant. Pryor & Miles, of Ft. Smith, for appellee.

WOOD, J. (after stating the facts as above). [1, 2] 1. The appellant testified, in part, as follows:

"He never saw the original order of the county court appointing Jewett and himself commissioners. His employment as architect was a short time after he declined to accept the position of commissioner and Jewett was appointed sole commissioner by the county court. Some time after his appointment, there was common talk of litigation and controversy between the city and the county over the construction of a courthouse building on block 515. He was present as a spectator during the argument of these cases before the chancellor; but, not being a lawyer, he could not keep up with the proceedings, but was informed that as a result the chancery court enjoined the building of a courthouse in the corner of block 515, where it was at first contemplated to build. He never saw or read any of the pleadings in the case and got his information from the public press and common report."

While appellant was not a party to the proceedings to determine the title to the block and lot upon which the courthouse was to be erected, it appears from his own testimony that he was cognizant that proceedings had been instituted to test the title of the Ft. Smith district to the lot upon which the courthouse was ordered to be erected.

The county court, under our statute, had no authority to order the erection of a courthouse upon land that did not belong to the county of Sebastian. The statute provides that the court shall designate the place where to erect any county building on land belonging to the county at the established seat of justice. Kirby's Digest, § 1014. See, also, sections 1015 and 1016.

In the order appointing the commissioner, the court directed that proceedings be forthwith instituted for the purpose of determining the rights of the district to erect the courthouse upon the part of the block designated or any other part of the block where it was proposed to erect the courthouse. Under this order of the court the commissioner could not proceed to make any valid contract looking to the erection of the courthouse until the title to the site upon which it was proposed to build was determined by the court to be in the appellee. The record shows that the county court and its commissioner and the appellant all knew that the alleged title of the Ft. Smith district to the land upon which it was proposed to build and the right to build thereon were in question. Hence the court included in its order directing the courthouse to be built an order directing suit to be instituted for the purpose of testing the title. But, notwithstanding this knowledge, the court and its commissioner proceeded in an attempt to have the courthouse constructed.

The appellant was bound to take notice of the statute prescribing that the county court

could only erect a courthouse upon lands belonging to the county, and he was bound to take notice of the fact that neither the county court nor its commissioner could enter into a contract to erect a courthouse upon any other land, and, whether he was a party to the proceeding by which it was proposed to test the title or not, his own testimony shows that he had notice of such proceedings, and, having such notice, he could not in good faith enter into any contract with the commissioner to furnish plans and specifications for such building until it was first determined that the county had title to the site, and that therefore the county court and the commissioner had authority to enter into a contract for the erection of a courthouse upon such site.

It is well settled that the county court, under our Constitution, being created and given jurisdiction for special purposes, can only exercise such powers as are expressly conferred upon it by the Constitution and statutes, or those that arise by necessary implication from the powers expressly granted. 11 Cyc. 390; *Wheeler v. Wayne*, 132 Ill. 599, 24 N. E. 626; *State v. True*, 116 Tenn. 291, 95 S. W. 1032; and other authorities cited in appellee's brief.

[3] As we construe the decree and opinion of the chancery court rendered on August 12, 1912, the court did not determine that the Ft. Smith district had the title and the right to build upon the lot where the old courthouse was situated. The only question presented for determination, at least so far as indicated by the opinion and decree, was as to whether or not the Ft. Smith district of Sebastian county had power to locate the proposed new courthouse upon the northeast corner of block No. 515. The question of whether it had the right to build upon the old site was not in issue, at least so far as is shown by the opinion and decree to which reference is made in the abstract, and was not passed upon. The court's order and decree only restrained the county court and its commissioner from contracting for the construction of the courthouse "upon the northeast corner of said block or upon any other unoccupied portion of said block." This was by no means a finding and decree that the county court and its commissioner had the right to contract for the erection of a courthouse upon the portion of the block that was occupied. And as evidence that this was not the issue passed upon by the chancery court, in a proceeding afterwards instituted, when that issue was directly involved, the court entered a decree "perpetually enjoining the district from constructing a courthouse on the present site and from tearing down the old courthouse for that purpose." At the time therefore that the commissioner let the contract for the construction of the courthouse, and when the county court at a succeeding day entered an order directing the

courthouse to be erected on the site of the present building instead of on the corner of block 515, it had not been determined by the chancery court that the title to the site was in the county of Sebastian. The judge of the county court, the commissioner, and the appellant had knowledge of this fact, and their contracts made with such knowledge were not entered into in good faith, and were therefore void.

It is unnecessary to go further. The evidence was sufficient to warrant a finding that the appellant, having notice that there was litigation pending involving the authority of the commissioner to make the contract with him, at the time he alleges that it was made, and that the commissioner would have no right to enter into such contract until it was settled by the courts that he had such authority, cannot recover.

The court was therefore correct in declaring that the contract between the appellant and the commissioner, being without authority, did not make it a legal contract, binding on the Ft. Smith district of Sebastian county.

[4] 2. The order of the county court allowing the appellant the sum of \$1,200 for his services at the July term, 1912, was not treated by the court as a final order, for it appears that at the succeeding term the court with appellant's acquiescence required the appellant to verify his whole claim and then allowed the same in the sum of \$5,820, which was the full sum that appellant claimed to be due him, including the \$1,200. It was from the order of the county court setting aside this allowance of \$5,820 that appellant appealed to the circuit court, and it is from the order of the circuit court affirming the decision of the county court that appellant prosecutes this appeal. Appellant acquiesced in the order setting aside the first order allowing him \$1,200. Having consented to it then, he could not thereafter complain that the order allowing him \$1,200 was final.

There was no error in the refusal of the court to enter judgment in favor of appellant for the sum of \$1,200.

The judgment of the circuit court is in all things correct, and it is therefore affirmed.

MCCULLOCH, C. J., dissents as to the \$1,200.

MCCULLOCH, C. J. (dissenting). The order of allowance of the sum of \$1,200 to appellant made by the county court on August 30, 1912, was a final judgment which passed beyond the control of the court with the expiration of the term. No appeal was taken from that judgment, and the court had no power to set it aside at a later term. The fact that the claim was an unjust one and founded on no legal liability of the county afforded no ground for setting the judgment aside after the expiration of the term unless fraud was perpetrated in its procurement.

Fraud which vitiates a judgment must be in the procurement of the judgment, and not merely in the original cause of action. *Scott v. Penn*, 68 Ark. 492, 60 S. W. 235; *James v. Gibson*, 73 Ark. 440, 84 S. W. 485; *Boydton v. Ashabranner*, 75 Ark. 514, 88 S. W. 568; *Parker v. Bowman*, 83 Ark. 508, 104 S. W. 158; *Davis v. Rhea*, 90 Ark. 261, 119 S. W. 271.

Appellant did not consent to the order setting aside the judgment, nor can it be justly said that he acquiesced therein. He was never put in a position to complain of an adverse judgment of the court until October 30, 1912, when the judgments of allowance in his favor were set aside, and then he promptly appealed to the circuit court. I fail to perceive, therefore, how it can be said that he consented to the setting aside of his judgment, and I dissent from that part of the decision.

#### CHERRY v. PEAY. (No. 64.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

##### 1. COMPROMISE AND SETTLEMENT (§ 23\*) — FINDINGS—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence held to support a finding that two parties executed notes as a final settlement of all matters between them.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 91-94; Dec. Dig. § 23.\*]

##### 2. TRIAL (§ 404\*)—SPECIAL FINDING—CONCLUSIVENESS.

In an action on a note, where the court failed to find as requested, in regard to money alleged to have been paid out by defendant as surety for plaintiff, a finding that at the time the note in suit was given the parties settled all their accounts concludes that issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 957-962; Dec. Dig. § 404.\*]

##### 3. APPEAL AND ERROR (§ 1008\*) — FINDINGS BY COURT—CONCLUSIVE.

Findings of fact by the court are as conclusive on appeal as a verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by Nick Peay against L. W. Cherry on a note. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee was the plaintiff below, and brought suit on a note for \$4,595, dated July 26, 1912, and due six months thereafter, payable to his order, and executed by appellant.

Appellant filed an answer and a cross-complaint. In his answer he denied appellee's ownership of the note sued on, and denied being indebted to appellee in any sum, but alleged the fact to be that appellee was indebted to him in the sum of \$2,572.52 on account of advances made to appellee to enable him to complete a contract which he had with an improvement district in the city of Little Rock. By way of cross-complaint it

was alleged that the State National Bank of Little Rock was the true owner of the note sued on, and that that institution was indebted to appellant in a sum in excess of \$30,000, and that its officers had fraudulently transferred the note sued on to appellee. There were a number of allegations in regard to the management of the affairs of the bank, the effect of which was to allege that the bank was attempting to defraud appellant. Judgment was prayed both against the bank and appellee. Attached to the complaint, as an exhibit thereto, was an itemized statement of the transactions between appellant and appellee, beginning with October 4, 1910, and covering large sums of money.

The bank was made a party to this suit on account of the allegations of the cross-complaint, and it filed a demurrer and a motion to strike, both of which were sustained by the court. Appellant now concedes the correctness of the court's action, and further admits that appellee was the owner of the note sued on and also of another note executed at the same time for \$1,006.88. An answer was filed to the cross-complaint which denied its allegations.

During the progress of the trial it developed that on August 8, 1911, appellee executed a statement of his account with appellant, in which he admitted owing him \$1,795.84. This statement was sworn to by appellee, and appellant thereafter insisted that no account should be taken of any transaction between the parties prior to the date of this statement. The exhibit filed to the answer made no reference whatever to this statement, and in explanation of this failure counsel for appellant say:

"At the time defendant's answer was written, his attorneys were not aware of the affidavit showing an indebtedness of Peay of \$1,795.84. If the existence of the affidavit had been known, it would not have been necessary to state the account back of it at all, because there was a settlement of accounts up to and including that date, not only signed, but sworn to, by Peay himself, and it stated the account at that time."

The cause was, by consent of parties, submitted to the court sitting as a jury, and the following facts were disclosed by the evidence: Appellant was the president of the State National Bank, and undertook to furnish appellee the money to do the work required in an improvement district in the city of Little Rock and, in addition, made the bond required by the district guaranteeing the performance of the work, for which he was to be paid the sum of \$500. Appellant's bank furnished money to appellee to pay for the work as it progressed, and he received from appellee all money collected on account of the work. These payments on the work were deposited by appellant to the credit of his individual account, and the account of appellee at the bank became overdrawn \$5,600. On July 26, 1912, appellant and ap-

pellee undertook to settle with each other and with the bank. At that time appellant executed the note here sued on, and appellee executed to the order of appellant the note above mentioned for \$1,006.88. These two notes were used in settling the overdraft at the bank. The note for \$1,006.88 was a lengthy instrument, covering, with the indorsements thereon, three pages of the transcript. Among other recitals contained therein was the following: "This note, when paid, will cancel all indebtedness due to this date." Appellant testified that he did not know that this statement was written in the note, but it appears to have been done at the time of its execution. It is shown, without dispute, that appellee paid both these notes to the bank upon their maturity.

Appellant insists that the account should be stated from the date of the affidavit made by appellee, and that, if only the transactions between the parties since that date are taken into account, he would only owe appellee \$3,247.83, less a credit for the amount of the interest on this \$1,795.84, stated to be due in the affidavit. Appellant also claimed certain credits, all of which the court refused to allow, except an item of \$25. Among these credits was one for an attorney's fee in the litigation which was terminated by the decision of this court in the case of Nick Peay Construction Co. v. Miller, 100 Ark. 284, 139 S. W. 1107. That case arose over a contract made by appellee, for the performance of which appellant had become surety, and in the litigation arising out of it appellant incurred and paid an attorney's fee. It was testified by appellee, however, that there had been an arbitration of this controversy and an award in his favor by the arbitrator.

The execution of the affidavit by appellee, admitting an indebtedness on August 8, 1911, of \$1,795.84, was not denied. But appellee testified that in the settlement, when this affidavit was made, appellant took credit for the amount of an overdraft in the bank, under date of February 11, 1911, of \$5,000, the payment of which he then assumed. The statement of the account, which was made an exhibit to the answer, shows the assumption of this overdraft, but appellant never paid this overdraft, and it was finally paid by appellee, at least the court might have so found from the evidence. Moreover, according to appellee, there was a final accounting with appellant on July 26, 1912, which was evidenced by the notes executed on that date. The court below made a finding of fact to that effect, and on this finding awarded judgment for the amount of the note sued on with interest, after allowing the \$25 credit.

The court was asked to make declarations of law to the effect that the statement, of date August 8, 1911, was binding between the parties and that no items of debit or credit prior thereto could be considered, and also

to the effect that appellee was liable to appellant for any sum of money, including attorney's fees, which appellant had been compelled to pay as appellee's surety.

W. H. Pemberton and Mehaffy, Reid & Mehaffy, all of Little Rock, for appellant. Coleman & Lewis, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). [1, 2] The court below might have found from the evidence that the parties made a settlement of their accounts, and that appellee then made the affidavit showing the balance due by him, but that this settlement was made on the basis that appellant had assumed the payment of the overdraft at the bank for the money furnished to appellee to complete his contract with the improvement district, but that appellee in fact finally paid this overdraft. It was, of course, proper for the court to consider this explanation of the execution of the affidavit. But however that may be, the court declared in its finding of fact that the parties had a subsequent final settlement of all matters outstanding between them and that the settlement was evidenced by the two notes executed on the 26th of July, 1912, the day the settlement was made.

The court made no finding in regard to the money alleged to have been paid out in the litigation arising out of appellant's suretyship; but the finding of fact that the parties had settled all their accounts concludes that issue.

[3] Whether this finding was contrary to the preponderance of the evidence we need not decide. It is sufficient to say that the evidence was legally sufficient to support that finding, for the finding of a court, sitting as a jury, is as conclusive on questions of fact as the verdict of a jury would be. Gebhart v. Merchant, 84 Ark. 359, 105 S. W. 1034; Williams v. Board of Directors, 100 Ark. 166, 139 S. W. 1136; Greenspan v. Miller, 111 Ark. 190, 163 S. W. 776.

The judgment of the court below is therefore affirmed.

McCULLOCH, C. J., not participating.

#### PLUMLEY v. STATE. (No. 60.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

#### 1. CRIMINAL LAW (§ 366\*)—EVIDENCE—DECLARATION OF DECEASED—RES GESTÆ.

Where deceased exclaimed within 20 seconds after he was shot, "He shot me for nothing," it was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.\*]

#### 2. HOMICIDE (§ 300\*)—INSTRUCTION—SELF-DEFENSE.

On a trial for murder, where there was no testimony that defendant was not a person of ordinary reason and sense, an instruction that a bare fear is not sufficient to justify the killing,

but it must appear that the circumstances were sufficient to excite the fears of a reasonable person, is not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

### 3. HOMICIDE (§ 300\*)—INSTRUCTION—SELF-DEFENSE.

On a trial for murder, instructions that to justify a killing in self-defense "it must appear that the danger was so pressing that the killing was necessary, 'as it appears to the defendant,' and if defendant could have avoided the danger to himself as it actually appeared to him, it was his duty to do so," are not objectionable as denying the defendant the right to act upon the danger as it appeared to him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

### 4. HOMICIDE (§ 300\*)—INSTRUCTION—SELF-DEFENSE.

On a trial for murder, an instruction that the plea of self-defense is not available to defendant, unless it must have appeared to defendant, not only that the danger was imminent, but also that "it was so pressing and urgent that the killing of deceased was necessary," did not deny defendant the right to act upon the danger as it appeared to him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

### 5. HOMICIDE (§ 254\*)—SECOND DEGREE MURDER—SUFFICIENCY OF EVIDENCE.

On a trial for murder, evidence held to warrant a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. § 254.\*]

Appeal from Circuit Court, Columbia County; C. W. Smith, Judge.

A. J. Plumley was convicted of murder in the second degree, and he appeals. Affirmed.

A. J. Plumley was indicted for the crime of murder in the first degree in Columbia county for the killing of his son-in-law, Bynum Martin, and upon trial was convicted of murder in the second degree, and from the judgment he appealed.

The facts are substantially: Bynum Martin was killed by being shot with a shotgun on the 3d day of October, 1913, in front of the house of Witt Perkinson in Columbia county, Ark. The killing occurred just about dark, or shortly thereafter. Perkinson, who was at the supper table, heard a gun fire and a woman scream at his back porch. He ran immediately to her and then to the front porch, when he heard the dying man exclaim: "Oh! Oh! Witt, he shot me for nothing." He went to the place and found Bynum Martin lying on the ground wounded, who expired in five minutes thereafter. The feeling between the appellant and his son-in-law was not friendly, and on the day of the killing, and immediately before it, appellant called him up over the telephone and him why he had taken the flooring out cotton house, to which Martin replied, 'I know that I have.' Appellant said:

"Yes, you have. I didn't give you the cotton house." Martin replied: "You have this wrong. Come down here and we will talk it over." Appellant said: "No, I am not coming down there to your house, but I will meet you on halfway ground," to which Martin replied "All right." This conversation was over a rural telephone line, and J. H. Miller took down his receiver and heard it. He said the voices seemed dispassionate, and he was greatly shocked to hear of the death of Martin about a half hour afterwards. Appellant stated that:

Martin had moved the floor out of his cotton house, and he called him over the telephone and asked why he had done so, and "Martin replied that he did not know that he had moved the floor out of my cotton house, and I told him I did not give him the cotton house, and he said, 'If you will come down here, we will settle all that right now.' I told him I did not care about coming down there, but would meet him on halfway ground, and he said he would do that, and I hung up the receiver. I then picked up my gun and walked over to the bureau drawer, where I had two shotgun shells, and put the shells in my gun. My wife asked me not to go down there, and I stood there and talked to her two or three minutes and told her I wouldn't meet Bynum myself, but would go to Witt Perkinson's and get him to go over to the halfway place and meet Bynum, and I started out, and just as I got to the place where the trail forked to go up to Perkinson's house, Bynum hailed me, and said, 'Is that you, Andrew Plumley?' and I said, 'Yes,' and he started towards me. I told him I was going up to Witt Perkinson's to get him to settle the matter, and Bynum said: 'No, sir; this is the time and here is the place where we will settle the matter.' And I kept going, and he started to head me off, saying all the time that he would not wait, that we would settle everything right there and then. He was within a few feet of me, about 12, and said, 'Here is the place where we will settle it,' and at the time put his hand in his pocket, and I thought I heard the click of a pistol. He was within 10 or 12 feet of me. I raised my gun and fired, and he fell over there between me and the road. He was between 10 and 15 feet from me, between me and the road. I was standing in the trail that goes up from my house to Perkinson's, down towards my house from Martin's. My house was northwest of his. He was southeast of me. He was on the north side of the mound. We had not been on good terms prior to that night. He had mistreated my wife and also my daughter, who was his wife, to whom he had been married three years. I sold him the place he lived on, and the house and little strip of land, about 30 yards wide and 250 yards long, was not on the land I sold him, but I let him have the use of it, and he moved the floor from the house on this piece of land I had built for a shop. When I called him over the telephone, he did not appear to be in a good humor. He was walking very fast when he came down towards me."

Appellant told no one of having killed Martin until the Sunday following, when he was asked about it.

Perkinson testified: That he lived about 200 yards from Plumley, the appellant. That the nearest way between the two houses was through his back yard. That the path from the front way was about 50 or 75 yards further than from the back. That Martin lived about a quarter mile from him. That

going out from his front gate Plumley lived west and Martin to south.

"I heard the report of the gun that killed Bynum Martin. I was eating supper at the time, and it was after dark, probably 30 minutes. There was only one report. About that time a woman screamed at the back of my house. I heard the scream about the time I heard the report, and went to see about it, and Mrs. Plumley was at the back door. I then went to the front, and the man who was shot exclaimed, 'Oh! Oh!' That, I don't suppose, was over 10 seconds after the shot was fired. I couldn't understand him, I heard him say, 'Oh! Oh!' and, 'Witt, he shot me for nothing.' I was about 50 yards from the wounded man, and he died about 5 minutes after he was shot. He was unconscious after I got to him. It might have been 20 seconds from the time I heard the gun fire until Martin made the statement. I had gotten to the front porch after the gun fired, and I started when I heard the scream out the back way. I suppose it is 25 or 30 feet from the back to the front of the house. I heard Martin's statement before I got off the front porch. Martin was lying to the right of my front gate towards Plumley's house. The body was lying towards the cotton house. Mrs. Plumley went out to where the body was lying. Plumley was not there that night, although there was a crowd of 30 or 40 present. A knife partly opened was found near Martin's body shortly after he was killed. The wound was in the left side. Nine buckshot entered the body with the exception of those striking the hand of the deceased. The cotton house was 60 or 70 feet from where the body was lying and near where the roads come together."

The state's theory of the case was that appellant had gotten behind the cotton house and waited until Martin came more than two-thirds of the way and shot him as he passed. Gun wads were found in a direct line between the place where the weeds and grass had been tramped down by the cotton pen by some one standing there and the place where the body lay, showing they had been fired from the same gauge gun used by the appellant and loaded with buckshot. The first wad was found about 10 or 12 feet from the cotton house, and the layer of thin paper, the one over the shot, was found within 5 or 6 feet of the body, which was about 35 feet from the cotton house. The most of the shot ranged upward, and the mound near which Martin fell was about a foot and a half higher than the ground at the cotton house.

The court, among others, gave the following instructions, over the objections of the appellant:

Instruction No. 5, given at the instance of the state, is as follows:

"You are instructed that a bare fear of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under this influence, and not in the spirit of revenge."

Instruction No. 7, given at the instance of the state, is as follows:

"You are instructed that, in ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or

to prevent his receiving great bodily injury, the killing of the other was necessary, as it appears to the defendant, acting without negligence on his part, and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal injury was given."

Instruction No. 9, given at the instance of the state, is as follows:

"You are instructed that, in order to justify the taking of life in self-defense, the defendant must have employed all the means within his power and consistent with his safety to have avoided the danger and averted the necessity of the killing, and if you find that the defendant, consistent with his own safety, could have avoided the danger to himself as it actually appeared to him, and have averted the necessity of shooting the deceased by retreating, then you are told it was his duty to retreat, and, if he failed to do so, he cannot plead self-defense in justification of his act."

Instruction No. 10, given at the instance of the state, is as follows:

"You are instructed that, before the plea of self-defense made herein by the defendant shall be available, it must have appeared to the defendant, not only that the danger to him at the hands of the deceased was imminent, but it must also appear that it was so pressing and urgent that to save himself from death, or great bodily harm, the killing of the deceased was necessary."

J. W. Warren, of Camden, and C. W. McKay, of Magnolia, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

KIRBY, J. (after stating the facts as above). [1] It is contended that the court erred in admitting the testimony of the exclamation made by the deceased after he was shot and in giving each of said instructions. Appellant insists that the testimony of Witt Perkinson, admitted over his objections, that deceased exclaimed immediately after he was shot, "Oh! Oh! Witt, he shot me for nothing," was incompetent and highly prejudicial. We do not agree with this contention. The exclamation was part of the *res gestæ*, and it was necessary to make the proof fully set out the facts of a killing. The exclamation was made by the wounded man within 10 or 20 seconds, at most, after the shot was fired, and was so close in point of time as to be a part of the transaction, and it would have been difficult to give a connected and correct account of the occurrence without stating all that was said and done concerning it. As said in *Childs v. State*, 98 Ark. 435, 136 S. W. 288:

"Under the law, all that occurred at the time and place of the shooting which has reference thereto or connection therewith was part of the *res gestæ*." *Byrd v. State*, 69 Ark. 537, 64 S. W. 270. "Res gestæ are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting." *Carr v. State*, 43 Ark. 90.

See, also, *Little Rock Traction & Electric Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7.

[2] It is next contended that said instructions given by the court deprived the accused

of acting upon the appearance to him of danger and authorized the jury to find him guilty, unless they believed from the evidence that the killing was necessary to save his own life or to prevent his receiving great bodily harm.

There was no error committed in giving instruction numbered 5 complained of. It did not relate to the question of murder or manslaughter, but exclusively to the question of justification of the homicide, or self-defense, and there is nothing in the testimony indicating that appellant is not a person of ordinary reason and sense. *Bruder v. State*, 110 Ark. 415, 161 S. W. 1067; *Scoggin v. State*, 109 Ark. 515, 159 S. W. 211; *Hoard v. State*, 80 Ark. 87, 95 S. W. 1002.

[3, 4] Neither are instructions numbered 7 and 9 open to the objection that they precluded the defendant from acting upon the appearance to him of danger. Nor did the court intend by instruction numbered 10 to tell the jury that the defendant was not permitted to avail of the plea of self-defense unless it appeared to him that the danger was so pressing and urgent that to save himself from death or great bodily harm the killing of the deceased was necessary. It was the purpose only to tell the jury, in this instruction, that it must have appeared to the defendant, not only that the danger to him at the hands of deceased was imminent, etc., but also that it was so pressing and urgent that to save himself, etc., the killing of the deceased was necessary. Although the instruction says "it must have appeared to the defendant not only that the danger to him was imminent, but it must also appear," etc., intending only to say, but also, or but it must also have appeared "that it was so pressing and urgent," etc., leaving it to the jury to properly consider defendant's right to act upon appearances of danger when doing so without fault or carelessness. It was not the intention, however, and the instruction did not require the jury to find that the danger was so pressing and urgent that the defendant was required to act in order to save himself nor deny him the right to act upon the appearance of danger.

The instructions given for the defendant unmistakably show that such was the court's direction, and this instruction properly construed is not in conflict with them. The court repeatedly told the jury that the defendant had the right to act under the circumstances as they appeared to him, and in instruction numbered 6, after stating that the defendant relied upon the plea of self-defense:

"The court instructs you that in determining whether or not he acted within his rights under the law of self-defense, you may render the

question very simple by adopting the rule which the court now instructs you is the law, as follows: First. In so far as is possible, you are to place yourself in the position and under the circumstances surrounding the defendant at the time of the shooting, acting without carelessness on his part, as those circumstances and his position have been disclosed by the evidence, viewing it from the standpoint of the defendant at the time, as you believe from the evidence it appeared to him, you will ask: (1) Did it appear to the defendant at the time he fired the fatal shot, acting without carelessness on his part, that he was in danger of losing his life or of receiving great bodily harm at the hands of the defendant? (2) If it did so appear, did the defendant reach the conclusion that he was in danger of losing his life or of receiving great bodily harm at the hands of the deceased after the exercise of such caution and prudence in judging the appearance and circumstances by which he was surrounded as appeared to him to be reasonably consistent with his safety?"

The court told the jury, in instruction numbered 8:

"You will note that you must place your findings upon what you believe from the evidence the defendant, acting without carelessness on his part, actually thought of the circumstances and appearances by which he was surrounded at the time. It is not how you think those circumstances and appearances might have affected or impressed you, nor what the defendant might have done, or ought to have done. The question for you to decide on this issue of self-defense is, What, in good faith, acting under the test the court has given you, the defendant thought he ought to do. It really comes at last to this: Was the defendant really trying to save his own life or to prevent great bodily harm to himself, or did he shoot deceased simply out of malice or revenge? If he shot to save his own life or to prevent great bodily harm to himself, acting without carelessness on his part, as it appeared necessary to him under the test above laid down, he is not guilty, and you will acquit him."

[5] The appellant claimed to have killed the deceased in necessary self-defense, and the jury did not give credence to his statement. While it is true that seven of the eight of the charge of buckshot that entered the body and side of the deceased went through his hand, lending some weight to defendant's statement that he shot deceased when he thought he was about to draw a weapon, it is further true that most of the shots ranged upward, and, if defendant had been within 10 or 15 feet of the deceased when he shot him and shooting from his hip even as he claimed, the range of the bullets would doubtless not have been upward, and most probably the entire charge would have entered the body of deceased without separating. The testimony would have warranted the conviction of the defendant of the higher degree of the offense, and the instructions fairly submitted the issues to the jury.

Finding no prejudicial error in the record, the judgment is affirmed.

**THUMMEL v. SURPLUS. (No. 16652.)**

(Supreme Court of Missouri, Division No. 1.  
Dec. 19, 1914.)

**1. APPEAL AND ERROR (§ 882\*)—QUESTIONS REVIEWABLE—INVITED ERROR.**

A party inviting by requested instructions the submission of an issue may not complain of the submission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**2. ASSAULT AND BATTERY (§ 31\*)—SELF-DEFENSE—ACTS CONSTITUTING.**

The jury, in determining whether language used by plaintiff suing defendant for assault and battery was violent and threatening, may consider the acts and gestures accompanying the language and the culmination in immediate violence, and determine whether the language gave defendant reasonable ground to believe that plaintiff, in striking him, intended to do him bodily harm.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 43; Dec. Dig. § 31.\*]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Action by A. A. Thummel against John T. Surplus. From a judgment for defendant, plaintiff appeals. Affirmed.

Cook, Cummins & Dawson, of Maryville, for appellant. Shinabargar, Blagg & Ellison, of Maryville, for respondent.

**BROWN, C.** Suit for damages from assault and battery committed July 22, 1907. The defense pleaded was son assault demesne. The evidence showed that the plaintiff and defendant were both farmers and neighbors living in Nodaway county. In addition to the farm on which he was living, the plaintiff had another near by, upon which a woman named Mrs. Jocelyn had been living that summer and had planted a vegetable garden, which contained some potatoes which had attained the esculent age. Mrs. Jocelyn being about to leave this particular field of her activities, Mrs. Surplus, the wife of defendant, negotiated with her for the potatoes, and the week before the trouble, which occurred on Monday, she saw Mr. Thummel, who told her it would be all right for her to buy them, which she did, completing the transaction and paying for them on Saturday. Monday morning she took the notion that she wanted some new potatoes for dinner. Taking a hoe and a sack she got on her horse and rode over to the Thummel farm, a mile away, hitched her horse at the gate, and, with hoe and sack, went into the yard, where Mr. Thummel met her. She told him that she had bought the potatoes on Saturday and had come over to dig some. He told her that he had traded some chickens for them on Friday. The delicate courtesy that may have attended the giving and receiving of all this information does not appear, as Mr. Thummel in his testimony confines himself to an unembellished statement of what he seems to

consider the important facts, while Mrs. Surplus did not testify. Mr. Thummel, however, grows more interesting and circumstantial in his relation of the subsequent proceedings. He says Mrs. Surplus went home, and that soon afterward Mr. Surplus rode up. He met him at the garden gate and said, "Good morning, Mr. Surplus." The latter did not condescend to answer, but, without saying a word, got down from his horse, took something from his pocket that he thought was steel or iron, perhaps a cold chisel or something or other, and struck him over the eye, which knocked him cold the first lick. When he came to, Mr. Beattie and Mr. Antrim, who had been plowing corn in the field near by, had brought some water and were washing his face. He was a sight; "just blood from head to foot." He had nine gashes of different sizes and depth about his head and face; one eye was just about closed; his jaw was hurt; his ribs felt like they were knocked loose from his backbone; the whole hide was knocked off his hand; two teeth were out, and another was so badly jarred that he said it was still loose at the trial.

Mr. Surplus' tale of the same occurrence was that his wife came home crying, and he got on his horse and went over to get the potatoes. Mr. Thummel met him at the gate. They spoke to each other, and Mr. Surplus said he came to get some of the potatoes and asked him why he wouldn't let the woman dig them. Mr. Thummel said that "the old lady owed him and didn't pay him; went off and never paid him the money." Mr. Surplus said he came up after the potatoes and was going to have them, was going to dig them, and got off and took the sack with him. Mr. Thummel stepped right up and said, "No; you won't dig them." He then drew back, and Mr. Surplus did likewise. They both struck; Mr. Surplus getting in his blow with such force that it knocked Mr. Thummel down. He rose to a sitting posture, and Mr. Surplus struck him two or three times more. He declined to swear that he did not kick him, but said he did not think he did. He said he would not have hit Mr. Thummel if the latter had not attempted to strike him first, and that he had nothing in his hands, but used his naked fists.

Mr. Thummel's statement as to the character of his injuries was very much modified by his doctor, while his own character was considerably modified by evidence introduced for that purpose. Mr. Surplus admitted that after the trouble he had conveyed his farm to a neighbor without consideration to put it beyond the reach of a judgment, and that this had afterward been corrected.

As to the details of the difficulty, the jury had the testimony of both parties before it. To aid them in its consideration, the plaintiff asked the court to give them the following instructions:

"(2) The court instructs the jury that, if they believe from the evidence that the defendant, on or about the 22d day of July, 1907, did willfully and wrongfully make an assault upon and beat, strike, and bruise the plaintiff, not in a necessary defense of his person, as defined in other instructions, then the jury will find for the plaintiff.

"(3) The court instructs the jury that, if they shall believe from the evidence that the defendant, Surplus, provoked and brought on the difficulty with the plaintiff, Thummel, then defendant, Surplus, cannot avail himself of the right of self-defense in order to shield himself from the consequences of beating and assaulting his adversary, no matter how imminent any danger in which he may have found himself during the progress of the fight, and if in this case the jury shall believe from the evidence that the defendant, Surplus, prepared himself previous to his assault on the plaintiff and brought on the fight in order to wreak his malice, or satisfy any private vengeance upon the plaintiff, then there was no self-defense in this case."

The court gave No. 2 as asked, and modified No. 3 by inserting, after the word "Thummel," the words "with intent to do him some bodily harm," giving it as modified. The other instructions asked and given were not pertinent to this inquiry.

The petition asked for \$3,000 actual, and \$5,000 punitive, damages. The verdict was for the defendant, and from the judgment entered thereon this appeal is taken by the plaintiff.

The appellant insists, in substance, that error was committed because: (1) There was no self-defense in the case, so that that issue ought not to have been submitted to the jury; and (2) that instruction No. 1, given at the instance of the defendant, is erroneous, because it submits to the jury, as a condition of such defense, that "plaintiff approached the defendant and used violent and threatening language toward him," when, in fact, there is no evidence in the record of the use of violent or threatening language by plaintiff, and therefore no evidence on which to base the instruction.

[1] 1. While we do not wish to be understood as holding that, when a party, in submitting his cause to the jury, is driven to a false issue by erroneous instructions given by the court at the instance of his adversary and against his protest, he may not try to have such issue fairly submitted without waiving his right to object to the erroneous action of the court, it is evident that he ought not to be permitted to take advantage of such error when committed at his own invitation. The appellant had, in this case, before the court had spoken upon the subject, asked it in his request for two distinct instructions to submit the question of self-defense to the jury, instead of asking it, as he might have done were his present position well taken, to find for the plaintiff upon the admitted assault and battery, leaving nothing for their determination except the quantum of damages. Having invited this issue, he cannot now complain that the defendant

accepted it, nor that the court submitted it to the jury. *Rourke v. Railroad*, 221 Mo. 46, 62, 119 S. W. 1094, 133 Am. St. Rep. 468; *Smart v. Kansas City*, 208 Mo. 162, 204, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932; *Barr v. Hays*, 172 Mo. App. 591, 600, 155 S. W. 1095, and cases cited.

[2] 2. The other point made by the appellant is that the court erred in permitting the jury to inquire whether the plaintiff used violent and threatening language toward the defendant, and in an angry and threatening manner, and within striking distance, drew back his hand to strike him, because there was no evidence of either violent and threatening language or an angry and threatening manner on the part of plaintiff. The testimony was that the plaintiff "stepped right up and he said, 'No; you won't dig them.'" He drew back and struck at plaintiff, who says, in his cross-examination, that the blow hit him, although that fact is immaterial in this connection. The jury had both parties before it, heard them relate the circumstances, and might take into consideration their personal appearance, as well as their manner in relating so exciting an episode, to aid them in determining the impression its enactment was calculated to produce on the defendant. In judging whether the language was "violent and threatening," they were not confined to the tone or voice in which the words were uttered, but could take into consideration the acts and gestures accompanying it, and even its culmination in immediate violence. The real question was whether it gave the defendant reasonable ground to believe, and he did believe, that, in striking him, the plaintiff intended to do him bodily harm, or simply to give exuberant expression to his good will toward a neighbor.

We see no error in the record which has not been fully concurred in by the plaintiff, and accordingly affirm the judgment.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

TREFNY v. EICHENSEER et al.  
(No. 16966.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 2, 1914.)

1. ACTION (§ 50\*)—JOINDER OF CAUSES OF ACTION—PARTIES AFFECTED.

A petition which states two causes of action, one of which affects four defendants, and the other only three of them, is bad under Rev. St. 1909, § 1795, requiring that causes of action to be joined must each affect all the parties to the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.\*]

## 2. STATUTES (§ 190\*)—CONSTRUCTION.

Where there is no ambiguity in the language of a statute, there is no room for construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by Charles Louis Trefny against William Eichenseer and others. Judgment on demurrer for defendants, and plaintiff appeals. Affirmed.

F. W. Imalepen and Andrew J. Haverstick, both of St. Louis, for appellant. Geo. W. Lubke, Geo. W. Lubke, Jr., and Frank X. Hiemenz, all of St. Louis, for respondents.

LAMM, J. Cast below on several joint and separate demurrers, plaintiff stood on his petition, refused to plead over, suffered judgment, and appeals.

[1, 2] The demurrers on which plaintiff was made to go out of court have a common ground reading: "That several causes of action have been improperly united in said petition." That is a statutory ground of demurrer—the fifth, R. S. 1909, § 1800. Our statutes prescribe rules for uniting causes of action in the same petition. One of them is that:

"A plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action. \* \* \* But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action. \* \* \*"  
R. S. 1909, § 1795.

Defendants maintain that the petition is obnoxious to the statutory rule just announced; hence, the demurrers being leveled at that contention, it presents the single question in the case. Attend to the record:

Plaintiff, claiming to own certain valuable real estate in the city of St. Louis, filed his bill in equity against certain named defendants (to wit, four, Eichenseer, Ammen, Charles William Trefny, and Nolte, sheriff) and in aid of the bill sought and got against all the defendants a temporary injunction before the return term, restraining an alleged wrongful execution sale of said real estate. To that bill he added a second count at law which prayed damages, \$5,000 compensatory and \$5,000 by way of smart money for malicious wrongs in the premises. This count at law in set terms involved only two of the defendants, Eichenseer and Ammen.

Presently, before the return term, he filed what he called his "first amended and supplemental petition," bringing in a new party defendant Eyerman, and asked a temporary injunction against him to restrain the sale of the same real estate under another execution and prayed additional relief not material here. In this "supplemental and amended petition" he added against three of the de-

fendants, to wit, Eichenseer, Ammen, and Eyerman, a count in damages at law on the same transaction pleaded in the first or equity count and on transactions connected with the same subject of action, laying his damages at \$14,000, divided between compensation and smart money half and half. As we understand this record, a temporary injunction issued against the new party, Eyerman, and Sheriff Nolte.

Presently, at the return term plaintiff dismissed one of the then defendants, Charles William Trefny, and by leave filed what he called a "second supplemental petition," and by the same token brought in a new party, Pearl Byrnes. This latter petition is the one challenged by the demurrers, and thereby plaintiff plants himself upon the grounds where he wishes to pitch his forensic battle. It is too long to copy, and we give our estimate of it, thus: It is in two counts: The first, a copious bill in equity seeking relief in clearing title to real estate and preventing threatened sales calculated to wrongfully cloud the title; the second, a suit at law for damages. The first brings forward the various allegations in the former petitions, connects Eichenseer, Ammen, and Eyerman as co-conspirators to a common wrongful intent and design, and adds new averments connecting Pearl Byrnes with the subject of the cause of action. As said, in its general scope the object of the bill was to enjoin certain levies and threatened sales under executions against the father of plaintiff (said Charles William Trefny), which said executions were levied as hereinbefore mentioned on valuable real estate claimed by plaintiff in the city of St. Louis. It runs on the theory these levies were wrongful and malicious, the product of conspiracy, and were intended to depress the value and clog the alienation of plaintiff's property by casting a cloud on his title, etc., and to extort money from him. The bill further averred that defendants had been successful in making one sale under a similar execution, and that defendant Byrnes had bought at such sale for and on behalf and as a "tool of" certain of her codefendants named and received and recorded a sheriff's deed purporting to convey the property as that of a third person, to wit, defendant's said father. The bill also seeks to remove the cloud of that sale and the record of that sheriff's deed and asks general relief. The second count confessedly arises out of the same transaction or transactions connected with the same subjects of action and asks \$10,000 in damages for acts he characterizes as libels on his title, acts done in furtherance of a malicious conspiracy to injure plaintiff. That there may be no question that such is the fact, plaintiff in his brief does not deny that his damages arise out of the same transaction complained of in his first count, and in his

petition he solemnly demands separate trials on the two counts; the first to a chancellor, and the other to a jury after plaintiff's equitable relief in the first count has been awarded.

Now, the parties against whom equitable relief is sought in this challenged petition are Eichenseer, Ammen, Eyerman, Nolte, and Byrnes, while in set terms (speaking *ipsis verbis*) the parties to the count at law are the three first, to wit, Eichenseer, Ammen, and Eyerman.

On such a record it is clear that the ruling on the demurrer was well enough, if, by heeding, we give effect to the command of the statute, *supra*, to wit, that "the causes of action so united \* \* \* must affect all the parties to the action," and to the construction put upon it by this court.

With praiseworthy industry counsel for appellant have marshaled an array of authorities which, on one or another angle, lend countenance not only to the right of plaintiff to specific relief in equity, but to damages at law as well, on facts such as alleged in his pleading. Now, if opposing counsel were attacking the petition for that it did not state a cause of action, then these authorities would stand to be reckoned with; but they do not do that. Instead, they attack the petition in another quarter by pointing to one statute making the improper joinder of causes of action in the same petition a ground of demurrer, and by pointing to another denouncing a joinder unless the causes so joined "affect all the parties to the action." The trial judge was charged with the duty of enforcing those statutes on demurrer, and learned counsel were charged with the duty of complying with them in bringing his suit. So far as we know, it has always been the rule of decision in Missouri, in construing the statutes in judgment, that A. could not join a cause of action against B., C., and D. in one count and against C. or C. and D. in another.

"Notwithstanding the great liberality of the present practice act in relation to the joinder of actions, it is conceived that there is nothing contained in it which gives the slightest sanction to the joining of actions in which the defendants are not the same, not in part but in the whole." Per Scott, J., in *Doan v. Holly*, 25 Mo. loc. cit. 359.

Judge Scott puts the reason of the rule upon the possible liability for costs in the *Doan-Holly* Case, and the oppression springing from that view of it. In *Liney v. Martin*, 29 Mo. 28, the same conclusion was reached on the construction of the wording of the statute without attempting to establish or aid the rule by referring to reasons underlying it. This course, in dealing with statutes, is a sound rule of construction where there is no ambiguity in language—the applicable maxims being, *ita lex scripta est*; and the other, The will (of the lawmaker) stands in place

of reason (*Stat pro ratione voluntas*). So, in *Beattie Mfg. Co. v. Gerardi*, 166 Mo. loc. cit. 156, 65 S. W. 1035, it was held (on the authority of the *Doan-Holly* and *Liney-Martin* Cases) that, where there are two counts joined in a petition, the petition is demurrable unless each count affects all the parties to the action. In *Scott v. Taylor et al.*, 231 Mo. loc. cit. 668, 132 S. W. 1149, the doctrine of the *Beattie-Gerardi* Case, *supra*, was construed to be "that the joinder of matters not affecting all of the parties is impossible." In *Mann v. Doerr*, 222 Mo. loc. cit. 12, 121 S. W. 86, the question was in judgment, and the reason underlying the statutory provision was said to be the confusion entering through any other door and the common burdens of defense inequitably put upon litigants.

By parity of reasoning, in the latter aspect of the case, the reasons underlying the rule against multifariousness are in point. To illustrate: Under our Code there can be but one final judgment, no matter how many issues are framed in several counts. A "judgment upon each separate finding shall await the trial of all the issues." R. S. 1909, § 1971. Agreeably to that theory is section 2097, *Id.* Now, when different causes of action are bundled in one petition in separate counts, which do not affect all the parties, it results that hazards, inconveniences, and other burdens are put upon litigants in the matter of appeals and steps incident to appeals, on points where on final judgment the shoe pinches one or another litigant or one or another group of litigants which are unfair and oppressive. Assuming (as is the case) there can be no appeal except from the final and only judgment on all counts, why should parties not interested in the second count be bound to dance attendance or cool their heels in court awaiting the vicissitudes or delays in final judgment on the second count over which they have neither concern nor control, before they can take steps to be relieved from an adverse finding and judgment on the first count? If all the parties are the same in both, this sharp inconvenience and hazard are absent. They become, but usual incidents to the litigation. Otherwise, otherwise. Peradventure, in litigation the eye of the lawmaker has not rested exclusively on the welfare and convenience of plaintiffs. It has blandly rested as well upon the welfare and convenience of defendants. Why not? Plaintiffs go into court of choice; defendants are lugged in—pulled in by the ears. Agreeable to those views is the reasoning of such cases as *Chaput v. Bock*, 224 Mo. 73, 123 S. W. 16; *Peniston v. Pressed Brick Co.*, 234 Mo. 698, 138 S. W. 532, which, not unprofitably, the curious may consult.

Each and all the premises in mind, the judgment should be affirmed. It is so ordered. All concur; BOND, J., in result.

**SCOFFIN v. ABERNATHY FURNITURE CO.** (No. 11163.)

(Kansas City Court of Appeals. Missouri, June 13, 1914. Motion to Transfer to Supreme Court Denied Dec. 21, 1914.)

**1. MASTER AND SERVANT (§ 219\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

A teamster of long experience, who had been working for defendant continuously for four years before his injury helping to unload cars of heavy and bulky merchandise, injured while, with two experienced fellow servants, using their own method in the work, by the falling of a steel vault, loaded standing up without chocks to keep it from inclining forward, after the transverse braces in front of the row had been removed and the danger from its fall was obvious, assumed the risk of such injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

**2. MASTER AND SERVANT (§ 125\*)—MASTER'S LIABILITY—SAFE PLACE TO WORK.**

Where a furniture company was responsible for the loading of a car with steel vaults, and knew that it had been negligently loaded, such negligence merely called for the exercise of care commensurate with the peculiar dangers of unloading, and its duty to provide a reasonably safe place for work required no more than the sending of experienced and competent men to unload them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Action by George Scoffin against the Abernathy Furniture Company. Judgment for plaintiff, and defendant appeals. Reversed.

Battle McArdle and Francis L. Barry, both of Kansas City, for appellant. Martin J. O'Donnell and Horace Kimbrell, both of Kansas City, for respondent.

**JOHNSON, J.** Plaintiff sued to recover damages for personal injuries he alleges were caused by the negligent failure of defendant, his master, to exercise reasonable care to furnish him a reasonably safe place in which to work. The answer is a general denial and pleas of assumed risk and contributory negligence. Verdict and judgment were for plaintiff. Defendant appealed, and argues that error was committed in the overruling of its demurrer to the evidence. Defendant is an extensive dealer in furniture in Kansas City, and plaintiff a teamster of more than 20 years' experience, who had been working for defendant continuously for four years before his injury, driving a team, and, as part of his duties, helping to unload cars of bulky and heavy merchandise. His injury occurred while he and two other employees of defendant were unloading steel grave vaults from a car which had been shipped to defendant from an eastern city and was standing on a team track about 300

feet from defendant's place of business. That morning the foreman of plaintiff ordered him to haul the grave vaults from the car and told him that other workmen would be sent over to help him unload. Two were sent, one, William Rankin, described as defendant's "head man in loading and unloading cars," and the other a laborer of experience in that kind of work. There is no complaint that the three men were not a sufficient force, nor that they were lacking in experience or skill in handling heavy and bulky freight, but plaintiff claims that none of them had had experience in unloading a car load of grave vaults, as this was the first car load defendant had received. They had handled smaller lots of such vaults, and were familiar with their size, form, weight, and the manner of handling them, though not with the customary method of loading them in car lots. Each vault was 7 feet long, 3 feet wide, 3 feet deep, weighed 450 pounds, and was incased in a burlap covering to protect its finished surfaces. Its top or lid projected two inches beyond its sides and ends and when a vault was standing on end the protecting flange of the top prevented the vault from standing perpendicularly, and caused its top end to lean five or six inches to one side of a perpendicular line. There were 50 vaults in the car, half in one end and half in the other, the vaults in each division standing on end in parallel rows with their top sides facing the car end and their bottoms facing the middle of the car in which there was an open space between the two divisions of the load. Each row contained three vaults placed close together, and transverse braces consisting of 2x4 timbers had been placed across the face of each row, one at the top and one at the bottom, and spiked at their ends to the sides of the car. Each row, because of the projecting flanges of the vaults, leaned towards the middle of the car, and the braces were put in to keep its members in place and to prevent their toppling forward during the transportation. The sole criticism of this method of loading offered in the evidence of plaintiff relates to the omission of the loaders to place another transverse 2x4 timber under the forward edge of each row and nail it to the car floor, in order that the vaults might stand perpendicularly and not be so likely to fall over on the unloaders, who necessarily would have to begin their operations in the open space in the middle of the car, and if such chocking timbers were omitted would be compelled to face and work upon rows of vaults leaning towards them. In the present instance the loaders had put in no blocking and the unloaders were compelled to work on successive rows of vaults leaning towards them. They removed all of the load from the south end of the car, and were working on the second row in the

north end when the accident occurred. Much is said in the evidence about the condition of the transverse braces, but as we view the case, the fact that many of them were found to have been broken during the transportation could have had no relation to the cause of the injury, since it is conceded the unloaders had removed both braces in front of the row they were working upon, and were engaged in pulling the middle vault over onto a truck, when one of the other vaults in that row fell forward on plaintiff and injured him.

Plaintiff claims that the vault which fell was wholly disengaged from its neighbor, and attributes its fall to the jar produced by the middle vault falling over on the truck, while his collaborators, who were introduced as witnesses by defendant, say that handles on the sides of the two vaults had become engaged in a way that caused the pulling over of the middle vault to bring the other over with it. Plaintiff's version, which would excuse him and his collaborators from the imputation of negligence amounting to gross carelessness, and would attribute the fall of the vault to its instability caused by the lack of proper chocking, is reasonable, and for the purposes of the demurrer to the evidence will be accepted as true.

But with this concession, must it be said that the evidence of plaintiff, howsoever favorably regarded, accuses defendant, his master, of negligence that should be regarded as the proximate cause of the injury? What did defendant fail to do that a reasonably careful and prudent master in his situation would have done for the protection of his servants? Plaintiff says: First, that a prudent master, having proper regard for his servants, would not have negligently loaded the car, but there is no proof that defendant had anything to do with that operation, and the only permissible inference that may be drawn from all the evidence is that the car was loaded by the vendor of defendant, and that the officers of defendant had no knowledge, or reason to believe, that the loading had not been done in a reasonably careful and skillful manner. But that the question of final consequence in the merits of the case may not be confused or misunderstood we shall concede, for argument, that defendant was responsible for the loading of the car, and therefore knew that it had been negligently loaded. Still such negligence could not be treated otherwise than as a remote cause of the injury, as merely furnishing a condition which called for the exercise of care commensurate with its peculiar dangers. *Mullery v. Telephone Co.*, 168 S. W. 213, decided at this term, not yet officially reported. Defendant was not bound to abandon its property and refuse to unload the vaults because they had been loaded in a negligent and dangerous way. It had a right to employ men to unload a dangerously load-

ed car, to work in a place made unsafe by former negligence, just as the owner of a negligently constructed building would have the right to employ men to tear it down.

[1] This is not a case where an inexperienced workman is sent into a place of danger without notice or warning, or where an experienced workman is kept in ignorance of concealed dangers or risks, but is a case where experienced and skillful workmen were sent by the master to work in a place where the dangers and risks were obvious, and were left free to adopt and follow their own plans and method of work. *Roberts v. Tel. Co.*, 166 Mo. 370, 66 S. W. 155; *Corby v. Tel. Co.*, 231 Mo. 417, 132 S. W. 712; *Miller v. Tel. Co.*, 141 Mo. App. 462, 126 S. W. 187; *Fleeman v. Bag Co.*, 159 Mo. App. 593, 141 S. W. 481; *Bradley v. Tea Co.*, 213 Mo. loc. cit. 331, 111 S. W. 919.

[2] As soon as they opened the car the men could, and did, see that the rows were tilted forward, and they knew the cause thereof and the consequent risk as well as they would have known them had they been told of them by an inspector previously sent to examine the load for such defects. All of the inspections that could have been made would have revealed nothing beyond the patent facts that the rows had not been chocked, and that the long, slim, up-ended and tilted steel boxes would tip over if the men were not careful in handling them. We do not perceive on what ground it may be said that the duty devolving upon defendant to exercise reasonable care to provide a reasonably safe place for its servants required more, under such circumstances, than the sending of experienced and competent men to unload the vaults. There was nothing else the most prudent master could do. A row of vaults could not have been blocked up to a perpendicular position with the rows behind it leaning forward, and therefore all of the vaults except those in the last rows would have had to be removed before any row could be blocked. It is true the master cannot delegate to another the performance of his primary duty towards his servant, but defendant was guilty of no such attempted evasion of duty. It has a right to employ servants to do dangerous work, but had no right to enhance the natural and incidental dangers of such employment by any negligence of its own. The natural risks of such employment are assumed by the servant, and in this case the assumed risks were those which were obvious and became known to those experienced and competent servants the moment they opened the door of the car and saw the manner in which the vaults had been placed therein.

It is idle to speak of them as inexperienced because they had unloaded no other car load of grave vaults. There could be no difference between a steel grave vault stood on end and any other long, slim, heavy box

placed in such position. These men were fellow servants, were their own masters, so far as the method to be followed in unloading the vaults was concerned, and the injury of plaintiff clearly was due to one of the risks of the employment he assumed. The court erred in not sustaining a demurrer to the evidence.

Reversed. All concur.

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**BROWN v. CITY OF ST. JOSEPH.**  
(No. 10850.)

(Kansas City Court of Appeals. Missouri. Nov. 23, 1914. Rehearing Denied Dec. 21, 1914.)

**1. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—CLERICAL MISTAKE.**

Where the petition alleged and the evidence showed that the plaintiff was injured on a crosswalk on the north side of the street which ran east and west, error in an instruction, stating that it was on the west side of that street, was merely clerical, and does not require a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**2. TRIAL (§ 252\*)—REQUESTED INSTRUCTIONS—APPLICABILITY TO EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

Where plaintiff's evidence as to a fall on a sidewalk did not support an inference of contributory negligence, and the city offered no evidence on that issue, a requested instruction on contributory negligence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 590-612; Dec. Dig. § 252.\*]

**3. EVIDENCE (§ 558\*) — EXPERT WITNESS — CROSS-EXAMINATION—SCOPE.**

In an action for injuries to plaintiff's knee, a question, asked on cross-examination of defendant's expert, whether the injury would likely subject the plaintiff to rheumatism, was not objectionable as an attempt to show that plaintiff had suffered rheumatism, which was not claimed by the petition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.\*]

**4. APPEAL AND ERROR (§ 237\*)—PRESENTING QUESTIONS IN LOWER COURT—IRRELEVANT TESTIMONY—MOTION TO STRIKE.**

Where plaintiff, in response to a proper question, stated that she did not go to a hospital because of the injury of which she complained, but went to have a tumor removed, and then voluntarily added that the injury made it necessary to remove the tumor sooner, that statement does not require a reversal where there was no objection thereto and no request to strike it from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.\*]

**5. MUNICIPAL CORPORATIONS (§ 818\*)—TORTS—DEFECTIVE SIDEWALK—ADMISSIBILITY OF EVIDENCE.**

In an action for personal injuries caused by a defective sidewalk, a contract for the grading of the street, which required the contractor to replace the walk in good order, is not admissible to show that the contractor should have been made a party under Rev. St. 1909, § 8862, where the grading had been finished several months before the accident and there was no evi-

dence that the defect in the walk was due to the contractor's negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.\*]

**6. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—INJURY TO KNEE.**

An award of \$1,500 damages for injuries to a woman's knee, which caused great pain and stiffness in the point, and would result in a permanent weakness and perhaps permanent stiffness, is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Eva L. Brown against the City of St. Joseph. Judgment for the plaintiff, and defendant appeals. Affirmed.

Frank B. Fulkerson, L. E. Thompson, and Herman Hess, all of St. Joseph, for appellant. John S. Boyer, of St. Joseph, and Charles C. Crow, of Kansas City, for respondent.

**TRIMBLE, J.** Suit for personal injuries alleged to have been sustained by a fall caused by a defective crosswalk in one of the public streets of appellant city. Respondent was returning home from church between 9:30 and 10 o'clock in the evening of March 27, 1913. It was dark, and the street was not illuminated. Having alighted from a street car at the intersection of Thirty-Third and Seneca streets, respondent started west on the crosswalk over Thirty-Third street and on the north side of Seneca. This crosswalk was made of large boards laid lengthwise of the crossing and nailed to stringers thereunder. One of these boards had warped, and the nails in the east end of the board had pulled out of the stringer, allowing the board to cup up and raise the end of the board some six inches or more above the level of the walk, with the nails still remaining in the board and turned outward toward the east. It had remained in this condition for a month or six weeks prior to the night in question. Respondent's toe or foot caught under the upturned end of this board, and she was thrown heavily to the ground injuring her left leg and knee. Appellant offered no evidence to dispute the facts concerning the location of the crosswalk or the defect therein or respondent's fall thereon as a result thereof, nor any disputing the manner in which it occurred, or that an injury was in fact received.

The first complaint of error is that the petition did not count upon negligence of defendant in maintaining the crosswalk in a dangerous and unsafe condition. But a reading of the entire petition, without confining one's self to a preliminary paragraph thereof, will disclose that this contention is without merit.

[1] Point is also made that respondent's instruction No. 1, which submitted the case,

referred to the place of the accident as the crosswalk "at the intersection of Thirty-Third and Seneca streets in said city and on the west side of Seneca street in Thirty-Third street" when the petition alleged, and the evidence showed, that it was on the north side of Seneca street. There was but one crosswalk shown in evidence, and that was the one where the fall occurred. Thirty-Third street runs north and south, intersecting Seneca, which runs east and west. Therefore there could be no west side of Seneca street. Hence the error in the instruction in referring to the crosswalk as being on the west side instead of the north side of Seneca street was merely clerical, and could deceive or mislead no one. The context showed that the place referred to was the crosswalk located as specified in the petition and evidence. Such an error is no ground for reversal. *Drimmel v. Kansas City*, 168 S. W. 280.

[2] Appellant next says the court erred in refusing its instruction on contributory negligence. This instruction, however, was properly refused since there was no evidence whatever tending to show contributory negligence. Appellant offered no evidence concerning the happening of the fall, and no proof nor inference of contributory negligence appeared in respondent's evidence.

[3] On the cross-examination of defendant's medical expert, respondent's counsel was trying to get the expert to admit that the injured knee was likely to remain in a weakened state, and hence constitute a permanent injury. In the course of this cross-examination the question was asked whether or not such an injury would likely subject the person to rheumatism. Appellant objected, and now claims this was error because the petition did not allege rheumatism. But the question was not in reference to rheumatism suffered by respondent. No attempt was being made to show that she had suffered rheumatism, and that it was caused by the injury. If such had been the attempt, then possibly the case of *Peterle v. Railroad*, 177 Mo. App. 359, 164 S. W. 254, cited by appellant, might apply. But the question objected to was to show the condition such an injury would reasonably and probably leave a person in, whether or not the knee joint would always remain weakened and predispose one to attacks of rheumatism. There was no reversible error in the attempt to do that.

[4] It is urged that the case should be reversed and remanded because the plaintiff, in the course of her direct examination, made a statement to the effect that the fall hastened the performance of an operation for a tumor which she had. Appellant says it was not proper for respondent, not being a medical expert, to testify as to such effect resulting from her fall. But the inquiry being made of her by her attorney was not to show

that she had been compelled to go to the hospital as a result of the fall, but that her going there was not on account of any trouble to her knee. She answered that she did not go to the hospital on account of her knee, but that she went to the hospital before the accident, to be operated on for appendicitis, and, after the accident, went a second time to have some adhesions removed which had formed as a result of the operation. This was in answer to her attorney's question, which was to show that it was not on account of anything wrong with the knee that she was in the hospital. This was perfectly proper, and her answer thus far was competent. She then stated that when she had the adhesions broken up on her second visit to the hospital she also had a tumor removed and volunteered the additional statement that the jar she got from the fall "wrenched me so that it was necessary to remove it sooner." Perhaps this last statement should not have been made, but it was not in response to any question asked her, and if appellant did not want it to remain in the record, objection thereto should have been entered and a request made to strike it from the record. But nothing of this kind was done.

[5] Appellant claimed that a grading contractor had taken up the crosswalk in grading the street under a contract with the city by which it was made his duty to carefully replace the walk in as good condition as before, and that the defect in the crosswalk was caused by his negligence. If this was true, he should have been a party to the suit under section 8862, R. S. Mo. 1909. Appellant claims error on the part of the trial court in excluding the contract between the city and the contractor. But the evidence showed that the grading had been finished several months before the accident, and that the defective condition arose only about a month or six weeks prior thereto. There was no evidence showing or tending to show that the act of the contractor caused the defect. Hence the court did not err in excluding the contract.

[6] Lastly, it is urged that the verdict is excessive. It does not appear thus so clearly as to justify us in reducing it. The physician who was called to treat respondent's knee testified that the leg was lacerated, the skin broken and discolored, and the knee badly swollen; there was great pain, and inflammation of the synovial membrane or covering of the joint, and the knee became stiff. This, in the opinion of the doctor, would likely disappear in time if proper treatment and manipulation were given it with care and regularity, which process would be attended with pain. However, he would not say with certainty that the joint would lose its stiffness, only time could tell about that; sometimes such an injury resulted in a permanent stiffness, but he thought that with care and proper attention she would have a serviceable

knee, though not so good as before. At the time of the trial the leg was partially flexed so that only the toes touched the ground, the heel did not touch, and any attempt to straighten the leg caused great pain. Appellant's expert gave it as his opinion that the knee would recover, but admitted on cross-examination that the joint would be permanently weakened. Under such testimony we are not justified in reducing a verdict for \$1,500.

Judgment affirmed. All concur.

# HICKS v. HAMMOND PACKING CO. (No. 11252.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914. Rehearing Denied  
Dec. 21, 1914.)

## 1. MASTER AND SERVANT (§ 125\*)—OBLIGATION OF MASTER—REASONABLY SAFE PLACE TO WORK.

An employer is entitled to a reasonable time and opportunity to discover and repair a defect in the place of work arising during the progress of the work, and where a defect in a step in a stairway, causing injury to an employe, did not exist prior to the day of the accident, the employer was not negligent in failing to exercise reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

## 2. APPEAL AND ERROR (§ 927\*)—PRESUMPTIONS—REFUSAL TO DIRECT VERDICT.

In reviewing the refusal to direct a verdict for defendant, the evidence must be considered in the light most favorable to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

## 3. MASTER AND SERVANT (§§ 286, 289\*)—INJURY TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an employe by a defective step in a stairway, the questions of the employer's negligence in failing to discover and repair the defect, and of the employe's contributory negligence, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.\*]

## 4. DAMAGES (§ 160\*)—PERSONAL INJURY—RECOVERY FOR UNPAID MEDICAL EXPENSES—PLEADINGS.

A recovery for unpaid medical expenses, incurred by one suing for a personal injury, is not allowed under an allegation and prayer for no other expenses than those incurred and paid.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 439, 445, 448; Dec. Dig. § 160.\*]

## 5. DAMAGES (§ 160\*)—PERSONAL INJURY—RECOVERY FOR UNPAID MEDICAL EXPENSES—PLEADINGS.

A petition in an action for personal injuries, which alleges that plaintiff has and will in the future, be compelled to expend large sums of money, and contract large indebtedness for medicine and medical attention and nursing, sustains a recovery for unpaid medical expenses incurred.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 439, 445, 448; Dec. Dig. § 160.\*]

## 6. DAMAGES (§ 131\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where one received a severe injury to the sciatic nerve, causing continued severe suffering and physical incapacity, traumatic rheumatism, and considerable expense, a verdict for \$1,375 was not excessive, though there was evidence that he would completely recover.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 131.\*]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Action by William Henry Hicks against the Hammond Packing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel I. Motter and O. E. Shultz, both of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondent.

JOHNSON, J. While employed as a carpenter in the meat packing establishment of defendant in St. Joseph plaintiff sustained personal injuries, which he alleges were caused by negligence of defendant. The answer is a general denial and a plea of contributory negligence. A trial in the circuit court resulted in a verdict and judgment for plaintiff in the sum of \$1,375. Defendant appealed.

[1] The injury occurred April 20, 1913, on a stairway connecting the fifth and sixth floors of one of the buildings. Plaintiff and a fellow workman had used the stairway that morning in going to the sixth floor, where they had some work to do, and were returning down the stairs, the steps of which were made of planks, when a defect in one of the steps caused plaintiff to lose his footing and to sit down so violently on the broken step that he injured the sciatic nerve in his left hip. The fact is not disputed that the tread plank of the step was in a defective condition at the time of the alleged injury, and that plaintiff, who followed his companion in descending the stairs, slipped on account of the defect, which consisted of a longitudinal split along the middle of the plank and a transverse break across the center of the forward half, which made that part of the tread insecure. In their argument on the demurrer to the evidence, which they urge should have been given, counsel for defendant insist that the evidence of plaintiff, as well as that of defendant, shows that the defect in the step was caused that morning after plaintiff had ascended to the sixth floor, and was the result of the accidental dropping of a heavy pipe which was being carried up or down the stairs. Such is the substance of the testimony of defendant's witnesses, and it is contended that plaintiff's own testimony conclusively shows that the defect was not in existence when he went to work that morning. The fact is important in its bearing on the issue of whether or not defendant, as master, exercised reason-

able care to provide its servant a reasonably safe place in which to work, and the court properly instructed the jury to find for defendant if "the defective condition complained of did not exist prior to the day plaintiff was injured." This was an application of the rule that a master is entitled to a reasonable time and opportunity to discover and repair a defect in the place of work which arises during the progress of the work and an expression of the conclusion as one of law that the brief period which elapsed between the ascent and descent of the stairway by plaintiff on that day would not permit constructive notice of a defect created during that period. Consequently in finding for plaintiff the jury, thus instructed, must have believed from the evidence that the defect had been in existence before that day, and that in the exercise of reasonable care defendant should have discovered and repaired it. A careful examination of all the evidence has led us to the conclusion that this finding has substantial support, and therefore that the court did not err in refusing to give the jury a peremptory instruction to find for defendant.

[2, 3] Plaintiff states that the light was so poor that the steps could be seen only in dim and vague outline, and that in the ascent he did not observe the defect and had no knowledge of its presence. The fact that the step did not give way at that time, but on his descent may be reasonably accounted for. In going up he doubtless stepped on the rear half of the tread, which was in sound condition, while in coming down he must have stepped on the defective and weakened front half which, as stated, had a transverse break, which made it unsafe and insecure.

Another witness introduced by plaintiff testified that the defect had existed for 17 or 18 days. The facts and circumstances related by plaintiff are in harmony with that testimony, and the jury were entitled to draw the inference that the defect had been there more than two weeks, and that, owing to the darkness, plaintiff, while proceeding with reasonable care, failed to discover it in his ascent of the stairway. In passing on the demurrer we must view the evidence in the light most favorable to the pleaded cause, and in so doing we find the questions of defendant's negligence and of plaintiff's contributory negligence involve issues of fact which the triers of fact alone were authorized to determine. The court did not err in refusing to direct a verdict for defendant.

[4, 5] The point made by defendant that error was committed in allowing plaintiff to recover damages for medical expenses which he had incurred on account of his injuries, but had not paid, rests upon a too strained construction of the petition, which alleges that plaintiff "has and will in the future be

compelled to expend large sums of money and contract large indebtedness for medicine, medical attention, and nursing." Such expenses are a special damage which, if plaintiff would recover, must be specially pleaded, and the rule in this state is that a recovery cannot be allowed for unpaid medical expenses incurred by the plaintiff under an allegation and prayer for no other expenses than those he has incurred and paid. *Muth v. Railway*, 87 Mo. App. 422; *Stanley v. Railway*, 112 Mo. App. 601, 87 S. W. 112; *Nelson v. Railway*, 113 Mo. App. 659, 88 S. W. 781.

The rule is very technical, and should not be aided in its scope by a strict and illiberal analysis of the pleaded charge. The language of the petition before us is not as clear as it might be, but we think the information is sufficiently imparted to defendant that plaintiff was seeking recovery, not only of the medical expenses he had paid, but also those he had incurred and had not paid.

[8] We find no merit in the point of an excessive verdict. There is evidence tending to show a very severe injury to the important sciatic nerve, which resulted in continued severe suffering and physical incapacity and considerable expense. Neuritis or traumatic rheumatism supervened; and, while the weight of the expert evidence points to a complete recovery as the eventual outcome, the consequences already suffered have been of such a character that we cannot say the jury exceeded its latitude in the damages assessed.

There is no prejudicial error in the record, and the judgment is affirmed. All concur.

#### TILLMAN v. BUNGENSTOCK. (No. 11232.)

(Kansas City Court of Appeals. Missouri.  
Dec. 21, 1914.)

##### 1. CROPS (§ 5\*)—EFFECT OF CONVEYANCE OF LAND.

A deed without reservation conveys the vendor's entire interest in the lands, including his interest in the crops to be raised by a tenant.

[Ed. Note.—For other cases, see *Crops*, Cent. Dig. §§ 2, 3; Dec. Dig. § 5.\*]

##### 2. PRINCIPAL AND AGENT (§ 136\*)—LIABILITY OF AGENT.

Where defendant, who was a subagent for the collection of crop rent, paid over the proceeds to his immediate principal, although he knew that he had sold the land, he is liable to the new owner therefor.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. § 136.\*]

Appeal from Circuit Court, Atchison County; William C. Ellison, Judge.

Action by Joel W. Tillman against L. W. Bungenstock. From a judgment for plaintiff, defendant appeals. Affirmed.

Hunt, Bailey & Hunt, of Rockport, for appellant. James F. Gore, of Rockport, for respondent.

ELLISON, P. J. Plaintiff's action is for money claimed to belong to him as the proceeds of sale of rent corn. He recovered judgment in the trial court.

One Robinson, a nonresident, owned some farm land in Atchison county and, through his agent Cockburn, rented it to one Morrow for one-third of the crop. Cockburn himself did not live in Atchison county, his residence being in St. Joseph, Mo., and he engaged the defendant to keep an oversight of the leased premises and to sell the rent crop when it matured. In the month of August, during the tenancy of Morrow and while the crop (corn) was yet not matured, Robinson sold the premises to Leidigh, and he, in the same month, sold them to plaintiff. These deeds were recorded, and Morrow and this defendant otherwise knew of the sale. Morrow gathered the rent corn and, under defendant's direction, delivered it to a grain buyer, who gave to defendant a check for the price, \$114.54, and the latter indorsed and sent the check to Cockburn at St. Joseph. Plaintiff claimed to be entitled to the rent, and both the tenant Morrow and the defendant knew it, so that the fact is that defendant paid the money (indorsed the check) over to Cockburn knowing it was claimed by plaintiff, who had become owner of the land. We have omitted some unnecessary detail of statement, believing the foregoing will be sufficient for the application of the law which governs the case.

[1] When plaintiff bought the land and received a deed thereto without reservation, he became the owner of that part of the growing crop due to his vendor as rent. A deed without reserve conveys the vendor's interest in the land, and this will include his interest in the crop. *Stevenson v. Hancock*, 72 Mo. 612; *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483; *Hayden v. Burkemper*, 101 Mo. 644, 14 S. W. 767, 20 Am. St. Rep. 643; *Salmon v. Fewell*, 17 Mo. App. 118; *Vogt v. Cunningham*, 50 Mo. App. 136; *Fischer v. Johnson*, 51 Mo. App. 157; *Watson v. Menteer*, 59 Mo. App. 387. By act of the Legislature (Laws 1893, p. 210, now section 2841, R. S. 1909), the statute was so amended as to protect the interest of the tenant in the crop sown after the mortgage (*Walton v. Fudge*, 63 Mo. App. 52). But this did not affect the interest of the landlord owner of the land, and undoubtedly this plaintiff in purchasing the land acquired the interest of Robinson, the vendor landlord in the crop.

[2] But this leaves the question whether an agent who collects for, and pays, money to a principal and before paying it over to him is notified by one having a paramount title is liable to the latter. In this state the relation between a principal and his agent is held to

estop the latter from denying an accounting to the principal in an action between them. *Witman v. Felton*, 28 Mo. 601. But where a third party has paramount title to the money in the hands of the agent, and notifies the latter of his claim, if the agent nevertheless pays the principal, he is liable to the true owner. *Moss Merc. Co. v. Bank*, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, 8 Ann. Cas. 569. This rule is said to be sustained by the great weight of authority. Case note, 2 L. R. A. (N. S.) 657; *Sims v. Brown*, 6 Thomp. & C. (N. Y.) 5, affirmed 64 N. Y. 660. In the last case it is said:

"The general rule, doubtless, is that an agent cannot dispute the title of his principal to property intrusted to him by the latter. But that principle does not apply to a case where a claim is made by a third person to the property. In such case the agent must interplead the principal and claimant if he can, or he must demand indemnity, and deliver to the party who indemnifies him. He is not compelled to yield to the claim of the principal without an effort to protect himself against the claims of third persons. And if he has delivered the property to his principal without notice of the claims of others thereto, he is protected against such claims to the extent of the delivery."

It is said in 27 Cyc. 869, B, that:

"An action for money had and received may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over."

See, also, 1 *Mechem on Agency*, § 1457, and 2 *Clark & Skyles on Agency*, § 600. The statement is made, in many of the authorities on the subject, that an agent, finding himself in the predicament of a claimant contending with his principal, may, in some instances, ask an interpleader, or, if not, that he be indemnified. We are not unmindful of the fact that in defendant paying the money to Cockburn he was acting in the capacity of a sub-agent paying to the principal agent. But that cannot prevent application of the law we have just stated. His liability arose, not for paying the money to a person to whom it did not belong; but, properly speaking, the wrong he committed and the liability he incurred was in refusing to pay to plaintiff, the true owner.

The judgment is affirmed. All concur.

ELLIOTT et al. v. THOMAS et al.  
(No. 11253.)

(Kansas City Court of Appeals. Missouri.  
Dec. 21, 1914.)

1. ACCORD AND SATISFACTION (§ 11\*)—PART  
PAYMENT—ORDER RECITING FULL PAY-  
MENT.

Where a creditor received an order for an amount less than that claimed by him, which stated that it was in full payment of the balance due, but he could not read it at that time, and nothing was said to him about its being any different from other orders which he had accepted, the acceptance thereof did not amount

to an accord and satisfaction which barred his right to recover on the original debt.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–82; Dec. Dig. § 11.\*]

2. ACCORD AND SATISFACTION (§ 17\*)—NECESSITY OF EXECUTION—PAYMENT OF ORDER.

The acceptance of an order reciting that it is given in full payment of the balance due does not bar an action on the original debt, where the creditor received only part of the amount called for by the order, since an accord and satisfaction must be completed in order to be binding.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 123; Dec. Dig. § 17.\*]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Action by G. W. Elliott and another against A. A. Thomas and others. Judgment for the defendants, and plaintiffs appeal. Reversed and remanded for new trial.

Sterling P. Reynolds, of St. Joseph, for appellants. W. N. Linn and John E. Heffley, both of St. Joseph, for respondents.

TRIMBLE, J. This suit was instituted by appellants, G. W. Elliott and Charles Davis, to enforce a mechanic's lien for \$84.37, the balance alleged by them to be due on an account for labor performed in building a small house for respondent A. A. Thomas. Under the original contract, which was oral, they were to build a five-room house for \$125 and do some painting for \$35, making \$160 in all. After the work began, appellants claim that Thomas appeared at the place where the house was being erected and gave them the plan of the house to be built. According to appellant's testimony, this included more than the house contemplated in the contract, and Thomas was so told, whereupon he agreed they should do the extra work and he would pay for same. Thomas had borrowed some money to pay for the house, and this was held by the firm of Shull & Chipps, who paid it out to appellants as the work progressed on orders signed by Thomas. Appellants' testimony tends to show that when the house was completed Thomas expressed himself as satisfied therewith; that, in addition to the work called for in the original contract, they did \$56.50 worth of extra work, making their account aggregate the sum of \$216.50; that in various orders given by Thomas on Shull & Chipps they have received \$152.13, leaving a balance due of \$84.37. Thomas denied that there was anything said about extra work or that anything extra was required or done. Davis testified that he had cashed orders given by Thomas on Shull & Chipps to the amount of \$75, which lacked \$2.50 of amounting to one-half of the amount due under the original contract at the time he came into it; Elliott having already done \$5 worth of work, leaving \$155 as the balance to be paid for the work not counting extra work done. It seems that the last order given by

Thomas to Davis was for \$17.50, and the last given Elliott was for \$36.75. These orders, although exhibited to appellants while on the stand and identified by them, were not offered in evidence, and we have no means of knowing what were their terms except by inference from the testimony. It is Thomas' contention, however, that they were in full of the balance due from him under the original contract. Davis says his order was given to him the same as the others, with no statement that it was in full of the amount due; that he could not read it without his glasses and did not have them, and cashed it without knowing anything about its being in full, and would not have accepted it had he known of it. Elliott says Thomas gave him the order for \$36.75, saying he thought that paid the bill in full; that he told Thomas it did not pay the bill in full. He took the order, however, to Shull & Chipps, but there found that Thomas had only a balance of \$32.13 remaining on deposit with them to meet the order. This amount was paid him thereon. Thomas admits that the full amount of the order never was paid, because after suit was brought to enforce the mechanic's lien he deposited \$4.62 to cover the deficit.

[1, 2] At the close of plaintiffs' case in chief, the trial court sustained a demurrer to the evidence. Evidently this was on the theory that plaintiffs' own evidence showed that a settlement had been made between the parties. This ruling was in view of the decision in *Andrews v. Stubbs*, 100 Mo. App. 599, 75 S. W. 178, and *Cornelius v. Rosen*, 111 Mo. App. 619, 86 S. W. 500, which holds that, where one accepts and cashes a check sent in payment in full of the balance due on a disputed account, he thereby discharges the account, since he cannot accept the check without accepting the conditions attached thereto. No doubt this is true, but that is hardly the situation here. As to Davis, nothing was done or said indicating to him that if he accepted the order given him it would be a settlement in full. He took the order thinking it was like the rest, and the giving of the order was merely what Thomas had agreed to do from time to time. As to Elliott, although at the time he received the \$32.13 on the order he may have known it read in full of the balance due him, yet he did not get the amount called for in the order. His reception from Shull & Chipps of the \$32.13 thereon should not be treated as conclusive evidence of a settlement in full. Even if the giving of the last order and the acceptance thereof by Elliott be considered in the light of an accord and satisfaction, yet the terms thereof were not performed. That is, even if Thomas by giving the order, in effect, said to Elliott, "If you will agree to accept \$36.75 in full satisfaction of your account, I will enable you to draw that amount by giving you this order on Shull & Chipps."

yet Elliott did not receive the \$36.75. The agreement was not carried out on Thomas' part. He admits this by attempting to make a deposit after suit is brought. An accord and satisfaction must be completed in order to be binding. *Peterson v. Wheeler*, 45 Mo. 369; *Barton v. Hunter*, 59 Mo. App. 610. The execution of the accord is the satisfaction, and an accord without satisfaction does not bar a suit on the original obligation. *Carter v. Chicago, etc., Ry. Co.*, 138 Mo. App. 719, 119 S. W. 35. To constitute a bar to the original claim, the accord must be fully executed. 1 Cyc. 813-816.

The questions whether there was any extra work done and, if so, whether Thomas agreed to pay for it, were for the jury to determine. What was done by the parties concerning the giving of the two last orders, and all the circumstances surrounding them, may be looked at by the jury in arriving at a determination of the question whether anything beyond the original contract price is due or not. But appellants cannot be conclusively bound to have discharged the account merely because Elliott received from Shull & Chipps a part of the money specified in the order given him.

Hence the case should not have been taken from the jury. The judgment is therefore reversed, and the cause remanded for a new trial in order that the issues between the parties may be determined by a jury. The other Judges concur.

#### NOWOTNY v. ST. LOUIS BREWING ASS'N. (No. 13759.)

(St. Louis Court of Appeals. Missouri. Nov. 8, 1914. Rehearing Denied Dec. 8, 1914.)

##### 1. MASTER AND SERVANT (§ 278\*)—ACTIONS FOR DEATH—SUFFICIENCY OF EVIDENCE.

In an action for the death of an employé in a brewery, caused by the explosion of an ammonia tank, liberating fumes, from which he died, evidence held to support the allegations that the tank was old, worn, weak, and defective, and thereby unsafe and dangerous, and that the exercise of ordinary care on defendant's part would have revealed its condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

##### 2. MASTER AND SERVANT (§ 124\*)—LIABILITY FOR INJURIES—DUTY TO INSPECT.

The duty resting upon a master to inspect and to make such examinations and tests at reasonable intervals as may be reasonably necessary to ascertain the condition of the place where, or the instrumentality with which, the servant is required to work is an affirmative and continuing duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

##### 3. MASTER AND SERVANT (§ 226\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

While an employé in a brewery assumed the risk ordinarily incident to the employment after the performance of the duty of inspection

enjoined by law upon the employer, he did not assume the risk of injury from the explosion of an ammonia tank arising from the employer's negligent failure to inspect the tank; where it was not part of the employé's duty to make such inspection.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 659-667; Dec. Dig. § 226.\*]

##### 4. MASTER AND SERVANT (§ 289\*) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the death of an employé in a brewery, caused by the explosion of an ammonia tank, his negligence was a question for the jury, even though such tank was so closed off from the remainder of the refrigerating system, when such employé took complete charge and control of the engine room and machinery shortly before the accident, that it could not explode, and that the employé was so informed, where there was nothing to show that he had any cause to suspect that it was dangerous to change the valves in the tank, thereby subjecting it to the usual pressure when in use, if necessary or proper in his judgment, especially where it appeared that, though he was in charge of the engine room, others had access thereto and were in the room during the evening prior to the explosion.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Josephine Nowotny against the St. Louis Brewing Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward C. Kehr, of St. Louis, for appellant. Chas. E. Morrow, of St. Louis, for respondent.

ALLEN, J. This is an action brought by plaintiff to recover damages for the death of her husband, alleged to have been caused by the negligence of defendant. There was a verdict and judgment for plaintiff, and the defendant appeals.

On and prior to January 5, 1909, defendant owned and operated a brewery in the city of St. Louis, in connection with which it operated a refrigerating system. On the day aforesaid, plaintiff's husband, Joseph Nowotny, was in the employ of the defendant as an engineer, and, while he was engaged in the line of his employment in the engine room of defendant's brewery an ammonia tank or receiver, located in said engine room and constituting a part of the defendant's said refrigerating system, exploded, whereby he received injuries, from which he died on January 12, 1909.

The negligence charged in the petition is that the ammonia tank was "old, worn, thin, weak, and defective," and was not provided with a safety valve, by reason whereof it was unsafe and dangerous for use, and which defendant knew, or by the exercise of ordinary care would have known, and by reason whereof it was caused to explode.

The answer is a general denial, together with a plea of assumption of risk and a plea to the effect that when the deceased began

work upon the evening in question, and the tank was placed in his control; it was closed off from the remainder of the refrigerating system, and that a relief valve upon it had been opened to empty its contents, of which he was informed, and that in such condition an explosion was impossible, and any subsequent change in the condition of the tank, whereby the explosion became possible, was a negligent act of the deceased, "who thereby brought about or directly contributed to bring about the injuries of which the plaintiff complains." The reply is conventional.

[1] The evidence discloses that Nowotny went to work at about 3 o'clock on the evening of January 7, 1909, having charge of defendant's engine room in its brewery in which the ammonia tank in question was located; that shortly before 8 o'clock of that evening, while he was alone in this room, the tank exploded, causing ammonia fumes to escape into the room, and that he was fatally injured by inhaling such fumes. It appears that the tank, which was about 7 feet in length and  $14\frac{1}{2}$  inches in diameter, was made of steel of the thickness of  $1\frac{1}{2}$  inches, and was connected by pipes with the remainder of the refrigerating system. It was equipped with an inlet valve, an outlet valve, and what is called a "pumping-out" valve. It had no safety valve, or other like appliance, to relieve the pressure in case the same should become dangerously great.

The evidence further discloses that the defendant had purchased and installed this tank in its said place of business in 1883, and that it had been in constant operation from that time up to the day of the injury, with the exception of a period of about five months. The last-mentioned period was in the year preceding the accident, during which time it was in a shed, having been again put in operation about two weeks prior to its explosion. Though the tank had been tested when new, before being put into operation, it is undisputed that, during the entire period of approximately 26 years after its purchase, no test was ever made to determine the strain to which it might be safely subjected.

On behalf of plaintiff, there was expert testimony going to show that the metal of which the tank was composed had become crystallized, and hence brittle and weak, from long-continued use. This testimony went to show that, in an appliance of this character, the metal of which it is composed will, in course of time, become crystallized, owing to the repeated contraction and expansion incident to its operation. The expert, so testifying, had examined the tank after the explosion, and stated that the nature of the break, and likewise the appearance of the metal, indicated that the material had become brittle through crystallization, whereby the tank had become weak and unsafe for ordinary use. This witness also testified to

the methods employed for testing such an appliance.

It appears that the tank, when in use as a part of the refrigerating system, was ordinarily subjected to a pressure of something like 180 pounds to the square inch. There was no evidence as to the pressure to which it was subjected at the time of its explosion. It appears that it had no gauge upon it whereby to determine such pressure, though there was a gauge elsewhere upon the ammonia system of which the tank formed a part when connected therewith.

On behalf of defendant there was expert testimony tending to contradict that for plaintiff, and tending to show that the tank had not become materially weakened or injured through long use, by reason of the crystallization of the metal composing it or otherwise. And there was evidence in support of defendant's answer to the effect that defendant's chief engineer had informed the deceased, at about 5 o'clock upon the evening in question, that this tank had been closed off from the remainder of the system, the inlet valve and the outlet valve being closed and the pumping-out valve opened, and that the witness told the deceased to leave it in that condition; that in this condition the tank was subjected to pressure of only 10 or 15 pounds to the square inch, and could not explode.

Appellant urges that its demurrer to the evidence should have been sustained. But we are not so persuaded. The charge of negligence to the effect that the tank was old, worn, weak, and defective, whereby it was rendered unsafe and dangerous, and that the exercise of ordinary care on defendant's part would have revealed the same, is, we think, amply sustained by the evidence. It was upon this assignment of negligence alone that plaintiff's case was sent to the jury, as appears from the instructions given. That the tank was not sufficiently strong to stand the pressure to which it was subjected at the time is, of course, beyond dispute. What may be the effect of the evidence adduced in an effort to show negligence on the part of the deceased will be touched upon later; but, so far as concerns defendant's negligence, we think that the evidence tends with much force to establish a failure on the part of the defendant to exercise ordinary care with respect to the appliance in question, and to show a breach of the duty which it owed its servant.

It is conceded that though the tank had been in defendant's possession for a period of approximately 26 years, during nearly all of which time it was constantly in use, it had at no time been inspected in any manner so as to determine whether or not it was reasonably safe for the use to which it was being applied. It was designed to be and was subjected to enormous pressure in the course of its operation, and contained a deadly substance, to wit, ammonia, the fumes of which

caused the death of plaintiff's husband. It was a highly dangerous instrumentality, and one requiring inspection from time to time, at reasonable intervals, in order to determine its capacity to stand the strain to which it was subjected.

[2] It is a trite doctrine that the duty resting upon the master to inspect and to make such examinations and tests, at reasonable intervals, as may be reasonably necessary to ascertain the condition of the place where or the instrumentality with which the servant is required to work is an affirmative and continuing duty. This question has been but lately discussed by us in *Pendegrass v. Railroad*, 162 S. W. 712, and it is unnecessary for us to repeat what was there said. See, also, *Ogan v. Railroad*, 142 Mo. App. loc. cit. 252, 126 S. W. 191; *Denker v. Milling Co.*, 135 Mo. App. 340, 115 S. W. 1035; *Scheurer v. Rubber Co.*, 227 Mo. loc. cit. 368, 126 S. W. 1037, 28 L. R. A. (N. S.) 1207, 21 Ann. Cas. 1110; *Guttridge v. Railway Co.*, 105 Mo. 520, 16 S. W. 943.

It appears that the exterior of the tank was kept painted, and it is said that the ammonia within the tank would preserve the interior thereof, and that hence the tank could not deteriorate either from within or without. But the expert testimony for plaintiff is to the effect that the weakening of the tank was caused by a gradual process of crystallization of the metal composing it, wholly independent of any corroding process upon the surface of the material. On the other hand, the fact that the exterior of the tank was painted would of necessity prevent any inspection thereof, respecting its safety, by merely looking at it. And, indeed, merely looking, under such circumstances, would not be sufficient; but the master must use such reasonable tests as ordinary prudence would suggest, in order to ascertain the condition of such an appliance. See *Guttridge v. Railway Co.*, *supra*.

The evidence adduced by plaintiff respecting the condition of the tank, the admitted failure of defendant to inspect it, together with the expert evidence for plaintiff tending to show that a proper test would have disclosed its unsafe condition, is sufficient to cast liability upon defendant, unless, indeed, defendant may be relieved therefrom upon the ground either of assumption of risk or of negligence on the part of deceased, as pleaded in defendant's answer.

[3] We may pass over the alleged assumption of risk on Nowotny's part, for it is altogether clear that it was no part of his duty to make such tests as might be necessary to determine the safety of the appliance in question. And while he assumed the risk ordinarily incident to the employment, after the performance of the duty which the law en-

joins upon the master, he assumes no risk arising from the master's negligence. See *Crader v. Railroad*, 164 S. W. 678, and cases cited.

[4] As to negligence on Nowotny's part, we think it sufficient to say that whatever appeared on this score was by no means conclusive, but merely raised a question for the jury. Plaintiff asserts that the testimony of defendant's chief engineer as to his statements to Nowotny on the evening in question, respecting the condition of the valves upon the tank, was much shaken by the testimony of this witness at the coroner's inquest, all of which came into the case without objection. But we shall not discuss this phase of the matter. It does not appear that Nowotny can be said to have been negligent as a matter of law, granting the truth of the evidence adduced by defendant on this score. Defendant's answer sets up that the engine room and machinery therein were under Nowotny's complete charge and control during the hours of his employment, and that it was his duty to exercise his own judgment with respect to the management thereof. And such is defendant's evidence. And if, during the course of the evening in question, it became, in Nowotny's judgment, necessary or proper to make any change in the valves of this tank, there is absolutely nothing to show that he had any cause to suspect that it was dangerous to do so. There is nothing whatsoever to suggest that the tank, under such circumstances, would be subjected to anything more than the pressure to which it was ordinarily subjected, and which Nowotny might assume would be safe. Quite to the contrary, it may be readily inferred that, if Nowotny did in fact reconnect the tank with the remainder of the refrigerating system, it would then be subjected to the pressure which prevailed over the entire system in use, the strain of which all portions thereof were intended to stand. And, though Nowotny was in charge of the engine room, others had access thereto, and it appears that others were in the room on this very evening, prior to the explosion. It by no means conclusively appears that Nowotny did any negligent act causing or contributing to cause his injuries, but, on the contrary, the evidence relating to his alleged negligence could do no more than raise an issue to be determined by the jury.

Other questions raised have been fully examined, but they are not of sufficient merit or importance to call for discussion. The cause was well tried below, and the amount of the verdict, to wit \$5,500, is not challenged.

The judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

**ROTH v. CITY OF ST. JOSEPH.**

(Kansas City Court of Appeals. Missouri.  
June 1, 1914.)

**COURTS (§ 231\*) — MISSOURI — MOTION TO TRANSFER TO SUPREME COURT—CONFLICTING DECISION.**

The decision of the Kansas City Court of Appeals that a defect in a petition was waived because not duly raised and because of the theory of the parties at trial is not conflicting with decisions of the Supreme Court and other Courts of Appeal that petitions similar to the one involved were defective; and hence a motion to transfer to the Supreme Court on the ground of conflict must be denied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 437, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

On motion to transfer to the Supreme Court. Motion denied.

For former opinion, see 167 S. W. 1155.

**TRIMBLE, J.** A motion to transfer this case to the Supreme Court has been filed claiming that the foregoing decision is in conflict with *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 130 Am. St. Rep. 761, 12 Ann. Cas. 457, *Millar v. Transit Co.*, 216 Mo. 99, 115 S. W. 521, and *Greer v. Railroad*, 173 Mo. App. 276, 158 S. W. 740, in holding that the petition herein is not vulnerable to attack in this court for the first time, under the circumstances of this case.

We do not think the decision herein conflicts in any way with the above decisions on the point mentioned. In the case at bar the petition clearly stated a cause of action which survived—namely, the injury to the property rights of Mrs. Guzman. One of the items of damages claimed was to her health merely. No attack in any way was made on the petition in the trial court nor complaint made of it in the motion for new trial. The trial was had with both sides expressly stating that the injuries to her health did not cause Mrs. Guzman's death. The attack made, therefore, did not go to the plaintiff's entire cause of action, but only to one item of the damages claimed, and, as to that one item, defendant at the trial agreed with plaintiff that the personal injuries to Mrs. Guzman's health did not result in her death. The case is therefore wholly unlike the case of *Greer v. Railroad*, 173 Mo. App. 276, 158 S. W. 740, where the original suit was solely for personal injuries, and the petition of the revived suit intimated that the injuries did cause the death, and the point was duly raised and saved. Nor is the case at bar like the case of *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157, 130 Am. St. Rep. 761, 12 Ann. Cas. 457, where the original suit was for the negligent killing of plaintiff's husband, and the petition, of course, expressly stated that the injury resulted in the death of deceased. The same is true of *Millar v.*

*St. Louis Transit Co.*, 216 Mo. 99, 115 S. W. 521. The original cause of action was for the death of the plaintiff's husband. In all these cases the petitions clearly stated no cause of action at all. In the case at bar the petition not only stated a cause of action as to the property rights which survived, but, as it sued merely for impairment of health, and not for loss of life, the inference could be indulged in its favor that the nuisance did not cause the death, especially when both sides were asserting and agreeing in the trial court and here that the death was not caused thereby, and no objection was raised to the petition because it failed to expressly and specifically aver that fact. We are not holding in this case that when a suit for personal injuries is revived in the name of the plaintiff's administrator the petition need not state that the personal injuries did not result in death. All we are holding is that, under the allegations of this petition, and the course pursued by defendant, the objection that the petition did not contain an allegation specifically and affirmatively stating that the nuisance did not result in death cannot now be raised by defendant for the first time in the appellate court.

The motion to transfer is therefore overruled. All concur.

**TWENTIETH CENTURY MACHINERY CO.  
v. EXCELSIOR SPRINGS MINERAL WATER & BOTTLING CO. (No. 11275.)**

(Kansas City Court of Appeals. Missouri. Nov. 23, 1914. Rehearing Denied Dec. 21, 1914.  
On Motion to Transfer, Dec. 21, 1914.)

**1. SALES (§ 23\*)—OFFER—ACCEPTANCE—MEETING OF MINDS.**

An offer to buy, met by a counter offer, is refused, for there can be no contract of sale until the minds of the parties meet in mutual agreement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.\*]

**2. SALES (§ 479\*)—ACTIONS—EVIDENCE.**

Evidence held to show that the parties entered into a valid conditional contract for the purchase and sale of the articles claimed to have been converted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

**3. SALES (§ 479\*)—CONDITIONAL CONTRACT OF SALE—REMEDY OF SELLER.**

Where goods were sold under an agreement that title should remain in the seller until payment was made and the buyer failed to make payment according to the contract, the seller may stand on his title and sue in replevin or for the conversion, or waive his title and sue for the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

**4. SALES (§ 473\*)—CONDITIONAL SALES—TITLE OF SELLER.**

Where goods were sold under an agreement that the title should remain in the seller until payment, a purchaser from the buyer, who took

with knowledge of the conditional nature of the sale, is bound by the condition.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377-1390; Dec. Dig. § 473.\*]

#### 5. TROVER AND CONVERSION (§ 11\*)—WHAT CONSTITUTES.

Where defendant held and refused to pay for goods knowing that its vendor had acquired them under a conditional contract sale, there was a conversion, and the original seller could sue for the conversion or replevin the goods without formal demand.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 95-98; Dec. Dig. § 11.\*]

#### 6. SALES (§ 479\*)—CONDITIONAL SALES—REMEDIES.

For one who sold goods under a contract reserving the title until payment to sue for the purchase price is not an election barring action for conversion, where the suit was not prosecuted to judgment; for, the reservation of title being in the nature of a security for payment, it requires more than a mere effort to enforce payment to constitute a waiver of the security.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

On Motion to Transfer.

#### 7. TROVER AND CONVERSION (§ 32\*)—PETITION—ESSENTIALS.

The petition must show plaintiff was entitled to possession of the property at the time of the suit for conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 191-202; Dec. Dig. § 32.\*]

#### 8. TROVER AND CONVERSION (§ 32\*)—PETITION—SUFFICIENCY.

The petition must allege the value of the property claimed to have been converted.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 191-202; Dec. Dig. § 32.\*]

#### 9. PLEADING (§ 406\*)—ERRORS—WAIVER.

Unless raised by demurrer, the insufficiency of a petition, which did not allege that plaintiff was entitled to possession at the time of the conversion, is waived and cannot thereafter be raised.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.\*]

Appeal from Circuit Court, Clay County; F. P. Divilbiss, Judge.

Action by the Twentieth Century Machinery Company against the Excelsior Springs Mineral Water & Bottling Company. From a judgment for plaintiff, defendant appeals. Affirmed, and cause transferred to the Supreme Court.

Culver & Phillip, of St. Joseph, and Craven & Moore, of Excelsior Springs, for appellant. Richard I. Bruce, of Liberty, for respondent.

JOHNSON, J. This suit was begun in the circuit court of Clay county, May 7, 1913, for the recovery of the value of certain machinery which, it is alleged, belonged to plaintiff and was wrongfully converted by the defendant corporation. The title claimed by plaintiff is founded on an alleged written contract in which plaintiff sold the machin-

ery to the grantor of defendant and reserved title in itself until the payment of the purchase price by the vendee. The answer, in addition to a general denial, alleges that before the institution of this suit plaintiff waived its title in the property and elected to enforce the alleged contract as a contract of sale. The case was tried without the aid of a jury, and judgment was rendered for plaintiff. Defendant appealed.

On February 11, 1909, Henry Ettenson, who was engaged in the business of bottling and selling mineral waters at Excelsior Springs under the trade-name of "Excelsior Springs Bottling Company," entered into a written agreement with plaintiff, a manufacturer of certain types of bottling machines at Milwaukee, Wis., for the sale and delivery to him of a soaking machine for half-gallon bottles, a bottle washer, a labeler, and a rinser, for the lump price of \$1,800 f. o. b. at factories. The terms of payment were one-third in 30 days "after receipt of machines, one-third 30 days, and the remainder in 60 days thereafter." It was provided:

"Party of the first part (plaintiff) retains title of the property until fully paid, in cash. This agreement is not binding on the party of the first part until approved by its own office at Milwaukee, Wis."

The instrument was signed:

"The 20th Century Machinery Co., per Wm. Ercheman, Party of the First Part.  
"Excelsior Springs Bottling Co., per Henry Ettenson, Party of the Second Part."

There was no formal acceptance of the order sent to Ettenson from the office of plaintiff at Milwaukee. Two of the machines, viz., the washer and labeler, were not of plaintiff's manufacture, and under date of March 6, 1909, plaintiff wrote Ettenson from its Milwaukee office that it would be unable to ship the kind of labeler mentioned in the order and urging him to allow another kind to be furnished in lieu of the one called for. Ettenson then countermanded the order for the labeler and washer, and plaintiff accepted the countermand and afterward delivered the soaking machine and rinser to Ettenson, who installed them in his factory, where they have since been in use. The reasonable value of these machines, as well as their value as measured in the contract for the four machines, was \$907.75 for the soaking machine and \$55 for the rinser. Plaintiff billed them at these prices to Ettenson, and, not receiving payment, notified him that if the bill were not paid in a specified time a sight draft would be drawn for the amount. Under date of June 23, 1909, he replied:

"We are just in receipt of your statement for \$962.75 which should be \$900.00, as that is our contract price, on which you state that if you do not receive check by return mail you will be compelled to make protest sight draft for the amount.

"In reply will say we do not see what good it will do you to make a protest draft on us as

we will not pay it until the machine has been tested. We put in our new machinery, but found that we did not have power enough to run it, so we had to put in a new boiler, and yesterday we just put up the smokestack, but as soon as we start up and find the machinery is satisfactory we will remit you for same.

"The Excelsior Springs Bottling Company's accounts do not have to be protested; they always pay their bills promptly, and if you think you will get your money quicker by protesting, go ahead and do it, but if your machinery works satisfactorily you will get your money, protest or no protest. We refer you to your contract which says the money is to be paid after the machinery is installed.

"Yours truly,

"Excelsior Springs Bottling Co.,  
"By Henry Ettenson."

It will be noted that the signature to this letter was in the trade-name under which Ettenson had been doing business, but before the letter was written, and after the delivery of the two machines, he had transferred his business and conveyed all of the property used in its prosecution, including the machines in controversy, to the Excelsior Springs Water & Bottling Company, a corporation he had formed and caused to be incorporated under the laws of Missouri. The capital stock of this corporation was \$500,000, divided into 2,000 shares of preferred and 3,000 shares of common stock. Ettenson subscribed for and owned all of the stock with the exception of 2 shares of the common, of the par value of \$100 each, which were divided between the other two incorporators.

Ettenson died in October, 1909, and on October 22d of that year letters testamentary were issued by the probate court of Clay county, and his estate was duly administered. Plaintiff exhibited no demand against the estate and took no steps in any court to enforce its rights growing out of the sale until February 13, 1913, when it filed suit against the present defendant to recover the purchase price of the two machines on the theory that, as the successor to Ettenson's business, the corporation had assumed the payment of his liability to plaintiff. That suit was not prosecuted to judgment and resulted in plaintiff's being compelled to take a nonsuit. Afterward the present action was begun.

The position of plaintiff is that the machines were delivered pursuant to the terms of the written agreement as modified in the subsequent correspondence; that the acceptance by plaintiff of the contract thus made was manifested by the delivery of the machines which constituted full performance on the part of plaintiff, and that, since the sale was conditional, the failure of the vendee to perform the condition, followed by his transfer of the property to the defendant corporation, which took it with full knowledge of all the facts, left the title to the property in plaintiff in whose favor an action in the nature of trover would lie against defendant.

On the other hand, defendant contends that

the written agreement was nothing more than an unaccepted offer for four machines at the lump price of \$1,800, which could not ripen into a binding contract without an acceptance by plaintiff in the manner specified in the order; that there was no such acceptance but, instead, a counter proposal from plaintiff to substitute a different machine for one included in the order; and that this counter proposal was followed by an agreement that only two of the machines originally ordered by Ettenson should be delivered. It is argued that since the burden is upon plaintiff to prove a conditional sale of the machines delivered, and the only evidence of such sale is an unaccepted written offer to purchase, plaintiff must be held to have failed in its proof, which is just as consistent with the theory that the delivery was made pursuant to an agreement of which the original offer formed no part as with the opposite theory that the delivery was in performance of the original offer as subsequently modified by agreement of the parties.

[1, 2] We agree with defendant that the inclusion of the provision relating to the acceptance of the order by plaintiff bespeaks an intention of the signatory parties that the instrument should not become a binding contract upon plaintiff until its acceptance by plaintiff and should be regarded only as a mere proposal from Ettenson to purchase the four machines on the terms stated. Until accepted by plaintiff, the instrument could not become a contract of purchase and sale, and such acceptance to become binding upon the proposer had to be unconditional. An offer met by a counter offer, in law, is refused. There can be no contract of purchase and sale until the minds of the parties have met in mutual agreement. *Bronson v. Weber Imp. Co.*, 135 Mo. App. 483, 116 S. W. 20; *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378; *Richardson v. Bank*, 10 Mo. App. 246; *Shickle v. Iron Co.*, 84 Mo. 161; *Cangas v. Rumsey Mfg. Co.*, 37 Mo. App. 297; *Tufts v. Sams*, 47 Mo. App. 487; *Houston & Brazos Valley Ry. Co. v. Joseph & Brothers Co.*, 169 Mo. App. 174, 152 S. W. 394; *Stephens v. Railway Co.*, 157 Mo. App. 656, 138 S. W. 904. But we think the evidence as a whole gives substantial support to the inference upon which the trial judge evidently rendered judgment for plaintiff, i. e., that the two machines were delivered pursuant to a contract which the parties understood and intended should consist of the original proposal as modified by the subsequent agreement to exclude two of the machines from the order. The tenor of the letters in evidence is in harmony with all the proved circumstances which tend to show that the negotiations preceding the delivery of the two machines and which culminated in a final definite agreement between the parties proceeded from the mutual intention that the terms of the original proposal should

control to the extent of their applicability to the sale and delivery of the two machines which the parties finally agreed should be delivered. There is no room in the evidence for the thought that a subsequent written contract was entered into, and the final reference in Ettenson's letter of June 23, 1909, obviously relates to the original agreement and discloses that he understood the delivery had been made pursuant to its terms. The same may be said of his reference to the price at which plaintiff billed the machines. Evidently he was contending that their proportional value, as measured in the contract by the lump sum of \$1,800 for the four machines, did not exceed \$900, which he spoke of as "our contract price." If there was any other contract between the parties than that which we have described, the proof of such contract was just as available to defendant as to plaintiff, and, in view of the evidence adduced by plaintiff tending to establish the fact that the machines were delivered under the terms of the original offer as subsequently modified, we could not disturb the finding of the trial court that such was the contract without resorting to the conjecture, unsupported by proof, that another and different contract had been entered into which did not reserve title in plaintiff to the delivered machines.

[3-5] We conclude that a conditional sale of the machines was made; that the condition was broken by the vendee, Ettenson; and that thereupon plaintiff, in whom the title still remained, could stand upon its title and sue in replevin or for the conversion of the machines or, in lieu of such remedy, could waive its title and sue its vendee for the purchase price. The intervention of defendant as the purchaser of the property from the conditional vendee was without effect upon the title of plaintiff. A conditional sale contract, not acknowledged and recorded, is good between the parties and is binding upon a subsequent purchaser from the conditional vendee, unless such purchaser buys in good faith and without notice. *Coover v. Johnson*, 86 Mo. 533; *Eldson v. Hedger*, 38 Mo. App. 52. With full knowledge of the facts that the sale to its vendor was conditional and that the condition had been broken, defendant, in purchasing the machines and proceeding to use them without paying plaintiff for them, wrongfully converted them and became liable to plaintiff for their value. Plaintiff became entitled to sue defendant in replevin or in trover without formal demand, since the possession of the machines by defendant was not rightfully but, as to plaintiff, wrongfully acquired.

[6] But it is argued that in first bringing suit against defendant in affirmation of the sale plaintiff made an election between two inconsistent remedies, thereby waived its title to the property, and precluded itself from thereafter asserting a title thus waived and abandoned. The rule is invoked that:

"Where, on the sale and delivery of personal property on credit, the title is to remain in the vendor until payment, the vendor, upon the non-compliance with the conditions of sale by the vendee, may either retake the property, or may treat the sale as absolute and bring an action for the price; but the assertion of either right is an abandonment of the other." *Davis v. Millings*, 141 Ala. 378, 37 South. 737, and authorities cited.

This rule may be accepted with the qualification that the mere prosecution of a suit against the conditional vendee for the purchase price is not such an election of remedies as will amount to a waiver of title. The reservation in a contract of sale, of title in the vendor until payment of the price, is in the nature of a security for the payment, and it requires more than a mere attempt to enforce the collection of the price after condition broken to constitute a waiver of the security. The rule in cases of this character is that the prosecution of one remedial right to judgment or decree, whether the judgment is for or against the plaintiff, is a decisive act which constitutes a conclusive election, and bars the subsequent prosecution of inconsistent remedial rights; but the mere assertion in court of one of such rights, abandoned before the action has proceeded to judgment, is not such an election as will deprive the plaintiff of the right to invoke the opposite remedy, where it appears, as in the instant case, that the defendant suffered no impairment of any right by reason of the abandoned proceeding. *Iron Co. v. Iron Co.*, 153 Ky. 20, 154 S. W. 374; *Johnson v. Central Bank of Kansas City*, 116 Mo. 559, 22 S. W. 813, 38 Am. St. Rep. 615. The reasoning in the latter case applies with equal force to the present situation.

"We do not think," say the court, "that the bringing of the attachment suit by plaintiff against the Imboden Commission Company, nor the purchase by plaintiff of the office fixtures, amounted in law to an affirmation of the sale of the wheat by plaintiff to that company. This precise question was before the St. Louis Court of Appeals in the case of *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107, where the facts were that the plaintiff had brought suit and levied an attachment upon certain property of the defendant, thereby asserting the defendant's title to it. Afterwards the plaintiff, finding that it had misconceived its remedy, dismissed the attachment suit and brought replevin, thereby asserting the property belonged to it. The court held that there was no estoppel by record, for the attachment has not proceeded to judgment. There is no estoppel in pais, for the defendant has not taken such action in consequence of the suing out of the attachment that he will receive detriment in a legal sense from the conduct of the plaintiff in changing his position and pursuing a different remedy. If the rule of the circuit court were generalized, it would amount to this: That a litigant elects his remedy in every case, in the first instance, at his peril. If he finds that he has made a mistake, whether in consequence of erroneous views of law or fact, he has nevertheless estopped himself from retracing his steps. He cannot dismiss his suit and institute a new proceeding of a different nature against the same party. But no one supposes that this is law."

There was no inconsistency in plaintiff attempting to recover the purchase price and, on finding that this could not be done, resorting to the title it held in the property as a security for its vendee's performance of the contract.

The judgment is for the right party and is affirmed. All concur.

#### On Motion to Transfer.

[7-8] We are asked to certify the case to the Supreme Court on the ground that in omitting to state that plaintiff had, or was entitled to, the possession of the property at the time of its alleged conversion, the petition is fatally defective, under the ruling of the St. Louis Court of Appeals in *O'Toole v. Lowenstein*, 177 Mo. App. 662, 160 S. W. 1016, and that in affirming the judgment our decision is in conflict with that case. The petition was not attacked by demurrer, and the cause was tried on the theory that a good cause of action was pleaded and that one of the important issues of the case was the right of plaintiff to the possession of the property at the time of its alleged conversion. The sufficiency of the petition first was questioned in the motion in arrest of judgment which the court overruled.

In cases of this character the fact of plaintiff's possession or right to the possession of the property at the time of the conversion is essential to his right to recover, and a petition which fails to allege such facts is defective. *Bank v. Land Co.*, 152 Mo. loc. cit. 156, 53 S. W. 902. The same may be said of the value of the property which also must be alleged. *Case v. Fogg*, 46 Mo. 44. In the case just cited the petition did not allege the value, but the defendant, as here, did not raise the question of the sufficiency of the petition until he raised it in his motion in arrest. The Supreme Court held the petition good after verdict and that a judgment would not be disturbed "for the reason that the pleadings omit 'any allegation or averment without proving which the triers of the issue ought not to have given such a verdict.'"

In *Sawyer v. Railway*, 156 Mo. 468, 57 S. W. 108, it was held (as stated in a syllabus):

"Where the parties have tried a case as if the omitted averment were in the petition, although a demurrer was lodged against it on account of such omission, it will be sufficient to sustain a verdict, if after verdict it would have been consistent with the evidence, admitted without objection, to amend it so as to include such averment. And where such amendment might properly have been made, and the parties at the trial have proceeded as if it had been made, this court on appeal will consider the petition as having been amended."

In *Golden v. Moore*, 126 Mo. App. 518, 104 S. W. 481, we held a defect such as that under consideration was not incurable but would be deemed waived if not raised by

demurrer to the petition; and in *Merrill v. Mason*, 159 Mo. App. 605, 141 S. W. 454, we said:

"Had defendant made this objection to the petition by demurrer, it would have been good, and there is no doubt but what the court would have so decided. *Bank v. Fisher*, 55 Mo. App. 51; *Schwald v. Brunjes*, 139 Mo. App. 516 [123 S. W. 472]; *Bank v. Land Co.*, 152 Mo. 145 [53 S. W. 902]; *Golden v. Moore*, 126 Mo. App. 518 [104 S. W. 481]. But defendant should have demurred to the petition before he went into trial. The courts are not inclined to encourage such lack of diligence. This court held that such a defect may be cured by amendment when it is called to the attention of the trial court on hearing of the motion in arrest of judgment. *Golden v. Moore*, supra. It is also held, where no demurrer to the petition is filed, such objection is not good after verdict. *State ex rel. v. Reynolds*, 137 Mo. App. 261 [117 S. W. 653]; *McDonald v. Mangold*, 61 Mo. App. 291."

It is conceded in the *O'Toole* Case that the defect may be cured by amendment, and if this is so it needs must follow that the defendant may waive it, and will be treated as having waived it, if by answering to the merits he accepts the petition as tendering the statement of a good cause of action. We think the opposite conclusion, expressed in the *O'Toole* Case, is untenable, and accordingly certify this cause to the Supreme Court. All concur.

#### PARKES v. WOOLSEY. (No. 11302.)

(Kansas City Court of Appeals. Missouri.  
Dec. 21, 1914.)

#### APPEAL AND ERROR (§ 119\*)—DECISIONS APPEALABLE.

Judgment for defendant, including the usual judgment for costs, having been rendered, plaintiff on the following day, at the same term, moved to retax costs. His motion was granted, and defendant failed to move for new trial or to appeal from the judgment retaxing the costs. *Held*, that he could not thereafter appeal from a judgment denying his motion made at a subsequent term to retax the costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 823-839; Dec. Dig. § 119.\*]

Appeal from Circuit Court, Moniteau County; Jack G. Slate, Judge.

Action by J. W. Parkes against Ed. S. Woolsey. There was a judgment for defendant, and, on plaintiff's motion, certain costs were retaxed. From an order denying defendant's motion to retax the costs, defendant appeals. Affirmed.

S. C. Gill, of California, Mo., for appellant.  
Roy L. Kay and J. B. Gallagher, both of California, Mo., for respondent.

ELLISON, P. J. Plaintiff brought an action against defendant for damages suffered by reason of defendant's assault and battery. A judgment was rendered for defendant on the 6th day of May, 1914, during the May term, which included the usual judgment for costs in defendant's favor against plaintiff. Plaintiff, during the term and on the next

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

day, filed a motion to tax against the defendant costs of certain witnesses which had been subpoenaed by defendant and were not used at the trial, amounting in all to \$31.80. The court sustained this motion and adjudged such costs against defendant. The latter did not file a motion for new trial, nor did he appeal from the judgment on the motion. But afterwards, on the 4th of June, defendant filed a motion to retax the costs thus adjudged against him, and on June 8th this motion to retax was overruled. Defendant then filed a motion for new trial, which was overruled, and an appeal taken from the last judgment.

It thus appears that the trial court rendered a judgment for certain costs against the defendant, which would, but for such judgment, have been taxed by the clerk against the plaintiff, who was the losing party. No appeal was taken from that judgment. But instead defendant filed a motion to retax such costs, and the court rendered judgment refusing to retax. From this latter judgment defendant appealed after his motion for new trial had been overruled.

The appeal cannot be sustained. When the court rendered judgment taxing the costs against defendant, he should have appealed from that judgment. *Mann v. Warner*, 22 Mo. App. 577; *Bosley v. Parle*, 35 Mo. App. 232; *Paul v. Threshing Mach. Co.*, 37 Mo. App. 647; *Beecham v. Evans*, 136 Mo. App. 418, 117 S. W. 1190.

The judgment is affirmed. All concur.

#### KIESELHORST PIANO CO. v. PORTER. (No. 13748.)

(St. Louis Court of Appeals. Missouri. Nov. 3, 1914. Rehearing Denied Jan. 7, 1915.)

#### 1. REPLEVIN (§ 71\*)—RENTAL VALUE OF PROPERTY.

Where defendant, who was entitled to the use of a piano, was deprived of such use by plaintiff's wrongful replevin, evidence of the value of the use during the detention period was admissible.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 285-291; Dec. Dig. § 71.\*]

#### 2. PAYMENT (§ 70\*)—EVIDENCE—INDORSEMENT ON NOTE.

Where plaintiff replevined a piano from defendant for alleged nonpayment of a note for the price, which defendant claimed was fully paid, evidence of the nonentry of payments made on the back of the note was admissible.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 203, 204, 206-218; Dec. Dig. § 70.\*]

#### 3. EVIDENCE (§ 419\*)—WRITTEN CONTRACT—PAROL EVIDENCE.

Where defendant executed a note for \$200 for a piano, and paid \$10 cash, and delivered a credit slip for \$75, parol evidence was admissible to show that \$200 was the purchase price, and not \$275, as claimed by plaintiff, and that

plaintiff had failed to give defendant credit for the \$75.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

#### 4. TRIAL (§ 219\*)—INSTRUCTIONS—DEFINITION OF WORDS.

Where negligence was not the gist of the action, the use of the word in an instruction, without defining it, was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 489; Dec. Dig. § 219.\*]

#### 5. APPEAL AND ERROR (§ 173\*)—ISSUES NOT RAISED AT TRIAL.

No issue of estoppel having been raised at the trial by objection or instructions, it would not be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by the Kieselhorst Piano Company against Elizabeth Porter. Judgment for defendant, and plaintiff appeals. Affirmed.

H. A. Loevy, of St. Louis, for appellant. Ellroy V. Selleck, of St. Louis, for respondent.

REYNOLDS, P. J. This action, commenced before a justice of the peace, is a statutory action for claim and delivery of personal property, replevin, so-called, plaintiff claiming under a chattel mortgage executed by defendant, the chattel mortgage pledging a certain piano which had been bought by defendant of plaintiff, secured a note dated November 30th, 1908, signed by defendant, whereby for value received she promised to pay to order of defendant \$200, "with 6 per cent. interest per annum to maturity; said principal and interest payable \$10 cash this date and balance in installments of five or more dollars each and every month, beginning December 30th, 1908," with the usual clause that in case of default in the payment of the note or any installment or of interest when due the whole should become due. Defendant made no written pleading, nor does the abstract show which party prevailed before the justice. The case reached the circuit court where it was tried before the court and a jury, resulting in a verdict in favor of defendant, the jury finding that defendant is still the owner and entitled to possession of the property, describing the piano, assessing the value of it at \$125, and assessing damages in favor of defendant for the wrongful detention of it in the sum of \$31.25, that, as stated in the verdict, being at the rate of \$2.50 a month for a year and 15 days. The ordinary judgment in such cases, as provided by statute, followed. Filing a motion for new trial as well as one in arrest, plaintiff has perfected its appeal to this court.

Here counsel for appellant assigns ten errors.

[1] The first to the admission of evidence as to the rental value of the piano from date

of taking, is untenable. Respondent, if entitled to the use of the instrument, was entitled to the value of that use, and we find evidence in the record of that value as assessed by the jury.

[2] The second assignment is that it was error to admit evidence as to the non-entry of payments on the back of the note; that is, evidence was admitted to show that these payments had not been endorsed on the note until a short time prior to the trial. We see no error here.

[3] The third assignment is the most serious one in the case; that is to say, the admission of parol evidence, as it is claimed, to contradict or vary the note and mortgage.

The transaction, as in evidence, was about this: Respondent wanted to purchase a piano. Appellant is a dealer in pianos. Respondent, accompanied by her pastor, a Mr. Washington, went to the salesroom of appellant and told a salesman whom they met there, of her desire to purchase a piano. The salesman asked her how much she proposed to pay. She told him she could pay only \$200; that she was not prepared to pay more than that. The salesman showed respondent and Mr. Washington a number of pianos and quoted prices on them; some at \$200; others more or less; some new, others secondhand. Respondent expressing a preference for a secondhand one, priced at \$200, the salesman, according to the testimony of respondent and Mr. Washington, showed her a new piano and endeavored to have her buy that. He quoted it at \$200. So both these witnesses most positively testify. Mr. Washington asked the salesman how it was that they could sell a new piano for the same price as an old one, whereupon the salesman said that this new piano was named for a member of the family of the proprietor of the music house (appellant) and that the house wanted to get it on the market. Respondent still insisted that she preferred the secondhand piano; both she and Mr. Washington saying they liked its tone better. Respondent thereupon said she would take the secondhand piano at the price named, \$200. Thereupon she handed the salesman a credit slip calling for a credit of \$75 on the purchase of a piano. Respondent and Mr. Washington both testify that the salesman took this credit slip to the office in the salesroom and immediately came back to them and said that this credit slip was only good for and could only be used on the purchase of a new piano. The only contradiction at this point is that according to the salesman he did not have to go to the office with the credit slip, but that when he looked at it he saw that it called for a credit only on a new piano and at once so informed respondent. At any rate, all agree that the salesman told respondent that it could not be applied on an old piano but only on a new one; that it could not be applied in the purchase of the secondhand piano respondent

had selected. Thereupon, according to the positive testimony of respondent and Mr. Washington, respondent agreed to take the new piano at \$200, finding that she could not use the credit slip in payment upon an old or secondhand piano. There is little contradiction of this. The salesman, asked by counsel for appellant if he had told respondent and Mr. Washington that the new piano was \$275, answered:

"I may have shown them the new pianos. Ques. Did you tell either of them at that time? Ans. No, all the pianos have the tag price on them. Ques. Did you vary from it? Ans. I could not, because it is there in black and white."

Whether respondent saw this tag or had her attention called to it, does not appear. Both respondent and Mr. Washington testify in the most positive manner that no price other than \$200 was named as the price for this new piano. The salesman's only version of it is as above set out. The note and mortgage were then drawn up, presented to respondent and she signed both, paying \$10 in cash, the salesman retaining the credit slip for \$75. The piano was thereupon delivered to respondent, who retained it for nearly three years, making payments until she had paid in cash \$145, exclusive of the \$75, when appellant replevied it from her possession, claiming a balance still due on the basis of \$275 being the price of the instrument.

During these years there was a continual dispute between the parties as to how much respondent owed on the piano, respondent insisting that she was entitled to a credit for the \$75 called for in the credit slip which appellant had accepted; appellant claiming that the price of the piano was \$275; that it had credited the \$75 slip or order on its book account with respondent in which it had entered the transaction from a sales slip made out by the salesman, and that when respondent signed the note she still owed \$200, on which she then paid \$10. Including this \$10, appellant had credited respondent with \$145, not crediting the \$75 evidenced by the credit slip on the note.

Going back to the purchase of the piano and execution of the note and mortgage, it is in evidence that when the salesman handed them to respondent and she was asked to sign them, and was about to do so, Mr. Washington said: "Why do you sign a note without having it read?" Whereupon, according to Mr. Washington, the salesman said: "It is all right; that is the contract that we sell everything." The salesman testified very positively that both the mortgage and note were read by him to respondent. Respondent testified that she could write but could not read "to amount to anything." She at first testified that neither the note nor mortgage were read by or to her. On cross-examination she testified:

"They didn't read that chattel mortgage to me any more than they read it to the jury, not that much." Asked, "Did they" (meaning the

salesmen) "at that time tell you how much the balance was that was due?" she answered: "They said after I paid my money it would be \$115, I think, \$115 with interest, being interest on the \$115 with six per cent.; that would be what I had to pay after I had paid this \$75 and the \$10. Ques. Was that stated to you at the time you signed the papers? Ans. That was stated to me at the time I signed the papers right then and there what the amount would be."

So much for the facts as in evidence.

On these facts the court, at the instance of appellant, instructed the jury as follows:

"If you believe and find from the evidence in this case that defendant bought a piano from plaintiff for \$275; that she received a credit on purchase price at that time from plaintiff for \$75, and then executed her note for \$200, payable to its order, at the rate of \$10 cash and \$5 each month, with interest at 6 per cent. per annum from date, and secured payment thereof by a chattel mortgage on said piano, in and by which she agreed that if she failed to make payments as agreed by her, then plaintiff should be entitled to the possession of said piano, and if you further find and believe from the evidence that on October 24, 1911, she was by reason of said note, indebted to plaintiff in any sum, then plaintiff is entitled to recover the possession of said piano, and your verdict must be for the plaintiff."

At the instance of respondent, the court instructed the jury, in substance, that if they found and believed from the evidence that on November 30th, 1908, plaintiff sold the piano to defendant for \$200 and the order for \$75 mentioned in the evidence is a partial payment on the piano, "and if the jury find and believe from the evidence that the signature of defendant to the mortgage and note in question was obtained upon a false representation by plaintiff or its authorized agents as to the amount to be paid thereon, and the defendant signed it without knowing the amount and under the belief it was for the sum of \$125, and not for an amount in excess thereof, and you further so find that said sum of \$125 has been paid to plaintiff by defendant, or if you shall find that the mortgage and note was misread to defendant and she signed it when she was told by a representative or representatives of defendant, and believed that she was signing another and different one in amount, to-wit, one for \$125, and that defendant did not or could not herself read such note, and that she was not guilty of any negligence in so signing the mortgage and note, then, your verdict must be for the defendant."

Two instructions as to the amount of the verdict were given.

The principal contention by counsel for appellant is as to this first instruction and his very learned argument turns largely on his third assignment of error; that is, that the respondent was allowed to introduce parol evidence attacking the note and mortgage. It may be admitted that this first instruction is inartificially drawn. But the question for us here is, is it so defective and so misleading and so erroneous as to demand a reversal of this judgment? In the first

place, "it is not necessary to hold that the parol evidence attacked or contradicted the note and mortgage." Absent fraud, that cannot be done. *Jenkins Sons Music Co. v. Johnson*, 175 Mo. App. 355, 162 S. W. 308; *Ely v. Sutton*, 177 Mo. App. 546, 162 S. W. 755, and the many cases there cited. Fraud is here relied upon, but that fraud goes, not directly to impeach the note and mortgage, but to the claim of appellant that at the time of the execution of these papers respondent did so to evidence that a balance of \$200 was due on the purchase of a piano at the price of \$275. The testimony in the case, if believed by the jury, is overwhelming that respondent never undertook or agreed to buy any piano other than the one priced to her at \$200. Granting that she read both papers; granting that she is bound by them and cannot be permitted to contradict them, absent fraud, it seems clear that respondent had a right to assume even from them, that she was to pay only \$200. The salesman told her, in presenting the papers to her for signature, and after, as he says, having read them to her, "It is all right; that is the contract that (by which?) we sell everything." So that respondent may well have assumed, if she knew that the note called for the payment of \$200, that as she was buying a piano at that figure it was all right to put \$200 in the note as that was what she was to pay, and that having turned over the credit slip calling for \$75, which appellant accepted, and having paid \$10 in cash, that the \$200 note would be credited with both of these payments. It is not necessary therefore to hold that her testimony tended to impeach or contradict the note; to the contrary it may be said to be consistent with it.

We hold that under the facts in evidence, it does not follow that this evidence is to be construed as contradicting the note or mortgage. More accurately, it bore on the question of whether proper credit had been given upon the note. The note and mortgage might well stand as executed and yet the question would remain as to whether defendant still owed anything on the note. This, not in contradiction of the note but accepting it, challenging the correctness of the credits.

There is abundance of evidence tending to prove that respondent supposed she was buying a \$200 piano and that she never intended to and never agreed to pay \$275. Neither the note nor mortgage make any reference to \$275 as the price of the piano she bought; in fact, they do not name any price, but call for \$200, ten of this to be paid in cash. The evidence is conclusive that respondent supposed she was buying the piano for the total price of \$200. Along with the delivery of the note respondent paid \$10 cash, having before that turned over the credit slip for \$75, and appellant credited the \$10 on the note. Instead of crediting the \$75 on the note, it credited it on a piano at the price of

\$275. It is clear that respondent never agreed to pay that price for any piano.

[4] The use of the word "negligence" in this instruction, without explaining it, was not error. The cases in which it is held that to do so is error, are cases in which the gist of the action was negligence. That is not this case.

[5] It is urged that by retention of the piano for so long a time and by overpaying the debt (according to what respondent claimed she owed), respondent is estopped from now setting up her defense. No such issue was raised below by objection or instruction. On the facts before us we cannot declare estoppel as a matter of law. Claiming and obviously believing that she had paid in full for the instrument, respondent was under no obligation to return it. That she had constantly and consistently insisted on her purchase of the instrument at and for the price of \$200, is very clear.

Other errors are assigned, but we do not consider them tenable, nor, in the view we take of the case, do we deem it necessary to discuss them.

We are admonished by statute (R. S. 1909, § 1850), to disregard any error or defect in the proceedings which shall not affect the substantial right of the adverse party, and by section 2082 not to reverse the judgment of the trial court unless we shall believe that error was committed against appellant and materially affecting the merits of the action.

Applying these statutory provisions, we fail to find reversible error.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

RIGLER v. REID et al. (No. 13751.)  
(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Jan. 7, 1915.)

1. CORPORATIONS (§ 121\*)—STOCK SALES—FRAUD—RESCISSION—ELECTION.

One defrauded into purchasing corporate stock has one election, either to rescind, or to abide by the contract and recover damages, and, having once elected, his election is final.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

2. CORPORATIONS (§ 117\*)—STOCK SALES—EVIDENCE—FALSE REPRESENTATIONS.

Where defendant sought to rescind a purchase of corporate stock made May 16, 1911, for fraud, and had elected to affirm a prior purchase of certain of the same stock, false representations antedating and concurring with the prior purchase were irrelevant and inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.\*]

3. EVIDENCE (§ 441\*)—RIGHT TO RESCIND—PAROL EVIDENCE.

Where a written contract for the sale of corporate stock was plain and explicit on its face, and contained no provision authorizing defendant to rescind, if dissatisfied, at the end of

30 days, parol evidence that such option was an agreed provision of the sale was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

4. CORPORATIONS (§ 117\*)—STOCK SALES—RESCISSION—FRAUD.

Evidence held insufficient to warrant a finding that defendant was induced to purchase certain corporate stock from plaintiff and execute a note for a part of the price by fraudulent representations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.\*]

5. CORPORATIONS (§ 116\*)—SALE OF STOCK—CANCELLATION—FRAUD.

Cancellation of a contract for the sale of corporate stock cannot be had for the seller's mere breach of a promise nor because of his statement that the stock was very valuable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. § 116.\*]

6. CORPORATIONS (§ 117\*)—STOCK SALES—RESCISSION—FRAUD—TIME—"IMMEDIATELY."

While the word "immediately," as used in the rule that one induced to purchase property by fraud must immediately rescind, does not mean "instantly," regardless of hindering conditions, it does mean within a reasonable time, considering the conditions and circumstances prevailing, and that the buyer shall not be permitted to speculate on whether to rescind; and hence, where defendant purchased certain corporate stock from plaintiff on May 16th, and was immediately elected secretary of the company, and did not elect to rescind for alleged fraud until July 29th, his election was not made within a reasonable time, and his right to rescind was lost.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.\*]

For other definitions, see Words and Phrases, First and Second Series, Immediately.]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by R. I. Rigler against H. E. Reid and others. Judgment for defendants, and plaintiff appeals. Reversed, and judgment ordered for plaintiff.

A. H. Breitenbach and H. A. Loevy, both of St. Louis, for appellant. Thomas H. Sprinkle, of St. Louis, for respondents.

NORTONI, J. This is a suit on a promissory note, but the important question for consideration relates to the equitable defense set forth in the cross-bill. The answer and cross-bill charge the note was induced through fraudulent representations on the part of plaintiff; avers defendant rescinded the contract on discovery of the fraud; and prays the court for a decree of rescission touching the note and the contract of purchase for which it was given. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

It appears that plaintiff, one Bloomer, and Williamson were conducting a small business in St. Louis in partnership and manufacturing extracts. About February 25, 1911, this business was incorporated for \$10,000 under the name of the Mound City Extract Company. The goods of the partnership were

given over to the corporation in payment of the capital stock of \$10,000, and such stock was issued to plaintiff, Bloomer, and Williamson. About March 9th defendant Reid, desiring to go into business, purchased 300 shares of the stock, the face value of which was \$10 each, for \$1,000, from plaintiff, Dr. R. I. Rigler. At the time of this purchase, March 9th, it is said plaintiff made certain false representations to defendant with respect to the value of the stock, etc. Among other things, it is said Dr. Rigler told defendant he had invested \$3,500 in the business, and that it made a profit of 400 per cent. However, there is no statement that it made a net profit of that amount. There is evidence tending to prove that some of the receptacles for extracts were not full, as they seemed to be, and that, in fact, the inventory was "stuffed." There is some evidence, too, that all of the liabilities of the company were not truly revealed to defendant; the discrepancy being some \$500 or \$600, thereabout. But, after all, the statement of assets and liabilities that defendant details shows total assets of \$11,488.05 owned by this \$10,000 corporation, and it appears defendant purchased \$3,000 worth of stock at par value therein from plaintiff for \$1,000, or at 33½ cents on the dollar. On March 31, defendant was elected secretary of the company, and it appears that he continued in and about its office and plant all of the time, and took an active part in managing the affairs of the business. Plaintiff, Dr. Rigler, was a practicing physician, and it is said he was present at the place of business only occasionally. Matters moved along with defendant present in the place of business and Bloomer traveling "on the road" until about the 16th of May, when one Herzog desired to purchase defendant's stock and the controlling interest in the business. On May 16th defendant made a new purchase of stock from plaintiff, Dr. Rigler, with a view, he says, of selling his entire interest to Herzog. By this second purchase, effected on May 16, 1911, defendant procured from plaintiff 460 additional shares of the stock in the company for the agreed price of \$1,800, to be paid as follows: \$50 cash; and \$1,750 by a note, dated May 16, 1911, and due in 30 days. This transaction was evidenced by a written contract, of even date therewith, executed by both parties, and, as part of the consideration, defendant agreed to pay a note held by the Cass Avenue Bank for \$208 and another note to the Merrill Drug Company for \$80. Defendant insists, too, that it was agreed that if he became dissatisfied within 30 days he could surrender the stock to plaintiff, Dr. Rigler, take up his note, and receive the \$50 paid, which was to be returned, and be released from the bargain; but there is no mention of this feature of the transaction in the written contract referred to. About June 1st defendant had occasion to go through the books of the com-

pany, and discovered, as he says, that he had been deceived on purchasing his stock on the 9th of March theretofore, in that the liabilities of the company were several hundred dollars greater than he had understood, and the amount of goods on hand was not as great as had been represented to him at the time; also that plaintiff had not invested \$3,500 therein. Thereafter he sought to rescind by tendering the stock purchased on May 16th to plaintiff and demanding the return of his note and the \$50 paid on the purchase of stock. Plaintiff declined to accede to the proffered rescission, and said they would straighten the matter out some way, but nothing was done. Several months thereafter plaintiff instituted suit against defendant on the note of date May 16th, given in consideration of the second purchase of stock, and defendant sets forth in his cross-bill that the note was induced by fraud; that upon the discovery of the fraud he rescinded the contract; and prays the court for a decree of rescission canceling the note and a judgment awarding him a recovery of the \$50 from plaintiff. There is much evidence in the record concerning representations made by plaintiff to defendant, pertaining to the first purchase of stock on March 9, 1911, but obviously this is foreign to the issue here in judgment, for the present suit deals alone with the note given May 16, 1911, and the cross-bill seeking a rescission for fraud in the inception of that transaction. Defendant in no wise seeks to rescind the contract by which he purchased the stock in the company of plaintiff on March 9th, but, on the contrary, affirms that transaction.

[1] A person defrauded into making a contract has but an election, and an election once determined is determined forever. An election to abide by the contract will prevent its rescission.

[2] Defendant clearly affirms the transaction of March 9th, and his cross-bill seeks equitable relief only with respect to the transaction of May 16th. The fraud, if any, antedating and concurring with the purchase of March 9th, appears to be condoned and ratified by defendant. But, though such be true, he details in evidence alleged fraudulent representations with respect to the transaction of March 9th as if they are pertinent to be considered on his cross-bill for rescission of the contract entered into May 16th thereafter. Obviously this evidence is beside the case, for the contract in judgment is to be determined with reference to the facts and circumstances under which it was made. Concerning this matter, we find no substantial evidence in the record tending to prove fraudulent representations sufficient to mislead defendant and authorize the cancellation of the contract entered into on May 16th.

[3] However, on reviewing defendant's evidence, it appears his real ground of complaint on which he seeks a rescission of the contract of May 16th in judgment here is

that plaintiff agreed to take back the stock and surrender the note in suit if defendant were dissatisfied at the end of 30 days. But this may not be considered; for the whole transaction was reduced to writing at the time, and no such provision appears therein. Obviously this is but an attempt to vary by parol the terms of a written contract plain and explicit on its face. The evidence concerning this matter is to be rejected entirely as of no avail here.

[4] We come now to consider the question of the alleged fraud and false representations, or, in other words, the fraud and deceit practiced by plaintiff on defendant, and relied upon as the inducing cause of the contract of May 16th, by which defendant purchased the 460 shares of stock and executed the note for same. The substance of defendant's case touching this matter is revealed in the following portion of the record—that is, an extended excerpt from his testimony—which we copy:

"Q. It was May 16th that you bought the second block of stock? A. Yes, sir. Q. Now, from March 9th to May 16th, what, if anything, did Dr. Rigler have to do with the conduct of the company? Did he take any active part in the management of the office? Did he come to the office to do anything? A. Yes; he was down there quite often; but he had nothing actually to do. He is a practicing physician. He would drop in there every day or two. He would call up a couple of times a day, probably. Q. When you bought this second block of stock and gave this note, what induced you to do it? What did you rely upon? A. He came down there. He had been sending people down there about the stock, looking at the stock, and looking at the place, and he didn't like the idea of it getting out only just with us few in. He told me it would be a good thing for me to buy it. Q. Is that the reason you bought it? A. On his recommendation. I believed in him. I believed that what he said was right. I thought that he— Q. What do you mean by 'what he said was right'? A. Well, he had always done what he told me he would do, in the best way; his business dealings had been favorable previous to this time. Q. Did you rely on his statement that he would take this stock back and return your \$50 in 30 days, if you were not satisfied? A. I did. Q. Then you didn't rely on the statement made in March as to the condition of the company? A. Yes; I put that along with what he told me; I thought it must be correct. My investments previous to this time were under the same conditions, and when I asked for the principal, he has returned it to me. Q. Between the 9th of March, when you were put into the office to learn the business and after you bought the first block of stock, and the 16th of May, when you bought the second block of stock, did you discover anything in or about the business or the books of the company that led you to suppose that the statement made on March 9th was not true? A. Only in these checks that came in and the commissions and the few bills that were there. I took it up with them, and they said it would be adjusted later. The doctor said he would fix it up with me. Q. I thought you told me a while ago that he told you that those checks were issued for money that was due him personally. A. I kicked on those being paid. Q. What was it he said he would do when you kicked on that being paid? A. He suggested several times that he would sell some of his stock and put the money into the company. Q. How much? A. He suggested dif-

ferent shares; suggested it different times. Q. Put it into the company—what for? To replace the amount of these checks? A. Yes, sir. Q. Reimburse the company for what it had expended? A. That they hadn't given me. Q. What I am trying to find out from you is what was the inducing cause for your buying this second block of stock—what was it you relied upon that induced you to buy the stock? A. Well, it was this: He kept sending representatives down there and telling me what a good thing this was, and made me believe that the stock was very valuable. His representatives were Mr. Parker, Mr. Sarles, his brother-in-law, and he had two other parties come down. He phoned me that they were coming, and he told me of several parties that he was going to send down to buy stock in the company. He said he was trying to sell his own stock, and he told me in advance that he was about to send somebody down to inquire as to the condition of the company. He told me to show the people around there; tell them what profit was being made, and what he had there, in a general way most generally Bloomer taking care of them. He also had the arrangement with him as well as with me. Q. What did he tell you to say to these customers about the profits being made? A. About the same as what he had told me. Q. What did he tell you? A. About 400 per cent. He made the statement to me that the company was making 400 per cent. before I bought my first stock. That conversation took place out at his office just about the day before I bought my stock. Q. Now, repeat that conversation as it occurred, as far as you can. A. I asked him what per cent. the company was making. He said about 400 per cent. profit. Along with this conversation he said that he had invested himself personally. Q. Was that gross profit, or net profit, did he say? A. No; he didn't say that. Q. Did the company make a gross profit of 400 per cent. on its sales? A. Well, I hardly know whether they did or not; I don't think they did; in fact, I didn't go into the works enough to get to realize what he really did make, the way they bought the stuff in small dribs. I bought this second lot of stock on the 16th of May. After that I continued in the office of the company until June. Then there was arrangements made at the bank at that time for Bloomer to write the checks. I had been signing the checks before that time. The cashier told me about the change when I went to balance the bank book. We kept a bank account at the Cass Avenue Bank. It had been kept there while they were a partnership and after it was incorporated. I left the place about June 16th. Q. Why did you leave? A. Bloomer had not been on the road for several weeks previous to that date. He came in, and he wanted to take charge of the plant. There was nothing for me to do that I could reap any benefit from; I had to go out and do something for a living. He took charge of the place. Q. From the 9th of March until the 16th of June were you paid anything for your services there? A. Yes; I had something like \$200 altogether; probably a few dollars more than that. Q. Was there any arrangement among you as to how much you should draw? A. There was; \$100 a month. Q. With whom was the arrangement made? A. Dr. Rigler and Mr. Bloomer. Q. Was any one else besides those two consulted about how much you should draw in the way of salary? A. No, sir; that arrangement was made practically between Dr. Rigler and I. The board of directors of the company consisted of Dr. Rigler, Williamson, and Bloomer. I never was a member of the board. I was elected secretary about the 31st of March, and did not resign as secretary. On June 16th I quit, because there was nothing out there for me to do, owing to the fact that Bloomer had come in, and he wanted to take charge of the plant. I offered to give this stock

back to Dr. Rigler, and demanded my note and the \$50 before June 16th at his office."

Obviously the statements attributed to plaintiff in this testimony are wholly insufficient to charge him as for false representations, so as to infect the transaction with fraud sufficient to authorize a rescission of the contract on that ground. The witness says that he relied principally on the promise of plaintiff to surrender his note and accept the stock in return if he became dissatisfied in 30 days, and the evidence concerning this matter is incompetent, because it contradicts and varies the written contract which, separate and apart from the note, details the whole transaction.

[5] Furthermore, cancellation on the grounds of fraud may not be had for the mere breach of a promise. The mere fact that men were sent to defendant telling him what a good thing the business was, without more, is insufficient to predicate the charge of fraud, and so, too, is the statement that the stock was very valuable. The latter is no more than an expression of opinion, and defendant, being secretary of the company, and in charge of the plant, was certainly not misled thereby. What defendant says on harking back to the representations made in March, to the effect that plaintiff stated the business yielded a profit of 400 per cent., counts for nothing, because he even disclaims knowledge as to whether that representation is true or false. The witness says that plaintiff did not say whether such a profit was net or gross, and then says, too, that he doesn't know whether that representation was true or false. It is entirely clear that the representations relied upon as fraudulent for a rescission of the contract are insufficient.

[6] Moreover, it does not appear that defendant disaffirmed promptly and tendered the stock to plaintiff in due time in order to afford him the right of rescission as for fraud and deceit. It is true defendant says he discovered the alleged fraud on the 1st of June, and declared a rescission and tendered the return of his 460 shares of stock to plaintiff immediately before June 16th. But it appears from other portions of the record that plaintiff continued in and about the business for some time thereafter, and, indeed, sought to sell this stock to other parties. Letters in the record admittedly written by defendant reveal such to be true, and we find the fact to be that he first declared a rescission and tendered the stock to plaintiff about July 29th, as stated by plaintiff. The facts and circumstances and letters in evidence overwhelmingly support this view. No one can doubt that the right to disaffirm or rescind a contract on the ground of fraud must be exercised promptly—that is, on the discovery of the fraud—and the disaffirmance must be in toto. See *Estes v. Reynolds*, 75 Mo. 563; *Taylor v. Short*, 107 Mo. 384, 17 S. W. 970;

*Dougherty v. Stamps*, 43 Mo. 243. One who has been defrauded has an election either to affirm or rescind the contract, but he is bound to make that election at once on discovering the existence of the alleged fraud practiced upon him. He is not at liberty to hesitate and delay and wait for a future view of his own convenience or the market value of the property and to put forward an effort to sell the stocks before determining the question of the affirmation or the rescission of the contract. See *Hart v. Handlin*, 43 Mo. 171. Of course, "immediately," in such cases, does not mean "instantly," regardless of hindering conditions. It may be said to mean a reasonable time, considering the conditions and circumstances which prevail. However, such reasonable time is not allowed to speculate on whether to rescind, but rather to do the things necessary in order to rescind. *Long v. International Vending Co.*, 158 Mo. App. 662, 139 S. W. 819. At most, the right of the party is one of an election to rescind or affirm the contract, and, unless he acts with reasonable promptitude thereon in declaring a rescission, he is to be treated as having waived his right to rescind and elected to affirm the transaction. An election once determined is determined forever; for it cannot be recalled. See *Fry's Specific Performance* (5th Ed.) § 739; *Harms v. Wolf*, 114 Mo. App. 387, 89 S. W. 1037. Defendant should be regarded as having elected to affirm the contract because of his failure to promptly rescind.

For the reasons above pointed out, the judgment should be reversed, and the cause remanded, with directions to the trial court to enter judgment for plaintiff on the note and dismiss defendant's cross-bill.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

# BAXTER v. CAMPBELL LUMBER CO. (No. 1323.)

(Springfield Court of Appeals. Missouri. Dec. 12, 1914.)

## 1. APPEAL AND ERROR (§ 761\*)—BRIEFS—CITATION OF MISSOURI AUTHORITIES.

Attorneys citing in their briefs Missouri cases should add parallel references to the official reports when they cite the *Southwestern Reporter*, though cases from other states may be cited from the *Reporters* alone.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3096; Dec. Dig. § 761.\*]

## 2. MASTER AND SERVANT (§ 287\*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—QUESTION FOR JURY.

Whether an injury to an employé was caused by the negligence of fellow servants held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054–1067; Dec. Dig. § 287.\*]

**3. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—SAFE PLACE TO WORK.**

Whether the place where an employé worked was reasonably safe *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**4. MASTER AND SERVANT (§§ 101, 102\*)—INJURY TO SERVANT—SAFE PLACE TO WORK.**

The work of installing a blowpipe in a sawmill to collect and convey sawdust, shavings, etc., from saws and planes, is within the rule requiring an employer to furnish a safe place to work, though the fact that the place of doing the work is temporary may be considered in determining what is reasonable care in providing a reasonably safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**5. MASTER AND SERVANT (§ 222\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.**

An employé working in the presence of and in obedience to the peremptory command of his employer, demanding quick obedience, may rely on the superior knowledge of the employer, and obey without inspection, and may assume that the employer will not send him into a place of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

**6. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

An instruction, in an action for injuries to an employé, which states generally that the employer must furnish a reasonably safe place to work, does not impose on the employer too high a duty, where the court in applying the facts states that to justify a recovery the jury must find that the employé's injuries were caused by the employer's negligence in failing to furnish a reasonably safe place, and that the employer is not an insurer of the employé's safety, and that a recovery must be based on the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1150, 1158-1160; Dec. Dig. § 293.\*]

**7. MASTER AND SERVANT (§ 226\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

An employé does not assume risks arising from the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.\*]

**8. TRIAL (§ 242\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

Where, in an action for injuries to an employé, the court correctly charged on assumption of risk by stating that the employé assumed the risks ordinarily incident to the work, and if he was injured by the dangers incident to the work he could not recover, instructions that the employé did not assume risks incident to the employment unless such risks and dangers were so apparent that an ordinarily prudent man would not have undertaken the work, and that the verdict should be for the employé on the defense of assumption of risk in using a dangerous place to work at the employer's directions, unless the danger was so obvious as to deter a man of ordinary prudence from so doing, were not misleading, though correctly stating the law on contributory negligence instead of

assumption of risk, as declared by the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

**9. APPEAL AND ERROR (§ 1053\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The admission of evidence that an employer, sued for injuries to an employé, had liability insurance, so that the insurer would be ultimately liable for any verdict rendered against the employer, was not ground for reversal, where the evidence came in merely incidentally and was promptly stricken out on objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**10. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EXAMINATION OF WITNESSES—INTEREST.**

Any error in permitting an employé suing for a personal injury to show that his foreman testifying for the employer received \$100 a month as wages was harmless, though to show his interest the court should merely have allowed the employé to show that the foreman was in the employer's employ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

**11. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

A verdict for \$2,500 for a personal injury, whereby plaintiff's leg was permanently injured, and its strength and usefulness greatly impaired, will not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 872-885, 896; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by George W. Baxter against the Campbell Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff sues for personal injuries received while working as a common laborer at defendant's sawmill. At the time of his injury he was one of a gang of men working under the immediate direction of a "boss" or foreman in installing a new overhead conveyor or "blowpipe" used to collect and convey by suction the sawdust, shavings, etc., from the saws and planers to the engine room, where this refuse served as fuel. This conveyor or blowpipe was being constructed at a considerable height from the floor, and was made of joints or sections of metal pipe about 12 feet long and 2 feet in diameter, fitted together like stovepipe, and each section weighed between 200 and 300 pounds. The sections had been brought in and laid on the floor and were being raised by a block and tackle; the pulley being fastened to the roof. The particular section being raised at the time was one containing side or "flue holes," as they are called, for the purpose of connecting smaller lateral pipes running to the separate saws and planers. These flue holes had the iron turned outward, projecting 5 or 6 inches, forming a short lateral pipe into which the lateral pipes were to be fitted. This section of large pipe was to be raised

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in a somewhat narrow space between the posts and the machinery. It was important that in raising it these projecting flues should not strike against the posts or machinery and be bent or indented. This section of pipe was not directly under the pulley, being 8 to 10 feet back of a perpendicular line, so that the rope passing over the pulley came down to it at an angle and was fastened around the section of pipe a little back of the middle. In being raised, this would cause the section of pipe to swing forward as well as upward and the forward end to hang lower than the other.

The evidence shows that the old wooden blowpipe or conveyor had been recently taken down and sections thereof, together with shavings, sawdust, and pieces of boards, left lying on the floor around and under this section of pipe. The sections of the old wooden pipe were some 18 to 20 inches square. There were three sections of this old pipe lying there in a sort of triangle; the section of new pipe resting on one of them. One of the witnesses described it by saying that these sections of old pipe formed a sort of pit around the forward end of the new pipe being raised. Just as the new pipe was about to start upward by reason of two men pulling down on the other end of the rope passing over the overhead pulley, the foreman in charge ordered this plaintiff to "get in there and hold that and keep them flue holes from getting mashed." The plaintiff hesitated, as not exactly understanding, and the order was repeated directly to plaintiff. He obeyed, went in and took hold of the forward end of the pipe to steady it, it swung forward, and in stepping backward the plaintiff's foot slipped or tripped, and he stumbled over the sections of old pipe and was thrown down by the weight of the pipe on his knee, dislocating it. The plaintiff testified:

"When they went to pull the blowpipe up, I stepped back and hit my heel against that blowpipe that was torn out, and my foot slipped from under me, and that threw the whole weight of the pipe right here (indicating) on my knee, and it mashed me right down under the pipe, and I sunk down."

Another witness described it thus:

"They were putting up this blowpipe, and each section of this blowpipe was something like 12 feet long, and something like 23 or 25 inches in diameter. We had a rope tied here (indicating), something like the center of the pipe, and the rope was attached to a block up at the top, and they used the rope to pull the blowpipe up. Two men were handling the rope. The two men were Mr. Chatman and myself. We was pulling on the rope, and Mr. Baxter was supposed to have guided the pipe to keep from knocking the flue holes as we pulled it up. As we pulled it up, it kindly swung around and knocked Mr. Baxter down, and he said the full weight of the pipe went on his knee. \* \* \* He had to go into a place where there was some old blowpipe, a post, and some boards that had been planed but had not been taken away and was laying on the floor, and he didn't have room enough to step around as the pipe swayed around."

The petition sets forth the ultimate facts above stated, the order of the foreman to plaintiff to go into this place and do the work he did, and:

"That owing to the rubbish and shavings and plank piled up about said joint of blowpipe, and owing to the way the pulley and rope was fastened to the said joint of blowpipe, plaintiff was unable to hold the pipe without injury as aforesaid, and in endeavoring to brace himself and hold said joint of pipe, and while exercising due care on his part, he fell in the manner and by the means aforesaid, thus and thereby permanently injuring his leg, kneejoint, and kneecap, all caused by the carelessness and negligence of the defendant company, under the order and direction of its foreman, Bud Mead, in requiring plaintiff to lift or assist in raising said joint of blowpipe in the manner and by the means as aforesaid, and in not furnishing plaintiff with a reasonably safe place to do and perform his work, and reasonably safe tools and appliances with which to do and perform the same."

As is proper on defendant's appeal, the facts are stated according to the evidence favorable to plaintiff.

The answer is a general denial, with special pleas: (1) That plaintiff was already suffering from a stiff and diseased knee when he accepted employment from defendant, and that his injury was within the assumed risk of, and incident to, his employment and physical condition; and (2) contributory negligence, in that plaintiff voluntarily and carelessly placed himself in a position to cause his fall and injury complained of.

The errors complained of relate to: (a) The refusal to sustain a demurrer to the evidence; (b) the giving of erroneous instructions; (c) the admission of improper evidence; and (d) that the verdict is excessive.

Fort & Zimmerman, of Kennett, for appellant. Bradley & McKay, of Kennett, for respondent.

STURGIS, J. (after stating the facts as above). [1] It is proper for us to remark that it materially aids the appellate courts for the parties in their briefs to cite the Missouri cases in the official reports as well as by reference to the Southwestern Reporter when the cases cited are officially reported. This method of citation to the Reporter system alone is not subject to objection in citing cases from other states. This is a growing tendency of attorneys, and we make this observation generally, rather than as applied to this particular case.

[2] Appellant's first point is that the evidence shows that the injury was caused by the negligence of plaintiff's fellow servants in giving the rope a quick jerk and thereby suddenly and violently throwing the pipe against plaintiff, citing *Madden v. Mo. Pac. R. Co.*, 167 Mo. App. 143, 147, 151 S. W. 489; *Henson v. Pascola Stave Co.*, 151 Mo. App. 234, 243, 131 S. W. 931. That defendant in this kind of a case is not liable for an injury due solely to the negligence of a fellow servant is conceded (*Rigsby v. Oil Well Supply*

ing been cleaned, was being flattened over an anvil, held that his assumption of risk was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**5. MASTER AND SERVANT (§ 286\*) — ACTION FOR INJURY—QUESTION FOR JURY—NEGLIGENCE.**

On evidence in such action, the master's negligence in running such pipes, collected from all sorts of places and known to be sometimes charged with highly dangerous matter, over the anvil without any inspection or effort to remove such dangerous matter was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**6. TRIAL § (256\*) — REQUEST FOR INSTRUCTIONS — FURTHER OR MORE SPECIFIC INSTRUCTIONS.**

Defendant's objection to plaintiff's instruction on the measure of damages, correct as far as they went, were untenable in the absence of any request for further instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by W. M. Gummerson against the Kansas City Bolt & Nut Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rees Turpin and James E. Taylor, both of Kansas City, for appellant. Leonard Ulmann and John L. Wheeler, both of Kansas City, for respondent.

JOHNSON, J. Plaintiff was injured while in the service of defendant as a common laborer, and sued to recover his damages on the ground that his injury was caused by a negligent breach of defendant's duty to exercise reasonable care to furnish him a reasonably safe place in which to work. The answer is a general denial and pleas of contributory negligence and assumed risk. A trial in the circuit court resulted in a verdict and judgment for plaintiff. Defendant appealed.

Defendant, a manufacturer of nuts and bolts, employed plaintiff to work at common labor in and about its factory at Sheffield near Kansas City. On the third day of his employment he was assigned to the task of operating shears for cutting iron, after being instructed in the proper method of using them. His post was in the same room with, and about 20 feet from, an electric hammer and anvil. The raw material from which defendant manufactured nuts and bolts consisted almost entirely of used and discarded iron pipes, which defendant procured from dealers in scrap iron and from other sources. These pipes were of different sizes and lengths, many were bent and twisted into various shapes, and as a general rule defendant had no knowledge of the character of their former uses. Many of them were rusty

and foul inside, and some contained a residue of liquids which had flowed through them while they were in use. Defendant's scrap piler, introduced as a witness by plaintiff, testified that the pipes which were of various sizes and lengths came in cars from the scrap dealers, and that generally "they contain dirt, grease, soap, and various kinds of filth." The manager of defendant testified:

"The pipe is, to begin with, old pipe; it is scrap pipe when it is bought, which means that it is rusty and dirty, just as any old, discarded iron or metal would be. Q. You buy pipe that has been used in these various factories, in the manufacture of soap and other articles, haven't you? A. We are buying pipe anywhere we can find it."

Further he said that:

"All pipes contain some residue of the material used in them before they were discarded. \* \* \* It is not cleaned before it is sent to us."

It is conceded that no inspection of the ends of the pipes was made for the purpose of detecting and removing such liquid substances as might be dangerous, and it is claimed by the witnesses for defendant that the method of work generally followed in that kind of factory ignores the observance of such care, as being unnecessary and commercially impracticable. The first process to which the pipes are treated is that of being passed, one by one, over the anvil, and subjected to the rapid battery of the hammer, which mashes the pipe into a flat bar. The bar then is taken by the operator of the shears and cut into short lengths, which are bundled together and taken to the furnace. While plaintiff was working at the shears and had turned, facing the anvil, to pick up another bar, a pipe just being started over the anvil was struck on the end by the hammer, and one of the results of the blow was to squirt a whitish and highly acid or caustic liquid from the end of the pipe with such force as to carry it to plaintiff, and a portion of the liquid struck him in the eye, burning and permanently injuring the eyeball.

Plaintiff testified that the liquid "was something like soap or lye \* \* \* kind of white-looking \* \* \* looked like soap," that "quite a little bit" struck his eye, and "I took my hand like that and whipped it out of my eye as soon as it hit me. \* \* \* It looked like soft soap and had some kind of acid in; it burned."

Another workman, a witness for plaintiff, testified:

"Well, I think it had something strong in it from the way it burned my neck, but what it was I couldn't say. \* \* \* It was soft, something like oil; it would run just like oil; it was very soft, some of it, and some of it was perfectly dry but in this particular instance it was soft."

A physician who treated plaintiff for the injury testified:

"On August 22, 1910, Mr. Gummerson came to my office with a bad, very bad, eye. It gave

me the appearance of a burn. He had some four or five scars over and around the ball of the eye, and considerable irritation of the conjunctiva, or the lining membrane around the eyeball, and at that time there was a great deal of irritation, of course, due to the injury."

The evidence as a whole tends to show: First, defendant knew that pipes were likely to be received which carried a residuum of deleterious and dangerous substances such as strong acids and caustics; and, second, that the pipe under consideration contained some such substance.

The negligence averred in the petition is:

"That all the injuries to plaintiff as aforesaid were caused by the negligence and carelessness of the defendant, its vice principal, agents, and servants in mashing and crushing said pipe when defendant saw, or by the exercise of ordinary care could have seen, that said pipes contained some soap and lye, or other material of liquid ingredients of like nature, and carelessly and negligently failing to provide a guard or shield to prevent soap or lye or other material of liquid ingredients of like nature from flying or being thrown into the face of this plaintiff."

[1] The points in the argument of counsel for defendant on the demurrer to the evidence that the petition does not state a cause of action and that no cause of action is proved will be considered together. The application of the liberal rules employed in the construction of a petition after verdict leads to an analysis resulting in the conclusion that two specific acts of negligence are included in the petition, viz.: (1) That defendant knew, or by the exercise of ordinary care could have known, of the danger and removed it in time to have avoided the injury; and (2) that defendant negligently failed to provide a screen between the anvil and the place where plaintiff was required to work, to guard him against such dangerous missiles. In other words, plaintiff's theory is that an ordinarily careful and prudent master in the situation of defendant would have done one of two things for the protection of his servant; i. e., inspected the forward ends of pipes, before putting them under the hammer, for the purpose of discovering and removing loose substances which might be converted into dangerous projectiles under the initial blows of the hammer, or in the absence of such inspection and cleansing, would have put up a barrier between the two machines to protect the operator of the shears.

It is conceded by counsel for plaintiff that the statute relating to the guarding of machinery has no application to this case, and acts of negligence we have noted are based on the ground of an actionable breach of the master's common-law duty to exercise reasonable care to furnish his servant a reasonably safe place in which to work.

[2, 3] The position of defendant is that the method of work employed in the factory was the usual and ordinary method for doing such work, and that the risk which resulted in the injury was one of the incidental risks of the

business assumed by plaintiff when he accepted the employment. Defendant was engaged in a lawful business, in converting worn-out scrap iron into valuable and useful articles, and would be justified in adopting and, indeed, compelled by competition to adopt and follow, a method of work that would be practical and commercially profitable. The courts of this state have said a number of times that a master is not negligent towards his servant when he conducts his business in the manner in which other prudent persons customarily conduct the same kind of business. *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 701; *Saversnick v. S. & S. Co.*, 141 Mo. App. 509, 125 S. W. 1192; *Chrismer v. Telephone Co.*, 194 Mo. 189, 92 S. W. 378, 6 L. R. A. (N. S.) 492; *Coin v. Lounge Co.*, 222 Mo. 488, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888; *Barnett v. Star Paper Mill Co.*, 149 Mo. App. 498, 130 S. W. 1121; *Shinners v. Mullins*, 136 Mo. App. 298, 117 S. W. 91; *Brandt v. Breweries Co.*, 159 Mo. App. 568, 141 S. W. 444; *Wilkinson v. Andriano Bottling Co.*, 154 Mo. App. 563, 136 S. W. 720. Masters are liable for the consequences of negligence, not of danger, and their duty towards their servants does not embrace the elimination of risks or dangers which inhere in the work when conducted in an ordinary and reasonably careful manner. Such dangers and risks are assumed by the servant.

But the duty of the master does call for the exercise of reasonable care to keep the dangers of the work within the scope of those classed as inherent. The fact that the work may be naturally dangerous, instead of absolving the master from the duty of exercising reasonable care to protect his servants who voluntarily and at their own risk accept its natural dangers, requires the performance of that duty in a way to confine the risks within their natural bonds. His right to conduct his own business in his own way does not extend beyond the limits of reasonable care, and if his servant suffers injury from his failure to conduct his business within those bonds, he will be liable, however great the natural dangers of the work may be. The term "natural dangers" may be defined as meaning those which reasonable care and prudence, having regard not only to the safety of the servant, but also to the necessities of the business, cannot be expected to suppress, while the term "negligence," when used to refer to a master's duty, has been well defined as the "omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Webb's Pollock on Torts* (En. Am. Ed.) 42.

[4, 5] Would a man of that description have done what defendant did—place an inexperienced and ignorant man at work in a

place where lurked a malignant, and, to him, concealed danger, which it is apparent from all the evidence could have been avoided by a slight effort on the part of the master? We note in the testimony of the witnesses for defendant the emphasis laid upon the facts that the machines for mashing the pipes and cutting the bars were of the usual type and free from defects, that their relative positions were those sanctioned by ordinary usage, and that it was not the usual custom to have a screen between the anvil and the shears, for the reason that it would seriously interfere with running long pipes over the anvil, and with the rapid moving of hammered pipes to the shears. But all this evidence—the purpose of which is to bring the conduct of defendant within the domain of custom and usage—falls short of being completely exculpatory, and is found, on analysis, to give undue prominence to facts not in controversy and to be deficient in vital respects. Plaintiff concedes that the machines were of proper construction, in good repair, and properly placed; that it was customary to use scrap pipe and to follow the course of treatment prescribed by defendant's method of work, and that the proper conduct of the work involved the natural risks of injury to him from missiles thrown out by the rapid blows of the powerful hammer on worn-out, rusty, and dirty pipes; but he denies that either custom or reasonable care would sanction the practice of running pipes, collected from all sorts of places, and known by the master to be charged, in some instances, with highly dangerous matter, over the anvil without any inspection or effort to remove such dangerous matter. We think plaintiff is right in this position, and that the evidence of defendant does not meet the issue thus tendered, at least, not so conclusively as would warrant us in holding, as a matter of law, that the injury was the result of one of the assumed risks. We need no expert to tell us that the duty of inspection could have been performed quickly, with little skill and effort. All that was required was to look into the forward end of each pipe and scrape away any loose substance that might be turned into a projectile by the first blows of the hammer. It was not necessary to do more, since the first strokes would seal the end of the pipe and prevent the escape of its contents.

In principle this case is very similar to that of *Nickel v. Columbia Paper Stock Co.*, 95 Mo. App. 226, 68 S. W. 935, where a rag and paper sorter was injured by poisonous material brought from a hospital. We said in the opinion:

"We cannot see how defendant can construct any reasonable theory of escape from the wrong done the plaintiff. If the foul and poisonous material was collected by agents for whose acts it is responsible, then it should answer to plaintiff for the consequences. And if the material

was collected without defendant's knowledge or authority, then the jury has found that common prudence would have dictated an inspection thereof before handing it over to plaintiff for sorting. And if the business was such that such an injury as happened to plaintiff was likely to unavoidably follow, then it was defendant's duty to have warned the plaintiff of the danger, or to have taken precautions against such consequences. *Hysell v. Swift Packing Co.*, 78 Mo. App. 39; *Mather v. Billston*, 156 U. S. 391 [15 Sup. Ct. 464, 39 L. Ed. 464]; *Smith v. Car Works*, 60 Mich. 501 [27 N. W. 662, 1 Am. St. Rep. 542]; *Smith v. Iron Co.*, 42 N. J. Law, 467 [36 Am. Rep. 535]; *Fox v. Peninsular Works*, 84 Mich. 676 [48 N. W. 203]."

It may be conceded that it would have been impracticable to have kept a screen between the anvil and plaintiff, but the jury were entitled to infer from all the evidence that a reasonably careful and prudent master would have exercised care to prevent the discharge of unnecessary missiles from the pipe ends, especially those of such a peculiarly malignant character.

The argument that plaintiff has injected this issue of negligence into the case on appeal and tried the case in the circuit court on the sole theory of negligence in not screening the anvil is supported neither by the petition which, as we have shown, charges negligence in failing to prevent the discharge of dangerous liquids from the pipe ends, nor by the record of the trial, which contains proof of all the ingredients of such negligence.

The demurrer to the evidence was properly overruled.

[8] The objection of defendant to plaintiff's instruction on the measure of damages is found to be untenable under the rule of the following cases: *Lathrop v. Railroad*, 135 Mo. App. 16, 115 S. W. 493; *Stamping Works v. Wicks*, 144 Mo. App. 249, 128 S. W. 775; *Morgan v. Mulhall*, 214 Mo. 451, 114 S. W. 4.

The judgment is affirmed. All concur.

#### BOONVILLE SPECIAL ROAD DIST. v. FUSER. (No. 11301.)

(Kansas City Court of Appeals. Missouri. Nov. 2, 1914. Rehearing and Motion to Transfer Denied Dec. 21, 1914.)

#### 1. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—FAILURE TO REMOVE—NOTICE.

A notice made out by a road overseer and officially signed by him which notifies an owner of land abutting on a road that he obstructs the road by a fence, and that he will be liable to statutory penalties unless the obstruction is removed in ten days, is sufficient under Rev. St. 1909, § 10533, imposing a penalty for obstructing a road after notice and failure to remove the obstruction, though the notice was served by another.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

#### 2. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—PENALTIES—RIGHT TO SUE.

Where, after service of notice by a road overseer of an obstruction of a road, the road district was absorbed by another road district

the latter could sue for the statutory penalty for failure to remove the obstruction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

**3. APPEAL AND ERROR (§ 170\*)—QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.**

A constitutional question not raised in the trial court may not be raised by appellant who appeals to a Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052, 1099, 1100; Dec. Dig. § 170.\*]

**4. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—EVIDENCE—ADMISSIBILITY.**

Where, in an action for a penalty for obstructing a road by a fence, the evidence did not show that the highway was established on a section line as its center, surveys of lands adjoining which did not state that the section line was in the center of the road were properly excluded, when offered by defendant to prove that the section line was in the center.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

**5. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—EVIDENCE—ADMISSIBILITY.**

In an action for penalty for obstructing a road by a fence, an order of the county court straightening a part of the road distant from the place of the obstruction was inadmissible as relocating the road at the place of obstruction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

**6. HIGHWAYS (§ 70\*)—ESTABLISHMENT—MODIFICATION—STATUTORY PROVISIONS.**

Act March 23, 1868 (Laws 1868, p. 150) § 5, authorizing proceedings to reduce the width of a road, was repealed by Act March 18, 1872 (Wag. St. c. 120, art. 1, § 72), so that an order reducing the width of a road after the repeal was void because made without authority.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 234, 235, 238; Dec. Dig. § 70.\*]

**7. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—EVIDENCE—ADMISSIBILITY.**

Where nothing was done to reduce the width of a road as actually existing on the ground pursuant to an order of the county court reducing the width, and an adjacent owner put his fence on the part of the road actually and continuously used by the public for many years, the order of the county court, invalid or valid, did not relieve him of knowledge that he obstructed the road, and he was liable to the penalty imposed by Rev. St. 1909, § 10533.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

**8. DEDICATION (§ 41\*)—PUBLIC ROADS.**

Where an owner of land built a fence, and for more than ten years thereafter allowed the public to continuously use and travel over ground beyond the fence, it will be presumed that he acquiesced in the use and intended to dedicate the used ground as a road.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 80, 82; Dec. Dig. § 41.\*]

**9. HIGHWAYS (§ 6\*)—PRESCRIPTION.**

Where the public used land outside an inclosure constructed and maintained by the owner continuously for a time longer than to create a prescriptive title, there was created a public road by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.\*]

**10. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—EVIDENCE—ADMISSIBILITY.**

In an action for a penalty for obstructing a road by erecting a fence, a direction from a sur-

vveyor as to the true line of the road and where the fence could be placed could not be proved.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

**11. LIMITATION OF ACTIONS (§ 35\*)—STATUTORY PENALTY — LIMITATIONS — OBSTRUCTING HIGHWAY.**

An action under Rev. St. 1909, § 10533, for a penalty for obstructing a public road is not a suit for a forfeiture given in whole or in part to any person who will prosecute the same within section 4949, limiting actions therefor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158-167; Dec. Dig. § 35.\*]

**12. LIMITATION OF ACTIONS (§ 59\*)—ACTION FOR OBSTRUCTING HIGHWAY—LIMITATIONS.**

An action under Rev. St. 1909, § 10533, for a penalty for obstructing a road is not barred by the statute of limitations (section 4946); for each day the obstruction is maintained after the ten days for removal is a distinct offense penalized by forfeiture of \$5, so that the offense is a continuing one.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 329-332; Dec. Dig. § 59.\*]

**13. HIGHWAYS (§ 161\*)—OBSTRUCTIONS—PENALTIES—STATUTES.**

Rev. St. 1909, § 10533, imposing a penalty of \$5 for each day for maintaining an obstruction of a public road after ten days' notice to remove the same, is penal, and must be strictly construed, and the case against one charged with obstructing a public road must come clearly within the statute.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 322, 437-443; Dec. Dig. § 161.\*]

**14. CONSTITUTIONAL LAW (§ 70\*)—LEGISLATIVE FUNCTIONS—JUDICIAL REVIEW.**

The penalty imposed by Rev. St. 1909, § 10533, for obstructing a public road after ten days' notice of removal, though severe is within legislative discretion, and the amount thereof conforming to the statute will not be disturbed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

Appeal from Circuit Court, Cooper County; Jack G. Slate, Judge.

Action by the Boonville Special Road District against Martin Fuser. From a judgment for plaintiff, defendant appeals. Affirmed.

John Cosgrove and D. W. Cosgrove, both of Boonville, for appellant. W. G. & G. T. Pendleton, Roy D. Williams, and W. F. Johnson, all of Boonville, for respondent.

TRIMBLE, J. For the second time this case is before the court. It was brought here the first time by plaintiff, who appealed from the judgment of the trial court sustaining a demurrer to the evidence. The judgment was reversed, and the cause remanded, as will appear from the opinion of this court reported in 174 Mo. App. 573, 161 S. W. 583. This time the defendant has appealed. The suit is under section 10533, Revised Statutes 1909, which provides that, if any person shall knowingly or willfully obstruct or damage any road by fencing upon the right of way of the same, the

road overseer of the district shall verbally or in writing notify him to remove such obstruction forthwith, and if said person does not remove such obstruction within 10 days after being notified, he shall pay the sum of \$5 for each and every day after the tenth day such obstruction is maintained or permitted to remain, to be recovered by suit brought in the name of the road district. It was brought July 12, 1912, to recover \$5 a day from and after 10 days from March 22, 1911, the date when defendant was notified by the road overseer to remove the obstruction. The court, however, instructed the jury that, if they found the issues for the plaintiff, the penalty could not be assessed for any day earlier than within one year next before the filing of the suit, and that the aggregate amount assessed could not in any event include more than one year less one day. Among the facts which the jury were required to find before they could return a verdict for plaintiff was that defendant had maintained the obstruction up to the time of filing the suit. The limitation on the amount recoverable above noted was placed there by the trial court as a precaution in view of his ruling that the case was governed, as to limitation, by section 4946, R. S. Mo. 1909. The jury returned a verdict assessing the penalty at \$1,820, which was the penalty for 364 days at \$5 per day.

[1] It is urged that the notice shown in evidence did not comply with the statute, in that it was not given by the road overseer himself. But the evidence was that the overseer made out and officially signed two duplicate written notices to the defendant notifying him of the obstruction and to remove it forthwith, and that, if it was not removed in 10 days, he would be liable to the penalties prescribed by the statute. The overseer gave these duplicates to his son, with directions to read and deliver one of them to the defendant. This the son did on March 22, 1911. Thereafter the road overseer himself saw the defendant and had a talk with him about the fence in the road. The requirement of the statute as to notice was complied with. It might be remarked here that, inasmuch as the former holding of this court on the demurrer to plaintiff's evidence necessarily included a holding that that notice was sufficient, this perhaps made the question of the sufficiency of the notice a matter adjudged, since that holding was a direct ruling on every question presented or that could have been raised, under the demurrer. *Dunn v. Nicholson*, 125 Mo. App. 725, 103 S. W. 114; *Roth v. City of St. Joseph*, 167 S. W. 1155. But, be this as it may, the notice contemplated by the statute was given, and was sufficient.

[2] When the road was obstructed, and the notice given, road district No. 5 was in existence and controlled the road in question. After the service of the notice by the

overseer, that district was absorbed and swallowed up by the Boonville special road district. Defendant on this account challenges the latter's right to sue. This, however, was decided adversely to defendant on the former appeal.

[3] The constitutionality of section 10533 is sought to be attacked on the ground that the statute gives the penalty to the road district, while the Constitution says it shall go to the school fund. Whether the statute says anything about where the penalty shall go, but merely provides a method of procedure for its recovery, is a question with which we have nothing to do; since a decision of it either way would involve the question whether or not the section came within the constitutional inhibition, and jurisdiction to pass on such question is in the Supreme Court. But the latter has held that a constitutional question is not involved in a case, unless it was raised in the trial court. And then it should be raised "timely in the course of orderly procedure." *Miller v. Connor*, 250 Mo. 677, loc. cit. 684, 157 S. W. 81; *Bennett v. Missouri Pacific Railway*, 105 Mo. 642, 16 S. W. 947. No such question was raised in the trial of the case, nor is it mentioned in the motion for new trial. In fact, the answer asserts that the penalty belonged to the former district No. 5. Defendant cannot, therefore, at this late hour, obtain any benefit from the point now made for the first time.

The road alleged to be obstructed is called the "Little Ferry Road" and runs west from the top of "Bell's Hill" at said road's intersection with the old "Santa Fé Trail" now the "State Highway." Defendant owns land south of the Little Ferry road extending from the above intersection west for a considerable distance. The obstruction complained of consists of a post and wire fence which defendant set commencing at the above intersection and running west to inclose his land. It is claimed that from the intersection west for a distance of 160 or more yards the fence is in the road. The pleadings admit that the road was originally established 60 feet in width. This was done many years ago. It was at least before 1848, because at that time and continuously thereafter the road has been open to and used by the public. How long it was used before that no one now living knows.

Defendant bought the land abutting the road on the south in 1885. After buying, he moved his fence two or three times, a few feet at a time, outward to the north and closer to the fence on the other side of the road. The last time he moved his fence was six or eight years before the trial. Having been traveled so long, the roadway had become worn down until there were then, and now are, banks 3 or 4 feet high on each side. The fence, as last located by defendant, leaves the roadway 28 feet wide from this fence to the one on the opposite side at or

near the top of the north bank. From the top of the south bank north to Fuser's fence is 20 or 25 feet, while from the foot of said bank north to the said fence is 14 feet, said space so inclosed by said fence is comparatively level, except for a depression taking the form of a nearly filled ditch along the roadside. Defendant's claim that his fence does not encroach upon the road is based upon the theory that the road in question was located so that its center line is upon and coincident with the east and west center line of section 5, and that, although the road was originally established 60 feet in width, yet in August, 1874, the county court, upon the petition of landowners along the road, reduced its width to 40 feet. Consequently, his position is that, as the offending fence is 20 or 21 feet from this center section line, and therefore in the road as originally established, yet it is still outside of the 20 feet constituting the south half of the road as reduced, and the fence is therefore not an obstruction.

[4] The evidence, however, does not show that the road was established on the section line as its center. No surveys establishing the road were introduced to show that this was so, and defendant's surveyor admitted that none would show such to be the fact. There was evidence on the contrary, however, which tended to show that the larger portion of the road was south of the section line. This was abundantly shown to be the fact, so far at least as the actual location of the road upon the ground is concerned. The surveys of lands adjoining the road did not state that the section line was in the center of said road, and for that reason, if for no other, they were not evidence that it was. Consequently, the court did not err in refusing to admit such surveys offered by defendant to prove that the section line was in the center of the road.

[5] But defendant contends, in effect, that if the road was not originally established on the section line as its center, it was afterwards relocated and placed thereon by the county court in February, 1890. This order of the county court had no reference to the road at the place in controversy, but referred to a change in the road some distance west where the road made a crook or turn to the northwest upon the land of John Labo and then turned southwest on his land and continued in the same westerly line as before. The county court's order was made upon the petition of John Labo, who sought to merely straighten this crook in the road under section 7818, R. S. Mo. 1889, now section 10444, R. S. Mo. 1909, authorizing the county court, upon the petition of one wishing to cultivate or inclose land through which the road may run, "to turn such road on his own land or the land of any other person consenting thereto, at his own expense." The order of the county court nowhere states that the road where straightened shall be

located with its center line upon said section, but, if it did, that could not affect the location of the road at a point some distance east of the crook and away from the land of the petitioner, and such order of the county court could have no effect to relocate the road at the place in controversy. So that defendant's contention that the center of the road was on the section line is not shown or supported by any evidence.

[6] As to the other branch of defendant's contention—namely, that the county court in August, 1874, reduced the width of the road to 40 feet—it may be said that, conceding for the sake of the argument that the county court had authority to reduce the width of the road, there is no evidence showing that anything was done thereunder either in changing its location or in reducing the width of the road as actually existing upon the ground. On the contrary, a number of witnesses testified that when defendant moved his fence the last time he placed it in the wagon track, being that part of the road which had been actually traveled and used by the public continuously as far back as they could remember, this being from 40 to 65 years. There is practically no dispute over this, but if there were, inasmuch as the jury has found that defendant obstructed the road, we must accept the above as true. It may be observed also that the proceeding to reduce the width of the road was had pursuant to authority given the county court by section 5 of an act approved March 23, 1868. Laws of 1868, p. 150. But this was expressly repealed March 18, 1872. Wagner's Statutes, vol. 2, p. 1230, § 72. And no such authority was on the statute book in August, 1874, when the county court made the reducing order. Whether the county court had any statutory authority to reduce the width of the road would doubtless be immaterial upon the question of whether or not defendant knowingly obstructed the road, if anything had been done to reduce the width of the road as actually existing on the ground.

[7] However, there is no evidence showing that anything of the kind was done pursuant to said county court's order; and if defendant put his fence in that part of the road actually and continuously used by the public for so many years, the county court order, whether valid or void, could not relieve defendant of the knowledge that he was obstructing the road. The trial court ruled and instructed the jury that the reduction of the width of the road by the county court was valid, but submitted to the jury the question whether or not the ground inclosed and occupied by defendant's fence had become a public road by dedication, prescription, or adverse user; and the jury were told that, if such were the fact, then the order of the county court availed nothing in the case. The jury found for plaintiff even upon the theory that the road was legally reduced to 40 feet by the county court.

[8, 9] We do not agree with defendant that there was no evidence to show a valid common-law dedication of the ground in question as a road. Jones, who built the first fence on top of the south bank many years ago, and, for more than 10 years thereafter allowed the public to continuously use and travel over the ground now occupied by the defendant's offending fence, is presumed to have acquiesced in such use and intended to dedicate the used ground as a road. *Kansas City Milling Co. v. Riley*, 133 Mo. 574, loc. cit. 584, 34 S. W. 835. And the defendant himself afterwards, in 1885 or shortly thereafter, by building his fence "halfway down the bank," but still much further south of the present fence, thereby evinced his consent to all north of said first fence being used as a road. And the fact that the public traveled and used the land north of said fence continuously thereafter for many years more than the requisite prescriptive time created upon the land a public highway by prescription. *State v. Transue*, 131 Mo. App. 323, 111 S. W. 523; *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, loc. cit. 460, 151 S. W. 460, and cases cited.

So that defendant's position that his fence is not in the road is untenable. His major premise, that the road is located equally on each side of the section line, was not established; and even though his minor premise, that the road was legally reduced to 40 feet, be conceded, still it was so reduced only on paper, because during the 11 years from August, 1874, to 1885, when defendant bought his land, the public continued to travel over and use the ground where the offending fence now stands, and continued thereafter to do so until 1907, when said fence was erected directly in the wagon track. And, in addition to this, the ground occupied by the fence had been traveled continuously from 1848 and prior to that time.

[10] It is urged that error was committed in not allowing defendant to show that he had had the section line surveyed by the county surveyor, and that the latter had pointed out a line 20 feet south of the section line as the true line of the road and where he could set his fence. But this officer had no power to change or relocate the road. It was in actual existence upon the ground, and had been for many years. The roadway was worn into the earth and the wagon track was plainly discernible. Hence the direction from the surveyor could not relieve defendant of the knowledge that he was setting his fence in the road. It was held in *State v. Wells*, 70 Mo. 635, a prosecution for obstructing a road, that it was no defense to show that defendant did not know the road was legally established, and in *State v. White*, 96 Mo. App. 34, loc. cit. 39, 69 S. W. 684, that, if defendant personally participated in putting the fence in the road

—which is the fact here—defendant's notion as to the legality of the road at that point is immaterial.

[11] Defendant also contends that the cause of action is barred by section 4949, R. S. Mo. 1908. The section does not apply to cases of this character. It is not a suit to recover a "forfeiture given in whole or in part to any person who will prosecute for the same."

[12] The only other limitation statute which might be applicable is section 4946, R. S. Mo. 1908. But, under the terms of section 10533, each day the obstruction is maintained after the 10 days' notice constitutes a distinct offense penalized by a forfeiture of \$5. The offense was therefore a continuing one, and the evidence showed that it continued down to the day suit was filed. It was held in *State v. Gilbert*, 73 Mo. 20, that in such case a prosecution for obstructing a public road was not barred. The trial court applied the statute by requiring the jury to find that the obstruction was maintained down to date of the suit, and limiting the amount recoverable, in that event, to within a year prior to the institution of the suit.

[13] The statute is penal, and, of course, must be strictly construed, and the case against defendant must come clearly within the terms thereof. We have carefully gone over the entire record repeatedly, but are unable to find any place where plaintiff has not brought the case strictly within the terms of the statute.

[14] That the penalty is severe is undoubtedly true; but, no doubt, the Legislature intended it should be so in order that the state's highways should not be unlawfully encroached upon in the manner shown in the evidence. The severity of the statute is a matter for the Legislature—not for us.

We are therefore without authority to disturb the verdict, and the judgment is affirmed. All concur.

#### KELLY et ux. v. CITY OF HIGGINSVILLE. (No. 11306.)

(Kansas City Court of Appeals. Missouri. Dec. 21, 1914.)

#### 1. NEW TRIAL (§ 163\*)—ORDER GRANTING—EFFECT.

The granting of a new trial on the sole ground that the verdict was excessive in effect overruled the other grounds assigned in the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330-332; Dec. Dig. § 163.\*]

#### 2. APPEAL AND ERROR (§ 977\*)—REVIEW—DISCRETION OF COURT—NEW TRIAL.

The rulings of the trial court on a motion for a new trial on the grounds that the plaintiff did not establish a case for the jury, that the verdict was against the weight of the evidence, and was the result of passion and prejudice, and that it was excessive, while presumptively

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

correct, may be reversed if there was an abuse of the court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

### 3. APPEAL AND ERROR (§ 867\*)—REVIEW—QUESTIONS PRESENTED—GROUNDS FOR NEW TRIAL.

Where the trial court granted a new trial to the defendant on the sole ground that the verdict was excessive, all the grounds assigned in the motion may be considered on plaintiff's appeal from that order, since if the ruling was right, it will be affirmed, though the reasoning was wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

### 4. ELECTRICITY (§ 19\*)—ACTIONS—EVIDENCE—NEGLIGENCE.

In an action against a city for the death of plaintiff's son, evidence held sufficient to take to the jury the question whether the city was negligent in maintaining its electric light wires.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

### 5. EVIDENCE (§ 594\*)—WEIGHT AND SUFFICIENCY—UNCONTRADICTED TESTIMONY.

The jury are not required to accept the testimony of city employes that they tested the electric light wires shortly before the accident and found no leakage of electricity therefrom, though such testimony is uncontradicted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.\*]

### 6. ELECTRICITY (§ 14\*)—CARE REQUIRED—USE OF CITY STREETS.

Those who transmit electricity on wires along a city street must exercise the highest degree of care to protect persons rightfully using the streets from injury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.\*]

### 7. ELECTRICITY (§ 19\*)—ACTIONS—RES IPSA LOQUITUR.

Proof that a pedestrian on a public street, while exercising due care, was injured by contact with an escaping electric current, establishes prima facie negligence of the owner of the wire from which it escaped, and the burden is upon such owner to show that the escape was in spite of the exercise of the highest care.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

### 8. ELECTRICITY (§ 19\*)—ACTIONS—EVIDENCE—NEGLIGENCE.

Where insulation of an electric wire had been defective and a cross-arm on the pole broken and loose for some time, and the wire was brought in contact with a guy wire during a storm, proof that shortly before the accident the owner of the wire tested it and found no leakage does not establish the exercise of the required degree of care on the part of the owner.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

### 9. ELECTRICITY (§ 19\*)—ACTIONS FOR INJURIES—EVIDENCE—PROXIMATE CAUSE.

In an action against a city, as the owner of an electric light wire, for the death of plaintiff's son, evidence held sufficient to take to the jury the question whether the boy was killed by an electric shock, though no burn or mark was found on his body.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

### 10. ELECTRICITY (§ 19\*)—ACTIONS FOR INJURIES—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a city for the death of a boy killed by an electric shock, evidence held not to show, as a matter of law, that the boy was contributorily negligent.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

### 11. DEATH (§ 95\*)—MEASURE OF DAMAGES—SERVICES OF CHILD.

The measure of a parent's damage for the death of a minor child is the pecuniary value of the child's services during his minority and the expenses incurred by his death, less the expense of his support and maintenance, and no damages can be allowed for mental anguish or distress for the death or loss of society of the child.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.\*]

### 12. DEATH (§ 99\*)—DAMAGES—EXCESSIVE DAMAGES—SERVICES OF CHILD.

An award of \$2,300 for the loss of services of a 17 year old boy who was going to school at the time, and who earned \$2 a day in vacation, is excessive, and should be reduced to \$1,500.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

### 13. APPEAL AND ERROR (§ 1140\*)—AFFIRMANCE—REMITTITUR.

Where the trial court rules that the amount of the verdict was excessive, but the result only of an honest overestimate of the amount recoverable, the appellate court may order a remittitur that will reduce the judgment to the proper sum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by A. H. Kelly and wife against the City of Higginsville. A verdict for the plaintiffs was set aside and new trial granted by the trial court, and plaintiffs appeal. Reversed and remanded, on condition that plaintiffs file a remittitur, otherwise to stand affirmed.

Aull & Aull, of Lexington, for appellants. Charles Lyons, of Lexington, G. W. Stegen, and J. P. Chinn, both of Higginsville, for respondent.

JOHNSON, J. Plaintiffs, who are husband and wife, sued to recover damages for the death of their minor unmarried son, which they charge was caused by negligence of defendant. The answer is a general denial and a plea of contributory negligence. A verdict was returned for plaintiffs in the sum of \$2,500, but afterward defendant's motion for a new trial, which alleged a number of grounds, was sustained on the sole ground of an excessive verdict. Plaintiffs did not offer to enter a remittitur, and the court did not indicate its views concerning the extent of the excessiveness. Plaintiffs appealed.

Defendant insists that the court did not err in granting a new trial on the ground stated in the order, but did err in not

sustaining the motion upon other grounds, the principal one of which was alleged error in overruling defendant's request for a directed verdict.

Young Kelly was 17½ years old at the time of his death, which occurred in the night of July 7, 1909, on one of the public streets of Higginsville. He was walking north on the sidewalk on the east side of Russell street, and had just passed over the crossing of Ambrose street when suddenly he sank down with a scream, attempted unsuccessfully to rise, struggled a brief moment, and then expired. He was a strong, vigorous boy, in the best of health, and a post mortem examination failed to reveal any weakness of the heart or other symptoms of disease. The doctors who made the examination testified to the absence of any burns or other marks of violence on the body, but witnesses introduced by plaintiffs testified to a mark resembling a burn across the inside of the fingers of the right hand. The electric lighting plant, which furnished electricity for both public and private consumption, was owned and operated by defendant, and one of its high-power lines ran north and south along the curb line on the west side of Russell street. One of the poles of this line was at the southwest corner of the intersection of Ambrose street. It carried three wires attached to a cross-arm in the usual manner. Heavy currents were transmitted by each of these wires, which were insulated. There is evidence tending to show that the insulation had been allowed to become and remain in a worn and defective condition, and that on account of the cross-arm having become defectively fastened to the pole, the wires were brought into contact with, or close proximity to, guy wires attached to the top of the pole, permitting the escape of electricity from its appointed channels. A span wire attached to the top of the pole crossed diagonally over the street intersection to the top of a guy pole at the northeast corner. The guy pole, which was set at the corner just outside the west line of the sidewalk, was held in place by guy wires, one of which extended from the top of that pole downward to a point 9 feet north of the pole and about 20 inches west of the sidewalk, where it was fastened to an iron rod, which in turn was fastened to a "dead man" buried in the ground. Neither this guy wire nor the span wire was intended to be charged with electricity, but, owing to the defects at the top of the pole at the southwest corner, electricity was escaping to the guy wires attached to the top of that pole, and was conducted by the span wire to the top of the guy pole on the northeast corner, from which it traveled over the guy wire and iron rod to the ground. The day and evening had been rainy, and sputterings of electric fire had been noticed at the ring on the top of the iron rod to which the guy wire was

attached. The ring had grown rusty, and as rust is an impediment to the free passage of electric currents, the flashes were due to such impediment, which hampered, but did not destroy, the circuit. The evidence of plaintiffs tends to show that the defects at the top of the line pole we have noted had been in existence long enough for defendant, in the exercise of proper care, to have discovered and repaired them. On the other hand, the evidence of defendant is to the effect that tests made that afternoon showed the absence of a short circuit on that line, and that the flow of electricity over the span and guy wires necessarily began after that test. Young Kelly was stricken at a point about midway between the guy pole and the point where the guy rod entered the ground. When his struggles ended his body was in the gutter two or three feet west of a line drawn from the guy pole to the iron rod. Evidently when stricken he was walking close to the outer edge of the sidewalk, and it is the contention of plaintiffs that he must have brushed against, or in some way, touched, the guy wire and received from it a lethal shock.

[1] In granting a new trial on the sole ground that the verdict was excessive the court, in effect, overruled the other grounds assigned in the motion. Among such other grounds it was alleged that plaintiffs had failed to make a case to go to the jury, that the verdict was against the weight of the evidence, and that it was the result of passion or prejudice in the jury. The court held that the evidence of plaintiffs substantially supported the pleaded cause that the verdict was sustained by the weight of the evidence, taken as a whole, that it was not the product of passion or prejudice, and that the excessive assessment of damages was an honest overestimate of the recoverable damages.

[2] We begin our examination of these rulings, especially of the one on which the new trial was ordered, with the presumption that they were proper expressions of the law of the case, but such presumption would not preclude us, as an appellate tribunal, from setting aside the order granting a new trial, if we find that it was an abuse of sound judicial discretion.

"Where it is manifest that a verdict is excessive, the court is remiss in its duty if it does not, upon motion, set it aside and grant a new trial, and this duty rests almost entirely within the province of the trial court, and this (the Supreme) court will not interfere with the exercise of such discretion unless it appears to have been unreasonably or arbitrarily exercised." *McCloskey v. Publishing Co.*, 163 Mo. 22, 63 S. W. 99; *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Rodan v. Transit Co.*, 207 Mo. 392, 105 S. W. 1061.

[3] Nor does the presumption of right acting in the trial court prevent us from giving full and unhampered consideration to grounds alleged in the motion for a new trial which were rejected by the trial court and are duly

presented by respondent. The rule in such cases is that:

"Where the party, in whose favor the order for a new trial goes, can make it clear, from the record brought up [on his adversary's appeal], that that order was right, for reasons [assigned in his motion] other than those on which the trial judge based the order, he may \* \* \* secure an affirmance on the general principal that an appellate court should always sustain a correct result, though it may have been brought about by an erroneous process of reasoning." *Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110; *Thiele v. Railway*, 140 Mo. 319, 41 S. W. 800.

Counsel for defendant argue that under these rules the judgment granting a new trial should be affirmed on the ground of error in the refusal of the trial court to direct a verdict for defendant, and as this is the most important issue in the case and must be decided in any event, we shall consider it first.

[4] It is contended that there is no substantial evidence of negligence on the part of defendant. It is true there was no witness who contradicted the testimony of the employés of defendant in charge of defendant's power house that a test was made with a testing instrument on the afternoon of the day of the injury and the line on Russell street was found to be free from any leakage of electricity, but such testimony by no means is conclusive proof that reasonable care, which, in the business of transmitting electricity over the public streets of a city, means the highest care, had been exercised by defendant's employés to prevent the diversion of a deadly current from its proper course to the uninsulated guy wire, which carried it into dangerous proximity to pedestrians rightfully using a public street crossing and sidewalk.

[5] The triers of fact were not bound to believe this testimony. The credibility of the witnesses who gave it, as well as the reasonableness of the testimony under all the facts and circumstances in evidence, were issues of fact for the jury to determine, notwithstanding the absence of direct contradictory testimony. But there is ample room in the record for the acceptance of this evidence, together with a reasonable inference that the escape of the current subsequent to the test was the direct result of negligence.

[6, 7] The law, in view of the extremely dangerous and subtle nature of electricity, imposes upon those who use the public streets of a city in its transmission the duty of exercising the highest degree of care to protect persons rightfully using the streets against injury caused by the escape of the fluid from its prescribed course, and where a pedestrian properly using the street, and in the exercise of reasonable care, is injured by coming into contact with an escaping current, a prima facie case of negligence on the part of the owner of the wire from which the current escaped is made out, and the burden devolves upon such owner of proving to the

satisfaction of the triers of fact that the escape of the force occurred, despite the exercise of the highest care, on the part of its custodian, to restrain it. *Hoover v. Railway*, 159 Mo. App. 416, 140 S. W. 321; *Gannon v. Gaslight Co.*, 145 Mo. loc. cit. 511, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Geismann v. Electric Co.*, 173 Mo. 654, 73 S. W. 654; *Winkelman v. Light Co.*, 110 Mo. App. 184, 85 S. W. 99; *Heiberger v. Telephone Co.*, 133 Mo. App. 452, 113 S. W. 730.

[8] The defensive proof fails entirely to explain away the negligence which the evidence of plaintiffs shows was the cause of the escape of the current from its proper course to the uninsulated guy wire. A defective condition at the top of the pole carrying the service wires, and which consisted of the broken and loosened cross-arm which brought those wires close to others wrapped around the top of the pole and of an obvious defect in the insulation of the service wires, had proclaimed for some time the likelihood of an escape of electricity to the span and guy wires on the first windy, rainy day. The condition, according to the evidence of plaintiffs, was obvious, and that it was highly dangerous goes without saying. It had existed long enough for defendant to have known of it, and it was negligence in the most culpable degree to permit a condition to continue that sooner or later would result in the diversion of a powerful current of electricity to a place where it would be a menace to the safety of persons rightfully using the street. The demands of reasonable care will not tolerate the thought that defendant could wait before acting, until its tests showed that the thing which the defect foretold would happen had become an accomplished fact. Plaintiffs' evidence affords ample proof of the charge of negligence.

[9] It is argued by defendant that no causal relation between such negligence and the death of young Kelly is shown. The burden is upon plaintiffs not only to establish by proof the existence of the pleaded charge of negligence, but also that such negligence was the proximate cause of their son's death. *Byerly v. Light Co.*, 130 Mo. App. 593, 109 S. W. 1065. The street lights were burning, and the young man was observed by witnesses who were across the street. He approached Ambrose street walking along the sidewalk whistling and carrying a cane or stick which he rattled against the palings of a fence along the property line. He passed over the crossing of Ambrose street to the sidewalk which continued on the east side of Russell street and took two or three steps to the place where he fell and almost immediately expired. Of course no one intently observed him before his fall and death scream proclaimed that he had been mortally stricken. No one saw him touch the guy wire before his fall. That wire was at his left, and manifestly, since he was walking without pausing or turning towards the left, he did not grasp the wire with his

right hand. He may have touched it with a swing of the stick or brushed it with his left shoulder, or, at least, passed so close to it that the current, which was meeting with opposition at the juncture of the wire with the rusty ring at the end of the grounded iron rod, jumped the intervening space to the better conductor offered by the passing body. There are other ways in which it may be reasonably inferred that he was brought into the short circuit, and the fact that no burn or external mark of the contact was left upon his body does not compel the conclusion that he was not attacked by the escaping force. We held in *Byerly v. Light Co.*, supra, that the absence of such a mark, though against the theory of death by an electric shock, was not conclusive. The vagaries of electricity and of its manifestations are well known. People have been killed by lightening without any mark being left upon the body. As is well said by the superintendent of defendant's lighting business (who appears to be well informed in the science of electricity), the passage through the body of a lethal current causes no burn and leaves no external mark. Burns are caused on the breaking of the contact by the intensely brilliant arc which, itself a species of combustion, temporarily bridges the widening space. If the arc comes into contact with dry skin a burn will ensue, but if the body at the point of contact is protected by damp clothing, which is a good conductor of electricity, in all probability no mark will be left on the body. With evidence tending to show that the boy's clothing and shoes were damp, and that he was in a position where the current could attack his body at a place covered by his clothes, there is nothing in the fact that no external mark was left upon him to militate against the inference that he died from a shock of electricity received from the uninsulated guy wire. The lurking deadly foe was there within striking distance; the manner of death which overcame the boy at its only place of attack was such as it could and would deal, there was no other ascertained cause, and to infer that death resulted to a strong, healthy boy from some other cause would be to indulge in the merest speculation. We have no right to resort to conjecture to aid either party. The evidence of plaintiffs strongly tends to show that the pleaded negligence of defendant was the proximate cause.

[10] The argument that the boy was guilty of contributory negligence as a matter of law is so clearly untenable that we shall not discuss it. The most that may be said of his conduct in favor of defendant's charge of contributory negligence is that it presented an issue of fact for the jury.

The court did not err in overruling defendant's request for a peremptory instruction.

[11, 12] Passing to the question of exces-

sive verdict, the evidence shows that plaintiffs were in humble circumstances, but were able to send the boy to school, and were intending to send him another year. It was vacation time, and he had been working in the harvest fields for \$2 per day. His funeral expenses, amounting to \$200, were allowed in the verdict, leaving an assessment of \$2,300 for the pecuniary loss plaintiffs sustained in consequence of his death. The measure of a parent's damage for the loss of a minor child is the pecuniary value to the parent of the child's services during his minority and the burial and other expenses incurred by his death, less the expense to the parents of his support and maintenance during that time. No damages may be allowed by way of solatium for mental anguish or distress for the death or loss of society of the child. *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Hickman v. Railway*, 22 Mo. App. 344; *Marshall v. Mines Co.*, 119 Mo. App. 270, 95 S. W. 972.

We are justified in inferring that the boy's earning capacity would constantly increase, and that he would become more and more valuable to his parents as a pecuniary asset and, further, it is proper to take into consideration the value of the services which a strong, bright, well-reared boy will render his parents apart from wages he may earn in the service of strangers and turn over to them. But after making all such allowances it would be difficult to conceive that the net pecuniary value of the minor's services for the 3½ years of his minority could have exceeded \$1,500. We, therefore, cannot say that the trial judge abused his discretion in granting a new trial. Indeed, it was his clear duty to set aside the verdict on that ground, and, as plaintiffs did not offer to remit, he could not do otherwise.

[13] The objection sustained by the court went to the amount and not to the integrity of the verdict. In such cases appellate courts have always exercised the right to avoid the necessity of a retrial by ordering a remittitur that will bring the recovery within proper bounds. *Ellis v. Construction Co.*, 60 Mo. App. 69; *Ray v. Thompson*, 28 Mo. App. 431; *Hoyt v. Reed*, 16 Mo. 294; *Buse v. Russell*, 86 Mo. 209; *Chitty v. Ry. Co.*, 148 Mo. loc. cit. 79, 49 S. W. 868. As is said in *Tuford v. Ramsey*, 43 Mo. 410:

"It is admitted that the judgment rendered was for too much, and the plaintiff has filed below, though too late, a remitter of the excess. Being filed out of time, we will treat it as filed in this court. When a judgment is sought to be set aside or reversed for this reason only, justice always demands that any court that has power to render judgment should accept the remitter and enter judgment for the true amount. As the plaintiff was at fault in this matter below, it is right that he should pay the costs occasioned by his negligence."

Plaintiffs now offer to file a remittitur for the amount we may hold the verdict to be excessive. We think that a remittitur of \$800 and all accrued interest will reduce the

verdict to the maximum limit of reasonable-ness.

Other points argued by defendant in support of a retrial of the case have been examined, and are found to be without merit. The case was fairly tried, and the verdict was for the right party. On condition that within 10 days of the announcement of this opinion a remittitur be filed as suggested, the judgment granting a new trial will be reversed, and the cause remanded, with directions to enter judgment for the amount of the verdict less the sum remitted; otherwise the judgment granting a new trial will stand affirmed. It is so ordered. All concur.

**FIRST NAT. REALTY & LOAN CO. et al. v. MASON.** (No. 11053.)

(Kansas City Court of Appeals. Missouri. Dec. 21, 1914.)

**1. WASTE (§ 18\*)—DAMAGES—MEASURE.**

The measure of damages for waste is compensation to the extent the value of the land is diminished.

[Ed. Note.—For other cases, see Waste, Cent. Dig. §§ 44, 45; Dec. Dig. § 18.\*]

**2. LANDLORD AND TENANT (§ 55\*)—ACTIONS FOR WASTE—CONSTRUCTION OF PETITION—"WASTE."**

A petition alleging that plaintiffs leased land to defendant, and that, being a tenant thereon, he committed waste by removing a barn, fences, and valuable timber which were the property of plaintiffs to their damage, states a cause of action for "waste," which means the destruction of an estate by demolishing, not only the temporary profits, but rendering it wild and desolate, notwithstanding that the petition specifically averred the value of each thing injured.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 136-150; Dec. Dig. § 55.\*]

For other definitions, see Words and Phrases, First and Second Series, Waste.]

**3. WASTE (§ 20\*)—ACTIONS—EVIDENCE.**

In a suit for waste, evidence showing the diminished value of the inheritance is admissible, notwithstanding value of the structures and fences destroyed was specified in the petition.

[Ed. Note.—For other cases, see Waste, Cent. Dig. §§ 27-33, 46-48; Dec. Dig. § 20.\*]

**4. JUDGMENT (§ 253\*) — CONFORMITY TO PLEADING—DAMAGES.**

Where the petition, in an action for waste, averred the value of each thing destroyed, the recovery cannot exceed the total of such items, though evidence of the injury to the inheritance is admissible.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.\*]

**5. TRIAL (§ 243\*) — CONFLICTING INSTRUCTIONS.**

In an action for waste by a tenant, where the petition averred the value of each thing destroyed, an instruction for plaintiffs charged that the damages allowable was the diminution in the market value of the premises, which could not exceed the total of the sums specified in the petition. An instruction on defendant's behalf charged that damages could not be assessed at an amount greater than the actual

value of the buildings and fences removed. Held, that the two were not conflicting, defendant's instruction not prescribing a different rule than plaintiffs', but, if there was error, it was not against defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.\*]

**6. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT.**

A verdict on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Circuit Court, Nodaway County; W. C. Ellison, Judge.

Action by the First National Realty & Loan Company and another against Adolphus O. Mason. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. G. Sawyers and Cook, Cummins & Dawson, all of Maryville, for appellant. Shinabargar, Blagg & Ellison, of Maryville, for respondents.

**TRIMBLE, J.** Plaintiffs, as the owners of a 221-acre farm, sued for waste committed thereon by defendant while he was a tenant under a lease for a term of years. The waste was alleged to have been wantonly committed.

Section 7913, R. S. Mo. 1909, subjects any tenant for life or years to a civil action for waste of anything belonging to the tenement so held, without special license in writing so to do. Section 7920, R. S. Mo. 1909, authorizes a judgment for treble damages if the jury find the waste was wantonly committed. The jury returned a verdict for \$300, but did not state in their verdict that the waste was wantonly done; and hence judgment was rendered for the \$300 without trebling the damages.

[1] The errors complained of are five in number, but they all relate to the same question and are but different methods of preserving and presenting that question for review on appeal. Said question is: What is the true measure of damages to be followed under the petition? The trial court allowed plaintiff to show the decrease in value of the farm caused by the waste. Defendant claims that, under the allegations of the petition, this was not permissible, but that the value of the buildings and fences removed was the only measure of recovery. We do not understand defendant as denying that, in an action to recover damages for waste, the measure of such damages is the extent of the injury to plaintiffs' particular estate, and that this is ordinarily the extent to which the value of the land is diminished. This is the true measure of damages in such cases. 30 Am. & Eng. Ency. of Law (2d Ed.) 301. But defendant's position is that the petition does not present an action for waste, but only one for damages for the destruction and removal of certain buildings and fences, the

specific value of each of which was alleged, and therefore the measure of damages is the value of the things destroyed and taken away. The question, therefore, resolves itself into one of pleading.

[2] The petition alleges: That on the 28th day of February, 1912, the defendant was the owner of a farm of 221 acres, specifically describing it, and on that day conveyed it to plaintiffs by warranty deeds, which were duly recorded. That plaintiffs thereupon became and are now the owners of the land in fee simple. That afterwards they executed a written lease to defendant, whereby they let the said farm to him for a period of three years from March 1, 1912. That thereafter, at different times, defendant, being then a tenant on said land, committed waste thereon after he had aliened it as aforesaid, and while he remained in possession thereof as aforesaid, in this: That he removed a certain barn and certain frame sheds and a house and certain barbed wire and woven wire fences, and also valuable timber standing and growing on said land. That said buildings, fences, and timber so removed were the property of plaintiffs, and defendant had no interest therein of any kind or character. That said acts of waste were wantonly committed by defendant. Wherefore plaintiffs allege they were damaged in the sum of \$542.50; and, inasmuch as said waste was wantonly committed as aforesaid, they prayed for treble damages and for costs. The petition specifically described the barn, sheds, house, and fences, standing on said farm and alleged to have been removed, and alleged the value of each to be a certain amount therein specified. It is this feature of the petition which causes defendant to insist that the suit is one in conversion for the value of the removed pieces of property.

We do not think that, merely because the petition annexed a specified value to the description of each piece of property, this changed the nature and character of the suit, and made it merely one in conversion for the value of the things taken away. While it is true there is no allegation saying, in so many words, that plaintiffs were damaged by reason of the diminishment in value of the farm, yet sufficient facts are alleged from which this follows as a necessary legal inference. The term "waste" means the "spoil and destruction of an estate either in houses, woods, or lands, by demolishing, not the temporary prouts only, but the very substance of the thing, thereby rendering it wild and desolate, which the common law expresses very significantly by the word 'vastum.'" 3 Blackstone's Comm. 223. Waste "is a lasting damage to the reversion caused by the destruction, by the tenant for life or years, of such things on the land as are not included in its temporary profits." *Proffitt v. Henderson*, 29 Mo. 325. Consequently the petition alleged a damage to the rever-

sion and was clearly a suit to recover that damage, and was not a suit in trover for the value of the things destroyed and removed.

[3] Being a suit to recover damages for waste, it was the trial court's duty to apply the correct measure of damages to that suit, even though the pleader may seem, by the language used, to have entertained the idea that another measure of damages was proper. Evidence showing the diminished value of the inheritance was not evidence of a fact outside of or beyond the pleadings, but of that which was strictly within the pleading. It is unlike a suit for personal injuries, in which certain specific consequences are alleged to have followed as a result of the occurrence complained of. In such case, evidence of other subsequent consequences not alleged nor necessarily implied in the petition is not admissible. Such, for example, is the case of *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107, where evidence of a malignant growth on the foot and the subsequent amputation thereof was not admissible under a petition which merely alleged that the fall broke the bones of the foot and tore loose the ligaments thereof. So also is the case of *Muth Ex. v. St. Louis, etc., R. Co.*, 87 Mo. App. 422, where evidence of loss of memory was held not to be admissible under a petition which did not plead it nor necessarily imply it. But that is not the situation here, where the petition alleges facts showing an injury to the freehold, and the damage sued for is the damage to the corporeal hereditament.

[4, 5] Of course the admission of evidence as to the injury to the freehold would not entitle the plaintiffs to recover damages beyond the amount alleged, but no such result is involved here. And this is all that is meant by instruction No. 5 given in defendant's behalf as a counterpart to plaintiffs' instruction No. 4. The latter told the jury that, if they found for the plaintiffs, the damages, if any, would be the diminishment in market value, if any, of the farm caused by the removal of the barn, etc., not to exceed \$542.50. No. 5 for the defendant told the jury that, although they found for plaintiffs, they could not assess the damages at any greater sum than the actual cash value of the buildings and fences removed. These two were not conflicting. The one given for defendant simply restricted the damages to the freehold to the value of the buildings and fences so removed. There was no evidence that the damage to the freehold was less than the value of the buildings and fences; and indeed it is not seen how it could be less. So that the jury were not given two different rules to go by, but were limited in the amount they could give under the one rule laid down. If this was error, it was not against defendant.

[6] There is substantial evidence that the defendant tore down and had removed the

buildings, etc., after he sold the land and had taken a lease thereon. It is true this is denied by defendant and his witnesses, who claim that the buildings, etc., were removed before he sold the farm. But as to which side told the truth was for the jury to determine. Their verdict is for plaintiffs, and we must accept it.

The judgment must be affirmed. So ordered. All concur.

### OWEN v. HADLEY et al. (No. 13882.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Jan. 7, 1915.)

#### 1. WORK AND LABOR (§ 4\*)—NATURE OF SERVICES—INTENT TO CHARGE.

Where plaintiff did certain work for a Republican state committee, preliminary to an election contest, without any expressed intention to charge therefor, or expectation or hope of immediate reward, a promise to pay the reasonable value of such services would not be implied.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. § 4.\*]

#### 2. PRINCIPAL AND AGENT (§ 102\*)—POLITICAL COMMITTEE—INDIVIDUAL MEMBERS—LIABILITY.

Where the chairman of the state committee of a Republican party employed an attorney to institute contest proceedings, after an election, without authority from the committee, and the attorney employed plaintiff to render services in the contest, the individual members of the committee were not liable for plaintiff's services.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 274-277, 347; Dec. Dig. § 102.\*]

#### 3. PRINCIPAL AND AGENT (§ 136\*)—AUTHORITY OF AGENT—APPOINTMENT OF THIRD PERSON.

Where the chairman of a state Republican committee, without authority from the committee, employed an attorney to conduct an election contest, and the attorney employed plaintiff to render certain services, limiting his own responsibility to \$50 per week, which was paid, such contract bound no one but the attorney who made it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. § 136.\*]

#### 4. WORK AND LABOR (§ 4\*)—QUANTUM MERUIT.

Where services are performed for one, either with or without his knowledge or consent, and he knowingly accepts and avails himself thereof, a promise to pay a fair and reasonable compensation therefor will be implied.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. § 4.\*]

#### 5. WORK AND LABOR (§ 9\*)—EXPRESS CONTRACT—FULL PERFORMANCE.

Where an existing express contract has been fully performed by plaintiff, and nothing remains to be done except payment by defendant, plaintiff need not declare on the express contract, but must proceed on quantum meruit to recover the reasonable value of such services; the recovery, however, being limited to the contract price.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 23-24; Dec. Dig. § 9.\*]

#### 6. WORK AND LABOR (§ 27\*)—ACTION ON QUANTUM MERUIT—CONTRACT—ADMISSIBILITY.

In an action on a quantum meruit for services rendered under an express contract, the contract is admissible in evidence, and the rights of the parties are to be determined in accordance therewith.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

#### 7. WORK AND LABOR (§ 4\*)—QUANTUM MERUIT—CREDIT.

One who is benefited by work performed is not liable therefor if credit is given solely to another at whose request it is performed.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. § 4.\*]

Appeal from St. Louis Circuit Court; Danl. D. Fisher, Judge.

Action by John B. Owen against Herbert S. Hadley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Sterling P. Bond, of St. Louis, for appellant. Spencer & Donnell, Lon O. Hocker, and William Zachritz, all of St. Louis, for respondents.

ALLEN, J. Plaintiff's action is against 39 defendants, and proceeds as in indebtedness assumpsit for the recovery of \$1,246.66, the balance claimed to be due for services rendered in connection with certain election contests. Plaintiff suffered a nonsuit below, and, after unsuccessfully moving to have the same set aside, appealed to this court.

The services in question were rendered by plaintiff in and concerning the election contests which were commenced in the Supreme Court of this state on or about December 17, 1910, involving the offices of judge of the Supreme Court, superintendent of public schools, and railroad and warehouse commissioner. In November, 1910, almost immediately following the general election of that year, it appeared that contest proceedings would probably be instituted by the defeated (Democratic) candidates for the offices above mentioned. Plaintiff, a resident of the city of St. Louis, had for many years been an active political worker in the Republican party, had had much experience in political affairs, and had rendered services in connection with other election contests. Shortly after the general election in 1910, it appears that an informal meeting or conference was held at the Jefferson Hotel, in the city of St. Louis, at which were present the following defendants, viz.: Hon. Herbert S. Hadley, then Governor of the state, Judge John Kenish, Judge John C. Brown, Prof. Wm. P. Evans, and Mr. Frank A. Wightman, who were the contestees in the contest proceedings afterwards instituted, and Mr. Chas. D. Morris, then chairman of the Republican State Committee. It seems that at this meeting the proposed contests were discussed, and plans for raising money therefor were con-

sidered. Following the conference, Mr. Morris, assuming to act for the State Committee, but without having been authorized by the committee so to do, employed Ex-Judge Selden P. Spencer, one of the defendants, and Lon O. Hocker, Esq., as counsel in connection with the contemplated contests.

Plaintiff testified that, just prior to the day upon which the canvassing of the election returns was to begin, Mr. Morris sent for him, and that he, in company with Mr. Morris, went to Jefferson City, where he conferred with Gov. Hadley, and for three days was present at the office of the Secretary of State, in connection with the canvassing of the returns, to "keep track of the returns and look for any irregularities that might happen that would be detrimental to the Republican party." Plaintiff stated that he then returned to the city of St. Louis, and later, in response to a telephone call from Judge Kennish, which, he says, he answered in Judge Spencer's office, in the latter's absence, he, Judge Spencer, and Mr. Hocker went to Jefferson City; that as the result of conferences at Jefferson City he went to certain other points in the state, and then reported to Gov. Hadley, who directed him to report to Judge Spencer at St. Louis; and that on December 6, 1910, he reported to Judge Spencer, when an oral agreement was made with the latter regarding plaintiff's employment, and his compensation. Plaintiff says that he told Judge Spencer that his services were worth \$100 per week, but that Judge Spencer said:

"You are worth \$100 a week, but, unfortunately, the State Committee has placed in my hands a very small sum of money, so small that I will not be personally responsible for more than \$50 a week to you."

And that he (plaintiff) then said that he would accept \$50 per week "on account," with the understanding that he was to have the additional \$50 per week "whenever the State Committee was in funds."

When asked by Judge Spencer, on cross-examination, to state again his understanding of this conversation, plaintiff said:

"That I was to receive \$100 a week. You said that I was worth a \$100, and that you would gladly pay it if you had it, but you said, unfortunately, the State Committee had placed in your hands a very small sum of money, and that you could not consistently guarantee to pay me more than \$50 on account, with the understanding and agreement that I was to have the additional \$50 when the State Committee was in funds. Q. Was there anything said about my guaranty or responsibility in the matter? A. \$50 a week. Q. That the limit would be \$50 a week? A. That was all you would guarantee at the time."

Plaintiff proceeded with the work and was engaged therein from December 6, 1910, the date of the agreement above mentioned, to May 13, 1911, during which time he was paid \$50 per week. In his account, contained in the petition, he claims \$100 for services rendered prior to December 6, 1911,

and \$50 per week additional thereafter to May 13, 1911, making a total of \$1,241.66.

The suit proceeds against Gov. Hadley, Judge Spencer, the four above-mentioned contestees, Mr. Morris, and all of the other members of the State Committee.

It is conceded here that no case was made against any of the individual members of the State Committee other than Mr. Morris, its chairman. It is contended, however, that the court erred in sustaining the demurrer to the evidence as to Gov. Hadley, Judge Spencer, Mr. Morris, and the four contestees.

[1] As to the services rendered prior to December 6, 1910, the date of the agreement with Judge Spencer, no express agreement appears on the part of any one to compensate plaintiff therefor. Nor do we think that the law will imply any such promise from all of the facts and circumstances shown in evidence. It does not appear that plaintiff intended at the time to charge therefor, but the inference is irresistible that such was not the case. And if plaintiff harbored any such secret intention, the character of the services and the circumstances under which they were rendered were such as to lead reasonable men, in the position of the other parties immediately concerned, to believe that they were rendered gratuitously; that plaintiff was assisting in this preliminary work as a matter of party service, without expectation or hope of immediate reward, as were other active members of his political party. His expenses were paid at the time, and there is no evidence of any word or act on his part indicating that he expected compensation; on the other hand, Gov. Hadley, called by plaintiff as a witness, testified that plaintiff said that he was rendering such services without charge. And it seems quite clear that those defendants with whom plaintiff was associated in such work had no reason to believe that they would be expected to compensate plaintiff therefor. We have no hesitation in saying that there could be no recovery upon these items of the account. See *Wagner v. Illuminating Co.*, 141 Mo. App. loc. cit. 72, 73, 121 S. W. 329.

[2] The services rendered after December 6, 1910, were rendered under the agreement made by plaintiff with Judge Spencer. This, as plaintiff himself says, was the only agreement had respecting his compensation. At the trial below it was admitted by defendants that Judge Spencer was acting at the time for the State Committee. The evidence is that he was retained by Mr. Morris, the chairman of the committee, without any authority therefor at any time given by the committee itself. It is clear that this could not bind the individual members of the committee; and such is conceded. Nor does it appear that this agreement could be binding upon any of the other defendants.

[3] The evidence is that Mr. Morris, acting upon his own initiative, employed Judge

Spencer and Mr. Hocker as counsel, and provided certain funds to defray the necessary expenses incident to the contests, thereby relieving the contestees of the burden of employing counsel and defending the title to their respective offices in these proceedings. In so doing it is to be inferred that Mr. Morris was acting under a sense of responsibility which he felt as chairman of the State Committee, believing that his political party, through him as the head of its state organization, should assume this burden. He did not, however, contract directly with plaintiff; but this was left to Judge Spencer, one of the counsel employed in the matter. The latter's agreement did not undertake or purport to bind Mr. Morris personally, nor did Judge Spencer have any authority so to do. Neither did it purport to bind Gov. Hadley or any of the contestees; nor could it, in the absence of authority therefor. It quite clearly appears that Judge Spencer limited his own responsibility to \$50 per week, which was paid; and that no further liability could attach to him in the premises. If Gov. Hadley and Mr. Morris are liable, such liability cannot grow out of the agreement made by Judge Spencer, but must arise from the acts of these defendants themselves in the premises.

It is contended that Gov. Hadley and Mr. Morris are liable, upon the theory that they procured the services to be rendered for the benefit of others without authority from the latter, whereby they became liable to plaintiff for the reasonable value of such services. We have no fault to find with the general proposition of law asserted in this connection, viz., that one will become personally liable, who, without authority, assumes to act for another, and procures the rendition of valuable services for the benefit of such other person. But the facts here are such, we think, as to leave no room for the application of this principle. Nothing appears which could bind either of these defendants personally as for having procured the rendition of the services by plaintiff without authority from those to be benefited thereby, or otherwise. All that is shown as to Gov. Hadley's connection with the ultimate employment of plaintiff for this work is that he told plaintiff, as the latter says, to report to Judge Spencer with whom plaintiff made his agreement. And Mr. Morris appears to have left the matter of employing plaintiff entirely in Judge Spencer's hands, and to have done nothing whereby to bind himself personally in the premises. And the evidence is that while the services were being rendered Mr. Morris took charge of making the weekly payments to plaintiff and learned that plaintiff was claiming \$100 per week, whereupon he told plaintiff that he would pay but \$50 per week. We see nothing in the evidence to fasten personal liability upon either of these two defendants.

[4-6] A further contention is that plaintiff

is entitled to recover, upon quantum meruit, against the four above-mentioned contestees, upon the theory that where services are performed for one, either with or without his knowledge and consent, and he knowingly accepts and avails himself of such services, the law will imply a promise to pay a fair and reasonable compensation therefor. Again, there is no fault to be found with this as a broad general statement of the law; but appellant's contention in this regard omits to properly reckon with the special agreement made in the premises and under which the services were rendered. It is quite true that where an existing express contract has been fully performed by the plaintiff, and nothing remains to be done except the payment by defendant for the services rendered thereunder, plaintiff need not declare on the express contract, but may proceed upon quantum meruit for the recovery of the reasonable value of such services. In such event, however, plaintiff's recovery is limited to the contract price; that is to say, he may recover the reasonable value of his services not exceeding the contract price. The contract is admissible in evidence, and the rights of the parties are to be determined in accordance with it. This question is fully discussed in *American Surety Co. v. Fruin-Bambrick Construction Co.*, 166 S. W. 333, in an opinion by Norton, J., where many authorities will be found cited.

In the instant case the special contract limited plaintiff's compensation to \$50 per week—except in so far as the agreement purported to bind the State Committee as such. It did not purport to and could not bind the contestees for the payment of additional compensation to plaintiff. And no recovery can be had against the contestees upon quantum meruit in the face of the express terms of the agreement made.

[7] And furthermore, one who is benefited by work performed is not liable therefor if credit is given solely to another at whose request it is performed. See 40 Cyc. p. 2838. The evidence shows that plaintiff performed his services relying entirely upon Judge Spencer and the State Committee to compensate him therefor. And as to this it matters not that the agreement, under the circumstances, failed to obligate the individual members of the committee, who had naught to do with the matter.

The action of the trial court in refusing to order the issuance of a subpoena duces tecum, upon plaintiff's application therefor, is assigned as error. Plaintiff sought to have such subpoena issued against Mr. Thos. K. Niedringhaus, then treasurer of the Republican State Committee, to compel the production of his books as such treasurer. Such application was made for the purpose of attempting to show that prior to the suit the committee was "in funds," and had the means wherewith to pay plaintiff's claim. Touching this matter, there was some conflict in

the evidence as to whether plaintiff was relying upon the committee to pay his claim when it had funds available, or in the event that sufficient funds were obtained by it for the purposes of the contests.

But this entire matter becomes immaterial in the view which we take of the case. It cannot matter whether the committee had funds on hand for contest purposes, or otherwise, so far as concerns the personal liability of any of these defendants. Though there was evidence that from the time of plaintiff's engagement to that of the trial the committee was always in debt to the extent of some thousands of dollars, if the question of the committee's financial affairs were here involved, the propriety of the ruling of the trial court respecting the issuance of the subpoena upon the committee's treasurer would demand our consideration. Under the circumstances, however, this ruling need not be reviewed.

Other questions are raised, but they are either not controlling, or are disposed of by what we have said above.

The judgment must be affirmed, and it is so ordered.

REYNOLDS, P. J., concurs. NORTON, J., not sitting.

#### PRICE BROKERAGE CO. v. RUSHFELDT et al. (No. 11267.)

(Kansas City Court of Appeals. Missouri. Dec. 21, 1914.)

##### 1. CARRIERS (§ 58\*)—BILL OF LADING—RIGHT OF TRANSFEREE—EVIDENCE.

In attachment, where a bank claimed the property through the purchase of a draft attached to a bill of lading, evidence held to show that the bank not only gave credit on its books to the owner for the amount of the draft, but paid out that amount on the checks of the owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.\*]

##### 2. CARRIERS (§ 58\*)—CARRIAGE OF GOODS—BILL OF LADING—RIGHTS OF ASSIGNEE AGAINST THIRD PERSONS.

Where a bank purchased a draft attached to a bill of lading for a car load of potatoes, credited the owner with the amount of the draft, and subsequently paid it out on his checks, the bank became entitled to the potatoes to secure the amount of the draft, as against a subsequent attaching creditor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.\*]

Appeal from Circuit Court, Buchanan County; Chas. H. Mayer, Judge.

Attachment by the Price Brokerage Company against Hans Rushfeldt, in which the State Bank of Hawley interpleaded, claiming the property. Judgment for the plaintiff, and interpleader appeals. Reversed and remanded, with directions to enter judgment for the interpleader.

Spencer & Landis, of St. Joseph, for appellant. Geo. W. Groves, O. W. Watkins, and Graham & Silverman, all of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff brought an action on account against defendant and sued out an attachment in aid and seized a car load of potatoes shipped to defendant at St. Joseph, Mo., from Hawley, Minn. The State Bank of Hawley claimed to own the potatoes and filed its interplea in the cause. Judgment was rendered against the interpleader, and it has appealed to this court.

When defendant received the bill of lading, he indorsed it to interpleader and drew a draft on it for \$420. These he delivered to interpleader, and the latter at that time entered that sum on its books as a credit to defendant.

[1] It is insisted that, as between the attaching plaintiff and the interpleader, the latter had no title to the potatoes for the reason that while, on receipt of the bill of lading and draft from defendant, it entered the amount of the latter on its books as a credit to defendant, it did not pay out any money thereon. And since, on learning the facts as to the attachment, it could charge back the credit, it had paid nothing, and therefore had no right to set up a claim to the property as against plaintiff's attachment. In behalf of this proposition, plaintiff cites *Boyd v. Mercer Co.*, 174 Mo. App. 431, 160 S. W. 587; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665; *Drovers' Bank v. Blue*, 110 Mich. 31, 67 N. W. 1105, 64 Am. St. Rep. 327; *First Nat. Bank v. Coal Co.*, 110 Mich. 447, 68 N. W. 232; *Bank v. Newell*, 71 Wis. 309, 37 N. W. 420; *Alabama Groc. Co. v. Bank*, 158 Ala. 143, 48 South. 340, 132 Am. St. Rep. 18; *Mann v. Bank*, 30 Kan. 412, 1 Pac. 579.

But the difficulty with plaintiff's position is that its application to this case does not find support in the record. The evidence showed, not only that interpleader placed the amount of the draft to defendant's credit on its bank books, but it had paid out the money on his checks. Defendant testified that he "made out the draft for the amount of the car, \$420, and attached it to the bill of lading and took it into the bank and got the money on it." It is true that, in answer to a question, he said that at the time he transferred it to the bank the latter "entered it on the book with other cash." But he also testified, in answer to the question, "How much money did you get from the bank for the draft?" that he got "face value." He then testified that he got the money the day the draft was deposited, by drawing his checks against it. In addition to this, the cashier of the bank was asked, "Has Mr. Rushfeldt refunded the money received from

you for that draft?" and he answered, "He has not." Again, the cashier testified that they would hold any one responsible for converting the potatoes "for the recovery of the money that we advanced on this draft." It is thus made plain that the bank did part with the money called for by the draft and that plaintiff's legal proposition is made inapplicable by the facts.

[2] The case made by the interpleader is this: That in regular order of business it purchased defendant's draft and attached bill of lading, by entering on its books a credit for the amount and then paying it out on defendant's checks. That operated as a transfer of the title to the property represented by the bill as security for the sum paid.

It follows that interpleader should prevail, and the judgment will be reversed, and the cause remanded, that judgment may be entered for the interpleader, sustaining his claim against the property for the amount of the draft and costs. All concur.

# TIERNEY v. UNITED RYS. CO. OF ST. LOUIS. (No. 13816.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914.)

## 1. CARRIERS (§ 316\*)—INJURY TO PASSENGER—PRESUMPTION AND BURDEN OF PROOF.

Where a collision between street cars injures a passenger, the maxim "*res ipsa loquitur*" applies, and negligence is presumed, and the burden shifts to the carrier to show a want of negligence on its part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]

## 2. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS—BURDEN OF PROOF.

In a passenger's action for injury from a collision, where the plaintiff's proof raised the presumption of negligence, and defendant offered no evidence as to its negligence, so that its negligence, having been established by plaintiff, was not in issue, any error in instructing that the burden was upon defendant to prove that the collision could not have been prevented by due care was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

## 3. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—PERSONAL INJURY—NERVOUS SHOCK.

A verdict of \$6,500 for injuries to a woman passenger 54 years of age and in good health, resulting in the breaking of two of her ribs, injuries to her back, head, and neck and a severe nervous shock, putting her constantly under the physician's care, and whose heart, nervous system, and general health were permanently impaired, and in view of expert testimony, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from St. Louis Circuit Court; Chas. Clafin Allen, Judge.

Action by Margaret Tierney against the United Railways Company of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle & Priest and S. P. McChesney, all of St. Louis, for appellant, cited the following authorities: Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. Supp. 321; Kay v. Metropolitan St. Ry. Co., 163 N. Y. 447, 57 N. E. 751; Long v. Long, 44 Mo. App. 141; Marshall Livery Co. v. McKelvy, 55 Mo. App. 240; Berger v. St. Louis Storage & Commission Co., 136 Mo. App. 36, 116 S. W. 444; O'Shea v. Lehr (Mo. App.) 165 S. W. 837; Wetsell, Adm'r, v. Reilly, 159 App. Div. 688, 145 N. Y. Supp. 167; St. Louis Sanitary Co. v. Reed (Mo. App.) 161 S. W. 316; Ranney v. Lewis (Mo. App.) 167 S. W. 601.

A. R. Taylor and Howard Taylor, both of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries alleged to have been sustained by plaintiff, while a passenger upon one of the defendant's street cars in the city of St. Louis, by reason of a collision of such car with another car of defendant then being operated by it in said city. At the trial, which was before the court and a jury, the evidence adduced by plaintiff went to show the relation of passenger and carrier, the collision, and injuries resulting to plaintiff therefrom. Defendant offered no evidence touching its alleged negligence in the premises, introducing only the testimony of a medical expert who had examined plaintiff on two occasions prior to the trial below. There was a verdict and judgment for plaintiff in the sum of \$6,500, and the defendant appealed.

[1] I. There are but two assignments of error before us. One of these pertains to the giving of an instruction for plaintiff in which it is claimed reversible error inheres. This instruction required the jury to find that the defendant was operating the cars in question for the purpose of carrying passengers for hire; that plaintiff was a passenger on one of defendant's cars; and that, while she was such passenger thereon, the car in which she was riding came into collision with another car operated by the defendant, and that she was thereby thrown from her seat and injured. The instruction then proceeds as follows:

"The court instructs the jury that the burden of proving that the defendant and its servants in charge of its said cars could not have prevented said collision by the exercise of the highest practicable care of careful and skillful railroad employes under the same or similar circumstances is upon the defendant, and, if the jury find from the evidence that the defendant has failed to so prove, the verdict should be for the plaintiff."

This instruction is criticized upon the ground that it tells the jury that, if certain facts are found, then the burden of proof shifts to the defendant. And it is said that it thus cast upon the defendant a burden which could not lawfully be placed upon it, at any stage of the case, for it is asserted

that the "burden of proof" does not at any time shift, but throughout the trial remains with the party having the affirmative of the issue, though "the burden of evidence" may shift. As to this authorities are cited which will doubtless be found in the brief of appellant accompanying the reported opinion herein. But it is clear that the giving of this instruction, which is the only immediate question involved, was not error.

In *Stauffer v. Railroad*, 243 Mo. loc. cit. 317, 147 S. W. 1032, it is said:

"Given the relation of passenger and carrier, a collision and an injury, the maxim '*res ipsa loquitur*' applies, negligence is presumed *prima facie*, and the burden is shifted over from plaintiff's shoulders to defendant's to show a want of negligence."

The effect of the instruction before us is merely to tell the jury that the burden of showing or "proving" want of negligence on defendant's part is cast upon it, if the facts mentioned are found. See, also, *Price v. Street Railway Co.*, 220 Mo. loc. cit. 461, 119 S. W. 932, 132 Am. St. Rep. 588; *MacDonald v. Railroad*, 219 Mo. loc. cit. 487, 118 S. W. 78, 16 Ann. Cas. 810; *Orcutt v. Century Bldg. Co.*, 201 Mo. loc. cit. 441, 99 S. W. 1062, 8 L. R. A. (N. S.) 929; *Redmon v. Railroad*, 185 Mo. loc. cit. 9, 84 S. W. 26, 105 Am. St. Rep. 558; *Lemon v. Chauslor*, 68 Mo. loc. cit. 356, 30 Am. Rep. 799; and authorities to which these cases refer.

[2] And, in any event, the giving of this instruction could not have been reversible error, under the circumstances.

Plaintiff's proof raised a presumption of negligence on the part of defendant which there was nothing tending to rebut or dispel. There was then left in the case no issue as to defendant's negligence. As to such a situation, this court in *Nagel v. Railroad*, 169 Mo. App. 284, 152 S. W. 621, in an opinion by Norton, J., said:

"Defendant introduced no evidence whatever tending to rebut the presumption of negligence, or tending to show that it had acquitted its obligation with due care. \* \* \* This being true, it would seem that, though the general denial in the answer put the question of negligence at issue, plaintiff sustained his burden and established the fact of negligence by showing a state of facts, as he did, which afforded the presumption, and that matter was set at rest in the case in the absence of countervailing proof on the part of defendant. In other words, when the presumption of negligence arose on the facts developed, and defendant declined to combat it or even attempt to repel it, the issue touching that matter disappeared. In this state of the case, except for the right of defendant to have the credibility of the witnesses passed upon by the jury, as declared in *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, the court might properly have declared defendant negligent, as a matter of law. With the matter of defendant's negligence established and no longer at issue, we are unable to discover reversible error in the general language of the instruction complained of."

And in *MacDonald v. Railroad*, supra, 219 Mo. loc. cit. 487, 118 S. W. 84, 16 Ann. Cas. 810, it is said:

"Therefore, as a carrier is under a duty to carry its passengers safely, it should explain its conduct in throwing them hither and yon as if shot out of a catapult. If it did not explain that conduct by proof showing its own high diligence and care, or by showing the intervention of some independent cause, it must be conclusively presumed guilty of negligence, for it has failed to rebut the *prima facie* presumption of negligence arising from the unusual and violent stop."

It is quite apparent that the defendant could not possibly have been prejudiced by the giving of the instruction here in question. Defendant complains of the burden which it says this instruction placed upon it; i. e., that it was thereby made to carry a heavier burden than the law sanctions. But the fact is that the defendant did not undertake to carry any burden whatsoever, but tacitly admitted its inability to overcome the presumption raised against it. That part of the instruction complained of might well have been omitted altogether, under the circumstances, for, if the jury found the relation of passenger and carrier, the collision and consequent injury to plaintiff, such facts, in the absence of any explanation on the part of defendant, entitled plaintiff to a verdict. And surely defendant cannot complain that the instruction was so drawn as to permit the jury to find that defendant had shown that it was not at fault in the premises, when in fact it did not attempt to make such showing.

[3] II. A further ground of complaint is that the amount of the verdict, to wit, \$6,500, is excessive. Respecting this assignment of error, we have carefully examined the evidence relating to plaintiff's injuries. It appears that she was 54 years of age, sound, and in good health, at the time of her injury. By reason of the collision she was thrown to the floor of the car and trampled upon by escaping passengers, two of her ribs were broken, and she received injuries to her back, head, and neck, and a severe nervous shock. She was constantly under a physician's care from the happening of the casualty to the time of the trial below. And the medical testimony adduced in her behalf went to show that, as the result of her injuries, her heart had become affected and her nervous system and general health greatly impaired; that she had become subject to dizzy or fainting spells, and had attacks of heart trouble which confined her to her bed for weeks at a time. And the opinions of the medical experts testifying in her behalf were that there would be no permanent improvement in her condition, and that her tenure of life was precarious.

With this evidence in the case, we think the verdict of the jury cannot be said to be excessive; certainly not so plainly so as to warrant interference by this court.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

STEDDINGS v. DOBBINS. (No. 11308.)  
(Kansas City Court of Appeals. Missouri.  
Dec. 21, 1914.)

1. TRIAL (§ 62\*)—ACTIONS BY SELLER—BREACH  
OF WARRANTY—ADMISSIBILITY OF EVIDENCE  
—REBUTTAL.

Where the defense to an action for the purchase price of hogs was a breach of warranty in that the hogs had cholera, from which most of them died, some on the day after the sale, evidence that none of the seller's hogs which had been in the same inclosure with those sold had the cholera is admissible as tending to show that the hogs sold did not die from cholera, which is well known to be highly contagious.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.\*]

2. TRIAL (§ 45\*)—RECEPTION OF EVIDENCE—  
OFFER OF PROOF.

Although such evidence was admitted, an offer by the buyer to prove that the following spring a tenant found dead hogs in a field which he had rented was too indefinite and remote, especially where there was no offer to show how or of what the hogs died.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.\*]

Appeal from Circuit Court, Saline County;  
Samuel Davis, Judge.

Action by H. R. Steddings against R. L. Dobbins. Judgment for the plaintiff, and defendant appeals. Affirmed.

C. P. Storts, of Slater, and Reynolds & James, of Marshall, for appellant. S. B. Burks, of Slater, and Duggins & Duggins, of Marshall, for respondent.

ELLISON, P. J. Plaintiff sold and delivered to defendant a lot of stock hogs, after defendant had inspected them, for the sum of \$364.85, of which price the defendant at the time settled \$47.50 by transferring and delivering to plaintiff a certain bull, and gave his check for the balance of \$317.35, and then notified the bank not to pay it. This action was then instituted for such balance, and judgment was rendered therefor in the trial court.

It was alleged in the answer that defendant desired the hogs to run in his feed lot, and so informed plaintiff, when the latter expressly warranted them to be "straight and all right and suitable for that purpose." A breach of such warranty was then pleaded; the specification being that the hogs, when purchased, were infected with the cholera, from the effect of which disease they began to die the next day after defendant took them to his farm. Defendant having inspected the hogs, he alleges he took plaintiff's express warranty that they were sound, that is, straight and all right. Plaintiff denied the warranty, and that issue was directly submitted to the jury by appropriate instructions, one given at plaintiff's and the other at defendant's request. We, therefore, accept as an established fact that no warranty was made.

[1] The only question left in the case re-

lates to the propriety of the court's rulings in admitting and rejecting evidence offered by the respective parties. The record before us does not show a reply denying the new matter of warranty, disease, and death of the hogs, but the parties treated the cause at the trial as though the issues were made up, and we will do likewise. Though plaintiff may have made the warranty, he was not liable unless the cause of the death of the hogs was within the warranty, and the right, therefore, existed in either party to investigate the further issue whether they in fact died from disease. To show they did not, plaintiff introduced evidence that defendant saturated them with coal oil in hauling them home, the day being exceedingly cold, and that this was sometimes fatal to hogs. He also introduced evidence, over defendant's objection, that they ran in the same lot or inclosure with other hogs belonging to plaintiff, and that the latter were sound and free from disease. The disease, called "hog cholera" is well known to be highly contagious. It is extremely likely that if 39 out of a total of 45 hogs died within a few days (some of them the next day) after being separated from another number, the fact that none of the latter had it—that they remained sound—is a circumstance which will assist in determining whether the death of the others was from a disease (cholera) taken with them from plaintiff's premises. Council v. Ry. Co., 123 Mo. App. 432, 100 S. W. 57.

[2] Defendant suggests that if the evidence just noted was admissible in plaintiff's behalf, his offer to prove that in the following spring a tenant "found dead hogs in a field he had rented" should also have been admitted. But we think not; it was altogether too indefinite and remote, and there was no offer to show how or of what these hogs died.

The case was a close one on the facts, but as it was properly tried, the parties must abide by the result, and the judgment will be affirmed. All concur.

GIBSON v. STATE MUT. LIFE ASSUR.  
CO. OF WORCESTER, MASS.  
(No. 11278.)

(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914. On motion for Rehear-  
ing, Dec. 21, 1914.)

INSURANCE (§ 150\*)—ACTION ON POLICY—  
STATUTORY PROVISIONS—COMPLIANCE—  
"PART OF THE POLICY."

An indorsement by a foreign insurance company on the back of a life policy of a conditional agreement for extended insurance on default in premiums, without referring to it in the policy or application, is not "a part of the policy" within Rev. St. 1889, § 5850, as amended by Laws 1895, p. 197, providing that, if the policy contains an agreement for paid-up insurance "as a part of the policy," sections

5856 and 5858 providing for extended insurance, shall not apply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 305-307; Dec. Dig. § 150.\*]

Appeal from Circuit Court, Howard County; A. H. Waller, Judge.

Action by Lucy A. Gibson against the State Mutual Life Assurance Company of Worcester, Mass. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. Denny, of Glasgow, for appellant.  
R. B. Caples, of Glasgow, for respondent.

TRIMBLE, J. Respondent is the widow of John W. Gibson and the beneficiary in an insurance policy on his life issued by appellant May 12, 1897. After paying 16 full annual premiums, Gibson defaulted in the payment of the seventeenth, which fell due on May 12, 1913, and, while in default, died on June 20th of that year. Satisfactory proofs of death were promptly furnished.

Respondent claims that she is entitled to recover the full amount of the policy (less the defaulted premium and a small loan made to the insured) as extended insurance given by the Missouri nonforfeiture statutes as they stood at the time the policy was issued. Appellant insists that the policy contains a provision for a specified sum as paid-up insurance in accordance with the laws of Massachusetts, and that therefore respondent is restricted to this sum, since, under the terms of our statute, whenever the policy contains such a provision, the statutes creating extended insurance are not applicable. The policy having been issued on May 12, 1897, the statutes of which respondent claims the benefit are sections 5856 and 5858, R. S. Mo. 1889. The appellant relies upon section 5859 as amended April 19, 1895. Laws of Mo. 1895, p. 197.

It is unnecessary to set out the provisions of the two statutes under which respondent claims, since it is conceded that, if the policy does not come within the terms of section 5859 as amended, then respondent's claim is well founded. So far as applicable to this case section 5859 provides that sections 5856-5858 shall not be applicable—

"If the policy shall have been issued by any company authorized to do business in this state, and organized under the laws of another state of the United States which prescribes a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and shall contain an agreement for such surrender value, temporary or paid-up insurance, as prescribed by such other state as a part of said policy, or if the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy for nonforfeitable paid-up insurance."

It is admitted that the policy was issued by a company authorized to do business in this state and organized under the laws of Massachusetts, and that the laws of that

state prescribed cash surrender and paid-up insurance values in accordance with the provisions of the above-quoted statute. The sole question for determination here is: Does the policy contain an agreement for such paid-up insurance, or a provision for an unconditional cash surrender value, or for the unconditional commutation of the policy into nonforfeitable paid-up insurance? In other words, is the liability of appellant to be fixed by the terms of section 5859 as amended in 1895, or by the terms of section 5856?

The written application made by insured, and upon which the policy was issued, stated that insured desired an ordinary life policy for \$1,000, payable to his wife in case she survived him, and agreed to pay an annual premium of \$45.10 during his life. Nothing is said therein about the laws of Massachusetts governing the policy, or about any other kind of insurance. On receiving this application and the first cash premium, the appellant accepted the same and delivered to the insured the policy in question. In it appellant promised that, in consideration of the application and the \$45.10 accompanying it and of the payment of a like sum on or before May 12th in each year during the life of insured, it would, upon satisfactory proof of insured's death, pay respondent \$1,000, less any indebtedness due the company, and that after two years the policy should be incontestable, provided the premiums were paid as agreed. There were no other terms contained on the face of the policy.

The provision relied upon by appellant to take the policy out of the operation of the statutes in respondent's favor does not appear in the body of the policy, nor is it referred to in any way therein or in the application signed by the insured. It is indorsed on the back side of the page containing the face of the policy, and is as follows:

"In accordance with the Massachusetts Insurance Act of 1894, the State Mutual Life Assurance Company of Worcester hereby agrees to give on the anniversary of the issue of this policy at the end of two full years from the date of issue thereof, or on any subsequent anniversary, to the person or persons entitled thereto, the cash surrender value herein below stated; or, in lieu thereof, to carry this policy 'as paid-up insurance' for the amount corresponding to such cash surrender value, any indebtedness to the company on account of this policy first deducted therefrom."

Following this is a table showing a paid-up insurance value at the end of the sixteenth year of \$502.

Does the indorsement of this provision on the policy, and not contained in, nor referred to in, the body of the policy or in the application, exempt the policy from the operation of sections 5856 and 5858, so as to deprive respondent of the extended insurance therein provided?

The policy and the application, which by the terms of the policy is made a part thereof, constitute a complete contract of insur-

ance. The insured applied for an ordinary straight life policy. So far as its terms go, the policy sought was to be a Missouri contract governed by the laws of the state and entitling the insured and beneficiary to all the rights and privileges conferred thereby. The appellant accepted this application and issued a policy which on its face corresponded strictly to the kind of policy asked for, and in no way referred to any provision for surrender value or paid-up insurance. The application and the policy therefore constituted a contract of insurance complete in itself. According to its terms, as modified by the nonforfeiture statutes, the insured would be entitled to extended insurance upon default of any premium after three years. But, in an indorsement upon the back, appellant offers to do certain things which it now claims is sufficient to take the policy out of the operation of the aforesaid extended insurance statutes.

Prior to the enactment of section 5859, the laws governing an insurance policy could not be set aside by the terms of the policy, even though expressly agreed to by both the insurer and the insured. *Nichols v. Mut. Life Ins. Co.*, 176 Mo. 374, 75 S. W. 664, 62 L. R. A. 657. But by the enactment of said section authority was given to exempt the policy from the three nonforfeiture statutes (sections 5856, 5857, and 5858), provided the parties contracted to do so. It would seem that the statute intended that the provision exempting the policy from the operation of the nonforfeiture law must be contained in the body of the policy itself, or referred to therein in such way as to clearly show that the insured agreed to it as one of its terms. The statute says:

"If the policy shall have been issued \* \* \* and shall contain an agreement for \* \* \* paid-up insurance, as prescribed by such other state as a part of said policy, or if the policy shall contain a provision for an unconditional \* \* \* commutation of the policy for nonforfeitable paid-up insurance."

Since the appellant is seeking to come within the exemption provided by this statute, it would seem that it should show that it has complied strictly with its terms and comes clearly within the requirements demanded by it. While it has often been decided that matter indorsed on a policy is to be considered a part of it, yet in nearly all of the cases the courts deciding them have been careful to state that the indorsement was referred to or mentioned in some way in the body of the instrument. And in those holding that mere indorsements on the policy, without mention thereof or reference thereto in the body of the policy, were *prima facie* a part of the contract, the indorsement covered matters about which the parties were free to contract. In *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, loc. cit. 240, 7 Atl. 257, loc. cit. 259, it is held that:

"An indorsement on the back of a policy may be regarded as part of the contract, pro-

vided it is referred to in the policy as constituting part of it. If, however, there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of the insurer, and not therefore binding on the insured. *Stone v. U. S. Casualty Co.*, 34 N. J. Law, 371; *Kingsley v. New Eng. Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 393; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Farmers' Ins. & L. Co. v. Snyder*, 16 Wend. 481 [30 Am. Dec. 118]; *Bize v. Fletcher*, Doug. 291, note."

So, also, to the same effect is 1 Joyce on Insurance, § 195. This would seem to be especially true in a case of this kind, where the indorsement is sought to be used by the insurer to take the policy out of the operation of laws enacted for the protection of the insured. In line with this principle it is held in *Goodson v. National Accident Ass'n*, 91 Mo. App. 339, that the statute requiring an insurance company to specify the exact sum it promised to pay meant that it must be specified in the body of the policy itself, and that an indorsement on the back specifying the amount to be paid was a compliance with the statute because the indorsement was specifically referred to in the face of the policy, and was thereby made a part of it. In like manner it would seem that the statute under consideration in the case at bar contemplates that the policy itself should contain the provision relied upon to exempt it from the state insurance laws, or that at least some reference or mention should be made of it in the application or policy so as to clearly show the insured's express contractual assent thereto; otherwise the insurer may secure an exemption which was not provided for in the contract, and which was not contemplated by at least one of the parties at the time the insurance contract was entered into. It is not clear from the terms of the provision that it was to cover a case of default in the payment of premiums. Nothing is said in the indorsed provision about default in the payment of premiums, and everything specified in the policy is conditioned on the payment of the premiums as they fall due. The wording of the provision implies that, if any benefit is to be obtained from it, arrangement therefor must be made on an anniversary of the issue of the policy; and the natural inference would be that the premium due on that anniversary must be paid, since all the benefits of the policy are by its terms made contingent upon the payment of premiums when due. If the provision means that it must be arranged for on a premium-paying day, then the provision for the commutation of the policy into paid-up insurance is not unconditional as the statute requires. *Smith v. Mut. Benefit Life Ins. Co.*, 173 Mo. 329, 72 S. W. 935. It would have been an easy matter to have inserted a plain and unequivocal statement in the policy providing for unconditional paid-up insurance in case of default in payment of pre-

miums and thereby obtained the insured's consent to the policy being exempt from the nonforfeiture laws of the state. This would clearly have shown that he contracted that it should be done. Instead of this, an equivocal and uncertain provision is indorsed on the back of the policy which, if given the effect contended for, will work a forfeiture of half the amount due on the policy without being mentioned or referred to in any way in the body of the contract.

We are of the opinion that, in order to claim the benefit of the above exemption statute, the insurer must come strictly within its terms, and that such was not done in this case.

The judgment is therefore affirmed. All concur.

#### On Motion for Rehearing.

The foregoing opinion holds that section 5859, R. S. Mo. 1889, exempting policies from the nonforfeiture law, if the policy shall contain an agreement for paid-up insurance, means that such agreement must be in the body of the policy or be referred to therein in such way as to show the assured's express contractual assent thereto, and that, as there was nothing in either the application or the policy referring in any way to such agreement, a mere indorsement on the back of the policy of an agreement in relation to paid-up insurance does not comply with the statute. Appellant now contends that this ruling is in conflict with certain decisions hereinafter mentioned.

The first of these cases is that of *Nichols v. Mutual Life Ins. Co.*, 176 Mo. 355, loc. cit. 374, 75 S. W. 664, loc. cit. 669 (62 L. R. A. 657). But in that case the application was by the policy made a part of the contract, and contained an agreement on the part of the assured "that the contract of insurance should be subject to, and based upon, the laws of the state of New York." Of course if there was an agreement that the policy should be governed by the laws of the state of the company which authorized paid-up insurance, then this would be a compliance with section 5859. But there is no such agreement in the case at bar.

The next case is that of *Price v. Conn. Mutual Life Ins. Co.*, 48 Mo. App. 281, loc. cit. 283, but the application in that case, and also the policy itself, contained full and explicit agreements concerning paid-up insurance and the waiver of insured's rights under the nonforfeiture law; hence defendant cannot rely upon it.

The next case is that of *Dakan v. Union Mut. Life Ins. Co.*, 125 Mo. App. 451, 102 S. W. 634. In that case the policy expressly provided that the provisions of the Maine nonforfeiture law should apply. Under that law the actuary's computation extended the

policy for a period of five and a fraction years. By a table on the back of the policy, not referred to either in the application or the policy, plaintiff contended the term of extension was for a period of eleven and a fraction years. The insured did not die within the term provided for by the policy, but did die within the term it was alleged the table provided. The court held, however, that if the table "served any purpose in the way of elucidating the terms of the contract," it might be construed as a part thereof, yet this would not be done where the indorsement must be construed as conflicting with the terms of the policy, and refused to allow the indorsement to have any effect. This ruling is to the effect that an indorsement on the back of the policy nowhere referred to either in the application or the policy is not, under all circumstances, to be considered a part of the policy, which is the ruling in the case at bar.

The last case cited by defendant is *Smoot v. Bankers' Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719. In that case the issue was whether the company was an assessment or an old-line company. The policy itself provided that benefits were to be paid the insured. An indorsement on the back of the policy stated that benefits were to be provided for by assessments. The court merely referred to this indorsement as one of the things going to show that the company did business on the assessment plan. The court was careful, however, to call attention to other facts shown in evidence that the company was in reality an assessment company. And the notices sent to the assured showed that to be a fact. As to the indorsement being a part of the policy, the court said (138 Mo. App. 461, 120 S. W. 727):

"That an indorsement on the back of the certificate is to be construed along with the face of the certificate has often been decided, and seems to have been a controlling fact in *Elliott v. Safety Fund Life Ass'n*, 76 Mo. App. 462, loc. cit. 565."

In that case the indorsement was in reference to the terms of payment of the premiums. The premiums, of course, were referred to in the policy; hence the indorsement was a "mere elucidation" of the terms of the policy. Neither of these cases hold that an indorsement is, under all circumstances, to be construed as a part of the policy. They are, therefore, not in conflict with the case at bar in the ruling it makes; namely, that an indorsement on the back of the policy which is not referred to in any way in the policy or application is not a compliance with section 5859, R. S. Mo. 1889, exempting a policy from the operation of our nonforfeiture laws if it "shall contain an agreement for paid-up insurance as a part of said policy."

The motions for a rehearing and to transfer are therefore overruled. All concur.

**WAINSCOTT v. HALEY. (No. 11322.)**

(Kansas City Court of Appeals. Missouri. Dec. 21, 1914.)

**1. HOMESTEAD (§ 117\*)—RIGHTS OF WIFE.**

The wife of the owner of a homestead has no estate or vested interest therein during his lifetime, notwithstanding Rev. St. 1909, § 6704, forbidding a husband from selling the homestead without the wife joining therein.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 191-202; Dec. Dig. § 117.\*]

**2. HOMESTEAD (§ 117\*)—"INCHOATE INTEREST" OF WIFE—NATURE.**

The inchoate interest of a wife in the homestead of her husband consists of the right to succeed him as the head of the family and owner on his death or abandonment of the family in possession and occupancy of the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 191-202; Dec. Dig. § 117.\*]

For other definitions, see Words and Phrases, Inchoate Interest.]

**3. HOMESTEAD (§ 117\*)—SALES—CONTRACTS—VALIDITY.**

A contract by a husband to convey his homestead is not void ab initio under Rev. St. 1909, § 6704, declaring that the husband shall be incapable of selling the homestead, and every alienation thereof shall be void, but nothing shall be construed to prevent husband and wife from jointly disposing of it, but is valid as binding him to procure the execution by his wife of a deed, and, where she refuses to join in the conveyance, he breaches his contract and is liable for the damages sustained.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 191-202; Dec. Dig. § 117.\*]

**4. CONTRACTS (§ 147\*)—CONSTRUCTION.**

Where the enforcement of the intention of the parties to a contract, as expressed in the language used, works no oppression or absurdity, it will be presumed that the parties intended that the language used should be given its ordinary meaning, and such intention will be given effect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

**5. DAMAGES (§ 78\*)—CONTRACTS—PENALTY—LIQUIDATED DAMAGES.**

A contract for the exchange of real estate which provides that the parties bind themselves in \$1,000, which they agree on as liquidated damages to be paid by the party failing to perform his part of the contract, stipulates for liquidated damages for a breach, where the land of each is valued at \$10,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by W. J. Wainscott against Mike Haley. From a judgment for plaintiff, defendant appeals. Affirmed.

A. J. King and D. M. Gibson, both of Nevada, Mo., for appellant. Scott & Bowker, of Nevada, Mo., for respondent.

JOHNSON, J. This is an action to recover liquidated damages for the breach by defendant of an executory contract for the exchange of real property in the city of Nevada, owned by plaintiff and which was his homestead, for a farm of 160 acres in

Vernon county, owned by defendant and occupied by him and his family as a homestead. The contract was not signed by the wife of either party, but at the time set for the exchange of deeds plaintiff tendered a warranty deed executed and acknowledged by him and his wife, and demanded a like deed from defendant conveying the farm. The wife of defendant would not join in the execution of such deed, and, being unable to perform the contract, he repudiated it as void from the beginning. The contract contained the agreement:

"The parties hereunto do bind themselves, their heirs, \* \* \* each unto the other in the sum of one thousand dollars, which they hereby agree upon as liquidated damages, to be paid by the party failing to comply with his covenants contained in this agreement."

The land of each party is valued in the testimony of plaintiff at \$10,000, and no attempt was made to prove any actual pecuniary loss to him from the refusal of defendant to perform the contract. At the close of the evidence of plaintiff the court refused defendant's request for a peremptory instruction, and (defendant offering no testimony) directed a verdict for plaintiff in the sum of \$850. Such verdict was returned, and defendant appealed. The farm of defendant, in area, did not exceed that allowed by law as a homestead, but it did in value to the extent of \$8,500. Section 6704, Rev. Stat. 1909. Obviously the court in its peremptory instruction treated the stipulation in the contract for the assessment of damages in the event of a breach by either party, not as a penalty, but as liquidated damages, and, on the theory that the contract was void as to the value of the homestead interest—i. e., \$1,500—but good as to the remainder of the value of the farm, apportioned the agreed damages accordingly.

Defendant argues: First, that the contract was void in toto; and, second, that since the two properties admittedly were equal in value, the agreement to liquidate the damages for a breach by either party at the sum of \$1,000 clearly was a provision for the imposition of a penalty.

The statute provides (section 6704):

"The husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void: Provided, however, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying, mortgaging, alienating or in any other manner disposing of such homestead, or any part thereof."

The history of our homestead law, which, in great part, was transplanted from Vermont (Macke v. Byrd, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649) was reviewed by the Supreme Court in Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029, and by this court in Williams v. Williams, 161 Mo. App. 249, 143 S. W. 559,

and need not be repeated here. The right of homestead is for the benefit of the family, and the head of the family in whom it inures has no other interest in it than that of the "head of a family and a member of an immediate family" (Bushnell v. Loomis, supra). The husband and father, who owns the land, subject to the right of homestead, which he holds in virtue of his headship of the family, is not allowed to sell or alienate that right without the consent of the wife, in whom the law invests the power to veto any such sale or alienation by refusing to join in the execution of a deed to give it effect.

[1, 2] "The wife and children of the owner of a homestead have no estate or vested interest in the property during his lifetime, and laws forbidding a husband to sell or incumber the homestead without the wife joining do not give her an estate, but a mere veto power over his right to convey or mortgage." Bushnell v. Loomis, supra, 234 Mo. loc. cit. 385, 137 S. W. 260. The inchoate interest in the homestead possessed by the wife of the husband, owner (Thorp v. Thorp, 70 Vt. 46, 39 Atl. 245) consists of the right to succeed him as the head of the family and owner of the homestead right upon his decease or abandonment of the family leaving it in possession and occupancy of the homestead (Williams v. Williams, supra).

[3] The right of the husband owner to sell and convey the homestead, if his wife join in the deed, is absolute, and, of course, is incompatible with the idea that the wife and children have any vested estate in the land, or that the wife possesses any other power than that of interposing her veto to the consummation of his contract. The statute does not curtail his right as owner of the fee and of the homestead to sell and alienate both estates, except to the extent, and to that extent only, that his contract to sell, mortgage, or alienate, becomes null and void if the wife refuse to join in the execution of the deed or mortgage. If, instead of so joining, she exercises her right of veto, specific performance of the husband's contract to sell cannot be enforced. The effect of the interposition of the veto is not to make the owner's contract for the sale of the land void ab initio, but only to place an effectual check upon its specific performance.

In some of the cases to which we shall refer the thought seems to be uppermost that one of the beneficent objects of the homestead law is to prevent, or at least discourage, both husband and wife from selling or attempting to sell the homestead which they have acquired. Such is not one of the purposes of the law, and, if it were, the result would be more harmful than beneficial; since frequently the necessities or interests of the family require the alienation of the homestead, and the father and mother are left by the statute, as they should be, in the

position of the sole judges of what was best to be done in the furtherance of the family fortunes. The father, as owner of the fee and head of the family, may contract to sell the homestead, and his contract will be good ab initio and enforceable against the vendee if the mother approve it by joining in the execution of a deed pursuant to the contract. If, in the present case, the wife of defendant had manifested her approval of the contract by joining in the execution of a deed conveying the farm to plaintiff, would plaintiff be heard to repudiate the contract on the ground that she had not been a party to the contract and had not divested herself of her right to veto the sale? We have shown that she could not be thus divested except by joining in a deed of conveyance, and, if the vendee could maintain such position, it would mean that all contracts for the sale of homesteads would be merely so much waste paper, since they could not be enforced against the vendee. Homestead laws are intended to be for the benefit, not the detriment, of the family, and our law bespeaks no intention of restricting the right of alienation in a way that would hamper the father and mother in their joint efforts to sell the homestead. The vendee in such contract could not successfully defend his breach thereof on the ground of its invalidity and neither may the vendor. The owner of the homestead who contracts to sell it and to invest the vendee with the entire estate binds himself to procure the execution of the deed by his wife, and, while the law will not allow the specific performance of his contract to be enforced, it does not exonerate him from his contractual obligation to do as he solemnly agreed he would do, and there is no good reason in law or morals which would justify his exemption of liability to respond in damages for his breach of contract. Such is the view of the law expressed by this court, speaking through Ellison, J., in Curry v. Whitmore, 110 Mo. App. 204, 84 S. W. 1131, where the defendant employed a real estate agent to sell his homestead and refused to pay the commission earned by the agent for the reason that his wife vetoed the sale. We rejected that reason as being unsound, saying:

"Neither can a husband sell any of his other lands and make perfect title without his wife's consent. But neither of these conditions will relieve him of liability on his contract for the sale of such lands. That is a matter he should think of and provide against at the time he enters into his obligation."

We repeated the same doctrine in the later case of Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228. In a still later case (Mundy v. Shellaberger, 161 Fed. 503, 88 C. C. A. 445) the United States Court of Appeals for the Eighth Circuit, in an action for the specific performance of the husband's contract for the sale of the homestead, properly held that the exercise by the wife of

the veto power granted her by the statutes of this state deprived the vendee of any right to a specific performance of the contract, but proceeded, upon reasoning at variance with that upon which we based our decisions in the Curry and Young Cases, to hold that such contract could not be made the basis of an action for damages for nonperformance. The opinions of that high court are entitled to, and have, our deepest respect, but in this instance we are unable to agree with the reasoning of their decision, which, if followed to its logical conclusion, would add no real benefit to families of owners of homesteads, and frequently would result in injury to them caused by the unnecessary restrictions it would impose upon the practical exercise of the lawful right of alienation, which still exists as an element of the ownership of property, subject only to the right of veto the wife may exercise to the sale of the homestead.

In rendering judgment upon the basis that defendant's contract was void in toto as to the value of the homestead, but valid as to the remainder, the learned trial court appears to have followed the views of the Supreme Court of Minnesota in *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817, where, on the postulate that the husband's contract to sell the homestead without his wife joining therein was "not merely voidable, but wholly void," it was held that, since the husband was under no legal obligation to perform the contract, it would be illogical (as doubtless it would be) to hold him liable in damages for the nonperformance of such contract, but that, if the homestead were only a part of the land he undertook to convey, he could be held liable in damages for his refusal to perform that part of the contract on the theory that, where a vendor is disabled from full performance, the vendee may elect to accept the partial performance he is able to make. The weakness of this line of reasoning is that it rests upon the unsound premise that it is unlawful for a husband to contract to sell the homestead. The premise being wrong, the conclusion was wrong. So far as the question of liability of the contracting parties to answer in damages for a breach of the contract is concerned, the contract was neither void nor voidable, in whole or in part. Each obligated himself to procure the execution of a deed by his wife. It is not unlawful for a person to contract to sell and convey something he does not own, but expects to acquire, and, if he unqualifiedly undertakes to do that which later he finds he cannot perform, he must and should suffer the liability the law imposes upon the contract breaker.

[4, 5] The remaining issue that the amount stipulated in the contract as liquidated damages should be construed as a penalty must also be decided against defendant. The question is one of law for the court (*May*

*v. Crawford*, 150 Mo. 504, 51 S. W. 693; *Dyer v. Cowden*, 168 Mo. App. 649, 151 S. W. 156), and where parties are *sui juris* and stand on equal footing, the courts will not interfere with their right to make their own contracts, and will not assume that an agreement for the liquidation of damages, in fact, is for the imposition of a penalty, unless it clearly appears that the sum agreed upon is out of all reasonable proportion to any loss that could result from a breach of the contract. The tests usually applied by the courts in the solution of such questions are: First, the language employed in the contract; second, the subject-matter; and, third, the intention of the parties—the last being regarded as the most important consideration. And where the enforcement of the intention expressed in the phraseology would work no absurdity or oppression, the parties must be presumed to have intended to say what they did say, and such intention should be given full effect. The rule thus is stated by *Wagner, J.*, in *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359:

"It is perfectly competent for parties, when entering into an agreement, to avoid all controversy as to the amount of damages which may result from a violation of the contract, and to agree upon a fixed, certain, and definite sum which shall be paid by the party in default. The damages in such a case are termed liquidated, stipulated, or stated damages. But in such cases great difficulty has been experienced in giving the contract a practical application and construction in determining whether the damages should be regarded as liquidated, or as a mere penalty only. The question is environed with doubt and contradiction, and the decisions are conflicting and inharmonious. Mr. Sedgwick, the learned author of the treatise on Damages, says: 'The subject-matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term "liquidated damages" will not prevent the courts from inquiring into the actual injury sustained and doing justice between the parties.'"

Each party valued his land at \$10,000, and it is fair to assume that neither would have agreed to an exchange if he had not expected to reap some profit or advantage. Such is the dominating motive in all trades. Both must have anticipated the difficulties and uncertainties that would be encountered in proving the actual pecuniary loss one would suffer if the other breached the contract. The market values were not definitely fixed by law and would be ascertained by the triers of fact from variable and even contradictory evidentiary sources of information. Each party occupied the dual rôle of vendor and vendee. Vendors are prone to overvalue and vendees to undervalue. Notwithstanding the valuation each party allowed the other to place on the property he put into the trade, the issue of the quantum of

damages would have to be determined by the test of the comparative market values, and it was within the realm of reasonable probability that proof would show a greater difference in the market values of the respective properties than the sum agreed upon as liquidated damages. Such being the case, we cannot say, as a matter of law, that the contractual estimate was unreasonable or oppressive, and therefore shall not interfere with the agreement the parties chose to make for themselves.

The court should have rendered judgment for plaintiff for the whole of the stipulated sum, but, since plaintiff did not appeal, and no prejudicial error was committed against defendant, the judgment should be affirmed.

It is so ordered. All concur.

### LAUFF v. J. KENNARD & SONS CARPET CO. (No. 13892.)

(St. Louis Court of Appeals. Missouri. Dec. 8, 1914. Rehearing Denied Jan. 7, 1915.)

#### 1. NEGLIGENCE (§ 25\*)—CARE—DUTY OF.

A driver who was carrying goods to a freight platform about which there were many persons is guilty of negligence in backing his wagon with great force against the platform without looking to see that no one was about or giving a warning so that persons could escape injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 35-38; Dec. Dig. § 25.\*]

#### 2. EVIDENCE (§ 589\*)—PHYSICAL FACTS—"SECOND."

Testimony that plaintiff, who was returning to a freight platform, spoke to defendant's driver and then entered a space between two wagons to mount the platform, when a second later he was struck by defendant's wagon, which was backed into the space, is not contrary to the physical facts because of the use of the word "second"; the term frequently being used to express a short interval of time, and not always in its precise sense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. § 589.\*]

#### 3. NEGLIGENCE (§ 136\*)—ACTIONS—EVIDENCE—SUFFICIENCY.

The question of the contributory negligence of plaintiff, who was crushed between a freight platform and defendant's wagon, *held* for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

#### 4. EVIDENCE (§ 359\*)—PHOTOGRAPHS—ADMISSIBILITY.

Photographs properly identified and shown to represent the situation as witnesses saw it are admissible as illustrations of the testimony, though the situation was not in all its attendant details precisely as it was at the time of the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.\*]

#### 5. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR.

The improper exclusion of photographs of the place of injury is harmless, where the facts and location of the place were so thoroughly described in evidence that the jury were apprised

of all facts they could have discovered from the photographs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

#### 6. NEGLIGENCE (§ 119\*)—PETITION—SPECIFIC ACTS.

Where specific acts of negligence are set forth in a petition containing general averments, the specific averments will be treated as superseding the general ones, and plaintiff can recover only on them.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.\*]

#### 7. NEGLIGENCE (§ 138\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Even where the averment of negligence is general, the instructions should confine the jury to the particular acts of negligence shown by the testimony.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354-370; Dec. Dig. § 138.\*]

#### 8. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the petition charged that defendant's servant, who backed a wagon against him, was negligent in failing to look for or warn plaintiff, an instruction authorizing a verdict for plaintiff if defendant's servant did not exercise proper care is erroneous, in not confining the jury to the negligence specified.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

#### 9. NEGLIGENCE (§ 16\*)—ACTIONS—GROUNDS OF RECOVERY.

When plaintiff's leg was crushed when defendant's wagon was backed against a freight platform on which plaintiff worked, it is no ground for recovery that defendant could have used another place, where it was allowed to use the platform.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 19-21; Dec. Dig. § 16.\*]

#### 10. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR.

In an action for injuries received when defendant's wagon was backed against the platform, on which plaintiff worked, the improper admission of evidence that defendant could have unloaded its freight at another point, although it was entitled to use the platform, is prejudicial, particularly where the instructions did not require a finding of the negligence alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

#### 11. NEGLIGENCE (§ 138\*)—INSTRUCTIONS.

A general requirement that the jury find defendant guilty of negligence before rendering judgment for plaintiff is not equivalent to instructions requiring them to find the specific acts of negligence charged.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354-370; Dec. Dig. § 138.\*]

#### 12. NEGLIGENCE (§ 138\*)—INSTRUCTIONS APPLICABLE TO ISSUES.

Where the petition charged that defendant's driver, who backed a wagon against plaintiff, was negligent in failing to warn plaintiff or to look out for him, an instruction which charged that the driver should have made observations before backing his wagon, and then charged that verdict should be for plaintiff if his injury resulted from the driver's failure to exercise care as defined above, is improper, not requiring the jury to find in what respect defendant breached its duty with reference to the averments of negligence in the petition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354-370; Dec. Dig. § 138.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by Conrad Lauff against the J. Kennard & Sons Carpet Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Smith & Percy and Chas. P. Williams, all of St. Louis, for appellant. George V. Reynolds, of St. Louis, for respondent.

**NORTONI, J.** This is a suit for damages accrued to plaintiff on account of personal injuries received through defendant's negligence. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff received his injury through defendant's wagon being backed upon him so as to crush his leg while in the act of mounting the freight platform in the depot of the St. Louis Transfer Company. It appears the St. Louis Transfer Company maintains a large freight depot in the city of St. Louis near Second street, and between Biddle street on the north and Carr street on the south. The depot, though roofed overhead, is constructed so that teams and wagons may drive into and through it for the purpose of loading and unloading freight. Two large freight platforms are maintained within the depot and extend north and south from Biddle to Carr streets. One of the platforms is erected on the east side of the passageway for conveyances and the other on the west. Plaintiff was employed—and had been for many years—by the St. Louis Transfer Company in the occupation of handling freight on the east platform. Defendant, J. Kennard & Sons Carpet Company, is engaged in the wholesale carpet business in St. Louis, and frequently delivers carpets for shipment at the freight depot above described. It appears that its driver, Werremeyer, who was in charge of the team at the time plaintiff received his injury, was entirely familiar with the situation and the locus in quo, and it is to be inferred from the frequency with which he visited the place in hauling carpets that he knew the habits of the employes thereabout. It was the habit and the custom of the men employed by the transfer company, in handling freight on the platform, to go out to lunch about noon each day and return through the passageway where wagons and teams delivered goods on and received goods from the platform. The east platform—that is, the one to which plaintiff was in the act of mounting at the time of his injury—was about 5 feet in height, and it was the custom of wagons to back up against it either to receive or discharge freight thereon. It appears plaintiff was returning from his lunch, and, entering the wide passageway about 12:45 o'clock p. m., passed defendant's wagon as it was driving into the depot with a load of carpets. On passing defendant's wagon, plain-

tiff spoke to Werremeyer, the driver, and Werremeyer spoke to him in return, and it is said defendant's wagon was still moving at the time. Defendant's wagon was laden with rolls of carpet for shipment and to be delivered on the east platform at the entrance of the Vandalia and Big Four Railroads, for it appears these two carriers occupied the same, or adjoining, space at the depot. However, it does not appear that plaintiff knew the destiny of the goods on the wagon or just where they were to be unloaded. The evidence on the part of plaintiff tends to prove that there were two other heavy stake wagons standing adjacent to the east platform, but lengthwise along beside it, so as to leave a space of about 12 feet in width between them. This space was immediately adjacent to the landing of the Vandalia and the Big Four Railroads, and it appears to be the very space into which defendant's wagon was destined to back to discharge its load. The "southern wagon," as referred to in the evidence, standing beside the platform was of the character known as a "stiff-tongued wagon," in that the tongue protruded horizontally directly in front, but no team was attached to it at the time. Plaintiff entered into the space about 12 feet wide between the two wagons with the purpose of mounting the platform by stepping upon the stiff tongue of the "southern wagon," and was thus engaged when defendant's wagon with the load of carpets backed upon him so as to catch and crush his leg between the rear end of its wagon and the side of the platform. It appears that defendant's driver, immediately after speaking to plaintiff, turned his horses and suddenly backed the load of carpets into the open space while plaintiff was in the act of mounting upon the platform and stood with one foot on the stiff and extended tongue of the "southern wagon" and the other upon the platform, said to be about 5 feet in height above the surface of the passageway. There is evidence in the record tending to prove that such was the usual course of the men engaged about the freight platforms on returning from their lunches, and the place was thus more or less frequented by employes of the St. Louis Transfer Company. Many wagons and many persons passed in and out each day, and, all in all, the situation appears to have been a busy mart. There is direct evidence that no warning whatever was given by defendant's driver before backing his wagon with a load of carpets into the open space and upon plaintiff, and it is to be inferred, too, from the evidence, that the driver made no observation whatever for persons thereabout before attempting to back his wagon into the place.

[1] It is argued the court should have directed a verdict for defendant because no breach of duty on its part appears, but obvi-

ously this suggestion is without merit. The evidence is abundant to the effect that men frequented the place where plaintiff was injured, and came upon the platform from lunch precisely as he did. There is an abundance of evidence, too, tending to prove that defendant's driver was sufficiently familiar with the situation and the habits of those engaged thereabout to know that the place was likely to be so used at that hour of the day. Although it was not a public street, it was, nevertheless, a public place, in a sense, and used by wagons and teams and employes thereabout quite as much as a thoroughfare. The record is replete with evidence tending to reveal these facts to be true. As before said, it appears from direct proof that defendant's driver gave no warning whatever that he intended to back his wagon into the space where plaintiff was injured, and an abundant inference is afforded from the entire evidence that he made no observation whatever before backing the wagon with great force against plaintiff and the platform. Obviously, when the circumstances are considered, the precepts of ordinary care would seem to require that defendant's driver should not only have made some observation for persons about to go upon or come from the platform at the time, but given a warning as well for their benefit and others likely to be there. It would seem that an ordinarily prudent person would do this much in order to obviate the probability of injuries to others. The situation and the character of the place were such as to suggest it within the range of probabilities that an injury was likely to befall some one through being crushed by a wagon suddenly backed without warning or observation upon them. Obviously the law devolved the duty upon defendant's driver to anticipate the presence of persons there and make observations and give warning, to the end of rendering them reasonably secure from injury or hurt. The character of the place and its use resemble a public street and the principle attending the use of the one applies with equal force to the other. See *McCloskey v. Chautauqua Ice Co.*, 174 Pa. 34, 34 Atl. 287; *Shamp v. Lambert*, 142 Mo. App. 567, 571, 572, 121 S. W. 770; *Ostermeier v. Kingman, etc.*, *Implement Co.*, 255 Mo. 128, 164 S. W. 218.

[2, 3] But it argued the court should have directed a verdict for defendant because plaintiff's story of the manner of his injury is improbable, in that it is contrary to the physical facts, and because, too, he was evidently guilty of contributory negligence. Much is said touching plaintiff's evidence to the effect that, upon his speaking to defendant's driver and the driver's returning the salutation, he immediately turned into the space to mount the platform, and the wagon backed in upon him before he reached a place of safety. It is true plaintiff said defendant's wagon was still moving forward and had

not commenced to back in at the time he spoke to the driver. And it is true, too, that plaintiff's story, if full value is given to every word, as it appears—for he says it was but a second—seems to be an improbable one. But, though such be true, we do not regard it so highly improbable as to render the question one about which different minds could not entertain divergent views, for the word "second" is promiscuously used to express a short interval of time, and not always in its precise sense. It may be that plaintiff tarried for an instant or walked very slowly so as to consume the time occupied by defendant's driver in stopping his team and commencing the backward run of the wagon. Plaintiff's evidence is not so completely at variance with known physical laws as to remove it from the province of the jury, and, while there may be a suggestion that he was somewhat remiss with respect to the duty to look out for his own safety, it does not appear conclusively that he tarried, without care, in the face of a known danger. The question concerning his contributory negligence was clearly one for the jury.

[4, 5] On the trial defendant sought to introduce several photographs of the situation described in evidence showing wagons located as they were at the time, the place of plaintiff's injury and wagon which occasioned his injury set as at the time, but the court excluded these on the objection of plaintiff's counsel, and to this ruling defendant excepted. The court seemed to entertain the view that, in order for the photographs to be admissible, they must reveal the situation in all of its attendant details precisely and identically as it was at the time. It is true the photographs were taken some time after the occurrence, as is usually the case, but the evidence introduced in connection with them is to the effect that at least two of the wagons photographed were the identical wagons present at the time plaintiff received his injury. Defendant's wagon shown by the photograph was the same, and loaded with carpets as nearly thereto as could be, as it was when plaintiff was injured. In every material respect, the photographs, according to the evidence of the witness, appear to truly portray the locus in quo and the arrangement of the wagons and show the precise place at which plaintiff received his injury. It is entirely clear that these photographs were admissible for what they were worth, though, of course, they were in no wise conclusive on the question. Mr. Wigmore, in his valuable work on Evidence (volume 1, § 792) says:

"If a qualified observer is found to say, 'This photograph represents the fact as I saw it,' there is no more reason to exclude it than if he had said, 'The following words represent the fact as I saw it,' which is always in effect the tenor of a witness' oath. If no witness has thus attached his credit to the photograph, then it should not come in at all, any more than an anonymous letter should be received as testimony. There can be no middle ground between

these two consequences. Occasionally a court is found excluding a photograph as being misleading; but this is a begging of the very question which the jury have to decide; it would be as anomalous as if the judge were to order a witness from the stand because he was believed by the judge to be lying. Perjury cannot be thus determined in advance by the judge—not more for photographic than for verbal testimony."

It is true, while the photographs themselves are not to be received as evidence of the facts, they are, if properly identified, as in this case, when shown to represent the situation truly, as the witness saw it, competent as illustrations of the testimony, and to this extent are to be received and considered for what they are worth. See *Baustian v. Young*, 152 Mo. 317, 324, 53 S. W. 921, 75 Am. St. Rep. 462; *Geer v. Missouri Lumber, etc., Co.*, 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; *Dean v. Wabash R. Co.*, 229 Mo. 425, 445, 447, 129 S. W. 953. Of course, sometimes photographs are misleading through being made from a viewpoint to confuse, and in such cases should be excluded, if the evidence shows such to be the fact concerning them, but nothing of that kind appears here. These photographs are said to be truly representative of all of the essential details of the case, and the mere fact that the identical wagons were not employed and that they were taken subsequent to the time of the injury are unimportant. However, as the facts of the case are so fully developed in evidence, we would hesitate to reverse the judgment for this alone, because we cannot say, as the statute requires, that the error in excluding the photographs was manifestly prejudicial to defendant. The situation, the location of the wagons, and the precise manner in which plaintiff received his injury were so thoroughly detailed in evidence that the jury were obviously apprised of all of the facts, though they were denied the illustration of the evidence which the photographs portrayed.

[6-8] But the judgment may not be sustained for that it seems the jury were permitted by plaintiff's instructions to give a verdict against defendant without heed to the specifications of negligence relied upon in the petition and on any theory of the remission of duty which it might evolve on the facts. The petition, besides containing a general averment of negligence, counts upon the failure of defendant's driver to warn plaintiff that he was about to back the wagon, and, further, upon the fact that the driver made no observation or lookout before backing the wagon upon him. It is unnecessary to copy the petition here, for such, in substance, are the two specific acts of negligence set forth and relied upon for a recovery. It is the established and accepted law that, where specific acts of negligence are set forth in a petition, which contains likewise

a general allegation of negligence, such specific negligent acts are to be treated as superseding the general averment, and the plaintiff must recover on them, if at all. See *McManamee v. Missouri Pac. Ry. Co.*, 135 Mo. 440, 37 S. W. 119; *Barnett v. Star Paper Mill Co.*, 149 Mo. App. 498, 130 S. W. 1121; *Gibler v. Quincy, O. & K. O. R. Co.*, 148 Mo. App. 475, 128 S. W. 791; *Waldhier v. Hannibal, etc., R. Co.*, 71 Mo. 514; *Clark v. General Motor Car Co.*, 177 Mo. App. 623, 160 S. W. 576. Moreover, it is the rule, too, even in those cases where the averment of negligence is general in character and no specific acts are alleged, that the instructions must require the jury to find the particular acts of negligence said to be revealed by the testimony. This is true because defendant is entitled to have the jury committed by the instructions to the case made in the evidence. *Sommers v. St. Louis Transit Co.*, 108 Mo. App. 319, 83 S. W. 268; *Miller v. United Rys. Co.*, 155 Mo. App. 528, 134 S. W. 1045. The rule is the same in, and finds special application to, those cases such as this one, where the petition counts on specific acts of negligence; for then the instruction must require the jury to respond to the precise charges laid in the petition and said to be established in the evidence. The authorities are multiplied on the subject. See *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Davidson v. St. Louis Transit Co.*, 211 Mo. 320, 109 S. W. 583; *Crone v. St. Louis Oil Co.*, 176 Mo. App. 344, 158 S. W. 417; *Miller v. United Rys. Co.*, 155 Mo. App. 528, 134 S. W. 1045; *Clark v. General Motor Car Co.*, 177 Mo. App. 623, 160 S. W. 576.

Plaintiff's first instruction, which purports to cover the whole case and authorize a verdict for him, impinges the rule above stated, in that it incorporates no requirement whatever to find either of the specific acts of negligence relied upon, but, on the contrary, is so general in its terms as to permit the jury to wander at random. The instruction is as follows:

"If you find and believe from the evidence that the plaintiff in this case, while going to his work and in attempting to mount the east platform referred to in the evidence, was exercising that degree of care which an ordinarily prudent person would have exercised under similar circumstances and conditions, and that he was run into and his left leg crushed by a wagon driven by an employé of the defendant, J. Kennard & Sons Carpet Company, and that the defendant J. Kennard & Sons Carpet Company's wagon was backed into the space referred to in the evidence between the north and south wagons referred to in the evidence, in a negligent way, by the defendant's driver—that is to say, if you find and believe from the evidence that the driver of defendant's wagon, in backing his team into the space between the north and south wagons referred to in the evidence, did not exercise ordinary care; that is to say, in such a way as an ordinarily prudent person under similar circumstances and condi-

tions would have backed his wagon—and that the plaintiff was injured as the result of the failure on the part of defendant's driver to exercise the degree of care as hereinabove set out, then your verdict shall be for the plaintiff in such sum as, considering all the facts in the evidence, will be a fair and reasonable compensation to him for the injury which plaintiff has received; not, however, to exceed the sum of \$15,000."

[9-11] In defendant's examination of Sullivan, the foreman at the transfer depot, it cropped out that defendant might have unloaded its goods in the alley if it chose to do so; that is, at an approach to the east platform through the alley and outside of, and apart from, the place where plaintiff was injured. Plaintiff's counsel seized upon this and pressed it by further examination, over the objections and exceptions of defendant, so as to elicit much evidence as if to suggest that defendant had violated some duty in entering the usual passageway and backing the wagon up to discharge the goods where it did. The arguments of plaintiff's counsel on the objection made reveals, too, such to be the purpose of pressing this examination. Obviously no breach of duty could be assigned against defendant on this score, and all of this evidence was prejudicial. It is referred to here, however, more particularly because of the fact that the general language of the instruction above copied authorizes the jury to find against defendant on any theory of negligence it might evolve on the testimony, and in no manner requires a finding of the facts set forth in the petition and relied upon. It is true the instruction requires the jury to find that defendant did not exercise ordinary care in backing its wagon, but nevertheless these general requirements in instructions in negligence cases the courts, including the Supreme Court, say are to be condemned because they permit the jury to evolve some theory of liability which may be entirely foreign to the issue presented in the pleadings. *Sommers v. St. Louis Transit Co.*, 108 Mo. App. 319, 83 S. W. 268; *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 351, 352, 111 S. W. 52.

[12] Plaintiff's second instruction seems to proceed as if the duty to make observations before backing the wagon rested upon defendant's driver, and we believe so much of it is well enough. But it authorizes a verdict for plaintiff on a general finding of negligence; that is, on the jury's finding that:

"Defendant's driver failed to exercise that care as defined above, and that, as a result of the failure of the defendant's driver to exercise said care, the plaintiff received the injury referred to in the evidence."

This instruction should be redrafted so as to require the jury to find in what respect defendant breached its duty with reference to the averments of negligence contained in the petition.

For the errors in the instructions above

pointed out, the judgment should be reversed, and the cause remanded.

It is so ordered.

ALLEN, J., concurs. REYNOLDS, P. J., not sitting.

WITHAM v. DELANO et al. (No. 11287.)  
(Kansas City Court of Appeals. Missouri.  
Nov. 23, 1914. Rehearing Denied Dec.  
21, 1914.)

1. RAILROADS (§ 275\*)—INJURY TO LICENSEE—DUTY OF THE COMPANY.

A laborer for an independent contractor, who was laying additional tracks for a railroad company, while on the right of way is a licensee by invitation, and is entitled to the same care for his safety as if employed by the railroad company as a track laborer.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877; Dec. Dig. § 275.\*]

2. MASTER AND SERVANT (§ 142\*)—OPERATION OF RAILROAD—REGULATIONS—DUTY TO TRACK LABORER.

A railroad company may make reasonable rules, giving precedence to certain classes of employes over others, which the courts will enforce because of the great necessity for system in the operation of a railroad, and track laborers are bound by the rule requiring them to know when trains will pass and look out for them, and an engineer is not required to warn them, unless they are in a position of obvious danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 285; Dec. Dig. § 142.\*]

3. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—INSUFFICIENCY OF EVIDENCE.

In an action by a track laborer for injuries by being struck by a train while walking near the track, evidence held not to show that the engineer saw plaintiff in a place of obvious peril.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

Appeal from Circuit Court, Randolph County; Alex. H. Waller, Judge.

Action by Daniel Witham against Frederick A. Delano and others, receivers of the Wabash Railroad Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Aubrey R. Hammett, of Moberly, for appellant. J. L. Minnis, of St. Louis, J. A. Collet, of Salisbury, D. G. Phillips, of Moberly, and David H. Robertson, of Mexico, Mo., for respondents.

JOHNSON, J. This is an action for personal injuries alleged to have been caused by negligence of defendant in the operation of one of its passenger trains. A directed verdict was returned for defendant, and plaintiff appealed.

At the time of his injury, which occurred about 6 o'clock p. m. September 1, 1913, near the station of Renick, plaintiff, a common laborer, was in the service of independent contractors who were laying a new main track for defendant parallel to, and eight

feet south of, the old main track. The work had progressed to the stage where the new track had been laid, and for a week or more had been occupied by 10 or 12 camp cars, in which the laborers, 35 or 40 in number, boarded and lodged. The presence and uses of these cars were known to defendant and to the engineer and fireman of the locomotive that injured plaintiff. The old and new tracks were on the same level, and were on a high fill. Ballast had been dumped between them, but had not been leveled or made smooth. A sinuous path had been worn over the uneven surface of this ballast by the laborers, who were compelled to use that space as a means of ingress and egress to and from the cars of the camp train. The camp cars were coupled together, and each was about 30 feet long. When a passenger train went by the clear space between it and the camp train was 3 feet and 2 inches. A laborer could stand in safety in this space and the openings between the camp cars at intervals of 30 feet afforded him places of refuge if he desired to give the passing train a wider clearance. Plaintiff had quit work for the day, returned to the camp, and was walking westward along the path, carrying a bucket which he intended to fill with water at the tank car. When he had proceeded three car lengths a west-bound passenger train, running 40 or 45 miles per hour, struck his right elbow and injured him. The engineer had whistled for the station and afterward for a public crossing, but plaintiff had not noticed these signals, and was not aware that the train was approaching. The engineer and fireman state they were looking ahead as they neared the camp, but neither observed plaintiff, and no warning signal was given. They did not know the engine struck him until their return trip, 36 hours afterward. It was broad daylight, the track was straight and level, plaintiff was in possession of unimpaired senses of sight and hearing, and there were no obstacles to prevent him seeing or hearing the train had he looked or listened. His negligence must be conceded, and the question at issue is whether or not his evidence discloses a cause which should have been submitted to the jury under the rules of the humanitarian doctrine.

[1] Plaintiff's contract with his employers, who, as stated, were independent contractors, required him to board and lodge at the camp cars, which were maintained on the new track with the knowledge and consent of defendant. In using the path which afforded the only means of ingress and egress to and from the camp he was in the exercise of a lawful right, and in no sense was a trespasser on the property of defendant. He was what is termed in some of the cases a "licensee by invitation" and was entitled to the same care for his safety the law would have exacted of the operators of defendant's

trains towards him if he had been employed by defendant as a track laborer, instead of being employed by an independent contractor. *Weaver v. Railroad*, 170 Mo. App. loc. cit. 239 et seq., 156 S. W. 1; *Nelson v. Railroad*, 132 Mo. App. loc. cit. 694, 112 S. W. 1017; *White on Personal Injuries*, § 864.

[2] The status of plaintiff was that of a track workman or section hand, and the general rule is that, as to such laborers who are required to keep out of the way of trains, the engineer of a passing locomotive is entitled to indulge the presumption of a clear track and is not required to be on the lookout for them. *Rashall v. Railroad*, 249 Mo. 509, 155 S. W. 426; *Gabal v. Railroad*, 251 Mo. 257, 158 S. W. 12; *Degonia v. Railroad*, 224 Mo. 564, 123 S. W. 807; *Sissel v. Railroad*, 214 Mo. 515, 113 S. W. 1104, 15 Ann. Cas. 429; *Williamson v. Railroad*, 139 Mo. App. 481, 122 S. W. 1113.

The necessity for order and system in the operation of a railroad is so great and of such vital importance that the courts have always recognized and enforced reasonable rules and regulations prescribed by the company which give precedence to certain trains and classes of employes over others and require those of an inferior grade to give their superiors a clear track. Sectionmen and track builders and repairers—those whose business it is to work upon and repair railroad tracks—"are supposed to look after their own personal safety, and to know of the time at which trains pass, to look for them, and see them and to move out of their way." *Sissel v. Railroad*, 214 Mo. loc. cit. 528, 113 S. W. loc. cit. 1107, 15 Ann. Cas. 429; *Clancy v. Transit Co.*, 192 Mo. loc. cit. 657, 91 S. W. 509; *Evans v. Railroad*, 178 Mo. loc. cit. 517, 77 S. W. 515. Under special conditions and circumstances the humanitarian doctrine has been held to require that a track laborer be given the protection of the duty of the operators of trains to keep a lookout at the place where he is working (e. g., *Hardwick v. Railroad*, 163 S. W. 328), for the reason, as stated in the *Rashall Case*, supra—

"that railroads are required to exercise at all times a degree of care and vigilance commensurate with the occasion. This implies a duty on their part correlative with the danger to be encountered. Hence, in passing portions of their tracks subjected to public use or license, they are charged with a knowledge of what is actually seen, or what could be seen with proper care."

But at places where the engineer has no reason to anticipate the presence of other persons than track workmen and their occupation or situation includes no special or extraordinary element of danger, the engineer is entitled to indulge the presumption of a clear track, and is not required to be on the lookout for such employes. Plaintiff's activities while on or off duty frequently placed him on or near tracks over which trains were being run. His duty required him to keep

out of the way of trains, and there was no occasion for him and his fellow laborers to incur any greater hazard than that usually encountered by ordinary sectionmen employed on country sections. To hold that the engineer owed him the duty of being on the lookout for him would be to abrogate completely the rule that such employes must look out for themselves.

[3] Defendant cannot be held liable for the injury unless there is room in the evidence for a reasonable inference that the engineer saw plaintiff in a position of peril, and negligently failed to put forth a reasonable effort to save him by giving a warning signal. The engineer, according to his own testimony, was maintaining a lookout while the train was approaching and, of course, he must have seen plaintiff walking in the space between the tracks. His statement that he did not see him, in view of the fact that he did not know of the injury until his return trip, means nothing more than his saying that the incident of seeing him was devoid of any impressive element and had been completely forgotten. In a run between division points an engineer has many duties to perform and sees many persons on or near the track. Unless something occurs to attract his attention especially to a person thus briefly seen, the impression left upon his memory is apt to be of the most fleeting character. If there was anything in the appearance of plaintiff to suggest that he was in danger of being struck and was unconscious of the danger, the assertion of the engineer that he was looking ahead and did not see that which was plainly to be seen, and which was invoking his humane care and attention, would appear to be, as has been repeatedly said in similar cases, a palpable falsehood, and to offer no contradiction to the inference that either he was not looking, or else did look and saw plaintiff in a perilous position and negligently failed to put forth a saving hand.

The facts and circumstances in evidence do not warrant an inference convicting the engineer of any breach of duty, and of attempting to exonerate himself and defendant with a falsehood. There was nothing in the position or conduct of this track workman to indicate that he was not performing his duty to keep out of the way of the train and, if not warned, was in danger of being injured. Seeing him walking along between the tracks in a manner that carried no suggestion that he was in peril because of his own lack of proper attention, the engineer was not required to anticipate that he might thoughtlessly protrude his elbow an inch or two into the path of the train. As is well said in *Evans v. Railroad*, supra:

"It is of common knowledge that these men often voluntarily wait until trains get dangerously close to them, and then step out of danger and let them pass by, and to require trains to stop upon all such occasions, when sectionmen are discovered at work on the track, would not only be imposing upon railroads unjust burdens, but would greatly interfere with traffic and travel."

Of course it requires but little effort for an engineer to give a warning signal, and it is his duty to do so whenever he sees in the appearance of a workman on or near the track that which suggests that he is unaware of the approach of the train, and thereby is in danger of being struck, but in the absence of any such appearance, as in the present case, the engineer is not required to burden himself with the performance of an apparently unnecessary task. The burden was on plaintiff to show that the engineer actually saw him in a position of obvious peril in time to prevent the injury by giving a signal. His evidence fails to show that he was in such position, and it follows that he has failed to make a case to go to the jury. The court committed no error in directing a verdict for defendant.

Affirmed. All concur.

## CASE v. STEELE COAL CO.

(Court of Appeals of Kentucky. Jan. 8, 1915.)

CORPORATIONS (§ 423\*)—LIBEL AND SLANDER—SCOPE OF EMPLOYMENT OF AGENT.

The bookkeeper of a corporation handed to an employé a statement of his account, and after it was returned to him by the employé, at the suggestion of a bystander, he added a charge of \$1.50 for "mulage." This was not entered on the books of the company or deducted from the balance due the employé or authorized by the corporation. Held, although the word "mulage" was libelous per se, the corporation was not liable, as the bookkeeper was not acting within the scope of his employment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.\*]

Appeal from Circuit Court, Pike County.

Action by Did Case against the Steele Coal Company. A judgment for defendant on a directed verdict, and plaintiff appeals. Affirmed.

E. J. Picklesimer and Roscoe Vanover, both of Pikeville, for appellant. Stratton & Stephenson, of Pikeville, for appellee.

SETTLE, J. This is an appeal from a judgment of the Pike circuit court, entered upon a verdict returned in behalf of appellee in obedience to a peremptory instruction from the court. The action was brought by appellant to recover of appellee damages for the alleged false and malicious publication by its agent of a libel against and concerning him. The language and character of the libel will more fully appear from the following averments of the petition:

"Plaintiff states that on and prior to February 16, 1913, he was employed by the defendant and in its service, engaged in mining coal at its mine in Pike county; \* \* \* that it was customary for defendant company to issue to its laborers statements showing the amount of labor performed by the laborer for the two weeks preceding, and said statement also showed any and all advances made said laborer for said period: \* \* \* that on said date defendant, by its duly authorized bookkeeper, issued a statement to this plaintiff showing the amount due said plaintiff from defendant, and also, under the head of 'Advances,' or under the head showing what defendant had paid plaintiff, defendant wrongfully, unlawfully, willfully, and maliciously, and for the purpose of defaming plaintiff in his good name and character, and with malice toward plaintiff, falsely issued said statement with the following item as advanced plaintiff, to wit: 'Mulage, \$1.50'; that the said bookkeeper of defendant issuing said statement for defendant had the authority under his said employment to issue statements for defendant, and was acting in the scope of his authority under his employment by defendant when he issued said statement as above set out; that said statement was exhibited to sundry people and citizens of Pike county, Ky., by defendant's said bookkeeper; that by the word 'mulage,' as charged in said statement, defendant meant to convey, and those who saw said statement understood defendant to convey, the meaning that plaintiff had been having sexual intercourse with defendant's mules used by defendant in its said coal mine in the mining and operating its said coal mines; that at and previous to said time defendant had been and was

using mules in its said mining operations in its said mines; that it was known and generally understood among the miners and people in and about said mines that the word 'mulage,' as used on said statement, meant to have sexual intercourse with a mule, and that, when so charged as an advancement on said statement, it meant that defendant company was charging plaintiff the sum of \$1.50 for having sexual intercourse with its mules; that defendant's said bookkeeper, having the authority to issue statements for defendant, showed and exhibited said statement to various and sundry people, and at said time laughed and made fun of plaintiff, and thereby, and as herein set out, injured and defamed the good name and character of said plaintiff falsely and maliciously, to his damage in the sum of \$3,000."

Appellee's answer, as amended, contained two paragraphs, the first being a traverse, and the second alleging, in substance, that, although it did, on February 16, 1913, issue to the appellant a statement showing what was due him for his labor and also such charges as he was owing it, the statement as delivered to appellant contained no charge for "mulage," as alleged in the petition, but that, after the statement was issued and delivered to appellant, some one then present in appellee's store suggested, as a joke, that appellant should be charged with "mulage," whereupon the latter returned the statement to its bookkeeper, who, to carry out the jest, added to it the word "Mulage," and placed opposite same the figures "\$1.50"; that the whole matter was a joke at which appellant took no offense and in which he participated by returning the statement to the bookkeeper for the purpose of having the words and figures in question added to it; and that no charge was, in fact, made against appellant or deducted from his wages for any such item.

On the trial appellee, at the conclusion of appellant's evidence, moved the court to grant a peremptory instruction directing a verdict for it. The court, however, then declined to act upon the motion, but later granted it at the conclusion of all the evidence.

It is insisted for appellant that the giving of the peremptory instruction was error. If the word "Mulage" and accompanying figures complained of had been written and published by appellee's bookkeeper, Johnson, in the manner alleged in the petition, its libelous character, in view of the evidence as to the meaning given the word "mulage" by the miners of the community in which appellee's mine is situated, would be manifest, because, as applied, it tended not only to make appellant contemptible and odious, which would of itself make the tort complete, but it, in fact, charged him with the crime of buggery. So, if the libel had been committed in the manner and under the circumstances indicated, there would seem to be no doubt of the appellant's right to make the bookkeeper, Johnson, responsible therefor in damages; but it would not follow that ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pellee would be responsible for the act of Johnson in writing or publishing the libel, unless it was done in execution of the authority, express or implied, given by it; for beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master.

It does not appear from the evidence, however, that the alleged libel was committed in the manner alleged in the petition. It was admitted by appellant in giving his testimony that the statement of his account with appellee when first handed him by the bookkeeper, Johnson, did not contain the word "Mulage" or the figures \$1.50, but that they were added thereto by Johnson after its delivery to appellant, and apparent from the testimony of Johnson, uncontradicted by appellant, and in part corroborated by the witnesses Cline and Steele, that the addition of the objectionable word and figures was suggested by Cline or Steele asking Johnson if, in making out the statement for appellant, he had charged him with "mulage," in reply to which Johnson said he had not and then obtained from appellant the statement and added to it the word "Mulage" and figures "\$1.50." According to all the evidence, this act of Johnson's raised a laugh among the persons present, in which appellant joined. It is true that appellant claims he became indignant on account of the addition to the statement of the word and figures complained of, but we think it manifest from the testimony of Johnson, Cline, and Steele that such indignation was not shown by appellant at the time, and he did not deny that he laughed with the others at what all evidently regarded as the joke perpetrated by Johnson. It is further apparent from the evidence that, of the persons present in the store, only Cline saw the word "Mulage" and figures "\$1.50" after they had been added to the statement by Johnson. They were afterwards seen by two other persons, but it was because the paper was shown them by appellant in the effort to discount or sell it to them, superinduced by his need of the money it showed him entitled to receive, which did not become due until several days later.

The circumstances attending the transaction in question clearly indicate that Johnson's motive in adding to the statement the word and figures complained of was to afford amusement to himself and the other persons present. The joke, however, was an indecent one, which only the vulgar mind would appreciate. Although appellant, at the time of its perpetration, was apparently amused by it, he did not willingly participate in the joke, and it can readily be understood that a sober second thought enabled him to realize its sting and the humiliation of feeling that would naturally result to a victim of such

obscurity. If this was an action against Johnson for the libel complained of, we would be inclined to hold that he could not escape liability upon the ground that the libel was a joke. At most, evidence that this was so would be competent only in mitigation of damages; as it would tend to show the motive for the libel and the absence of actual malice.

The remaining question to be determined is: Do the facts appearing in the record make appellee responsible for the libel complained of? The paper on which it was written is a printed form appellee requires its bookkeeper to use in furnishing its employees statements of its accounts with them. The statement furnished appellant by Johnson, the bookkeeper, was as follows:

No. 4.

Feb. 16, 1913.

Mr. Did Case	
Earnings	
Cars 37 @	22.20
Hours	
Tons	
Yards	
Total Earnings	
Advances	
Store	7.85
Rent	
Doctor	.50
Fuel	
Board	
Smithing	.50
Insurance	
Co. Deductions	
Claims—Mulage	1.50
[Pencil line run through the word "Claims," and on the same line, following the word "Claims," is the word "Mulage," written with pencil.]	
Helpers	3.30
Total Advances	12.15
Balance Due	10.05

It appears from the foregoing statement that appellee's indebtedness to appellant was \$22.20, and that there was due it from appellant for advances, as shown opposite the proper headings, various items aggregating \$12.15, which, deducted from the \$22.20 of its indebtedness to appellant, left due him \$10.05, as shown on the statement. According to the evidence, after this statement had been completed, Johnson obtained it from appellant and wrote thereon, opposite the word "Claims," the word "Mulage," and to the right of that word the figures "1.50." At the time this was done he ran his pencil through the word "Claims." All the figures appearing upon the statement were entered with a pen and ink, except the figures "1.50," which, together with the word "Mulage," was written with a pencil. It will further be observed that the figures "1.50" were not included in the advances charged to appellant in the statement, nor was the \$1.50 actually charged to appellant or deducted from what was due him from appellee. The form of statement used in furnishing appellant his account contains no item or heading for such a charge as mulage, and it is admitted by

appellant that no such charge as mulage is required by appellee to be made against its employes.

We think it patent from the evidence that the bookkeeper, Johnson, in writing the word and figures complained of on the statement furnished appellant, was not acting in the performance of any duty required of him by appellee or in the execution of any authority, express or implied, given him by it; nor was it an act within the scope of his employment or in the furtherance of his employer's business. It was merely an act done to accomplish a purpose of his own, wholly foreign to any duty he owed his employer, and entirely beyond the apparent scope of his employment by the latter. Nor does it appear from the evidence that his act in writing on the statement the word and figures complained of was at any time approved or ratified by appellee. Many cases have arisen in which the master has been held responsible for the torts of the servant, whether the tort consisted in the infliction of physical injury to the person aggrieved or injury to his character, but in all such cases liability is fastened upon the master because the servant is acting for the master. This doctrine is well stated in *Sullivan v. L. & N. R. Co.*, 115 Ky. 447, 74 S. W. 171, 24 Ky. Law Rep. 2344, 103 Am. St. Rep. 330, as follows:

"The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead and for him. Obviously, if the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by his master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of authority to support it. But where the servant steps aside from his employment and assumes to act, and does act solely on his own account in a matter which the master has no more connection with than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it; for in doing that act the servant, so called, was absolutely his own master. \* \* \* In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time the injury was inflicted, acting for himself and as his own master *pro tempore*, the master is not liable. If the servant stepped aside from his master's business, for however short a time, to do an act connected with his business, the relation of master and servant is for the time suspended." *C. N. O. & T. P. Ry. Co. v. Ry.*, 142 Ky. 694, 134 S. W. 1144, 34 L. R. A. (N. S.) 200.

In *Newell on Slander and Libel*, p. 373, it is said:

"If a partner, in conducting the business of a firm, causes a libel to be published, the firm will be liable as well as the individual partner. And so, if an agent or servant of the firm defames any one by the express direction of the

firm, or in accordance with the general orders given him by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited, or encouraged any other person to do it, or if, having authority to forbid it, he permitted it, the act was his." *Burgess & Co. v. Patterson*, 139 Ky. 547, 106 S. W. 887, 32 Ky. Law Rep. 624.

In *Pennsylvania Iron Works v. Voght Machine Co.*, 139 Ky. 497, 96 S. W. 551, 29 Ky. Law Rep. 861, 8 L. R. A. (N. S.) 1023, 139 Am. St. Rep. 504, it was held that one corporation may sue another for libel on it, as distinct from a libel on its individual members. In that case the plaintiff and defendant were rival ice machine manufacturers, both endeavoring to secure a particular contract, and defendant's agent for this purpose wrote a letter to the proposed purchaser stating that plaintiff was a secondhand dealer, that it put in a class of inferior work, was a scab establishment, and did not have a mechanic in its employ. It was held that such a writing was libelous *per se*, and that the corporation whose agent wrote the letter was liable in damages for the libel it contained, because, after obtaining knowledge of the publication of the libel, its failure to repudiate it before suit operated as a ratification and approval of the libel. In the opinion it is said:

"A corporation is liable in damages for the publication of a libel as it is for other torts. To establish its liability the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. \* \* \*

In *Duquesne Distributing Co. v. Greenbaum*, 135 Ky. 183, 121 S. W. 1026, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481, which was an action for slander, it was held that a partnership or corporation is not liable for slander by its servant, unless the actionable words were spoken by its express consent, direction, or authority, or were ratified or approved by it. In a case for libel by the servant of a corporation, however, the question of the latter's liability will not turn upon whether it expressly consented to, directed, or authorized the libel. It will be responsible for the libel if it was published by the servant in execution of the authority, express or implied, given by the corporation, or in the performance of the service for which the servant was engaged, or the act was one within the apparent scope of his employment.

Measured by the above test, there is no cause for holding that appellee is responsible for the libel complained of in this case; hence the action of the circuit court in peremptorily instructing the jury to find for appellee was not error.

Judgment affirmed.

**BRAUN'S EX'X v. WILLIAMS.**

(Court of Appeals of Kentucky. Jan. 7, 1915.)

**1. PLEADING (§ 369\*)—CAUSES OF ACTION—ELECTION.**

Where plaintiff sued an executrix to recover payment of a judgment recovered against her testator and averred a new promise by testator in 1901 and at divers other times to pay the debt, the executrix could not compel plaintiff to elect whether he would prosecute his action on the judgment or on the new promise.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

**2. APPEAL AND ERROR (§ 199\*)—REVIEW—OBJECTIONS AT TRIAL—NECESSITY.**

An objection that defendant was prematurely forced to trial cannot be reviewed in the absence of an objection below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1148-1160, 1152, 1155; Dec. Dig. § 199.\*]

Appeal from Circuit Court, Daviess County.

Action by George A. Williams against J. W. Braun's executrix. Judgment for plaintiff, and defendant appeals. Affirmed.

B. E. Watkins, of Owensboro, for appellant. W. T. Ellis, of Owensboro, for appellee.

CARROLL, J. [1] In 1895 the appellee, Williams, recovered a judgment against J. W. Braun, upon which execution was issued in 1896, and returned "no property found." In February, 1913, Braun died, leaving a will in which he nominated his wife, the appellant, as executrix. After this, payment of the judgment debt of Williams, which had been properly verified, was demanded and refused, and thereupon, in November, 1913, Williams brought this suit against the executrix, setting up that ample estate had come into her hands to pay the debt and asking for a settlement of the estate and that he have such orders as might be necessary to enforce the payment of his claim. It was further averred that J. W. Braun, in August, 1901, and at divers other times, had acknowledged the justice of the judgment debt and promised to pay it. To this suit the executrix filed a general demurrer and also a motion to require the plaintiff to elect whether he would prosecute his action on the original cause, to wit, the judgment, or on the new promise alleged to have been made in 1901, both of which were properly overruled by the court. On December 17, 1913, the executrix filed her answer, in which she stated that she had paid all of the claims presented against the estate of her husband except the Williams claim, and sought to defeat the collection of this on the principal ground that it was barred by limitation. The answer contained other matter that we do not think it necessary to notice. To this answer a reply was filed, and the record shows that without objection the case was set down for

trial for December 30th, and on this day, when the evidence without objection was heard by the court, it was adjudged that the claim asserted by Williams was a just claim and that he had promised to pay the same in August, 1901, and at other times, and the executrix was ordered to pay the claim within 30 days thereafter, and upon her failure to do so the court reserved the right to enter a judgment against her as executrix. It further appears from the record that in January, 1914, the transcript of the evidence heard by the court was tendered, and thereafter by further order of court was signed by the judge and filed. It is further shown that, the executrix having failed to pay the debt after being again ruled to do so, judgment was entered against her as executrix for the amount of the debt, to be levied on assets unadministered in her hands.

[2] On this appeal we are asked to reverse the judgment for error of the court in prematurely forcing the executrix into trial, and in permitting incompetent evidence to be heard. The record does not show that any objection was made to the trial of the case, and the evidence of the acknowledgment of the justness of the debt and the promise to pay it was as complete and satisfactory as evidence could well be.

The judgment is affirmed.

**BEWLEY et al. v. MOREMEN et al.**

(Court of Appeals of Kentucky. Jan. 6, 1915.)

**VENDOR AND PURCHASER (§ 33\*)—SALES—RESCISSIION—GROUNDS FOR.**

That the seller of land falsely represented he was the president of a land company is no ground for the rescission of the sale, where there was no showing that the misrepresentation damaged the purchaser or that the land was not as represented.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 33, 40-43, 66; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Meade County.

Action by Sallie Bewley and others against L. B. Moremen and another. From judgment for defendants, plaintiffs appeal. Affirmed.

Lewis & Ashcraft, of Brandenburg, for appellants. Claude Mercer, of Hardinsburg, for appellees.

MILLER, C. J. In 1906, the appellee L. B. Moremen sold to B. F. Bewley 10 town lots in Medford, Okl., for \$450 in cash. For purposes of convenience, the property had theretofore been conveyed to John P. Haswell, Jr., by Moremen and wife, and Haswell made the deed to Bewley, although the sale was really made by Moremen and the Rock Island Lot & Land Company, of which Moremen was president. As an inducement to the purchase, Moremen, as president and individually, ex-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

executed and delivered to Bewley the following paper:

"This is to certify that the Rock Island Lot & Land Company will guarantee an advancement of 100% in value over the purchase price within the next two years from the day of the opening of ten lots this day sold in the town of Medford, Oklahoma, to Mr. B. F. Bewley, and if said lots do not so advance, then the company agrees to refund the sum of \$450 with legal interest thereon, from date of payment.

"L. B. Moremen, President. [Seal.]"

"March 31, 1906.

"I personally guarantee the above.

"L. B. Moremen."

B. F. Bewley having died, his widow and infant son, who sues by his guardian, brought this action upon the guaranty, in October, 1912, to recover the \$450, with interest from September 19, 1908. A demurrer having been sustained to the original petition, the plaintiffs filed an amended petition on April 30, 1913, offering to reconvey said lots to Moremen as soon as he should pay the plaintiffs the sum of \$450, with interest thereon from March 31, 1906, and praying that the court, through its master commissioner, convey said 10 lots to the appellee Moremen for and on behalf of the widow and infant child of B. F. Bewley, and for judgment against Moremen for said \$450, with interest from March 31, 1906. In a second amended petition, filed October 11, 1913, it was alleged that the claim of appellee L. B. Moremen that he was the president of the Rock Island Lot & Land Company was false and fraudulent, and was made by him to Bewley for the purpose of deceiving and overreaching Bewley in the sale of said lots, and that it did so deceive said Bewley and cause him to make said purchase. It was further alleged that said lots were worth not exceeding \$150 at the time of the sale, and were not worth more than \$190 when the petition was filed, and that neither Bewley during his lifetime, nor the plaintiffs since his death, had ever had an offer of purchase for any of said lots. This amended petition asked that the deed from Haswell to Bewley for the 10 lots be canceled, and that the plaintiffs have judgment against Bewley for the \$450, with interest from March 31, 1906.

There are many irrelevant facts stated in the petition, as well as in the answers which were filed during the preparation of the case; but, in view of the final determination of the case upon a demurrer to the amended petition, these irrelevant matters will not be further mentioned.

The court sustained the defendant's motion to require the plaintiffs to elect which cause of action they would prosecute—the one contained in the original petition to recover on the written guaranty, or that contained in the amended petition filed October 11, 1913, which sought a cancellation of the deed to Bewley upon the ground of fraud on the part of Moremen in making the sale, and to recover the purchase price. The plaintiffs

elected to prosecute the action for a rescission, and recover the money as set forth in the amended petition of October 11, 1913. A general demurrer to the petition as amended having been sustained, it was dismissed upon a failure to amend, whereupon the plaintiffs appealed.

Stripping the amended petition of its irrelevant and unnecessary matter, it seeks to cancel the deed to Bewley and to recover the purchase money, with interest. The only allegation of fraud contained in the petition relates to the claim by Moremen that he was president of the Rock Island Lot & Land Company, and that said claim was made by him for the purpose of deceiving and overreaching Bewley in the sale, and that it did deceive him and induce him to make the purchase of the 10 lots for \$450, which were worth not exceeding \$190 at the time the petition was filed. It is nowhere alleged in the amended petition that the value of the lots, or the kind or quality thereof, was misrepresented to Bewley at any time; nor is it contended that Bewley did not get a good title to the land he bought. The original petition states that Bewley made the purchase and paid his money solely upon the written personal guaranty of Moremen that the lots would advance 100 per cent. in value within two years from the date of opening. Bewley accepted the deed from Haswell without objection, and did not require any deed from either Moremen or the Rock Island Lot & Land Company, of which he claimed to be president. It being conceded that Bewley's title to the lots is good, that he got the lots he contracted for, and there being no representation of any kind as to the quality or value of the land at the time of the sale, it would seem that plaintiffs had no cause for canceling the deed on the ground of fraudulent misrepresentation, and that the judgment of the circuit court was correct.

In *Gilbert v. Ledford*, 32 S. W. 223, 17 Ky. Law Rep. 608, this court said:

"The basis of the claim of appellees is that appellant said he was selling them all his land he owned on Richland creek, when, as they claim, he at the time owned 40 acres besides the boundary described in the deed. How were the appellees injured by such representation, if untrue, when the appellant conveyed them the entire boundary of land, the lines to which he pointed out when the trade was made?"

In *Neel v. Neel*, 26 S. W. 805, 16 Ky. Law Rep. 195, this court stated the distinction between the rules applicable to cases of specific performance and to cases seeking a rescission of an executed contract, as follows:

"The ground upon which courts of equity proceed in rescinding or canceling executed contracts is more narrow, and to be more carefully trodden, than that upon which they refuse specific performance, or even decree them [executory contracts] to cancellation. Nothing but fraud or palpable mistake is ground for rescinding an executed contract." *Graham v. Pancoast*, 30 Pa. 89; *Nace v. Boyer*, 30 Pa. 109."

The authorities upon the subject of the cancellation of an executed contract are reviewed at length in *Livernore v. Middlesborough Town Lands Co.*, 106 Ky. 163, 50 S. W. 13, 20 Ky. Law Rep. 1704, where we said:

"To establish actionable fraud, or fraud against which equity will relieve—and, as we have seen, the same rule applies in Kentucky to both classes of cases—it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time of previously existing (and not a mere promise for the future), must be relied upon by the person whose action is intended to be influenced, and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. This is the doctrine deducible from the Kentucky decisions. There are some modifications of this doctrine, but they are chiefly by way of substitution of an equivalent for some one of the essentials necessary to constitute fraudulent misrepresentation; as in the cases where it is held that a fraudulent concealment of a material matter of fact is the equivalent of an actual misrepresentation, and the cases in which a statement, made as of personal knowledge, but without knowledge, was held to be equivalent to a statement whose falsity was known."

There being no claim that any statement was made as to the value of the lots at the time they were sold, or fraud charged, the petition failed to state a case for a cancellation, and the demurrer was properly sustained.

Judgment affirmed.

#### CHEEK v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 7, 1915.)

##### 1. CRIMINAL LAW (§ 1032\*)—APPEAL—INDICTMENT—SUFFICIENCY—REVIEW.

Sufficiency of an indictment cannot be reviewed when raised for the first time in the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. § 1032.\*]

##### 2. CRIMINAL LAW (§ 1064\*)—APPEAL—REVIEW—INSTRUCTIONS—OBJECTIONS IN TRIAL COURT.

Though it is not necessary to except to instructions in order to question their sufficiency on appeal, it is necessary for that purpose that alleged errors in the instructions shall be made grounds for accused's motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

##### 3. BURGLARY (§ 41\*)—IDENTITY OF ACCUSED—EVIDENCE.

In a prosecution for burglary, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.\*]

Appeal from Circuit Court, McCracken County.

Street Cheek was convicted of burglary, and he appeals. Affirmed.

Hendrick & Nichols, of Paducah, for appellant. Jas. Garnett, Atty. Gen., and Robert Caldwell, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. Street Cheek was convicted of burglary, and appeals.

The only grounds assigned for a new trial in the court below are: (1) The verdict is against the evidence; and (2) the verdict is against the law.

It is insisted here that the indictment is insufficient, and that the instructions are erroneous.

[1] The indictment charges a public offense. It is merely insisted that the offense is imperfectly pleaded. The indictment was not demurred to, nor was there any motion to arrest the judgment. That being true, the sufficiency of the indictment cannot be considered when raised for the first time in this court. *Baldrige v. Commonwealth*, 88 S. W. 1076, 28 Ky. Law Rep. 33.

[2] Error in the instructions was not assigned as ground for a new trial. While it is true that it is not necessary to except to instructions in a criminal case in order to question their sufficiency, for the reason that it is the duty of the trial court to give correctly all the law of the case, yet it is equally well settled that errors in the instructions will not be considered on appeal unless relied on as a ground for new trial. *Buckles v. Commonwealth*, 113 Ky. 799, 68 S. W. 1084, 24 Ky. Law Rep. 571; *Thompson v. Commonwealth*, 122 Ky. 501, 91 S. W. 701, 28 Ky. Law Rep. 1187.

[3] The only question remaining is whether or not the verdict is flagrantly against the evidence. The facts developed by the evidence for the commonwealth are as follows: Early one morning in September, 1914, Miss Rosa Lee Petter, who, together with her father, occupied a residence in Paducah, was awakened by a noise in the room. She saw the figure of a man, and called to her father that there was a man in the house. Her father responded to the call. He heard the man running down the steps, and heard him come in contact with a large pedestal, which sounded like the whole house was coming down. They were unable to recognize the intruder. The sash and screen of one of the windows were raised. They found tracks near the window leading out through the yard to an alley. About 5 o'clock on the same morning appellant was arrested at his home on some minor charge. Appellant was in the back room and lying on a cot with no cover over him. When the burglary was reported to the chief of police, he removed the shoes of appellant and took them to the scene of the alleged crime. The shoes fitted the track near the window, and also the other tracks, with the exception that the tracks were about one-eighth of an inch longer. The shoes were run down at the heel, and the tracks indicated this condition. The tracks also showed the nail holes in the rubber heels. The holes in the tracks corresponded with the holes in the heels. Near the side of the house they had been unloading

some coal. The tracks appeared very plain in the coal dust. These tracks corresponded to the shoes in every respect, with the exception that they were one-eighth of an inch longer. Defendant testified that he never left his room, but remained there all night. He also proved by others that he was there during the entire night, though the evidence shows that he might have gone out without the others knowing it. While it is true that appellant was not identified, and no property belonging in the house was found on him, we cannot say that the verdict is flagrantly against the evidence. The heels of the appellant's shoes were run down. This condition appeared from the tracks. The impression in the tracks corresponded to the nails and the holes in the shoes. The jury heard this evidence and observed appellant's demeanor while on the stand, and they were therefore in a better position than we are to pass on the question of his guilt.

Finding no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

#### COMBS et al. v. FRICK CO.

(Court of Appeals of Kentucky. Jan. 7, 1915.)

##### 1. TIME (§ 9\*)—EXTENSION—FILING ANSWER—UNTIL.

Where defendants were given "until" the twenty-second day of the term in which to plead, an answer filed at any time during the twenty-second day of the term was in time.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.\*]

##### 2. SET-OFF AND COUNTERCLAIM (§ 35\*)—ACTION ON CONTRACT—RECOURPMENT—UNLIQUIDATED DAMAGES.

Where plaintiff was a foreign corporation and had no property in Kentucky, defendants were entitled to set off in recoupment a claim for unliquidated damages arising out of the same transaction.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 58-64; Dec. Dig. § 35.\*]

##### 3. PLEADING (§§ 194, 352\*)—ANSWER—SET-OFF—SUFFICIENCY—MOTION TO STRIKE.

Where defendants had failed to make defense within the time prescribed by the Code and were put on terms as to the filing of their answer, its alleged insufficiency when filed could be determined on motion to strike for insufficiency instead of testing its sufficiency by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444-446, 449-452, 1078-1091, 1125; Dec. Dig. §§ 194, 352.\*]

##### 4. SALES (§ 418\*)—SPECIAL DAMAGE—COMMUNICATION OF CIRCUMSTANCES.

Loss from delay in the receipt of machinery sold by plaintiff to defendants, during which defendants' men and teams were idle, was special damage, which could not be recovered in an action for breach of defendants' contract in the absence of a showing that the circumstances had been communicated to plaintiff so that it would have known in advance that the delay would probably cause such loss.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

Appeal from Circuit Court, Perry County.

Action by the Frick Company against R. B. Combs and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Napier & Turner, of Hazard, Thos. B. McGregor, of Frankfort, and J. B. Eversole, of Hazard, for appellants. Miller & Wheeler, of Hazard, for appellee.

HANNAH, J. On November 18, 1912, R. B. Combs and J. C. Combs executed a written order to the Frick Company, directing it to ship from Waynesboro, Pa., on or about December 1, 1912, to them at Typo, Perry county, Ky., a sawmill and other machinery and fixtures. By the terms of the order, they agreed to pay for the machinery \$246 in cash on delivery thereof, and five notes in the sum of \$220 each. The notes were to be secured by a mortgage on the machinery, and on such other property as might be agreed upon. The machinery so ordered was delivered to the purchasers on or about December 30, 1912; and on that day they gave the Frick Company their five notes in the sum of \$220 each, secured by a mortgage executed, acknowledged and delivered by them on that date, covering the machinery so purchased and certain real estate. They also paid the \$246 in cash. On June 3, 1913, a default in the payment of the note first maturing having by the terms thereof precipitated the maturity of the whole of the indebtedness, the Frick Company instituted this action in equity in the Perry circuit court to recover upon the notes and to enforce the mortgage lien. On the thirteenth day of appearance term, August 1913, of the court, defendants filed a special demurrer to the petition, which the court overruled; and "defendants were given *until* the twenty-second day of the term in which to plead." On the twenty-second day of the term, the "defendants filed their answer and set-off, to which plaintiff objected and moved the court to strike same from the record." This motion the court sustained, and struck the answer and set-off from the record, over the objection of the defendants. The court then rendered judgment in favor of plaintiff for the notes sued on, and ordered a sale of the mortgaged property in satisfaction of the judgment. Defendants appeal.

[1] 1. The objection of plaintiff to the filing of the answer and set-off by the defendants was twofold. Plaintiff insisted, first, that the pleading was not tendered in time. As to this contention, it was held in Newport News R. Co. v. Thomas, 96 Ky. 513, 29 S. W. 437, 16 Ky. Law Rep. 706, that when time is given until a day certain to file a bill of exceptions, if it is filed on or before that day, it is in time. The defendants were given until the twenty-second day of the term to plead, and, having tendered it on that day, they were in time.

[2, 3] 2. The second objection of plaintiff to the filing of the answer and set-off by defendants was that it failed to state facts sufficient to constitute a defense, or a cause of action against plaintiff by way of counterclaim or set-off. It is suggested that, the demand attempted to be pleaded in this answer and set-off being one for unliquidated damages, it could not properly be interposed by the defendants in this action. But it was alleged by the defendants that the plaintiff was a foreign corporation, and that it had no property in this state, and in such case a demand for unliquidated damages was a proper ground of recoupment. *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24, 10 Ky. Law Rep. 865; *Abernathy v. Myer-Bridges Co.*, 100 S. W. 862, 30 Ky. Law Rep. 1236; *Bates v. Reitz*, 157 Ky. 514, 163 S. W. 451. So the question is whether the pleading was sufficient to state a cause of action against the plaintiff; and upon this sufficiency rests the right of the defendants to file it at the time it was tendered. It is true that as a general rule the sufficiency of a pleading as stating a cause of action or defense is to be tested upon demurrer; but in this case, the defendants, having failed to make defense within the time prescribed by the Code, were put upon terms as to the filing of their answer, and when it was tendered, and its insufficiency was urged as an objection to the filing thereof, the court in its discretion had the power to refuse to permit it to be filed, or, after it was filed, had the power to strike it for insufficiency. 31 Cyc. 619. Briefly stated, the purported cause of action against the plaintiff, which was set up in the answer and set-off, or really counterclaim, in question, was that the plaintiff had agreed to deliver the machinery mentioned to the defendants at Typo, Ky., on December 1, 1912; that it failed to comply with this agreement; that the machinery did not reach the defendants until about 30 days after its delivery was promised; that, because of this delay, the defendants were caused to lose 30 days' time, with men and teams idle at great expense to them; and that they were thereby damaged in the sum of \$1,000. But the written order which was sent by the defendant to the plaintiff was accepted by it, and under which the machinery was delivered by plaintiff to defendants, does not stipulate that the delivery was to be made to defendants at Typo on December 1, 1912. It provides that the machinery ordered was to be shipped from Waynesboro, Pa., on or about December 1, 1912. The defendants did not deny their execution of this written contract, and it was the only contract between the parties. Defendants did not in any manner seek to avoid or modify it. Nor was it charged that plaintiff failed to make shipment from Waynesboro, Pa., on or about December 1, 1912, as it agreed to do. In fact, the pleading

shows no breach of any of the covenants of the contract entered into between the defendants and plaintiff.

[4] Moreover, the damages sought were purely special in their nature, and the pleading charges no such communication of the circumstances as is necessary to impose liability upon the plaintiff for damages not the result of an ordinary breach of the contract, assuming it to have been made as alleged by the defendants. *Pulaski Stave Co. v. Millers Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96. The pleading in question failed to state any matter available to the defendants either by way of defense or ground of recoupment against plaintiff, and the trial court properly struck it from the record.

Judgment affirmed.

#### BATH COUNTY v. DENTON et al.

(Court of Appeals of Kentucky. Jan. 7, 1915.)

COUNTIES (§ 217\*)—COUNTY PROPERTY—POSSESSION—RECOVERY BY EJECTMENT.

Under Ky. St. § 1840, giving fiscal courts jurisdiction to control the fiscal affairs and property of the county, and section 3948, making the jailer of certain counties the superintendent of the public square, courthouse, and other public buildings at the seat of justice, and providing that he shall have the power to carry on the appropriate civil procedure in the name of the county to recover possession, or for intrusion on any of such county property, a jailer without the consent of the fiscal court could not maintain ejectment to recover the possession of a part of the public square at the county seat which the fiscal court had leased to private parties, whether or not the fiscal court had power to make such lease, as the power of the fiscal court is superior to the authority of the jailer, and, when it undertakes to control in such manner as its judgment may dictate the property of the county, the jailer may not nullify its action by independent proceedings initiated on his own volition.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 347-351; Dec. Dig. § 217.\*]

Appeal from Circuit Court, Bath County.

Ejectment in the name of Bath County by Robert E. Duff, jailer of such county, against A. N. Denton and others. From a judgment overruling demurrers to the answers, plaintiff appeals. Affirmed.

W. S. Gudgeon, of Owingsville, for appellant. W. B. White, of Mt. Sterling, and G. C. Ewing, of Owingsville, for appellees.

CARROLL, J. Robert E. Duff, the jailer of Bath county, brought this suit in ejectment against the appellees Denton and Conner to recover from them the possession of two lots which were a part of the public square in Owingsville, the county seat of Bath county, on which square is situated the courthouse and other public buildings of the county. In an amended petition it was averred that the two lots in the possession of appellees were contiguous to the county jail, and their present use by the appellees was a

menace to the safety of the occupants of the jail, and they were necessary to the jailer for the convenience and enjoyment of the property in which he lived. The separate answers filed by the appellees, after admitting that the lots were owned by Bath county, set up that one of the lots for many years prior to 1902 had been occupied by the appellees and their lessors by a blacksmith shop and the other by a livery stable; that in 1902 the fiscal court of Bath county, by orders of court duly made and entered, leased these lots to Coon and others for a period of 16 years, in consideration of an annual rental charge, with the privilege in the lessees of subleasing the property, which privilege the lessees exercised by subletting it to the appellees.

If the jailer did not have authority to question in this action the power of the fiscal court to make the leases mentioned, then the decision of the lower court in overruling demurrers filed to the answers, which in effect amounted to a holding that the action could not be maintained, was correct, and the judgment should be affirmed, as it is not disputed that the appellees are holding the property under authority of the leases.

Section 1840 of the Kentucky Statutes provides, among other things, that the fiscal court shall have jurisdiction "to regulate and control the fiscal affairs and property of the county"; and it is the contention of counsel for appellees that the fiscal court had, by virtue of this statute, jurisdiction and power to lease these lots in the manner stated, and, this being so, any action to oust the tenants from possession must be brought in the name of or by the authority of the fiscal court, and the jailer, not having this authority, had no right to institute or maintain the action. On the other hand, the argument in behalf of the jailer is that under section 3948 of the Kentucky Statutes the jailer is made the superintendent of the public square at the seat of justice and clothed with "power and it shall be his duty to institute and carry on the appropriate civil procedure in the name of the county to recover possession of and for injury to, or intrusion or trespass which may be committed on any of the county property named in this chapter," and so he was vested with authority to maintain this action without asking either the advice or consent of the fiscal court.

The fiscal court is the governing authority in county affairs, and has by the statute general control of all matters that concern the county, unless the right of control has been lodged by statute in some other officer or body, and there is really no conflict between the authority granted to the fiscal court and the authority granted to the jailer under the statutes mentioned. It is true the jailer has a right, under section 3948, to institute such proceedings as may be necessary

to recover possession of property of the county and damages for any intrusion or trespass which may be committed on or against it. But this does not mean that he has power to override the authority of the fiscal court, or that, when the fiscal court undertakes to control in such manner as its judgment and discretion may dictate the property of the county, the jailer may nullify its action by independent proceedings initiated on his volition. The power of the fiscal court in the exercise of authority within its jurisdiction is superior to the authority of the jailer, and the jailer cannot nullify its authority in the manner attempted in this action.

In *Owen County v. Greene*, 129 Ky. 750, 112 S. W. 854, it was contended that the jailer of the county, and not the fiscal court, was the proper party to institute an action to recover property of the county; but we said in construing sections 1840 and 3948 of the Kentucky Statutes that, while section 3948 "gives the jailer the power and makes it his duty to institute actions to recover possession of public county buildings, it was not intended to deprive the fiscal court of the power to regulate \* \* \* such actions with reference thereto as it might deem necessary." It is entirely probable that many counties in the state own lots and other real estate not occupied by public buildings, or needed for public purposes, that are used by private persons under contract with the fiscal court, and it was certainly not contemplated that the jailer of the county might dispossess persons to whom the fiscal court had leased such property.

Counsel for appellant offer the argument that fiscal courts have no power to lease public property to the detriment of the public good or that has been set apart for or that is needed for public purposes. But the question of the jurisdiction or power of the fiscal court to lease or dispose of property set apart for public use is not before us in this record, and so we will not consider it. The only matter here presented is the right of a jailer to eject persons from property they are holding under a lease from the fiscal court.

This we think the jailer cannot do, and the judgment is affirmed.

CARTER'S ADM'R et al. v. REYNOLDS et al.

(Court of Appeals of Kentucky. Jan. 7, 1915.)

WILLS (§ 820\*)—GENERAL LEGACIES—CHARGE ON REAL PROPERTY.

Testatrix, residing with her granddaughter, owning only certain household goods and a house and lot, which her administrator sold for \$695, bequeathed to such granddaughter all her household goods and \$300 in cash, and directed her executor to sell the real estate and divide the proceeds among others named. Held, that the general legacy to the granddaughter did not abate because of insufficiency of assets, but such

legacy was a charge on the realty and payable out of its proceeds before division.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119, 2121; Dec. Dig. § 820.\*]

Appeal from Circuit Court, Graves County. Action by L. Carter's Administrator and others against Ollie Reynolds and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. E. Warren, of Mayfield, for appellants. Johnston & Wyman, of Mayfield, for appellees.

**HANNAH, J.** Mrs. Levitia Carter, a resident of Mayfield, died on March 8, 1910. She had made a will on October 20, 1905, which after her death was duly probated. So much of the will as is here involved, reads as follows:

"First: I desire that all my just debts be paid, after which I give and bequeath to my granddaughter, Ollie Reynolds, wife of Wash Reynolds, all of my household goods and three hundred dollars in cash; but if she should die before I do, then I desire that her children take said property. Second: It is my further will that my son, J. C. Carter, be appointed my executor with power to make deed of general warranty to any real estate that I may own at the time of my death; and that he use his own discretion as to whether said sale be made public or private; that he have one seventh of the proceeds of my real estate; and that he pay to my son, A. J. Carter, one seventh; to my daughter, Elizabeth Austin, one seventh; to the children of my deceased daughter, Mary Jane Wyatt, one seventh; to the children of my deceased daughter, Maude Eugene Wyatt, one seventh; to the children of my deceased daughter, Ada Byron Wyatt, one seventh; and to my daughter, Sarah Green, one seventh."

At the time she made this will, Mrs. Carter was an old woman, and had no property except a house and lot in Mayfield and her household goods; and this was all she possessed at the time of her death. The house, after Mrs. Carter's death, was rented by the executor and, after his resignation, by the administrator with the will annexed, and the rentals so received were applied to the payment of funeral expenses and other indebtedness of Mrs. Carter's estate, until March 16, 1914, when the real estate was sold for \$695. The administrator with the will annexed instituted this suit in the Graves circuit court to obtain a construction of the will, and the chancellor adjudged that the devise of \$300 to Ollie Reynolds was a charge upon the real estate mentioned, from which judgment, the plaintiffs appeal.

At the time she made the will in question, Mrs. Carter was making her home with her granddaughter, the appellee, Ollie Reynolds. Her only income was that received from the renting of the house owned by her. She had previously lived with her said granddaughter about three years, and paid nothing during that time for her maintenance; when she went back to appellee's the last time, she made the will here involved, and thereafter paid to appellee the income re-

ceived by her from the house mentioned, in consideration of her support. She was quite old, and lived with appellee about five years. The house owned by her rented for \$10 per month, and this, less the taxes and other charges, was the extent of her income. The record shows that Mrs. Carter was fully cognizant of the nature and extent of her resources at the time she made this will. It will thus be seen that unless we impute to Mrs. Carter an intent to bequeath to her granddaughter "in appearance only, and not in reality," no other construction may be placed upon her will except that she intended the \$300 to be a charge upon her real estate. It is true that the general rule is that an insufficiency of assets will operate to abate a general legacy; but this rule would be inapplicable if it was the intention of Mrs. Carter that the \$300 legacy to her granddaughter should be paid out of the proceeds of the real estate; and we are unable to understand that Mrs. Carter could have expected it to be paid in any other manner or from any other source. She had no such sum in her possession when she made the will, nor had she any reasonable expectation, so far as the record shows, of having such sum when she should die, for the little income available to her was insufficient for a reasonable maintenance; hence there remained no possibility of any accumulation thereof. So it must either be said that Mrs. Carter intended that this \$300 legacy should be paid out of the proceeds of her real estate, or else she did not intend that her granddaughter should have it, and this latter we are unwilling to believe. If Mrs. Carter intended her granddaughter, with whom she made her home in her declining years, and whom she mentions first in her will before her own children, to have this \$300 at all, she certainly intended it to be paid out of the proceeds of her real estate, and that such was her intention we do not doubt. This court has many times written that, in the exposition of wills, the rule is that the intention of the testator shall prevail. The chancellor has so construed the will in question, and his finding we approve.

Judgment affirmed.

#### CAMPBELL v. MOBILE & O. R. CO. (two cases).

(Court of Appeals of Kentucky. Jan. 8, 1915.)

#### 1. TRIAL (§ 140\*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

In an action tried by a jury, the trial judge may not reject the evidence of a witness merely because he does not appear to be telling the truth, as the credibility of a witness is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. RAILROADS (§ 446\*)—CROSSING ACCIDENT— QUESTION FOR JURY.

In an action against a railroad company for injury to horses at a crossing, evidence held sufficient to go to the jury as to whether the horses a witness stated he saw killed were those of plaintiffs.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

Appeal from Circuit Court, Hickman County.

Actions by Mrs. Jennie Campbell and by R. L. Campbell against the Mobile & Ohio Railroad Company. Judgment for defendant on a directed verdict, and plaintiffs appeal. Reversed.

Joe W. Bennett and Bennett, Robbins & Thomas, all of Clinton, for appellants. E. T. Bullock, of Clinton, and Kane & Bullock, of Bardwell, for appellee.

CLAY, C. These two actions were heard together below, and will be considered in one opinion. Appellant R. L. Campbell was the owner of a horse, and appellant Jennie Campbell was the owner of a mare, which were killed about 3:20 a. m. on September 16, 1911, by a fast passenger train, owned and operated by appellee, Mobile & Ohio Railroad Company. Appellants instituted two actions to recover damages. At the conclusion of the evidence in each case the trial court directed a verdict in favor of the railroad company. On appeal to this court the judgment in each case was reversed because of the failure of the railroad company to negative the negligence imputed to it by section 809, Kentucky Statutes, by proving that the statutory signals, required by section 786, Kentucky Statutes, for the road crossing at which the stock were killed, were properly given. These cases were subsequently dismissed without prejudice. Afterwards the present actions were filed, in which each of the appellants sought to recover damages in the sum of \$250. The two cases were tried together in February, 1913, and at the conclusion of the evidence the trial court directed verdicts in favor of the railroad company. From the judgments entered on the verdicts, these appeals are prosecuted.

On the last trial, the evidence for the railroad company was to the effect that the stock were killed about 3:24 a. m. on Saturday, September 16, 1911, by a passenger train running at the rate of about 55 miles an hour. When the train was a few feet from the crossing the fireman told the engineer to look out for stock. At that time some horses were running from the east. Before the engineer could do anything, the train collided with the horses. The engineer testified that he whistled for the road crossing when about a

quarter of a mile away. There was further evidence to the effect that there was a curve in the track near that point, and the furthest point away, from which the crossing could be seen, was about 406 feet distant.

Appellants introduced a witness by the name of Stanfield, who stated that during the month of September, 1911, he spent one night at his sister's. The next morning, between 2 and 3 o'clock, he started to Moscow. When he approached the Campbell crossing, he saw two horses on the crossing about 35 yards distant. The train struck the horses and killed them. The engineer did not whistle for the crossing. There was further evidence to the effect that an object on the crossing could be seen about 900 feet away.

[1] Exactly on what ground the trial court gave the peremptory instruction does not appear. It is argued that Stanfield's testimony does not show that the two horses which he saw killed were the horses belonging to appellants. It is also claimed that while this witness was testifying, great beads of perspiration stood on his forehead, and that his manner and demeanor on the stand were such as to lead the trial judge to believe that if he ever saw any horses killed, they were not the horses owned by appellants. No rule of law is better settled than that, in a common-law action, tried by a jury, the credibility of a witness is for the jury. That being true, neither the trial judge nor this court has a right to reject the evidence of a witness merely because his demeanor on the stand is such as to induce the belief that he is not telling the truth. The jury being the sole judges of the credibility of a witness, it is for them to observe his demeanor and determine what credence shall be placed in his statements.

[2] Nor do we think that the testimony of the witness in question should be rejected because he did not accurately fix the day on which he claims he saw two horses killed. He says that the occurrence took place on Saturday morning between 2 and 3 o'clock at the Campbell crossing during the month of September, 1911. Though he did not identify any particular date, yet if he saw any horses killed at all, it is by no means probable that other and different horses were killed on a Saturday morning in September at about the same hour and at the same crossing. At any rate, we think the question whether or not the horses which he saw killed were the horses of appellants was for the jury. We, therefore, conclude that the trial court erred to the prejudice of appellants in peremptorily instructing the jury to find for the defendant.

Judgments reversed and causes remanded for proceedings consistent with this opinion.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**PHILADELPHIA LIFE INS. CO. v. FARNSELEY'S ADMR.**

(Court of Appeals of Kentucky. Jan. 6, 1915.)

**1. INSURANCE (§ 639\*)—ACTIONS ON POLICIES—PETITION—CAUSE OF DEATH—"EXCEPTION"—"PROVISO."**

While a distinction is sometimes made between "provisos" in insurance policies, which are stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse, and "exceptions," which are clauses taking something out of the general operation of the contract, so that the promise is to perform only what remains after the part excepted is taken away, and while the general rule is that, if a contract contains a general clause and a subsequent separate and distinct clause taking out of the general clause something that would otherwise be included therein, a party relying upon the general clause may plead it without noticing the separate and distinct clause operating as an exception, but, if the exception is incorporated in the general clause, the party relying on it must plead it together with the exception, death by suicide need not be negated, in an action on a policy, whether the nonliability on account thereof appears in a proviso or an exception, or whether it occurs in the principal clause or in a separate and distinct clause, since the presumption of suicide is so abhorrent to the law that it cannot be indulged in.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1593, 1598; Dec. Dig. § 639.\*]

For other definitions, see Words and Phrases, First and Second Series, Exception; Proviso.]

**2. INSURANCE (§ 635\*)—ACTIONS ON POLICIES—PETITION—CAUSE OF DEATH.**

In an action on a policy insuring against bodily injuries effected through external, violent, and accidental means and death resulting from such injuries, and which contained provisions showing that death by accidental drowning was covered thereby, a petition alleging that insured met an accidental death effected through external, violent, and accidental means, and that, while crossing a gang plank between two vessels lying in a river, he slipped from the plank, fell into the river, and was drowned, sufficiently alleged that the death resulted directly, and independently of all other causes, from bodily injuries, effected through external, violent, and accidental means.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1599-1602; Dec. Dig. § 635.\*]

Appeal from Circuit Court, McCracken County.

Action by Frank R. Farnsley's Administrator against the Philadelphia Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Roscoe Reed and Sanders E. Clay, both of Paducah, for appellant. Bradshaw & Bradshaw, of Paducah, for appellee.

CLAY, C. On December 4, 1912, the Philadelphia Life Insurance Company issued to Frank R. Farnsley a policy insuring him "against accidental death and dismemberment (suicide, sane or insane, is not covered), disability due to either accident, illness, or funeral benefit for death from natural causes as hereinafter respectfully defined,

limited and specified." The material provisions of the policy are as follows:

**"Total Accident Disability.**

"(A) At the rate of seventy dollars per month, for a period of not exceeding twenty-four consecutive months, against total loss of time resulting directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means, and which wholly and continuously from date of accident disable and prevent the assured from performing every duty pertaining to any business or occupation, and require the regular attendance of a physician or surgeon."

**"Specific Total Losses.**

"(C) Or, if any one of the following specific total losses shall result solely from the injuries described in paragraph A within ninety days from date of accident, the company will pay, in lieu of any other indemnity, for loss of life, seven hundred dollars (the principal sum of this policy)."

On December 23, 1912, the insured was drowned. The Mechanics' Trust & Savings Bank, as his administrator, brought this action against the insurance company to recover on the policy. To the petition and the petition as amended, defendant interposed a demurrer, which was overruled. Having declined to plead further, judgment was rendered in favor of plaintiff, and defendant appeals.

The sufficiency of the petition as amended is the only question presented. In addition to certain formal averments, which need not be noticed, the petition contains the following allegations:

"Plaintiff says that on the 4th day of December, 1912, the defendant, the Philadelphia Life Insurance Company, a corporation of Philadelphia, Pa., engaged in the life and accident insurance business, issued and delivered to the plaintiff's decedent its policy of insurance, under the terms of which, in consideration of one and  $75/100$  (\$1.75) dollars, to be paid monthly by the decedent, and which monthly payment for December, 1912, was paid to the defendant by the decedent, the defendant undertook and obligated itself to pay to the defendant's administrator the sum of seven hundred (\$700.00) dollars in the event of the loss of the decedent's life, resulting directly and independently of all other causes from bodily injury, effected through external, violent, and accidental means. Plaintiff says that on the 23d day of December, 1912, and during the life of said policy, the decedent did meet an accidental death, effected through external, violent, and accidental means."

**The amended petition is as follows:**

"Comes the plaintiff, Mechanics' Trust & Savings Bank, administrator of the estate of Frank R. Farnsley, deceased, and for amendment to its petition filed herein says that on the 23d day of December, 1912, the decedent, Frank R. Farnsley, while crossing a gang plank lying between a barge and steamboat, both vessels lying in the Mississippi river near Cairo, Ill., accidentally slipped from the plank across which he was walking and fell into the Mississippi river between the boat and barge and was drowned."

It is insisted that the petition as amended is fatally defective for two reasons: (1) It fails to negative the suicide of the insured, which is an exception contained in the prom-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

issory clause; (2) it fails to allege that the death of the insured resulted directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means.

[1] 1. It is true that there is a class of cases which make a distinction between provisos and exceptions in insurance policies, in so far as the question of pleading is concerned. Provisos are stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse; and in an action thereon it is incumbent on the insurer to plead them in defense and support them by evidence. Exceptions are clauses taking something out of the general operation of the contract, so that the promise is to perform only what remains after the part excepted is taken away; and, in actions on policies of insurance containing such clauses, they must not only be negated by the plaintiff, but he must show by evidence that his case does not fall within the exception. *Sohier v. Norwich Fire Ins. Co.*, 11 Allen (Mass.) 336. The rule of pleading applicable to such a case is stated as follows:

If the contract sued on "contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party, relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it together with the exception." *Commonwealth v. Hart*, 11 Cush. (Mass.) 130.

Thus, where the policy of insurance provides that, if the insured is killed while engaged in an occupation classed by the insurance company as more hazardous than that stated in his application, his beneficiary is to receive a smaller sum than otherwise, the plaintiff must allege and prove that the insured was not killed in more hazardous occupation. *American Accident Ins. Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 18 Ky. Law Rep. 308, 34 L. R. A. 301, 59 Am. St. Rep. 473. The same doctrine was followed in the case of *Tolmie v. Fidelity & O. Co.*, 95 App. Div. 352, 88 N. Y. Supp. 717, affirmed in 183 N. Y. 581, 76 N. E. 1110, where the insurance company agreed to indemnify certain contractors against liability for any damages on account of injuries to third persons caused by the insured or other workmen, but not when the injuries were caused by the subcontractor or his workmen. It was held that it was the duty of the insured, in an action on the policy, to allege and prove that the injury for which he sought the company to respond in damages was not caused by the subcontractor or his workmen. However, it is the generally accepted rule that death by suicide need not be negated by the pleader. And this is true, we take it, whether the nonliability on account thereof appears in a proviso or an exception, or wheth-

er it occurs in the principal clause or in a separate and distinct clause. The reason for the rule is plain. Self-destruction is contrary to the general conduct of mankind. Men love and cling to life with such intensity that the presumption of suicide is utterly abhorrent to the law and cannot be indulged in. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Fidelity & Co. v. Love*, 49 O. C. A. 602, 111 Fed. 773; *National Union v. Thomas*, 10 App. D. C. 277; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Equitable Life Ins. Co. v. Hebert*, 37 Ind. App. 373, 76 N. E. 1023, 117 Am. St. Rep. 324; *Mutual L. Ins. Co. v. Wlswell*, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; *Supreme Council R. A. v. Brashears*, 89 Md. 624, 43 Atl. 886, 73 Am. St. Rep. 244; *Cox v. Royal Tribe*, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; *Continental Ins. Co. v. Delpench*, 82 Pa. 225; *Fisher v. Fidelity Mut. Life Ass'n*, 188 Pa. 1, 41 Atl. 467; *Brown v. Sun Life Ins. Co.* (Tenn. Ch. App.) 51 L. R. A. 252, 57 S. W. 415; *Mutual L. Ins. Co. v. Simpson* (Tex. Civ. App.) 23 S. W. 837; *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923. We therefore conclude that the petition is not defective because of its failure to allege that the insured did not commit suicide.

[2] 2. The next question presented is whether or not the petition, as amended, is defective because of its failure to allege that decedent's loss of life resulted directly, and independently of other causes, from bodily injuries, etc. Miscellaneous provision (R) of the policy shows conclusively that death by accidental drowning is covered by the policy. The original petition alleges that the decedent "did meet an accidental death, effected through external, violent, and accidental means." The amended petition alleges that the decedent "while crossing a gang plank lying between a barge and steamboat, both vessels lying in the Mississippi river near Cairo, Ill., accidentally slipped from the plank across which he was walking and fell into the Mississippi river between the boat and barge and was drowned." The latter allegation shows that death was due to drowning, and that the drowning resulted from decedent's accidentally slipping from the plank, across which he was walking, and falling into the river. By detailing the precise circumstances of decedent's death, and the precise cause thereof, we conclude that the allegations of the petition and amended petition are sufficient to negative the idea that other causes than those specified contributed to decedent's death, and are therefore sufficient to dispense with the necessity of a further allegation to the effect that the decedent's loss of life resulted direct-

ly and independently of all other causes from bodily injuries, etc. Manifestly, if the case had gone to trial, and plaintiff had proven the precise facts alleged in the petition and amended petition, these facts would have been sufficient to make out a prima facie case against defendant. It follows that the trial court did not err in overruling defendant's demurrer.

Judgment affirmed.

### ADAMS et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 8, 1915.)

#### 1. LEWDNESS (§ 5\*)—PROSECUTION—INDICTMENT.

An indictment charging that defendants, who were not man and wife, unlawfully cohabited in a specified house and carried on adulterous relations, acting in a lewd and vulgar manner, to the common public nuisance and scandal, etc., is sufficient, though not charging the acts were openly, notoriously, and scandalously committed; the facts alleged showing the acts to have been so committed.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. §§ 7-12; Dec. Dig. § 5.\*]

#### 2. LEWDNESS (§ 10\*) — PROSECUTION — EVIDENCE.

Evidence held to show the creation and maintenance of a common nuisance by carrying on adulterous relations.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. § 15; Dec. Dig. § 10.\*]

#### 3. LEWDNESS (§ 1\*)—OFFENSES—"NUISANCE PER SE"—"LEWDNESS."

The living together of a man and woman unmarried, when generally known throughout the neighborhood, not only constitutes open and gross "lewdness," which is a misdemeanor, but is a "nuisance per se," because outraging public decency.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Lewdness*; *Nuisance Per Se*.]

Appeal from Circuit Court, Rockcastle County.

Jennie Adams and another were convicted of maintaining a nuisance, and they appeal. Affirmed.

C. C. Williams, of Mt. Vernon, for appellants. James Garnett, Atty. Gen., for the Commonwealth.

SETTLE, J. The appellants, Jennie Adams and John Baker, were jointly indicted in the court below for creating and maintaining a common public nuisance. They were jointly tried, and by the verdict of the jury both were found guilty, and their punishment fixed at a fine of \$100 each. They were refused a new trial, and have appealed from the judgment entered upon the verdict.

[1] Their first complaint is that the indictment is fatally defective because it fails to charge that the acts constituting the alleged nuisance were "openly, notoriously,

and scandalously" committed. It is true that the words quoted do not appear in the indictment, but the acts constituting the nuisance are specifically set out in the indictment; it being in substance alleged therein that appellants, though not husband and wife, did for several months, and within a year before the finding of the indictment, unlawfully cohabit and live together in adulterous relations in a certain house in the town of Mt. Vernon by sleeping in and occupying the same room and bed in the house and "acting in a lewd and vulgar manner, to the common public nuisance and scandal, and to the detriment of good morals and religion and to those persons then and there residing in the neighborhood and passing and repassing, and having a right to pass and reside" therein. Obviously the language of the indictment charges a public offense "in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case." If the acts alleged as constituting the offense were committed by appellants as charged and with the knowledge of the persons "residing in the neighborhood and passing, repassing, and having a right to pass and reside" therein, as further alleged, they must have been "openly" and "notoriously" committed; and that such was their character is as fully stated as if the words "openly and notoriously" had been used. We concur in the conclusion of the trial court as to the sufficiency of the indictment; therefore the demurrer thereto was properly overruled.

[2, 3] The evidence introduced for the commonwealth manifests the following facts: That the appellant Jennie Adams is a widow, who owns and occupies a residence in Mt. Vernon, and that, at such times as the school of the town was in session, some of her nieces lived with her; that the appellant John Baker is a married man, who does not live with his wife or children; and that, for seven or eight months before the finding of the indictment, he was seen at and in the home of Jennie Adams almost continuously, both day and night, his presence there being noticed by persons in the neighborhood late at night and at times early in the morning. He was frequently seen by one of the residents of the neighborhood to come out of Mrs. Adams' house early in the morning without his coat, bareheaded, and with his hair uncombed, as though he had just gotten up; and on one of these occasions he went directly to the water-closet, where he was shortly followed by Mrs. Adams, who went into the closet while he was there and remained with him for some time. On another occasion they were seen in her bedroom

together at 11 o'clock at night, the upper part of Baker's body appearing at the time to be naked, and while thus together the light in the room was put out. According to all the evidence of the commonwealth, they lived together as man and wife and were seen on the premises and in the streets together. On yet another occasion a woman of the neighborhood saw the appellants embrace each other while driving in a buggy on a highway. There were numerous other houses near that of appellant Adams, occupied by men, women, and children, all of whom constantly saw the appellants, observed that they lived together as if they were husband and wife, and were greatly annoyed and outraged by their conduct and the relations maintained by them. In addition, it was proved by the commonwealth that the reputation of each of the appellants for chastity and morality was bad.

On the other hand, the appellants each denied that there were illicit or improper relations between them; denied that they had embraced on the highway or been in the water-closet together, or together at night in her bedroom, or at a time when the light was put out. The appellant Baker further denied that he was ever in a room at Mrs. Adams' house with his shirt off, but admitted that he sometimes had his top shirt off at her house. In attempted explanation of their intimacy and the conduct complained of by the residents of the neighborhood, appellants testified that Baker was employed to work for Mrs. Adams, which compelled him to spend much of his time at her house and about the premises, and that he did not sleep or spend the nights at her house. Other witnesses testified that Baker was often at work for Mrs. Adams; that he did some inside painting in the house, made for her a wagon bed, and also gathered for her a crop of corn.

While the evidence fails to show any specific adulterous act between appellants or act of gross immorality or indecency, it does, as a whole, show the existence of the conditions that manifestly attend the existence of the adulterous relations charged in the indictment. In other words, persons so lacking in virtue as appellants are shown by the evidence to be would not sustain toward each other the relations maintained by them for other than illicit or immoral purposes. As well argued by the Attorney General, the fact that a man and woman who are not married live together in a community and occupy the same house together, under the conditions shown by the evidence in this case, was enough to convince the jury of their guilt of the offense charged, without proof of outward indecency. The relations maintained by appellants could but offend the moral sense of the decent people to whom they were known. For these reasons, the

acts and conduct of which they were shown to be guilty constituted such a public or common nuisance as they are charged by the indictment with maintaining.

In Roberson's Criminal Law, vol. 2, p. 830, it is said:

"Open and gross lewdness, or whatever openly outrages decency and is injurious to public morals, is a misdemeanor and indictable at common law. Thus the living together of a man and woman unmarried, which is generally known throughout the neighborhood, is sufficient to constitute open and notorious lewdness, without proving it to have been in a street or under the immediate observation of strangers."

In Bishop on Criminal Law, vol. 1, § 1087, in discussing bawdyhouses as a nuisance, the author says:

"Outward indecency is not a necessary element. The allurements are as effective, or even more so, though no indecency or disorder is discernible from without."

In Ehrlick v. Commonwealth, 125 Ky. 746, 102 S. W. 290, 31 Ky. Law Rep. 401, 10 L. R. A. (N. S.) 995, 128 Am. St. Rep. 269, we said:

"A nuisance per se is any act or omission or use of property or thing which is of itself hurtful to the health, tranquillity, or morals, or outrages the decency, of the community. It is not permissible or excusable under any circumstances."

There is no ground for appellants' contention that the court should have peremptorily directed a verdict for them, or that the verdict is contrary to the evidence. The case was properly submitted to the jury under instructions which correctly advised them of the law, and, as there was evidence to support the verdict, it will not be disturbed.

Judgment affirmed.

## CINCINNATI, N. O. & T. P. RY. CO. v. DUNGAN.

(Court of Appeals of Kentucky. Jan. 7, 1915.)

### 1. APPEAL AND ERROR (§ 525\*) — RECORD — SCOPE OF REVIEW.

Where the instructions have been stricken from the record, the only questions left for review are whether the pleadings support the judgment and whether the verdict is warranted by the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2376-2378; Dec. Dig. § 525.\*]

### 2. RAILROADS (§ 95\*)—CROSSING TURNPIKE—RESTORATION OF ROAD.

Where a railroad constructs its line through a cut crossing a turnpike, it is required by St. 1909, § 763, subsec. 5, to restore the turnpike and maintain its integrity as a highway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 274-283; Dec. Dig. § 95.\*]

### 3. RAILROADS (§ 95\*) — BRIDGES — MAINTENANCE OVER ROAD—GUARD RAILS.

Where a railroad company was required to construct guard rails to a bridge or its approaches by which a turnpike was carried over the railroad's right of way, the railroad company's failure to properly maintain such rails, by reason of which a traveler was injured, constituted actionable negligence, notwithstanding the shying, backing, or unruly and unmanage-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

able conduct of the traveler's horse may have contributed to the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 274-283; Dec. Dig. § 95.\*]

**4. RAILROADS (§ 95\*)—BRIDGE OVER RIGHT OF WAY—BARRIERS—PERMISSION TO MAINTAIN—NEGLIGENCE—INJURIES—PETITION.**

Plaintiff alleged that defendant railroad company constructed a bridge to carry a turnpike over its right of way many years before, and protected it by a strong fence and barricade leading to the bridge, but that at the time plaintiff was injured, and continuously for a long time prior thereto, defendant company, through the gross carelessness and negligence of its officers, agents, and employes, suffered and permitted a gap in the barricade for a distance of about 20 feet to remain down so as to expose the highway to the precipice, and on the day in question plaintiff's horse became frightened and jumped through the gap, causing plaintiff to be thrown over the embankment and severely injured, and that defendant knew, or, by the exercise of reasonable diligence, could have known, of the dangerous condition of the right of way. *Held*, that such allegations charged gross carelessness and negligence on defendant's part and, with an amendment charging that plaintiff was driving an ordinarily gentle horse, stated a good cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 274-283; Dec. Dig. § 95.\*]

**5. PLEADING (§ 245\*)—AMENDMENT—CONFORMITY TO PROOF—DISCRETION.**

Under Civ. Code Prac. § 134, providing that the court may at any time, in the furtherance of justice and on such terms as may be proper, cause or permit a pleading to be amended by conforming it to the proof, if the amendment does not change substantially the claim or defense, it was not error, in an action for injuries by plaintiff's horse becoming frightened on a highway bridge over a railroad track and throwing him through a gap negligently permitted to remain in the barricade, to permit plaintiff to amend his petition at the close of the evidence to conform to the proof so as to allege that plaintiff's horse at the time of the injury was an ordinarily gentle one, and was carefully driven.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 635, 653-675; Dec. Dig. § 245.\*]

**6. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.**

Plaintiff, about 11 o'clock on a Sunday night, while driving over a turnpike bridge over defendant's railroad track, was thrown through a gap negligently permitted to remain in the barricade by his horse becoming unmanageable. He was found the next morning lying in the ditch at the bottom of the embankment in an unconscious condition, and remained unconscious until 4 o'clock in the afternoon of the following Wednesday. He was confined to the house for about a month, and sustained severe and probably permanent injuries to his back and hip. He was injured in the head, and continuously thereafter suffered from his kidneys, and, while no bones were broken, the extent of his injuries was, at the time of the trial, uncertain. *Held*, that a judgment for \$2,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Harrison County.

Action by Desman Dungan against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. T. Simon, of Cynthiana, for appellant.  
M. C. Swinford and E. H. Webb, both of Cynthiana, for appellee.

MILLER, C. J. In building its railroad near Hinton Station, in Harrison county, appellant caused it to intersect the Mulberry turnpike road, leaving a cut about 30 feet deep at the point of intersection. The turnpike had been a public highway for many years before the railroad was built; and, in order to preserve the highway, the appellant built a bridge over the cut, with appropriate approaches, protected by suitable guard rails and barriers across appellant's right of way. When constructed many years ago, these guard rails were strongly built of posts and boards to the height of about six feet.

On the third Sunday in August, 1912, the appellee, Desman Dungan, had attended church in the neighborhood, and was returning home about 11 o'clock at night, driving a horse attached to a buggy in which he was riding. When Dungan approached the bridge, and while on the right of way of appellant, his horse became unruly, and refused to cross the bridge, and in his effort to turn the buggy was upset, and Dungan thrown over the embankment into a ditch at the bottom. He brought this action to recover damages for his personal injuries, and recovered a judgment for \$2,500. The defendant appeals.

[1] As the instructions have heretofore been stricken from the record, the only questions left for consideration are whether the pleadings support the judgment, and the verdict of the jury is warranted by the proof. *Tinsley v. White*, 54 S. W. 169, 21 Ky. Law Rep. 1151; *Forest v. Crenshaw*, 81 Ky. 51.

[2] It is insisted that the petition does not state a cause of action.

Under subsection 5 of section 768 of the Kentucky Statutes, it was the duty of appellant to restore the turnpike and maintain its integrity as a highway; and in this connection it is proper to say that appellant in no way denies its duty in this respect.

[3] The rule of law requiring guard rails and barriers to be maintained for the protection of the public is stated in 4 R. C. L. p. 217, as follows:

"If guard rails are reasonably necessary for the safety of travelers and their property in crossing a bridge, then the owners are liable for an injury which is caused by a failure to construct them. The guard rails, furthermore, should be effective for the purpose for which they are constructed. They should be reasonably strong and maintained so as to withstand the ordinary weights and forces to which they are subjected, and the safeguards should be suited to the character of its ordinary traffic. \* \* \* And the absence of barriers to an approach of a bridge may be the proximate cause of injury even where there is a defect in the equipment of the traveler, as where for example, his horse was blind and walked off the side of the approach during a time when the driver lost consciousness."

The same rule is laid down in 5 Cyc. 1101, as follows:

"Where guard rails to a bridge or its approaches are clearly necessary for the safety of travelers, a failure to erect or properly maintain them is negligence, for which the municipality or company charged with the duty to maintain the bridge is liable to a party who, in the observance of due care, is injured by reason of such neglect. This is true, notwithstanding the shying, backing, or unruly and unmanageable conduct of the traveler's horse may have contributed to the accident; the rule being that the liability accrues if the injury would not have happened had there been a proper and sufficient guard. Whether a bridge is so situated or is such a structure that railings are necessary to make it reasonably safe for travel is usually a question of fact for the jury."

[4] Turning to the petition for the purpose of testing its sufficiency, and disregarding its mere formal allegations, we find it is alleged that appellant constructed the bridge from which Dungan was thrown many years ago, and protected it by a strong fence and barricade leading up to the bridge; that at the time of the injury complained of, and continuously for a long time prior thereto, the appellant company, through the gross carelessness and negligence of its officers, agents, and employes, did suffer and permit a gap in said barricade for a distance of about 20 feet to remain down so as to expose the public highway to the precipice; that on the day in question Dungan's horse became frightened and jumped through the said gap and caused Dungan to be thrown violently over the embankment as above stated, severely injuring him; and that the appellant company knew, or, by the exercise of reasonable diligence, could have known, the dangerous condition of the right of way.

By an amended petition tendered and filed at the close of the evidence for the purpose of conforming to the proof, it is alleged that the horse driven by Dungan at the time of the injury was an ordinarily gentle horse, and was carefully driven by Dungan on that occasion.

[5] It is insisted, however, that the court should not have permitted appellee to file the amended petition when he did; and, further, that upon sustaining the motion to file it the trial should have been postponed.

The evidence fully sustained the allegations of the amended petition, and it cannot be said that appellee was in any way surprised or prejudiced by it. Section 134 of the Civil Code of Practice provides that the court may at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading to be amended by conforming the pleading to the facts proved, if the amendment does not change substantially the claim or defense. In *City of Louisville v. Lausberg*, 161 Ky. 364, 170 S. W. 962, it was declared that the only limitation upon the discretion of the trial court in allowing pleadings to be filed is that they must be in furtherance of justice, and must not change

substantially the claim or defense. The amendment in this case was properly filed; it in no way violated the rule above announced. Without elaboration, it is sufficient to say that the petition charged gross carelessness and negligence upon the part of appellant's servants and agents in permitting the gap in the barrier through which appellee fell to remain open for a long time previous to the accident; that appellant knew, or by reasonable diligence could have known, the dangerous condition on its right of way; and that appellee was carefully driving a gentle horse. Under the rule of law applicable to cases of this character, the petition stated a cause of action.

[6] It is contended, however, that the verdict of the jury is not warranted by the testimony, in that it is excessive. There was ample evidence to sustain the charges of negligence. It is true that Dungan escaped without any broken bones; but it is also true that his injuries were very serious. As above stated, the accident occurred about 11 o'clock on Sunday night. Dungan was found the next morning lying in the ditch at the bottom of the embankment in an unconscious condition. He remained unconscious until 4 o'clock on the afternoon of the following Wednesday. He was confined to the house for about a month, and evidently sustained severe, and probably permanent, injuries in his back and hip. He was injured in the head, and has continuously suffered from his kidneys. The extent of his injuries is yet uncertain. Under this evidence it was the peculiar province of the jury to fix the amount of the recovery; and, as it is not clearly and palpably against the weight of the evidence, we would not be justified in disturbing it. *Bell v. Keach*, 80 Ky. 42; *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373; *Adams Express Co. v. Tucker*, 161 Ky. 741, 171 S. W. 428.

Judgment affirmed.

#### PADUCAH TRACTION CO. v. TOLAR.

(Court of Appeals of Kentucky. Jan. 7, 1915.)

##### 1. CARRIERS (§ 333\*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A woman passenger who went to the rear end and left the car while it was in motion, and at a place where it did not stop, was guilty of contributory negligence defeating a recovery, unless it was the conductor's duty to warn her of the danger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388—1397; Dec. Dig. § 333.\*]

##### 2. CARRIERS (§ 303\*)—PERSONAL INJURIES—DEGREE OF CARE—SETTING DOWN PASSENGERS.

Conductors on street cars are under a duty to exercise care to protect passengers from dangers arising from the passengers' negligence or thoughtlessness, and must not knowingly permit them to be injured, if by the exercise of ordinary care they can prevent the same, and

where an elderly woman passenger, after signaling for the car to stop, left her seat, and went to the rear end of the car, passing immediately by the conductor, who knew the car was in motion, it was his duty, if he knew that she intended to get off, to warn her of the danger or to try to prevent her alighting.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.\*]

### 3. CARRIERS (§ 320\*)—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

It is a question for the jury whether, considering the age or discretion of a person alighting from a car in motion, it was negligence or lack of ordinary care on his part to do so.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

### 4. CARRIERS (§ 320\*)—PERSONAL INJURIES—QUESTION FOR JURY—NEGLECT AND CONTRIBUTORY NEGLIGENCE.

In an action by a passenger for injuries from alighting from a street car while it was in motion, it was for the jury to say whether she knew it was in motion, and whether the conductor should have warned her of the danger and endeavored to protect her.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

Appeal from Circuit Court, McCracken County.

Action by Alice Tolar against the Paducah Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler & Hughes, of Paducah, for appellant. Berry & Grassham and L. B. Alexander, all of Paducah, for appellee.

CARROLL, J. The appellee, as plaintiff, brought this suit against the traction company to recover damages for personal injuries sustained, as she alleged, by the negligence of the conductor on a car on which she was a passenger.

The petition, as amended, charged in substance: That, desiring to alight from the car on which she was riding at the intersection of Third and Jackson streets, she so informed the conductor, who rang the bell for the car to stop, and then went back to his place at the rear end of the car where the conductor was accustomed to stand. That soon after this she left her seat and went to the rear end of the car for the purpose of getting off, and believing that the car had stopped when it was in fact moving, she attempted to alight and was thrown to the ground, receiving the injuries complained of. That at the time it was dark and the car was moving so smoothly that she could not tell that it had not stopped. She further averred that, when she went to the rear platform of the car for the purpose of alighting, she passed immediately by the conductor, who stepped out of her way for the purpose of allowing her to get off, when he knew that the car was

running, and negligently and carelessly allowed her to walk from the car while it was in motion without warning her of the danger or giving her notice that the car had not stopped.

The answer of the traction company was a traverse and a plea of contributory negligence, accompanied by the charge that the appellee stepped from the car while it was in full motion under the following circumstances:

"While said car was about the middle of the block between two streets, without warning or notice to the officers in charge of the car, the plaintiff left her seat and immediately left said car while the same was in motion, as she knew at the time."

The appellee, in her own behalf, testified: That, when she told the conductor that she wanted to get off, he pulled the bell cord, and she got up from her seat and started out, thinking the car was about to stop. That when she got to the rear end of the car the conductor was standing there and facing her when she went down the steps for the purpose of getting off. That she did not know the car was running, and the conductor did not do or say anything to give her notice that the car was running or that it was dangerous to get off.

T. F. Kettler, a passenger on the car, said, in substance, that appellee arose from her seat in the middle of the car, while it was in full motion, and in going out of the car to get off went by the conductor, who stepped out of her way so that she could pass.

George W. Muller, a witness for the traction company, who was also a passenger on the car, said that when appellee got off the car it was running 10 or 15 miles an hour and near the middle of the block.

J. F. Muller, another passenger, gave in substance the same evidence.

W. A. Strong, the conductor, testified that appellee said to him:

"I want to get off at Jackson.' She came to the door; I rang the bell. I said, 'You can get off at Ohio.' She said, 'I want off here,' and stepped right off."

He further testified: That he did not know she was going to get off, and that the car at the time was running 10 or 15 miles an hour. That he attempted to grab her as she left the car, but could not do so. That he did not know she intended to get off.

Briefly restated, the evidence for the plaintiff was: That, when she notified the conductor that she wanted to get off, he rang the bell, and, thinking that the car was about to stop, she went to the rear end for the purpose of getting off, passing immediately by the conductor, who knew the car was running, and that she intended to get off, but he did not give her any warning or notice of the danger or attempt in any manner to prevent her from getting off. That at the time it was dark, and when she stepped off she did not know the car was running.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

While the evidence for the traction company is that, when the conductor rang the bell to notify the motorman to stop the car at the next crossing, the appellee got up and walked off of the car when it was running 10 or 15 miles an hour, without giving any notice to the conductor of her intention to get off, and he did not know her purpose in time to prevent her from getting off.

With the evidence in this condition, the court, omitting the instruction on the measure of damages, told the jury in instruction No. 1 that:

"If you shall believe from the evidence in this case that on the occasion complained of by the plaintiff, and when she undertook to get off the defendant's street car on said occasion, and before same had been stopped, the conductor in charge of said street car knew that said car was still in motion, or by the exercise of ordinary care could have known it, and that plaintiff did not know that said car was in motion, but believed same had been stopped, and that said conductor saw plaintiff when she was making an effort to get off of said car in time to have warned her that said car had not stopped, or was still in motion, and thereby prevent her from stepping from said moving car, and failed to do so, then the defendant is chargeable with negligence, in this case, and the law is for the plaintiff, and you will so find."

And in instruction No. 2 the court told the jury:

"But the court further instructs you that defendant's conductor was not bound to anticipate that plaintiff would attempt to alight from said moving car; and unless you shall believe from the evidence that defendant's conductor in charge of said car discovered plaintiff's intention to alight from said car while same was in motion, and, after so discovering said intention, said conductor could have, by ordinary care, warned the plaintiff in time to have prevented her from stepping from said car, and failed to do so, then the law is for the defendant, and you will so find."

And in instruction No. 4 the jury were told:

"The court further instructs you that if you believe from the evidence in this case that, at the time and place complained of by plaintiff, she left her seat in defendant's car and attempted to get off of said car while same was in motion, and which she knew to be in motion at the time, and at a place where she knew it did not stop to discharge passengers, and this without any notice or warning to defendant's conductor in charge of said car, then the law is for the defendant, and you will so find."

Under the evidence and instructions, the jury returned a verdict for small damages, and judgment went accordingly.

[1, 2] That the appellee left the car about the middle of the block while it was running at a high rate of speed is not disputed; and so, unless the conductor of the car was under a duty to protect the appellee if he knew she was about to leave the car, the company is not liable. If, however, the appellee did not know the car was running, and the conductor knew that it was (and he testifies that he did), we think it was his duty, if he knew that appellee was about to leave the car, to warn her of the danger in so doing.

Conductors on street cars are under a duty to passengers to exercise care to protect them from danger, whether this danger arises from the negligence or thoughtlessness of the passenger or other causes. The duty of a carrier does not stop with protecting passengers from the negligence or misconduct of its employes, other fellow passengers or strangers, but extends to protecting them from perils created by their own conduct, when notice of the danger to which they are subjected is brought to the attention of the persons in charge of the train or car. *Louisville Ry. Co. v. Wilder*, 143 Ky. 436, 136 S. W. 892. The passengers on street cars are under the care and, in a measure, in the custody of the conductor, and he must not knowingly permit them to be injured if, by the exercise of ordinary care, he can prevent it.

[3] It is true that it is quite a common and usual thing for passengers to leave cars before they stop and to get on them before they stop, and, generally speaking, passengers who get on or get off cars that they know are running take the risk of any injury that may happen to them, subject to the qualification that it is a question for the jury to decide whether, considering the age and discretion of the party so alighting and the surrounding circumstances, it was negligence or lack of ordinary care on his part to try to get off the car. *Ford v. Paducah City Ry. Co.*, 96 S. W. 441, 29 Ky. Law Rep. 752; *Louisville Ry. Co. v. Williams*, 99 S. W. 245, 30 Ky. Law Rep. 493.

But here, when the appellee attempted to alight, the car was in the middle of the block and running at a rate of speed that made it necessarily dangerous, especially for an elderly woman, as appellee was, to attempt to get off. And while the conductor, in the exercise of ordinary care, might not be required to take notice of the action of a passenger able to take care of himself in alighting from a car running at a slow rate of speed, it is perfectly obvious that, when a conductor sees a middle-aged woman in the act of getting off a car running at 10 or 15 miles an hour, he cannot help but know that it is a most unusual and uncommon thing to do, as well as extremely dangerous, and, under conditions like this, the duty the conductor is under to protect the passengers requires that he shall make reasonable effort to prevent the passenger from getting off, if he knows his purpose. A conductor cannot shut his eyes and say he did not see or know what was going on when his duty in looking after the safety of his passengers requires him to see and know, and, according to the evidence of appellee, the conductor could not have avoided knowing that when she walked by him her purpose was to get off.

In *South Covington & Cincinnati Street Ry. Co. v. McCleave*, 38 S. W. 1055, 18 Ky.

Law Rep. 1036, a passenger, whose arm was protruding through an open window, was injured when it came in contact with the girders of a bridge. On the trial of the suit against the railway company to recover damages, the court told the jury that they should find for the plaintiff if they believed from the evidence that the conductor in charge of the car saw the plaintiff with his arm out of the window of the car, so as to be in danger of being struck by any part of the bridge, in time to have warned him of his peril before the accident occurred, and failed to do so. In approving this instruction, the court said:

"No degree of contributory negligence on the part of even a trespasser will release a person in charge of a train or single car, whether operated by steam or electricity, from the legal obligation to use reasonable effort to avoid injuring him if his peril is discovered in time to do so, and we do not see why the conductor of an electric or steam car should not be held to the duty of giving warning to one of his passengers when he actually sees him in a position or place on the car of peril to life or limb."

In *Blue Grass Traction Co. v. Skillman*, 102 S. W. 809, 31 Ky. Law Rep. 480, Mrs. Skillman, who was a passenger on a street car in the night, supposing that the car had stopped, when in fact it was running, stepped off and was hurt. In sustaining judgment for the plaintiff under evidence somewhat similar to the evidence in this case, the court said:

"The conductor was bound to know when the people followed him to the door, after he had announced the station and opened the door for them, that they were coming out of the car for the purpose of alighting; and it was incumbent upon him to warn them of the danger, for he knew the car had not stopped, and he could not but know from their actions that they were coming out to get off. Mrs. Skillman passed right by him as she went down the steps to get off. He could see plainly that she was going to get off, if he had paid attention to what was going on. It was incumbent upon him, under the circumstances, to pay attention, as it was dark and the car moving so smoothly that a person would not perceive the danger."

[4] If appellee went out of the car in the manner related by her, then it was a question for the jury to say whether she knew the car was running, and whether the conductor should not have warned her of the danger and endeavored to protect her; and if the jury believed her version of the affair, as evidently they did, it was their right to award her damages. On the other hand, if, as stated by the conductor, he did not know her purpose or have opportunity to arrest her action, the company was not guilty of any negligence, and there should and doubtless would have been a verdict in its favor, had the jury accepted the conductor's story of the accident.

The instructions, we think, aptly presented the law of the case as we understand it, and the judgment is affirmed.

**BARRY v. TOWN OF NEW HAVEN et al.**  
(Court of Appeals of Kentucky. Jan. 8, 1915.)

**1. MUNICIPAL CORPORATIONS (§ 918\*)—SIXTH-CLASS CITIES—INDEBTEDNESS—ELECTION.**

When a notice of election has been given by a sixth-class city to obtain authorization to create an indebtedness for street lighting in the form prescribed by Ky. St. § 3705, and the requisite majority has approved the creation of the indebtedness, the board of trustees may then pass an ordinance providing the mode of creating it and levy a tax to pay the annual interest and raise a sinking fund to meet the debt at its maturity, but the debt is not created until the city, by means of an election, has obtained the assent of two-thirds of its qualified voters voting on the question and has issued the bonds evidencing the debt.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

**2. MUNICIPAL CORPORATIONS (§ 919\*)—FISCAL MANAGEMENT—INDEBTEDNESS—INTEREST—SINKING FUND—TAX.**

A tax required to pay interest on an indebtedness and raise a sinking fund to pay the same may be levied at any time before bonds evidencing the debt are issued and sold.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1926-1929; Dec. Dig. § 919.\*]

**3. MUNICIPAL CORPORATIONS (§ 918\*)—INDEBTEDNESS—ELECTION—VOTING.**

Where voting on a bond issue in a city was by a separate ballot, which was deposited in a ballot box used for that purpose only, the vote was not invalidated because four or five voters, after having voted in the election for officers to be elected and had left the voting place, returned and were permitted to vote on the bond issue.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

**4. MUNICIPAL CORPORATIONS (§ 865\*)—INDEBTEDNESS—LIMITATION.**

Since the constitutional municipal debt limit contemplates a present and not a future indebtedness, the proper cost of maintaining and operating a municipal electric lighting plant in the future cannot be considered in determining whether the construction of the plant and system would entail an indebtedness greater than the limit prescribed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

**5. MUNICIPAL CORPORATIONS (§ 90\*)—BOARD OF TRUSTEES—ACTION—MAJORITY OF QUORUM—"QUORUM."**

Under Ky. St. § 3697, providing that a majority of the members of the board of trustees of cities of the sixth class shall constitute a quorum for the transaction of business, where one member of a city's board of directors, consisting of five members, resigned, the remaining four constituted a legal quorum and had power to act; a majority of a quorum being sufficient, unless there is some other rule established by Constitution or charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 201; Dec. Dig. § 90.\*]

For other definitions, see *Words and Phrases*, First and Second Series, Quorum.]

**6. MUNICIPAL CORPORATIONS (§ 918\*)—BOND ELECTION—IRREGULARITIES—RETURN OF UNUSED BALLOTS.**

That election officers, at an election on the question of incurring municipal indebtedness,

failed to perform their statutory duty of detaching and destroying the unused ballots, but returned them to the clerk, was a mere irregularity and did not invalidate the election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

Appeal from Circuit Court, Nelson County. Suit by John J. Barry against the Town of New Haven and another. A preliminary injunction granted by the Clerk of the Circuit Court was dissolved, and plaintiff applies for reinstatement before a division of the Court of Appeals. Application overruled.

Kelley & Kelley, of Bardstown, for appellant. R. C. Cherry, of Bardstown, for appellees.

MILLER, C. J. New Haven, in Nelson county, is a city of the sixth class. An election was held in said town on November 3, 1914, upon the question of authorizing the board of trustees to create an indebtedness of \$4,500 and to issue bonds therefor, for the purpose of building a system of electric lights for the town. Sixty-four votes were cast in favor of the bond issue, and thirty-two votes were cast against it. It thus received the necessary two-thirds of all the votes cast upon that question, as is required by section 157 of the Constitution. On November 14, 1914, the plaintiff, Barry, a citizen and taxpayer of New Haven, brought this action to enjoin the issuing of the proposed bonds upon the following grounds: (1) The notice of the election did not specify the amount of indebtedness proposed to be incurred, and did not state the amount of money necessary to be raised annually for interest and sinking fund; (2) the ordinance was illegal and void because it failed to set out particularly, definitely, and specifically the amount of indebtedness proposed to be voted; how it was to be paid; the interest the principal was to bear; the kind and character of same; and the question submitted upon the ballot was not sufficiently specific; (3) the election was void because four or five voters, after having entered the polling place and voted in the regular election for United States Senator and other officers, left the room wherein the election was held, and subsequently returned to said polling place and were given ballots and voted in the town election upon the question of the bond issue; (4) the notice, ordinance, and election were invalid because the amount of the indebtedness proposed, together with the cost of operating and maintaining the lighting system, will exceed 3 per cent. of the total taxable property of the town, the maximum limit authorized and permitted by the Constitution; (5) the election was void because, when the acts complained of were done, the board of trustees of the town was composed of only four members instead of five, as required by law, and the board was for that reason illegally

constituted; and (6) the election was void because the election officers failed to detach and destroy the unused ballots and return them to the clerk of the county court, attached to the stub of the ballot book, as required by the statute.

The case was tried upon the following agreed statement of facts:

"(1) The Exhibits A, B, and C, referred to and filed with the plaintiff's petition herein, are true copies of the ordinance and the orders of the board of trustees of the town of New Haven, Ky., ordaining and adopting said ordinance and directing the notice to be given. And there is no further ordinance or order made or entered by said board of trustees concerning the holding of said election involved in this suit.

"(2) That the notice of said election was published in two weekly issues of the *New Haven Echo*, a weekly newspaper published in New Haven, Nelson county, Ky., and that the notice as published is contained in copies of said papers issued October 1 and 15, 1914, which are filed in this suit, and the ordinance published in one of said issues as shown by exhibit.

"(3) That the ballot used in voting at said election is filed with the plaintiff's petition in this suit and is marked 'Educational Ballot,' and said exhibit is a fac simile of the ballot used at said election, except that it is marked 'Education Ballot.'

"(4) That the exhibit filed with the plaintiff's petition, marked 'Canvassing Board' for identification, is a true copy of the certificate issued and signed by the board of election commissioners of Nelson county, Ky.

"(5) During the holding of said election, four or five persons who were legally qualified to vote in New Haven, Nelson county, Ky., for state and county officers, and also in said municipal election, and who were not election officers, entered the said polling place where said election was being held and were given a ballot by the said election officers to vote in the state and county election; and after having cast their said ballots in the regular state and county election, and after same had been deposited in the ballot box, they left said polling place without having voted in said municipal election, and afterwards returned during the voting hours and re-entered said polling place and were given a ballot to vote in said municipal election on the question of creating said indebtedness, which ballot was cast by said voters and accepted by the officers of said election and deposited in said ballot box with the other ballots cast on said question and counted by the election officers and included in and were a part of the total of 96 votes cast on said question.

"(6) It is further agreed that the taxable value of the property in New Haven is as set out and stated in the petition.

"(7) At the time of the adoption of the ordinance, respecting said election, by the board of trustees of the town of New Haven, said board contained only four members, who constituted the said board; the vacancy in said board having been occasioned by the prior resignation of one of its members.

"(8) The unused ballots at said election were not detached from the book of ballots used at said election or destroyed by the election officers, but all of the unused ballots were returned by said election officers to the clerk of the Nelson county court. The stub book shows that 97 ballots were taken out, and the return of the election officers duly certified by them show that 96 were voted, and one was not voted, and all the other ballots remain in the book. The ballot taken out of the book but not voted was returned by the officers of the election as a spoiled ballot."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The clerk of the circuit court granted an injunction in accordance with the prayer of the petition; and, the circuit judge having dissolved said injunction, the plaintiff has applied for a reinstatement thereof. On account of the importance of the questions presented, it was brought before one of the divisions of the court in order that the ruling might have the approval of a majority of the judges of this court.

We will consider briefly the objections as above stated; the first and second objections being considered together.

1, 2. Section 3705 of the Kentucky Statutes, which is a part of the charter of cities of the sixth class, in so far as it concerns the question before us, reads as follows:

"If at any time the board of trustees shall deem it necessary to incur any indebtedness, the payment of which cannot be met by the levy authorized by law, they shall give notice of an election, by the qualified electors of the town, to be held to determine whether such indebtedness shall be incurred, \* \* \* the purpose or purposes of the same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund, as herein provided. Such notice shall be published for at least two weeks in some newspaper published in, or of general circulation in, such town, or by posting written or printed notices at three or more public places in such town. If, upon a canvass of the votes cast at such election, it appears that two-thirds of all the qualified electors in such town shall have voted in favor of incurring such indebtedness, it shall be the duty of the board of trustees to pass an ordinance providing for the mode of creating such indebtedness, and of paying the same."

An inspection of the notice of the election shows that it accurately followed the requirements of the statute. It stated the amount of the indebtedness proposed to be incurred, the purpose of the same, the amount of money necessary to be raised annually for interest and sinking fund; and it specifically says that the "amount necessary to be raised annually by taxation for a sinking fund will be \$400, and the amount of money necessary to be raised annually for interest will be \$225 for the first year, and \$20 less each subsequent year." The notice was published in two issues of the New Haven Echo, a weekly newspaper published in New Haven and of general circulation.

Upon this point it is sufficient to say that the requirements of the statute have been carefully followed almost to the letter. All the formal preliminaries leading up to the election were strictly and in good faith pursued. City of Covington, Ex parte, 160 Ky. 146, 169 S. W. 718, relied on by the plaintiff, is not controlling. Covington is a city of the second class, and its charter required the ordinance to state the amount of money necessary to be raised annually by taxation for interest and sinking fund. In the Covington Case, however, the ordinance did not comply with the statute in this particular. But in the case at bar the statute requires that the amount of money necessary to be raised annually by taxation must be set out in the no-

tice, and, as we have shown, the notice fully satisfied the statute.

In *Kash v. City of Jackson*, 159 Ky. 523, 167 S. W. 676, the notice was defective because it did not specify the amount of interest and sinking fund to be raised each year. But the ordinance in that case did set out those facts; and it was contended that the ordinance cured the defective notice. The court overruled that contention and held that the notice must so provide, because the statute expressly so held. See, also, *Iglehart v. City of Dawson Springs*, 143 Ky. 140, 136 S. W. 210.

[1] When the notice of election is given in the form required by the statute, and the requisite majority has approved the creation of the indebtedness, the board of trustees may then pass an ordinance providing for the mode of creating the indebtedness, and levy a tax to pay the annual interest and raise a sinking fund to meet the debt at its maturity. The indebtedness is not created until the city, by means of an election, has obtained the assent of two-thirds of its qualified voters voting on the question, and issued the bonds evidencing the debt.

[2] The tax required to pay the interest and raise the sinking fund may be levied at any time before the bonds are issued and sold. *O'Bryan v. City of Owensboro*, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. Law Rep. 469, 645; *Fowler v. City of Oakdale*, 158 Ky. 610, 166 S. W. 195.

[3] 3. It is next insisted that the election was invalid because four or five voters, after they had voted in the election for United States Senator and other officers, and had left the voting place, returned to the voting place and were permitted to vote in the election upon the bond issue. It is conceded that these voters were legal voters in the town, and had a right to vote on that question; but the complaint is that they should have voted in both elections upon their first entrance into the voting place, and that, after having voted in one election and departed, they could not return and subsequently vote in the other election. While this practice is irregular, it is by no means fatal. The voting on the bond issue was by a separate ballot which was deposited in a ballot box used for that purpose only; and, it being conceded that the voters had the right to vote in the bond issue election, it is difficult to see how the irregularity vitiated the election. Furthermore, it in no way appears how any of these four or five voters voted, or that the result of the election would be changed by excluding their votes. To declare the election void on this account would be to overthrow the verdict of the voters, fairly, accurately, and truthfully expressed in the result. When it is once admitted that no person voted at said election who did not have the legal right to vote, and that the election is free from fraud or bad faith on the part

of any one, that the result fairly expresses the will of the majority, the courts ignore any mere irregularity in the method of establishing that result.

In *City of Cynthiana v. Board of Education*, 52 S. W. 969, 21 Ky. Law Rep. 731, the court said:

"The rule is that, where there has been a fair and free expression of the popular will, a mere irregularity in conducting an election will not invalidate it. 7 *Lawson's Rights*, etc., § 3798; *Trustees District 88 v. Garvey*, 80 Ky. 159; *Clark v. Leathers* [5 S. W. 576] 9 Ky. Law Rep. 558."

See, also, *McCreary on Elections*, § 126, and *Anderson v. Winfree*, 85 Ky. 610, 4 S. W. 351, 11 S. W. 307, 9 Ky. Law Rep. 181.

In *Trustees Common School District No. 88 v. Garvey*, 80 Ky. 163, it is said:

"The statute, however, should be construed with a view of carrying into execution the legislative will; and, when an election has been held and the tax imposed, the burden is on the taxpayer who resists its collection to show that the election is void. A mere irregularity in conducting it will not authorize the chancellor to interfere and prevent the imposition of a burden the taxpayer has assumed for the purpose of aiding a great public interest."

And in *Cowan v. Prouse*, 93 Ky. 156, 19 S. W. 407, 14 Ky. Law Rep. 273, this court laid down the general principle that a mere irregularity on the part of officers of an election, or their omission to observe some directory provision of the law, would not vitiate the poll. See, also, *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867, 20 Ky. Law Rep. 1001; *Napier v. Cornett*, 68 S. W. 1076, 24 Ky. Law Rep. 576; *Cooley's Constitutional Limitations* (7th Ed.) pp. 928-930.

[4] 4. Little attention need be paid to the fourth objection that the indebtedness, together with the cost of operating and maintaining the lighting system, will exceed 3 per cent. of the taxable property of the town, as limited by the Constitution, because said objection is not sustained by any proof. On the contrary, the petition, which, under the stipulation, is to be taken as true in this respect, shows the taxable property of the town is \$291,854; 3 per cent. thereof being \$8,755.62, or nearly twice the amount of the proposed indebtedness. The probable cost of maintaining and operating the plant in the future cannot enter into the question. The constitutional prohibition contemplates a present, and not a future, indebtedness.

[5] 5. The board of trustees, as constituted by statute, consisted of five members; but, at the time it called the election, it consisted of only four members. All four mem-

bers were present, however, and voted in favor of all the steps that were taken. They constituted a legal quorum, and the fact that one member had resigned in no wise affected the legality of the action taken. A majority of a quorum is sufficient, unless there be some other rule established by the Constitution or the charter. *Cooley's Constitutional Limitations* (7th Ed.) p. 201.

Section 3697 of the Kentucky Statutes, being a part of the charter of sixth-class cities, expressly provides that a majority of the members of the board of trustees shall constitute a quorum for the transaction of business.

In *Shugars v. Hamilton*, 122 Ky. 606, 92 S. W. 564, 29 Ky. Law Rep. 127, and under a precisely similar provision of the charter of cities of the fifth class, it was held that four members of a council of six members constituted a quorum for the transaction of business.

It follows that the four members, in the case at bar, were fully authorized to exercise, as they did, the power of the board.

[6] 6. The objection that the election officers failed to perform their clerical statutory duty of detaching and destroying the unused ballots, but returned them to the clerk, is without merit. At most it was a mere irregularity which would not invalidate the election. See authorities cited supra. *Graham v. Graham*, 68 S. W. 1093, 24 Ky. Law Rep. 548, is, in effect, conclusive against this objection. In that case the polls were open about an hour later and closed about an hour earlier than the law required; the ballot box in which the ballots were deposited during the voting hours remained unlocked; and the number of unused ballots was not certified at all. In the absence of evidence showing that some one had been prejudiced by these irregular actions of the election officers, the court declined to nullify the election.

After a careful review of the facts of this case, and all the objections taken to the election, we are of opinion that all the necessary steps were taken to authorize the contemplated bond issue, and that the circuit judge properly dissolved the injunction.

The motion to reinstate the injunction is overruled.

SETTLE, HANNAH, and HURT, JJ., concur in this opinion; and by order of the court this opinion will be printed in the official reports.

**BALDWIN et al. v. JORDAN et ux.**  
(No. 358.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 19, 1914. Rehearing Denied  
Dec. 17, 1914.)

**1. PLEDGES (§ 57\*)—ACTION TO FORECLOSE—SUFFICIENCY OF PETITION.**

In an action on a principal note for the amount shown to be due and for attorney's fees provided therein, less the credits, and for a foreclosure of the plaintiff's lien upon a note given as collateral security and for an order for its sale, the petition was not insufficient because it did not allege that the collateral note was ever presented to the payor for payment, or that payment thereof was ever refused.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 184, 185; Dec. Dig. § 57.\*]

**2. PLEDGES (§ 57\*)—ACTION TO FORECLOSE—SUFFICIENCY OF PETITION—DEFENSIVE MATTERS.**

In such action, the petition was not insufficient because it did not allege that the payor of the collateral note had not paid it to plaintiff, or that defendants were not entitled to any credit on the principal note sued on, by reason of any payment on the collateral note, since such payments were defensive matters.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 184, 185; Dec. Dig. § 57.\*]

**3. PLEDGES (§§ 21, 30\*)—COLLATERAL NOTE—RIGHTS OF PARTIES.**

When a collateral note has been indorsed and delivered, the pledgee is the legal owner of it to the extent of the debt, and the pledgor is the owner of the remainder, and the pledgee is entitled to collect the note, though he must use diligence in doing so.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 45, 184, 185; Dec. Dig. §§ 21, 30.\*]

**4. PLEDGES (§ 57\*)—ENFORCEMENT—PARTIES.**

In an action on a note for the amount shown to be due, and for attorney's fees provided therein, less the credits, and for a foreclosure of the plaintiff's lien upon the collateral notes and a sale thereof, the payor of the collateral note, who indorsed it in blank, was not a necessary party defendant to the suit on the principal note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 184, 185; Dec. Dig. § 57.\*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by G. W. Jordan and wife against J. C. Baldwin and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Stevens & Stevens, of Liberty, and Baldwin & Baldwin, of Houston, for appellants. J. V. Meek, of Houston, for appellees.

**WALTHALL, J.** On February 7, 1911, appellants Jacob C. Baldwin and Charles H. Taylor executed and delivered to appellee Mrs. Cora Jordan, wife of appellee G. W. Jordan, a promissory note for \$1,239, due in six months from date, promising interest and attorney's fees on failure to pay the note or interest when due, should the note be placed in the hands of an attorney for collection, or if collected by legal proceedings, and any judgment rendered to bear 10 per cent. interest. The note further pledged, as collateral security for the payment of the prin-

cipal note, one note for \$2,140, made by K. H. Whitmire to Jacob C. Baldwin, of date February 1, 1910, due in two years, and secured by vendor's lien on real estate. The note further provided that in the event of default in its payment at the option of Mrs. Cora Jordan, or holder, the note should become due and payable, and that, upon default of payment at maturity, Mrs. Cora Jordan was authorized and empowered to sell the collateral Whitmire note, either at private sale or at public auction at her option, for the purpose of paying the note. Should the collateral note be sold at auction, three days' notice of the time and place of sale should first be given, as provided in the note, all costs to be charged to the makers of the note, and, on a sale, the holder could become the purchaser of the collateral note, if the highest bidder. The note then made further provision for costs in event of any litigation on the collateral note. On March 27, 1913, appellees brought suit on the principal note for the amount shown to be due and for attorney's fees, less the credits indorsed on the note, and asked for a foreclosure of the pledgee's lien upon the collateral note and for order of sale and for general and special relief. Jury was waived. The court overruled defendant's exceptions, heard the evidence, and rendered judgment for plaintiffs.

[1] Appellant's first assignment of error complains of the order of the court in overruling their special exception to plaintiffs' petition because it failed to allege that the collateral note was ever presented to the payor, Whitmire, for payment, or that payment thereof was ever refused. If the suit had been on the collateral note or some reason shown in plaintiff's petition why demand should have been made on the payee of the collateral note by the holder, the exception might have been well taken; but the petition shows none, and appellants have pointed out none. The assignment is overruled.

[2, 3] The second assignment is to the effect that the court should have sustained their exception to plaintiff's petition, because it did not allege that Whitmire had not paid to plaintiff the collateral note or that defendants were not entitled to any credit on the note sued on by reason of any payment on the collateral note. Whether the note sued on or the collateral note had been partly paid or fully paid were defensive matters and need not be alleged by the plaintiff. The appellants, under their first proposition under this assignment, state correct propositions of law, but have no application to the assignment. It is elementary that, when a collateral note has been indorsed and delivered, the pledgee is the legal owner of it to the extent of the debt, and the pledgors are owners of the remainder, and that the pledgee is entitled to collect the note and must use diligence to do so, but there is nothing in these principles of

law that necessitate or even suggest the propriety of the holder of the collateral note to make any statement at all, in suing on the principal note, with reference to it, more than the fact of the pledge, the lien given by reason thereof, and a prayer for the foreclosure of the pledgee's lien. A pleader may, if he prefers to do so, show all credits the defendants are entitled to, and, if the collateral note is then due, may embrace it in his suit and ask a foreclosure of the vendor's lien, but he is not required to do so.

[4] By defendant's third and fourth assignments they claim that Whitmire, the payor of the collateral note, was a necessary party defendant in the suit on the principal note, and, if not a necessary party, then a proper party, and complain that the court should have given them permission to make Whitmire a party defendant, in order that all matters between plaintiffs and defendants and Whitmire might be adjusted, and that Whitmire in that suit might have an opportunity to foreclose the vendor's lien expressed in the collateral note. We have carefully examined defendant's first amended original answer, and find no facts alleged which to us would seem to justify the trial court in delaying the plaintiff's suit in order to bring in Whitmire, and require the plaintiffs, if the court could properly do so, to sue on the collateral note and adjust the equities, if any, between the defendants and Whitmire, and to foreclose the vendor's lien expressed in the collateral note. The collateral note was indorsed in blank by the payee, and we must look to the principal note described above to see the parties' agreement with reference to it. Unless Whitmire was a necessary party to the suit on the principal note, the court's ruling was correct. To hold that Whitmire was a necessary party to a suit on the principal note would be to hold that the holder of the principal note could not elect to sue on it without, also, at the same time, suing on the collateral note. We do not so understand the law, and the appellants have referred us to no authority so holding. Appellants refer us to the case of East Texas Fire Ins. Co. v. Coffee, reported in 61 Tex. at page 287. The point contended for here is not found or decided in that case. That was an action brought by Coffee to recover on a policy of insurance against fire issued by the insurance company to Coffee & Pearson, which, with the consent of the insurance company, was transferred by Coffee & Pearson to Coffee. The action was brought by Coffee in his own name and right as the owner of the policy, but the evidence developed the fact that, after the loss, Coffee assigned the policy to Seellgson & Co., probably as collateral security for a debt due by him to that company. The court held in that case in the language quoted by appellants in their brief:

"A debtor is entitled to have before the court, before a judgment can be rendered against him, such person or persons as plaintiffs as will make the judgment conclusive of the rights of all parties who have an interest in the debt, and he thus be relieved from further costs, vexation, or liability."

We do not think that case conflicts with our holding in this. The cases appellants refer us to as authorities on the proposition under consideration are cases where suits were brought on the collaterals held, or where separate suits on the principal debt and on the collateral were pending in the same court, and a consolidation of the two was ordered by the trial court. In their fifth and sixth assignments, appellants complain that they should have been allowed the credits shown on the principal note and on the collateral note, which was not done. We have made the calculation as near as we can, and find that the credits were all allowed, with a small margin in appellee's favor.

The case is affirmed.

#### WINKIE v. CONATSER. (No. 658.)

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 7, 1914. Rehearing Denied  
Dec. 19, 1914.)

#### 1. EXECUTION (§ 171\*) — RESTRAINING ENFORCEMENT OF EXECUTION — ADEQUACY OF REMEDY AT LAW — STATUTES.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, authorizing an injunction where a cloud will be put on real estate by a sale on execution against one having no interest in the property, the adequacy of plaintiff's remedy at law in a case within the statute is no objection to relief.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.\*]

#### 2. EXECUTION (§ 171\*) — RESTRAINING SALE ON EXECUTION — GROUNDS.

Equity will enjoin a sale of land, title to which is in a husband, under execution against his wife, where parol evidence is necessary to show that she was not sued for necessities furnished her or her children, and that the property was not purchased with her separate earnings, and will cancel the execution as cloud on title.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171.\*]

#### 3. HUSBAND AND WIFE (§ 262\*) — TITLE — CONVEYANCE TO HUSBAND — COMMUNITY PROPERTY.

Land conveyed to a husband is prima facie community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.\*]

#### 4. HUSBAND AND WIFE (§ 268\*) — LIABILITY OF HUSBAND FOR WIFE'S DEBT — "NECESSARIES."

A debt due from a wife for commissions for an exchange of her separate property is not for "necessaries," within Vernon's Sayles' Ann. Civ. St. 1914, art. 4624, declaring that neither the separate property of the husband nor the community property other than the personal earnings of the wife and the income from her separate property, shall be subject to the payment of debts contracted by her, except for "necessaries"

furnished her or her children, and community property is not liable therefor.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 963-967; Dec. Dig. § 268.\*

For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

##### 5. STATUTES (§ 115\*)—TITLE—SUFFICIENCY.

The title of Act 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624), "An act to amend articles 4621, 4622 and 4624 \* \* \* concerning the marital rights of parties, defining separate and community property \* \* \* conferring upon the wife the power to make contracts," etc., meets the requirement of Const. art. 3, § 35, declaring that no bill shall contain more than one subject, which shall be embraced in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 150, 151; Dec. Dig. § 115.\*]

Appeal from District Court, Hemphill County; F. P. Greever, Judge.

Action by W. J. Conatser against H. J. Winkle and another. From a judgment perpetuating the injunction, defendant named appeals. Affirmed.

Fisher & Palmer, of Canadian, for appellant. Hoover & Hoover, of Canadian, for appellee.

HALL, J. Appellee, Conatser, filed this suit in the district court of Hemphill county, seeking to restrain C. H. Tipps, the sheriff of said county, from selling certain real estate, which had been levied upon by virtue of an execution issued out of the district court of Hemphill county, upon a certain judgment rendered on the 6th day of September, 1913, against Mrs. Mary A. Conatser, wife of the plaintiff, and in favor of the appellant, Winkle. The judgment upon which this execution was issued was based upon a judgment recovered in January, 1913, by H. J. Winkle against Mrs. Conatser, in Stanislaus county, Cal. The California judgment was recovered by Winkle for certain commissions alleged to be due him as a real estate broker in the exchange of certain property situated in California, and belonging to Mrs. Conatser. Appellee was made a party defendant pro forma, but neither of the judgments were rendered against him personally. From a judgment perpetuating the injunction this appeal is prosecuted.

[1] Appellant first contends that the injunction herein should not have been granted because it appears from the petition that the plaintiff had an adequate remedy at law for the injuries complained of. Article 4643, Vernon's Sayles' Civil Statutes, provides that judges of the district and county courts may grant writs of injunction in the following cases:

"(3) In all cases where the applicant for such writ may show himself entitled thereto under the principles of equity, and as provided by statutes and all other acts of this state, providing for the granting of injunctions, or where cloud would be put on the title of real estate being sold under an execution against a person,

partnership or corporation, having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law."

The fact that the applicant for injunction had an adequate remedy at law was formerly a sufficient ground under the decisions of this state for denying him relief in equity. The above-quoted statute was enacted to change this rule. By the express provisions of paragraph 3, if the title to his real estate is about to be clouded, he is now entitled to his writ of injunction, "irrespective of any legal remedy at law." *Lakeside I. Co. v. Kirby*, 166 S. W. 717; *Houston Oil Co. v. Davis*, 154 S. W. 337; *Acme Cement Plaster Co. v. American C. P. Co.*, 167 S. W. 185.

[2, 3] It is said, in *Texas Land & Mortgage Co. v. Worsham*, 5 Tex. Civ. App. 245, 23 S. W. 938, that if a judgment is on its face valid and is a subsisting lien on lands requiring extrinsic and parol evidence to defeat it, equity will enjoin execution thereunder and order its cancellation as a cloud on the title. This seems to be the rule announced by the great weight of authority. Under article 4624, Vernon's Sayles' Civil Statutes, neither the separate property of the husband nor the community property, other than the personal earnings of the wife, and the income, rents, and revenues from her separate property, shall be subject to the payment of debts contracted by her, except those contracted for necessities furnished her or her children. Neither the California judgment nor the judgment rendered in Hemphill county, upon which this execution was issued, shows the nature of the original debt upon which suit was instituted against Mrs. Conatser. Parol evidence is therefore necessary to establish the fact that she was not sued for necessities furnished her or her children, and that the property was not purchased with her separate earnings, thus bringing it within the rule announced in *Texas Land & Mortgage Co. v. Worsham*, supra. The land upon which the execution had been levied was conveyed to appellee, and was prima facie community property.

[4] The trial court did not err in holding that the debt due from Mrs. Conatser to appellant as commissions for the exchange of her separate property in California could not be classed as a debt for "necessaries" within the meaning of the statute.

[5] We think the title of Act 33d Leg., pp. 61 to 63, c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, §§ 4621, 4622, 4624), meets the requirements of article 3, § 35, of the Constitution. *Taggart v. Hillman*, 42 Tex. Civ. App. 71, 93 S. W. 245; *Focke v. State* (Cr. App.) 144 S. W. 267; *Brown v. State*, 57 Tex. Cr. R. 269, 122 S. W. 565; *Singleton v. State*, 53 Tex. Cr. R. 625, 111 S. W. 736.

We find no reversible error in the record, and the judgment is affirmed.

**SAN ANTONIO & A. P. RY. CO. v. GRADY.**  
(No. 5364.)

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 16, 1914.)

**1. TRIAL (§ 191\*)—INSTRUCTIONS—EVIDENCE.**

Where, in an action against the initial carrier for negligent handling and delay in transportation, the shipper testified that he made a contract for through shipment, while the carrier introduced a bill of lading limiting its liability to damages accruing on its own line and showed no damage or delay occurred on its line, a charge that the contract was for through shipment was on a material issue and assumed a controverted fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**2. CARRIERS (§ 180\*)—INTRASTATE SHIPMENT—INITIAL CARRIER—LIMITATION OF LIABILITY.**

An initial carrier of an intrastate shipment may limit its liability for damages occurring on its own line and in tendering the shipment to the connecting carrier for transportation to the point of destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.\*]

**3. EVIDENCE (§ 178\*)—SECONDARY EVIDENCE—LOSS OF PRIMARY EVIDENCE.**

Where a carrier did not contend that it did not issue contracts for return transportation of a shipper who lost the contracts, the shipper could testify as to their contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

Appeal from San Patricio County Court;  
P. A. Hunter, Judge.

Action by R. J. Grady against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Kleberg & Stayton and David M. Picton, Jr., all of Corpus Christi, for appellant.

CARL, J. Appellee, R. J. Grady, sued appellant, San Antonio & Aransas Pass Railway Company, for damages to two cars of watermelons shipped from Sinton, Tex., one car to Corsicana, Tex., and the other to Ennis, but diverted in transit to Hillsboro, Tex. It is alleged that on account of the negligent handling and delay of the railway company the melons in the car that went to Corsicana were ruined, bursted, and bruised in such a way that they were worthless, but would have been worth \$140 on the market if they had been properly and promptly delivered; and from the car that went to Hillsboro 171 had been stolen or were missing, valued at \$39.20. The plaintiff alleged that both were through shipments, and that he was compelled to pay the freight charges before he obtained the cars, but the freight paid on the Corsicana car was returned to him. Plaintiff also alleges that the railway company contracted to give him free transportation with the shipments, but failed to do so, and he was compelled to pay \$20 for railway fare. The total amount sued for was \$199.70, and that sum he recovered.

Appellant pleaded, among other defenses, a contract limiting its liability to its own line, which terminated at Houston, Tex., and to delivery there to its connecting carrier, which in this instance was the Houston & Texas Central Railway Company. Both cars were loaded at Sinton, consigned to the plaintiff, and the destination of San Antonio & Aransas Pass car No. 7143 was Corsicana, routed by way of Houston and thence of the Houston & Texas Central Railway to point of destination, while the other car was billed to Ennis, but changed to Hillsboro. Both contracts or bills of lading show that the cars were shipped from Sinton to Houston, and a clause is contained in each contract, as follows:

"Section 2. If shipment is destined to a point off this company's road, it is agreed that this is no contract for through shipment, and this company's liability as a common carrier shall terminate on tender of delivery to a connecting carrier."

Other issues will be stated in the course of the opinion.

The first assignment complains of the action of the court in giving paragraph 9 of the charge to the jury, which is as follows:

"You are further instructed that plaintiff's contract with the defendant shows a through shipment of said melons, and the defendant cannot limit its liability for any damages occurring to said melons, on account of the injury or damage to said melons, occurring on any connecting lines over which said melons were transported. If said melons were lost or damaged anywhere en route to their destination, the defendant in this case would be liable for the full amount of the damages which plaintiff had sustained, regardless of whether the loss or injury occurred on its own line, or on the line of the connecting carrier transporting said melons."

The objections are: (a) Because it states an incorrect principle of law; (b) because the first part thereof is on the weight of the evidence; (c) because the first part thereof is on the weight of the evidence as to any contract of carriage entered into between plaintiff and defendant which had not been introduced in evidence during the trial of the suit; and (d) because the same is an erroneous construction as a matter of law of the contracts of carriage introduced in evidence by defendant covering the shipments sued on by plaintiff.

[1] The question of whether or not the contracts of carriage entered into between the parties were contracts for through shipments was a question for the jury, as the issues were made by the pleadings. The plaintiff alleged that he made contracts for through shipments direct from Sinton to points of destination, and to this he testified. But the railway introduced in evidence the two contracts or bills of lading, one signed by appellee and the other by his agent or representative, J. T. Patterson. Both of these bills of lading, or contracts, showed the shipments were made from Sinton to Houston, and both contained the above clause limiting the lia-

bility of appellant to damages accruing on its own line and to a delivery to the connecting carrier to point of destination.

The evidence, then, was conflicting as to what the contract of carriage was, and it cannot be said that this part of the charge was not material, because appellant had offered evidence tending to show that there was no damage or delay that occurred on its line or up until the cars were delivered to the connecting carrier. So when the court charges that the contracts were for through shipment, such charge is certainly upon a material part of the controversy. A charge which assumes a controverted fact is erroneous. *T. & P. Ry. Co. v. Murphy*, 46 Tex. 366, 26 Am. Rep. 272; *Linney v. Wood*, 66 Tex. 22, 17 S. W. 244; *H. & T. C. Ry. Co. v. Nixon*, 52 Tex. 19; *Overall v. Armstrong*, 25 S. W. 440; *Boaz Co. v. Schneider*, 69 Tex. 128, 6 S. W. 402; *Lake, Tomb & Co. v. Copeland*, 31 Tex. Civ. App. 359, 72 S. W. 99.

[2] That an initial common carrier of an intrastate shipment of goods may limit its liability for damages to those occurring on its own line of railway and in tendering the shipment to a connecting carrier for transportation to point of destination seems to be settled. *G., H. & S. A. Ry. Co. v. Jones*, 104 Tex. 92, 134 S. W. 328; *S. A. & A. P. Ry. v. Chittim*, 135 S. W. 747; *Elder Dempster Co. v. Ry. Co.*, 105 Tex. 628, 154 S. W. 975; *David Hunter v. So. Pac. Ry. Co.*, 76 Tex. 195, 13 S. W. 190. A similar case was before this court in *S. A. & A. P. Ry. Co. v. Barnett*, 27 Tex. Civ. App. 502, 66 S. W. 474, and Mr. Chief Justice James held that in the absence of a fraud, compulsion, want of time to read the contracts, etc., the shipper could not repudiate the contract of shipment so signed. None of these matters are alleged in this case. On the other hand, "they appear to have been deliberately entered into, and under the foregoing circumstances must be taken as merging all previous understandings of the parties. By their terms defendant was not liable for injuries occurring beyond its line." So says Chief Justice James in the *Barnett* Case, supra, and the court makes the further observation in that case:

"The fact that the waybill issued by defendant for the guidance of its employes denominated this as a 'through live stock waybill from Karnes City to San Angelo via Cameron & G. C.', could have no effect upon the terms of the contracts with defendant. Neither could the shipping report signed by plaintiff and the Gulf, Colorado & Santa Fé Railway agent at Cameron."

In *G., H. & S. A. Ry. Co. v. Jones*, supra, the court says:

"Upon its face the contract of shipment expresses the agreement to be that the first company is to transport the cattle to the end of its line at Placedo and there deliver the same to the Galveston, Harrisburg & San Antonio Railway Company, limiting the liability of each company to damages arising upon its own line. To bring a contract of this character within the terms of article 331a, the contract entered into by the first carrier must be for carriage from

the point of shipment to the destination, and the shipment must be received and carried by the connecting carriers under that contract. There being in this case no contract for through shipment, the fact that the second company received and transported the cattle is not sufficient to create the joint liability declared by article 331a, and the Court of Civil Appeals erred in so holding. In order to bind the second or subsequent companies jointly with the first, or with any of the other companies, there must be something more than receiving and transporting the goods, or property, because the law requires the carrier to so receive and transport such freight when tendered to it. *Ft. Worth & D. C. R. R. Co. v. Williams*, 77 Tex. 125 [13 S. W. 637]."

The court further said, in that case:

"The said railroad company also assigns as error the refusal of the court to give this charge to the jury: 'You are instructed that the defendant, St. Louis, Brownsville & Mexico Railway Company, is a common carrier, and as such may limit its liability to damages occurring on its own line, and cannot be required to furnish cars to go beyond its own line, in the absence of a contract so requiring same. If you find that the contract of shipment in question limits the defendant's liability to damages occurring upon its own line, then in arriving at the amount of damages, if any, sustained by plaintiff, you are to look only to such damages as may be shown to have occurred upon defendant's own line of road, and damages, if any, sustained in transferring said cattle to connecting carriers; and if you further find that no damages, such as alleged by plaintiff, occurred upon this defendant's line of road, or in transferring said cattle to connecting carriers, you will find your verdict in favor of this defendant.' The charge refused presented a correct statement of the law applicable to the facts of this case, and we are of the opinion that it should have been given as a guide to the jury in determining what damages, if any, would be properly chargeable to that railroad company."

A similar charge was requested in this case and refused.

In *Hunter v. So. Pac. Ry. Co.*, supra, the court has this to say as to liability for freight shipment:

"And the fact alone that it received goods marked for a place beyond its own terminus does not import an agreement to transport to the destination named as a common carrier. *Laws on Carr. § 240*. Those cases which hold that such fact alone is to be regarded as showing that the railroad had contracted for the delivery of the freight at the point of destination, and as showing that it had made arrangements with connecting lines, concede that this is not so where it expressly limits its liability. *Ala. S. S. Ry. Co. v. Mt. V. Co.*, 84 Ala. 173 [4 South. 356]; *Falvey v. Railway*, 76 Ga. 597 [2 Am. St. Rep. 58]. The reason a railroad is not liable beyond its own line as a common carrier, in the absence of an express contract, is because it is not a common carrier beyond its own line. The law attaches to it no liability as a common carrier beyond the terminus of its own line, and does not compel it to act as common carrier over other lines not within its control. *Railway v. Baird*, 75 Tex. 256 [12 S. W. 530]. Hence, when this liability does attach, it must be by virtue of some contract assuming it. In the case under consideration, the stipulation excepted to expressly releases it from such liability. It was lawful for the defendant in the contract of shipment to so decide. *Railway v. Baird*, supra."

The first five assignments are sustained, since they all raise substantially the matters hereinabove discussed.

[3] The matters complained of in the sixth assignment are without merit. Appellee testified that he received written contracts for his transportation, the first of which he presented when ready to return, and it was refused. The second time, he presented a duplicate, the original being lost, and this was refused. It is not contended that appellant did not issue such contracts for return transportation, and appellee, having lost these papers, and that fact appearing, could testify as to the contents of the papers. This assignment is overruled.

The judgment is reversed and the cause remanded.

**ALLISON v. RICHARDSON et al†**  
(No. 7214.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 28, 1914. Rehearing Denied  
Jan. 2, 1915.)

**1. TRESPASS TO TRY TITLE (§ 6\*)—SUFFICIENCY OF EVIDENCE OF TITLE.**

In trespass to try title against a person in actual possession, who claimed under deeds of conveyance and was not a naked trespasser, where plaintiff had never occupied the land, he could recover, if at all, upon the strength of his title only, and not upon the weakness of defendant's title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 5-9, 15, 16; Dec. Dig. § 6.\*]

**2. ABATEMENT AND REVIVAL (§ 39\*)—DISSOLUTION OF CORPORATION—"DEFENDANT"—"PLAINTIFF"—"PERSON."**

Under Rev. St. 1911, art. 3723, providing that where a sole defendant dies after judgment for money against him execution shall not issue thereon, but that the judgment may be paid in due course of administration; article 3725, defining "plaintiff" as used in that title as the party in whose favor a judgment is rendered, and "defendant" as the party against whom judgment was rendered; and article 5504, subd. 2, providing that "person" includes a corporation—a judgment against a corporation was not enforceable by execution after it had been dissolved by the sale of its roadbed, franchise, tracks, property, and charter rights, under a deed of trust, and a sale under execution of land not included in the sale under the deed of trust was void.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 194-204; Dec. Dig. § 39.\*]

For other definitions, see *Words and Phrases*, First and Second Series, Defendant; Plaintiff; Person.]

**3. RAILROADS (§ 32\*)—DISSOLUTION—WINDING UP AFFAIRS—LIMITATIONS.**

Under Rev. St. 1911, art. 6630, providing that whenever a sale of the roadbed, track, franchise, and charter powers, and privileges of a railroad corporation is made, the directors of the corporation shall be trustees of the creditors, and stockholders, and have full power to settle the affairs of the corporation, and article 6539, requiring that land acquired by railroads, not for depots, machine shops, turnouts, and switches, shall be alienated within 12 years, and providing that all lands not so alienated shall become forfeited to the state, where the directors of a corporation, whose franchise, etc., were sold under a deed of trust, never took possession of property not included in the sale, and

did nothing toward settling its affairs, for 27 years they had no interest in the land, especially as it must be presumed that they abandoned the trust and could not assume it after such a lapse of time.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 63-69; Dec. Dig. § 32.\*]

Appeal from District Court, Henderson County; John S. Prince, Judge.

Trespass to try title by B. M. Richardson against G. W. Allison, in which James Garrity and others intervened. From a judgment for plaintiff and the interveners, defendant appeals. Reversed and rendered.

J. J. Faulk, of Athens, for appellant. W. R. Bishop, of Athens, for appellees.

RAINEY, C. J. This is an action of trespass to try title to 3½ acres of land brought by appellee Richardson against appellant. Appellant answered by general demurrer and by plea of not guilty. On the 5th day of February, 1914, James Garrity, W. H. Randolph, and C. T. Bonner intervened, alleging that they were the only surviving directors of the St. Louis Railway Company of Texas, which became defunct on the 10th day of February, 1886, by reason of the roadbed, franchises, tracks, property, and charter rights of said railway company having been sold out by virtue of a deed of trust; that at the time of its demise no one was appointed by any authority to take charge of the said sold-out company, and that they became the trustees of said company's stockholders and creditors; that said Bonner recovered a judgment against said railway company on the 7th day of November, 1884, and he sold an interest to plaintiff; that said judgment was valid and subsisting; and that said land had been sold by virtue of an execution issued thereon, and asked for a judgment against defendant for possession, etc. Defendant answered said plea by plea of not guilty and three years' limitation. A trial resulted in a judgment in favor of plaintiff and interveners, and defendant appeals.

On August 26, 1876, the land in controversy was patented by the state of Texas to R. C. Underwood. In 1880 Underwood and wife conveyed it to the Texas & St. Louis Railway Company in consideration of the location and maintenance of a depot and station on said road contiguous to it. Bonner sued and recovered a judgment against said road for \$745.70 on November 6, 1884, and executions were issued thereon from time to time to prevent the statute of limitation of ten years from running. In 1886 the Texas & St. Louis Railway Company's roadbed, tracks, franchises, charter, etc., were sold out under a deed of trust, and said railway company became extinct. This land was not included in the sale and remained unoccupied until a short time prior to January 30, 1913, when it was possessed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Writ of error pending in Supreme Court.

by appellant under deeds from parties purporting to be the heirs of the original grantee. On the 30th day of January, 1913, an execution was issued by virtue of the Bonner judgment. It was levied on the land in controversy, which was sold by the sheriff and conveyed by him to appellee Richardson.

[1] Appellant being in actual possession of the land and claiming same under deeds of conveyance, he was not a naked trespasser; therefore appellees could not recover on that ground alone. They had never occupied the land, and, being the actors in this action, must recover upon the strength of their title, if at all, and not upon the weakness of appellant's title. Appellee Richardson's title depends upon the validity of the sale of the land by virtue of an execution issued on the Bonner judgment in his favor rendered against the Texas & St. Louis Railway Company.

[2] The question arises: Was said execution lawfully issued? We think not. Article 3723, R. S., provides:

"When a sole defendant dies after judgment for money against him, execution shall not issue thereon, but the judgment may be proved up and paid in due course of administration."

Article 3725, R. S., provides:

"By the term 'plaintiff' as used in this title, is meant the party in whose favor the judgment is rendered, and by the term 'defendant' is meant the party against whom judgment was rendered."

Article 5504, R. S., in defining the meaning of words, says in subdivision 2 that "'Person' includes a corporation." So we construe the word "defendant" as used in article 3723, to include a corporation, and applies to a dissolved corporation with the same force as to a demised person.

The Bonner judgment having been rendered in 1884, and the Texas & St. Louis Railway Company having been dissolved in 1886 by reason of the sale of its franchises, etc., it was in fact dead, and it was unlawful to thereafter issue executions on said judgment, and the sale thereunder was invalid. In this instance 27 years elapsed from the death of the road until the sale of the land was made under the execution. The statute says an execution on a judgment for money shall not issue after the death of the defendant. This positive injunction we take it is mandatory, and no authority exists for the issuance of the execution.

There is some conflict in the decisions of our Supreme Court as to whether a sale of land under execution issued as in this case is void or voidable. We think by the plain import of the statute such a sale is void and that the weight of authority so holds. In the case of *Fleming v. Ball*, 25 Tex. Civ.

App. 209, 60 S. W. 985, rendered by the Fourth Court of Civil Appeals, and a writ of error denied by the Supreme Court, it was held that such a sale was void and could be collaterally attacked. The sale in that case was made eight years after the death of the sole defendant, and on whose estate there has been no administration. In this case there had been no administration, and the land had been unoccupied for about 25 years. We think the ruling in the *Fleming Case* is the correct one, and we will follow it.

[3] When the Texas & St. Louis Railway Company became extinct, its directors became trustees of its unsold property, and were entitled to administer it for the benefit of creditors and stockholders. Article 6630, R. S.; *Aldridge v. Pardee*, 24 Tex. Civ. App. 254, 60 S. W. 790.

When the railway corporation became extinct, its directors (interveners) did not assume the duty imposed upon them by law. They never took possession of the property, nor did they do anything towards settling up the affairs of the concern; but from their nonaction it must be presumed that so long a time having elapsed they abandoned the trust and cannot now assume it, therefore whatever rights they may have had in the matter have been lost.

The appellant invokes article 1206, R. S., which limits the time for the settlement of the affairs of a dissolved private corporation by its directors to three years. We find no time fixed by the statute under the title "railroad," in which the administration of the affairs of a defunct railroad is to be terminated. We find, however, in article 6539, R. S. 1911, that land acquired by railroads not for depots, machine shops, turnouts, and switches, shall be alienated by the expiration of 12 years, and all land not so alienated shall become forfeited to the state, and it would seem from this, whether the terms of article 1206 apply to this case, that such a length of time has elapsed that such interest as may have been held by the interveners had ceased to exist.

At the time the said railroad was sold out and the corporation ceased to exist, the Bonner judgment was a valid and existing claim and could have been collected through the trustees. He never presented said claim, nor took any steps to have it paid. It was not enforceable by the writ of execution, but under the law it was only collectible through the administration of the affairs of said defunct railroad company.

The plaintiff and interveners failing to show any title in themselves as against appellant, the judgment of the court below is reversed, and judgment here rendered for appellant.

**HORTON v. TEXAS MIDLAND R. R.**

(No. 7233.)

(Court of Civil Appeals of Texas. Dallas. Dec. 12, 1914. Rehearing Denied Jan. 2, 1915.)

**1. APPEAL AND ERROR (§ 549\*)—BILL OF EXCEPTIONS—INSTRUCTIONS—OBJECTIONS.**

The giving or refusal of instructions cannot be reviewed where there is no bill of exceptions showing that the trial court's action was challenged before finally instructing the jury and an opportunity given the court to cure the errors pointed out, as provided by Acts 33d Leg. c. 59.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.\*]

**2. RAILROADS (§ 95\*)—DEFECTIVE CROSSING—PERSONAL INJURIES—QUESTION FOR JURY.**

Though, under Rev. St. 1911, art. 6485, it is the absolute legal duty of a railroad company to restore a crossing to its original state and keep it in repair, it is a question for the jury whether a crossing on which plaintiff claimed to be injured was properly restored or kept in repair.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 274-283; Dec. Dig. § 95.\*]

**3. APPEAL AND ERROR (§ 1003\*)—REVIEW—WEIGHT OF EVIDENCE.**

Unless the verdict is manifestly against the evidence, the appellate court may not disturb it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3933-3943; Dec. Dig. § 1003.\*]

Appeal from District Court, Hunt County; A. P. Dohoney, Judge.

Action by Maggie Horton against the Texas Midland Railroad. From a judgment for defendant, plaintiff appeals. Affirmed.

J. G. Matthews, of Greenville, for appellant. Henry C. Coke and S. W. Marshall, both of Dallas, and Dashiell & Coon, of Terrell, for appellee.

**RASBURY, J.** Appellant sued appellee in the court below for damages for personal injuries. Appellant was driving upon Division street in the city of Greenville in a buggy drawn by a single horse. When she reached a point where appellee's line of railway crossed said street, which was in a deep cut with high embankments, and when, upon the crossing laid by appellee for the use of the public, her horse shied, causing a backward movement of the buggy, and placing same in a position where it was in imminent danger of being pushed or driven into a ditch or water hole by the side of the street and the railway, caused by the sweep of water in time of rains, as it came down the public street and met a similar sweep of water down the side of appellee's road. In order to avoid such result, appellant hurriedly pulled her horse by the rein in a direction which would propel the buggy away from the ditch and avoid same. But due to the jerk of the buggy and its contact with the railroad tie or rail, she was thrown from the buggy and seriously injured. The grounds of negligence alleged by appellant were the failure of the

appellee to keep and maintain a statutory crossing, alleging specifically that said crossing was in a defective condition and insufficient in width for the purpose for which it was constructed. Appellee's answer consisted of a general denial, a special plea asserting that the crossing was as wide as the dirt road and as wide as could be maintained on account of the ditches on either side thereof, which were necessary to carry off the water. A summary of the facts established by the evidence of the respective parties is unnecessary in order to determine the issues involved.

[1] The first assignment of error complains of the action of the trial judge in giving a special charge requested by appellee; and the second assignment complains of the refusal of the judge to give a special charge requested by appellant. Without reference to whether there was or was not error in the trial judge's action in giving the charge in the one instance and in refusing to do so in the other, we cannot consider the assignments, since it does not appear from the record before us that appellant complied in the court below with the recent statutory provisions governing the right of litigants to have this court review the action of the trial court in the giving or refusing of charges specially requested. Gen. Laws Reg. Sess. 33d Leg. 1913, p. 113. We have, in obedience to the several legislative enactments cited, and in consonance with the construction placed thereon by the other Courts of Civil Appeals, heretofore held that, in order to correct alleged errors in the court's general charge or in giving or refusing special charges reviewed by the appellate courts, it should affirmatively appear from the record by bill of exceptions, when the proceeding complained of is some part of the general charge, or the giving of a special charge, that the charge so complained of was prepared by the trial judge and submitted to the respective parties or their attorneys for inspection, and that the objections urged on appeal were in like manner urged in the court below and presented to the trial judge before reading such general or allowed special charges to the jury, and that, in the absence of such affirmative showing by the record, all such objections are by the statute declared to be waived; and, in reference to the action of the trial court in refusing charges specially requested by any litigant, we have said that, in order to review such action, it must affirmatively appear from the record by bill of exception that the refused charge was presented to the trial court before the reading of the general charge and submitted to opposing counsel for examination and objection within a reasonable time after the general charge is given such counsel for examination, and that, in the absence of such affirmative showing, the action of the court in refusing the special charge shall be re-

garded as approved. *Insurance Co. v. Rhoderick*, 164 S. W. 1067; *Railway Co. v. Wad-sack*, 166 S. W. 42; *Heath v. Huffhines*, 168 S. W. 974; *Railway Co. v. Culver*, 168 S. W. 514; *Railway Co. v. Chumbley*, 169 S. W. 1107; *Railway Co. v. Tomlinson*, 169 S. W. 217; *Texas Midland Railroad v. Becker & Cole*, *infra*, decided by this court November 28, 1914, and not yet officially reported; *Texas Midland Railroad v. C. F. Fogleman*, 172 S. W. 558, decided by this court December 5, 1914, and not yet officially published; *W. R. Case & Sons Cutlery Co. v. A. I. Folsom*, 170 S. W. 1066, decided by this court November 21, 1914, and not yet officially reported.

In the instant case there is an entire absence of any bill of exception showing a compliance with the provisions just enumerated. The special charge given at the request of appellee contains only the word "given," and the one requested by appellant the words "refused, plaintiff excepts," both signed by the trial judge and filed by the clerk. It is obvious that the essential and vital provisions of the new procedure are omitted, since there is no bill of exceptions affirmatively showing that the court's action in both cases was challenged before finally instructing the jury and an opportunity given the court to cure the alleged errors so pointed out.

[2, 3] By her third assignment of error appellant asserts that, under the undisputed evidence, she was entitled to a verdict, and that the court should have for that reason set aside the verdict of the jury and granted her a new trial. The evidence without contradiction does show that the place where appellant received her injuries was at a point where appellee's line of railway crossed a public road, and as a consequence it was the absolute legal duty of appellee to restore the road to its original state or to maintain same in such condition as not to unnecessarily impair its usefulness and to keep such crossing in repair. Article 6485, R. S. 1911. Conceding the legal duty imposed upon appellee by the statute and that the crossing was a public one, still it was a question of fact for the determination of the jury whether appellee had, when it crossed the public road, restored the same to its former state or to such state as not to unnecessarily impair its usefulness and had kept the same in repair. On that issue, which is vital, the evidence is not without contradiction. We have read the testimony bearing upon the condition of the crossing, and we conclude it is sufficient to sustain the finding of the jury in that respect. We might, in deference to counsel's contention, assemble and compare the evidence of both parties, but since it is a matter finally for this court to determine, after reading the evidence, we conclude we are expected to do no more than carefully examine same and

state our conclusions, which are that it cannot be said, from such examination, that the verdict of the jury is manifestly against the evidence, or inadequate or contrary thereto, or does not support the verdict, and, until the evidence presents such a condition, we are without authority to disturb the verdict.

Finding no reversible error in the record, the judgment is affirmed.

#### TEXAS MIDLAND R. R. et al. v. BECKER & COLE. (No. 7216.)

(Court of Civil Appeals of Texas. Dallas. Nov. 28, 1914. Rehearing Denied Jan. 2, 1915.)

##### 1. APPEAL AND ERROR (§ 499\*)—RECORD—MATTERS PRESENTED FOR REVIEW.

That objections to the charge were presented before it was read to the jury, and that exceptions were taken to the refusal of special charges as required by Act March 29, 1913 (Acts 33d Leg. c. 59) must be shown by a bill of exceptions taken and incorporated into the record, and was not sufficiently shown by a purported transcript of the objections and exceptions, signed by counsel for the appellants and filed with the clerk without presentation to, and approval by, the trial judge, nor by affidavits of the trial judge made long after the perfecting of the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

##### 2. CARRIERS (§ 213\*)—TRANSPORTATION OF LIVE STOCK—PERFORMANCE OF CONTRACT.

A carrier's agreement to deliver cattle at a market on a particular day was not complied with by delivering them before the market closed, but too late to unload them and get them on the market before its close.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 920-922; Dec. Dig. § 213.\*]

##### 3. CARRIERS (§ 228\*)—TRANSPORTATION OF LIVE STOCK—ACTIONS FOR DAMAGES—EVIDENCE.

In an action for damages to a shipment of live stock from delay in transportation and rough handling, the testimony of witnesses for plaintiffs that the delay and rough handling complained of was all along the route was properly admitted.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

##### 4. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR BAD IN PART.

In an action for damages from delay in transportation and rough handling of a shipment of cattle, assignments of error that there was no evidence of delay or rough handling, and that the evidence showed by its great preponderance that there was no delay or rough handling on the line of either defendant, would be overruled, where the evidence supported a jury finding of unnecessary delay and rough handling on the line of one of the defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.\*]

##### 5. CARRIERS (§ 219\*)—DAMAGES—LIABILITY OF INITIAL CARRIER.

Under Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. 1913, § 8592), providing that any common carrier receiving property for interstate transportation shall issue a receipt or bill of lading and shall be liable to the lawful holder thereof for any loss, damage,

or injury to the property caused by it, or by any common carrier to which such property may be delivered or over whose lines it may pass, an initial carrier was liable for the damages to an interstate shipment of cattle, due to delay in transportation and rough handling while on the line of a connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.\*]

**6. DAMAGES (§ 139\*)—EXCESSIVENESS—INJURIES TO SHIPMENT OF CATTLE.**

That, in an action for damages to a shipment of cattle from delay in transportation and rough handling, the verdict was for a greater amount than the damages as estimated by one of plaintiff's witnesses who it was claimed was their agent, was not conclusive that the verdict was excessive, where the testimony of other witnesses supported the verdict.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 400-403; Dec. Dig. § 139.\*]

**7. APPEAL AND ERROR (§ 1004\*)—REVIEW—QUESTIONS OF FACT.**

A verdict supported by the testimony of some of the witnesses should not be disturbed as excessive, though an appellate court might, upon the whole testimony or the testimony of a particular witness, have found differently if the matter had been submitted to it as an original proposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

Appeal from Kaufman County Court; James A. Cooley, Judge.

Action by Becker & Cole against the Texas Midland Railroad, the St. Louis & San Francisco Railroad Company, and another. From a judgment for plaintiff against the defendants named, they appeal. Affirmed.

Henry C. Coke, of Dallas, Dashiell & Coon, of Terrell, and Andrews, Streetman, Burns & Logue, of Houston, for appellants. Wynne & Wynne, of Kaufman, for appellees.

**TALBOT, J.** The appellants state the nature and result of the suit as follows: The appellees, Becker & Cole, sued the Texas Midland Railroad, Paris & Great Northern Railroad, and the St. Louis & San Francisco Railroad Companies, in the county court of Kaufman county, for damages in the sum of \$962.82 to a shipment of cattle from Kaufman, Tex., to the National Live Stock Yards at East St. Louis, Ill. They alleged that on the 4th day of June, 1910, they made a contract with the Texas Midland Railroad to ship two car loads of beef cattle, which were intended to be sold on the 6th day of June, 1910, but they arrived too late to be sold on that day's market, and were not sold until the following day. They sought to recover on two grounds of negligence: One was delay in reaching the market; the other was rough handling of cattle while en route. As a result, they alleged that they were damaged by an excessive shrinkage in weight, by the market declining, and by loss in appearance of cattle. All the defendants answered. They excepted to the petition because the allegations were too vague and indefinite and failed

to inform defendants what train carried the cattle, or on what line or place the delay occurred. Then, after a general denial, they pleaded a written contract, in which was contained certain stipulations and conditions, and said written contract was executed in consideration of a reduced rate. For the purpose of this appeal, only one clause need be considered, the clause requiring notice of damages to be given to the delivering carrier at destination before the live stock were mingled with other live stock in order that an investigation might be made. They also pleaded that the cattle were transported in a reasonable time, and that the stop at Newberg was made in compliance with the federal act. The court overruled the special exceptions, and, refusing to instruct the jury to return a verdict for the defendants on the ground that the claim was not presented in the time prescribed in the contract, the case was submitted to the jury, and a verdict was returned in favor of the plaintiff against the Texas Midland Railroad and the St. Louis and San Francisco Railroad Company for the sum of \$450, and in favor of the Paris and Great Northern Railroad Company. The Texas Midland Railroad and the St. Louis and San Francisco Railway Company filed motion for a new trial, which was overruled, and they appealed.

[1] There are several assignments of error complaining of certain paragraphs of the court's general charge and the refusal of special charges requested by appellant. The action of the court in giving and refusing the charges to which these assignments relate cannot be reviewed, for the reason that the record fails to properly show that objections to the paragraphs of the general charge in question were presented before it was read to the jury, and fails to so show that exceptions were taken to the refusal of the special charges, as required by the act of the Legislature, approved March 29, 1913 (Session Acts 1913, p. 113). There is in the transcript what purports to be appellants' objections to said paragraphs of the general charge and exceptions to the special charges, but it does not appear that this paper was presented to the trial judge and approved by him and ordered filed as a part of the record in the case. It is simply signed by counsel for appellants, and marked filed by the clerk. The paper cannot therefore be regarded as a bill of exceptions; nor can it be considered in any sense as a part of the record exhibiting the presentation of objections to the general charge or exceptions to the court's action in refusing the special charges. It is settled by numerous decisions of Courts of Civil Appeals that, under the provisions of the act of the Thirty-Third Legislature, to which we have referred, objections to charges given, and the refusal of special charges requested, must be disregarded on appeal, unless the appellant shows, by bill of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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exceptions taken and incorporated into the record that such objections were made and presented before the charge of the court was delivered to the jury and that the particular special charge was requested and its refusal excepted to at the time. The following are some of the decisions on the subject: *Railway Co. v. Wadsack*, 166 S. W. 42; *Ins. Co. v. Rhoderick*, 164 S. W. 1067; *Heath v. Huffhines*, 168 S. W. 974; *Railway Co. v. Culver*, 168 S. W. 514; *Railway Co. v. Chumbley*, 169 S. W. 1107; *Railway Co. v. Tomlinson*, 169 S. W. 217. There is also found in the briefs of appellee and appellant affidavits of the trial judge relating to the question of whether or not the appellants objected to the court's general charge and excepted to the refusal of the court to give their special charges, made long after this appeal was perfected, but those affidavits cannot take the place of the bill of exceptions required by the statute, or be considered by this court for any purpose.

[2] In regard to the proposition asserted by appellants under their third assignment of error, to the effect that, when the carrier delivers cattle at the market on the day it agreed to deliver them before the market closes, it complies with its contract, and is not liable for any loss to the shipper by reason of his carrying the cattle over to the following day, even though such delivery was too late to get the cattle unloaded and on the market before it was closed, it is sufficient to say that such proposition has been expressly decided against them. *Railway Co. v. White*, 160 S. W. 1128; *Railway Co. v. Wells, Nash & Nash*, 153 S. W. 659.

The seventh and eighth assignments of error complain of the court's action in overruling appellants' special exceptions "A" and "B" to appellees' petition. Exception "A" is:

"The allegations in the plaintiffs' petition that the agents, servants, and employés of defendant in charge of the respective trains handling plaintiffs' cattle carelessly and negligently rammed and jammed the cars together are too vague and indefinite, in that they do not state specifically the time and place, or places, where said train was carelessly and negligently handled, and the cars negligently and carelessly handled, rammed, and jammed together, throwing plaintiffs' cattle down."

Exception "B" reads:

"The allegations that the cattle were delayed by the negligence and carelessness of the defendants for over 24 hours is too vague and indefinite, in that it fails to state specifically the places where the cattle were delayed and for the length of time delayed at each place."

These allegations were sufficient to admit proof of them, and no reversible error was committed in overruling the exceptions. *Railway Co. v. Jones*, 41 Tex. Civ. App. 327, 91 S. W. 611; *Railway Co. v. Martin*, 49 Tex. Civ. App. 197, 108 S. W. 981; *Railway Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 787; *Railway Co. v. Cartwright*, 151 S. W. 630. The record here, unlike in the Cartwright Case, *supra*, shows that an order was

made and entered overruling appellants' said exceptions, and hence such action, having been assigned as error, is reviewable in this court.

[3] In this connection we will further say that there was no error in permitting the witnesses Carter, Cole, and Morrow to testify that the delay and rough handling of the cattle complained of was all along the route. The objections to the testimony went to its weight and sufficiency, rather than to its admissibility.

[4, 5] The tenth and eleventh assignments assert, in substance, that there is no evidence of delay or rough handling on the line of either of the appellants, and that the verdict of the jury is against the great preponderance of the evidence, and manifestly wrong. These assignments are submitted together as propositions, and it is sufficient to say that the evidence, especially with regard to the appellant *St. Louis & San Francisco Railroad Company*, was sufficient, although conflicting, to support the verdict of the jury finding that company guilty of unnecessary delay and rough handling of the cattle on the line of its railway, and hence the assignments should be overruled. There is no distinct proposition urged here that there was no evidence showing unnecessary delay and rough handling of the cattle of the *Midland Railroad's* line of railway. The proposition as presented is that there was no evidence, or that the evidence overwhelmingly shows that there was no delay or rough handling on the line of either of these appellants. But however this may be, the *Midland Railroad* was the initial carrier in the shipment of appellees' cattle, and the shipment being an interstate one that company, under Act of June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), was liable to appellees for any loss or injury to their property caused by it or any connecting carrier over whose line such property passed in transit to its destination.

[6, 7] It is also contended that the verdict is excessive. This contention we are not prepared to sustain. Our examination of the evidence results in the conclusion that the amount of damages awarded was authorized by the evidence; that is, that there was substantial legal testimony going to show that, by unnecessary and unreasonable delays and rough handling of the cattle, appellees had suffered damages in the amount awarded them by the jury. This is true without regard to any decline in the market on June 7, 1910, when the cattle were sold. We would not be warranted in sustaining appellants' contention to the effect that appellees should be bound by the estimate made of their damages by the witness Keechler, who, it is claimed, was their agent, and from whose testimony the jury might have found that appellees' damages were less than the amount awarded. The jurors trying the case were

the judges of the credibility of the witnesses and the weight to be given to their testimony. Their verdict is supported by the testimony of other witnesses, and should not be disturbed, even though we might, upon the whole testimony or the testimony of any particular witness, have found differently, if the matter had been submitted to us as an original proposition.

The judgment is affirmed.

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**MULDOON v. J. E. BRAY LAND CO.**  
(No. 686.)

(Court of Civil Appeals of Texas. Amarillo.  
Dec. 12, 1914.)

**1. CONTINUANCE (§ 37\*)—ABSENCE OF PARTY—MOTION—SUFFICIENCY.**

A motion for a continuance, verified by counsel for defendant, which alleges the materiality of defendant's testimony, but which states only in general terms that defendant was absent from cause over which he had no control, is properly overruled.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 117-121, 127; Dec. Dig. § 37.\*]

**2. NEW TRIAL (§ 124\*)—MOTION—GROUNDS—ABSENCE OF DEFENDANT AT TRIAL.**

Denial of new trial on the ground of defendant's absence, where the motion fails to aver why he did not notify his counsel or the court of his absence, knowing that his case would be called for trial, or to show why he could not have started earlier for the place of trial and be personally present at the trial, is within the discretion of the court.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 250-253; Dec. Dig. § 124.\*]

Appeal from Foard County Court; T. W. Staton, Judge.

Action by the J. E. Bray Land Company against Mathew Muldoon. From a judgment denying new trial after verdict for plaintiff, defendant appeals. Affirmed.

See, also, 147 S. W. 701.

Robert Cole, of Crowell, and Jones & Miller, of Amarillo, for appellant. G. W. Walthall, of Crowell, for appellee.

**HENDRICKS, J.** The appellee, J. E. Bray, recovered of appellant, Mathew Muldoon, a verdict and judgment in the lower court for the sum of \$242.50, as a claim for one-half of a commission collected by Muldoon from one Fenton, arising from a land trade; Bray claiming that he was entitled to participate with Muldoon by virtue of a contract to divide commissions when Muldoon furnished a purchaser—Bray furnishing the lands listed on his books for sale or exchange. The cause had been on the county court docket for several terms and stood for trial the 2d day of March, A. D. 1914 (the first Monday in the month), but was not called for trial until Tuesday, the day following, at which time, on account of the absence of the defendant Muldoon, his counsel requested a postponement until the next day, Wednesday, in order to ascertain by tele-

gram the whereabouts of his client and obtain his presence at the trial of the case. This cause had been tried twice previously, resulting in a verdict in favor of the plaintiff at one trial, and in favor of the defendant at another; both of which were set aside by the trial court. At a term previous to the present trial, the defendant Muldoon, who resided in Kansas City, Mo., had obtained an agreed continuance of the case on account of the sickness of his wife, but was in attendance at the two trials mentioned, testifying personally in each.

[1, 2] When this cause was again called, Wednesday, for announcement, defendant's counsel presented a sworn motion for continuance, alleging the materiality of defendant's testimony, but stating only in general terms that defendant was absent from some cause over which the latter had no control, and which motion the court very properly overruled. The verdict of the jury was based upon testimony, and was not purely one of default, and judgment was rendered Wednesday, March 4th, the day the cause was last called. The defendant Muldoon arrived Thursday, March 5th, and on the 13th filed an amended motion for new trial, alleging his residence in Kansas City, Mo., and that his wife was in such condition that she could not be left alone, and in order to attend the trial it was necessary for him to take her to her mother's 200 miles distant from Kansas City, before defendant could then leave for Crowell; and for that purpose he intended to start with his wife to her mother's on the previous Thursday, but on account of her condition the trip was delayed until the following Saturday. There is no allegation why he failed to notify his counsel or the court of his absence, knowing that this case would be called for trial Monday, March 2d. There is a statement that he took his wife 200 miles to her mother, but when he arrived here, and after leaving his wife, why he could not have started earlier for Crowell, for the purpose of personal attendance at the trial, was not shown. It was shown that some time Wednesday, after the trial had begun, defendant's counsel at Crowell received a telegram from him, evidently in response to counsel's telegram; but when sent or from what place is not alleged. There is a space of time from Saturday until this telegram was sent by him to his counsel, which, except for 200 miles of train travel, is not accounted for in the slightest. There is no allegation that he had to stay with his wife, assisting her mother in attendance upon the latter on account of her condition. Justice Gaines said in the cause of *Mayer v. Duke*, 72 Tex. 449, 10 S. W. 566:

"It may be conceded that the affidavit of Kahn (a defendant in that cause) attached to the motion for a new trial sufficiently showed the materiality and importance of his testi-

mony, and that his failure to attend was the result of a mistake as to the day which was set down for the trial of the cause. The fact, however, remains that the diligence was not used which the law requires. A party to a suit, whose testimony is material to his cause, may prefer to give his testimony in person, and may therefore decline to have his deposition taken in his own behalf. But if he does so, he takes the risk of losing the benefit of his testimony, in the event he should fail from any cause to attend upon the trial. Having elected to take his chance of attendance upon the trial, his absence should not, in an ordinary case, be permitted to result to the prejudice of the opposite party. It should neither be a ground for a continuance, nor for the granting of a new trial. There is nothing in this case to take it out of the ordinary rule. The facts within the knowledge of Kahn could have been as well presented by deposition as by his oral testimony upon the stand. Besides, the affidavits supporting the motion for a new trial tend very strongly to show that the mistake which caused his absence came about by his negligence in failing to give attention to his counsel, when the latter informed him of the day set down for the trial of his case. At all events, it was the result either of his own negligence or that of his counsel, and the consequence would be the same in either case."

The language of the Supreme Court is quite appropriate in many respects to this cause. There is a failure of allegation here accounting for the absence of the defendant after he left Kansas City and traveled 200 miles to his destination, which suggests considerable neglect on the part of the defendant; at least, the allegations in the motion for new trial, sworn to by defendant, are of such an unsatisfactory nature as that this court is unable to say there is any abuse of discretion on the part of the trial court, and the cause clearly comes within the principle announced by Justice Gaines, applied to rather similar facts disclosed in the case cited.

The judgment is affirmed.

HALL, J., not sitting.

#### ATCHISON, T. & S. F. RY. CO. v. HILL et al. (No. 670.)

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 14, 1914. Rehearing Denied  
Dec. 12, 1914.)

#### 1. TRIAL (§ 260\*) — INSTRUCTIONS — SUBMITTING AFFIRMATIVE DEFENSE.

A special charge affirmatively presenting in detail the elements of an affirmative defense established by evidence should not be denied, though a general charge presents in a general manner the same defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 2. TRIAL (§ 260\*) — INSTRUCTIONS — SPECIAL AFFIRMATIVE CHARGE.

Where the evidence almost conclusively established a case against defendant presenting an affirmative defense, refusal of a special charge affirmatively presenting in detail the elements of the defense was not error, where the general charge presented the defense in a general manner.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 3. CARRIERS (§ 211\*)—INTERSTATE CARRIAGE OF LIVE STOCK — VIOLATION OF TWENTY-EIGHT HOUR LAW.

A violation by a carrier of an interstate shipment of live stock of the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. 1913, §§ 8651-8654]), relating to unloading stock for feeding, is negligence per se rendering the carrier liable to the shipper for resulting injuries to the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.\*]

#### 4. CARRIERS (§ 211\*)—INTERSTATE CARRIAGE OF LIVE STOCK — VIOLATION OF TWENTY-EIGHT HOUR LAW.

A carrier of swine cannot justify a violation of the Twenty-Eight Hour Law by relying on regulations of the Bureau of Animal Industry providing that public stockyards shall be considered infectious, and no interstate movement of swine therefrom shall be made for feeding purposes, but that swine not diseased and not exposed by being in yards may be shipped, and that cars that have contained interstate shipments shall not be removed until the inspector has ascertained the condition of the stock, and either released the cars or given notice that they shall be disinfected, where the swine came from private pens and were loaded in disinfected cars, in the absence of anything to show that the carrier could not provide uninfected pens.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.\*]

Appeal from Armstrong County Court; H. L. Mobley, Judge.

Action by J. E. Hill and another against the Atchison, Topeka & Santa Fé Railway Company and others. From a judgment for plaintiffs against defendant named, it appeals. Affirmed.

Madden, Trulove & Kimbrough and H. C. Pipkin, all of Amarillo, for appellant. W. A. Wilson, of Claude, and Turner & Wharton, of Amarillo, for appellees.

HENDRICKS, J. The appellees sued the Atchison, Topeka & Santa Fé Railway Company, also the Eastern Railway Company of New Mexico, the Pecos & Northern Texas Railway Company, and the Ft. Worth & Denver City Railway Company, in the county court of Armstrong county, Tex., alleging damages on account of negligence of the defendant carriers. The cause was tried to a jury, resulting in a verdict against the Atchison, Topeka & Santa Fé Railway Company, the appellant herein, for the sum of \$575, and in favor of the other defendant carriers. The record discloses that J. E. Hill purchased two car loads of hogs, 365 in number, of one W. F. Holloman, and that the latter, prior to the sale of his hogs to the former, on October 23, 1912, had made a written order with the railway agent at Artesia, N. M., for double-deck cars for the purpose of shipping the hogs. The railway company was unable to furnish the double-deck cars, and the next day, the 24th of October, 1912, the train dispatcher of the Santa Fé at Roswell, N. M., was telegraphed to furnish two single-deck cars for the purpose of the shipment. The hogs, during this time were in private pens

adjoining one of the switch tracks of the defendant Santa Fé Railway Company at Artesia, and the single-deck cars were not furnished by said train dispatcher until Saturday, October 26th, at 7:50 p. m. The shipment did not leave Artesia, N. M., until 1:55 p. m. on October 28th (destined for Claude, Tex., on the Ft. Worth & Denver City Railway), and upon arrival at Roswell on the line of the Santa Fé at 5:10 p. m. the same date, were held on the cars at that place until 5:50 p. m. October 29th—over 24 hours' delay at the latter station. The trial court charged the jury in paragraph 5 as follows:

"When a railway accepts a shipment of live stock for transportation, it becomes its duty to exercise ordinary care to transport to its destination within a reasonable time, or to deliver it to its connecting carrier over whose lines such stock must be transported. What would be a reasonable time in a given case must be determined by the jury from all the facts and circumstances of the case, as shown by the testimony in view of the character of the shipment and its liability to injury in the time of transportation. Now, if you find and believe from a preponderance of the evidence that the defendants or either of them failed to use ordinary care to transport the said shipment over its lines within a reasonable time, and that plaintiff was damaged thereby, then you will find for the plaintiff such damages, if any, which he has incurred by reason of such failure against the defendants so failing; otherwise you will find for the defendants on this phase of the case."

Also submitting the following as paragraph 6:

"Paragraph 6 of the court's main charge instructed the jury that: You are instructed that it is the duty of the carrier over whose lines a shipment is transported to use ordinary care to prevent such shipment from injury. Now, if you find and believe from the evidence that the shipment in question was damaged by the drenching with water, as alleged by the plaintiff, and that said damages were the proximate result of the failure of the said defendant to use ordinary care for the protection of the said shipment, then you will find for the plaintiff such damages, if any, as may be accrued to him by reason of such failure to use ordinary care to prevent such injury, and assess the damages against the defendant or defendants so failing; otherwise you will find for the defendants on this phase of the case."

The appellant, Atchison, Topeka & Santa Fé Railway Company, assigned as error the refusal of the trial court to submit to the jury their special charge No. 2, which is as follows:

"Gentlemen of the jury, you are instructed that, if you believe and find from the evidence in this case that the plaintiff or his agent made a reasonable request upon the defendant's agents at Artesia for this defendant to furnish cars for the transportation of the hogs in question, and if you further believe and find from the evidence after such request that this defendant, to the best of its ability, furnished said cars within a reasonable time, and you further believe and find that this defendant exercised ordinary care on its part to transport said hogs over its line of road and to deliver the same to its connecting carrier within a reasonable time, and you further find and believe from the evidence that this defendant exercised ordinary care on its part to feed and water and rest said hogs while in this defendant's possession, and if you further find

and believe from the evidence that this defendant was not guilty of negligence in putting water into the cars in question or in drenching said hogs, then you will find for this defendant, and so say by your verdict."

[1, 2] The argument is that the testimony of appellant is sufficient to the extent to raise the issue that it furnished the cars within a reasonable time, and that it transported the said shipment with reasonable dispatch under the circumstances, and that it exercised ordinary care in feeding and watering the hogs and that, since appellee's complaint was substantially that the shipment was damaged by reason of the negligence of appellant as to such matters, the latter had the right to have the facts grouped, as set forth in the special charge, and to have the jury pass upon the same affirmatively. The rule contended for with reference to the omission of requested instructions, where the record is in such condition as that the affirmative issue, in favor of the defendant in cases of ordinary care, and in any litigation where applicable, is well settled in this state. The Supreme Court, in the case of *Yellow Pine Oil Co. v. Noble*, 101 Tex. 125, 105 S. W. 318, applied the rule as to the affirmative presentation of the issue for the defendant to the extent that a special charge affirmatively presenting in detail the elements of defense should not be denied, though the general charge of the trial court, however, only in a general manner affirmatively presented the same defense. Also see *Railway Co. v. Taylor*, 162 S. W. 969, and cases cited. However, in this case, after a careful consideration of the record as to the negligence of the railway company, relative to the transportation of the particular shipment, without detailed analysis of the facts and the inferences derivable therefrom, we are convinced that, considering the main charge of the court, in view of the cogency, and almost conclusive effect, of the testimony exhibiting the negligence of the initial carrier, that the omission of the special charge submitted by the appellant was not calculated in the slightest to affect the jury's verdict.

[3, 4] The more important question in this case is raised by the third assignment of error, on account of the submission by the trial court to the jury of plaintiff's special charge No. 1, which charge is as follows:

"Gentlemen of the jury, you are instructed at the request of the plaintiff that, if you find and believe from the evidence that the hogs in the shipment in question were held in the cars for an unreasonable length of time without being unloaded for food, water, and rest, and that such act was due to the negligence, if any, of the defendants, or either of them, and that by reason thereof the said hogs sustained injury thereby, then you will find for the plaintiff such damages, if any, as you may find from the evidence he sustained by reason of such negligence, if any, in respect to any of the matters submitted to you in the court's main charge, and you will assess the damages against the particular defendant responsible therefor, as directed in the said main charge."

Eliminating the element in the case of the failure upon the part of the appellant to procure the single-deck cars, the record shows that the swine were something like 75 hours in course of transportation of a distance of 281 miles, and were not unloaded for feed, water, or rest at any point during that period. The appellee Hill accompanied the hogs from Artesia, N. M., to Roswell, where the delay of 24 hours occurred, and, on account of the delay, left the shipment at that place by different transportation for Claude. The justification by appellant of its failure to comply with the federal law requiring stock to be unloaded for feed, water, and rest is presented in its brief in the following manner:

"Regulation 44 of the Bureau of Animal Industry, among other things, provides that public stockyards shall be considered infectious and no interstate movement of swine therefrom shall be made for feeding or stocking purposes. \* \* \* Swine that are not diseased and have been merely exposed by being in the yards may be shipped interstate to a recognized slaughtering center for immediate slaughter. Where, however, a part of the yard is set apart for the reception of uninfected shipments of swine and is kept free of infection, swine may be shipped interstate from the uninfected portions thereof without restriction. \* \* \*

Regulation 45, as quoted in the brief, applicable to this question, provides:

"That cars that have contained interstate shipments of swine shall not be removed until the inspector has ascertained the condition of the live animals and either released the cars or given notice that they shall be cleaned and disinfected. \* \* \*

These particular hogs are not shown to have been exposed to any disease, nor to have been infected in any manner. The cars in which the shipment was made were cleansed and disinfected before the transportation began, and, as presented in this brief, without more, we are inclined to think that the mere proof of the regulations of the Bureau of Animal Industry, as therein exhibited, is not a sufficient defense of a violation of the federal law. This federal statute, as amended and approved June 29, 1906 (34 Stat. 607, c. 3594 [U. S. Comp. St. 1913, §§ 8651-8654]) provides:

"That no railroad \* \* \* whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed \* \* \* (in interstate commerce) \* \* \* shall confine the same in cars, \* \* \* of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by \* \* \* unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. \* \* \*

There can be no question in this record of the shipper assuming any duty, as applicable to the direct contention, for the reason that the railway company, during the course of transportation, refused to unload the hogs for feed, water, and rest, upon the ground that the regulations mentioned prevented it from so doing.

In a civil case a violation of the Twenty-Eight Hour Law "is negligence per se, rendering the railway company liable to the shipper for resulting injuries to animals." 6 Cyc. p. 439; *Reynolds v. Railway Co.*, 40 Wash. 163, 82 Pac. 165, 111 Am. St. Rep. 883; *Railway Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453.

The primary purpose of the act, as exhibited by the title of the same, is "to prevent cruelty to animals in transit"; its declared intent being "to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated." Same statute; *Railway Co. v. U. S.*, 220 U. S. 94, 31 Sup. Ct. 369, 55 L. Ed. 384.

It is also particularly to be noted that the confinement is not to occur, "unless prevented by \* \* \* unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight." While not made clear by appellant, except that it presents a general justification by virtue of the regulations of the Bureau of Animal Industry, we presume the contention is that any stock pens in which the hogs would have to be unloaded, and again reloaded, en route, provided for that purpose by the carrier, would be public stockyards within the purview of the regulation, and that no interstate movement of swine therefrom should be made for feeding or stocking purposes. Regulation 44. The same regulation provides, however:

"Where a part of the yard is set apart for the reception of uninfected shipments of swine, and is kept free of infection, the swine may be shipped interstate from the uninfected portions thereof without restrictions."

As stated, the beginning of this particular shipment was not from public stockyards, but was from private pens, deducible from the testimony.

As to the unloading and reloading of the swine en route, we presume that the further contention of appellant is, by virtue of regulation 45, that these cars having contained interstate shipments, that said cars could not be removed, nor could the hogs be reloaded in the same, until some inspector had ascertained the condition of the live animals and either released the cars while en route or gave notice that they should be cleansed and disinfected. The particular cars had already been disinfected. There is no showing by the railway company in regard to uninfected pens, or, if they could not provide pens for the purpose of transportation, there is no showing why provision could not have been made. The railway company had accepted the hogs for transportation—true, an interstate shipment—and, though a duty is not generally devolved upon a carrier outside the scope of transportation, we are not able to say that it may show a justification of a violation of this law by merely presenting regulations 44

and 45, and by merely saying, if the hogs had been unloaded at Roswell or at any other point for the purpose of complying with the law, that they could not have reloaded them on account of this regulation without some testimony precluding anticipation of such result as a cause justifying the violation of the law. "The cause, in order to justify the excessive confinement on the cars, must be one which cannot be anticipated or avoided under the terms of the statute, by the exercise of due diligence and foresight," and, as to the particular question, this due diligence is not devolved upon the shipper, but is incumbent upon the carrier.

Starting with the premise that it was the duty of the carrier to comply with the act, as an incident to transportation, which, if not done, is negligence per se, and which cannot be excused "except upon the contingency" mentioned in the act, we think it is also its duty in this instance to show as an avoidable cause of exoneration that it could not have complied with the regulations of the Bureau of Animal Industry. Under this condition, the giving of plaintiff's special charge we do not consider as error.

There is no other assignment which we think is sufficient to require discussion, and, upon the whole, we think the cause should be affirmed; and it is so ordered.

### KIRKLAND v. RUTHERFORD et al. (No. 8013.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 17, 1914. Rehearing Denied  
Dec. 5, 1914.)

#### 1. PRINCIPAL AND AGENT (§ 189\*)—ACTION— EVIDENCE ADMISSIBLE UNDER PLEADINGS— REPRESENTATIONS BY AGENT.

In a suit in effect to rescind an exchange of property because of false representations, where the petition specifically alleged that the false representations were made by defendants, and nowhere alleged that they were made through agents, evidence as to representations by alleged agents was not admissible, especially where there was no evidence justifying the inference that such persons were defendants' agents.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713-717; Dec. Dig. § 189.\*]

#### 2. PRINCIPAL AND AGENT (§ 23\*)—EVIDENCE OF AGENCY.

In a suit to rescind an exchange of property, evidence that certain persons who made false representations approached plaintiff with reference to a trade of the property was not sufficient evidence that such persons were defendants' agents, since agency cannot be proved by the mere declarations or acts of the agent alone.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

#### 3. EXCHANGE OF PROPERTY (§ 8\*)—SUITS FOR RESCISSION—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In a suit to rescind an exchange of land for corporate stock for false representations as to the condition of the corporation, where there

was no issue of laches or limitations, evidence that plaintiff had no knowledge of the true condition of the corporation prior to the time of filing his petition was not admissible.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

#### 4. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION —EVIDENCE.

In a suit to rescind an exchange of land for corporate stock for false representations as to the condition of the corporation, where the jury found that defendant neither made nor authorized any false representations, evidence that plaintiff had no knowledge of the true condition of the corporation prior to the filing of the petition, and that the property was of less value than had been represented, was immaterial.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

#### 5. APPEAL AND ERROR (§ 1046\*)—RECORD— PREJUDICE FROM ERROR.

No harm from the holding of a night session of the court when plaintiff's leading counsel was unable to be present from illness appeared, where the bill of exceptions failed to show what transpired at the night session, but did show that plaintiff was represented by two other attorneys.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.\*]

#### 6. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION —GROUNDS—FRAUD.

Where, though on an exchange of land for corporate stock defendant's husband made false representations as to the condition of the corporation, defendant made no misrepresentations, and did not authorize her husband to represent her, and the exchange resulted from negotiations between plaintiff and defendant, plaintiff could not rescind and recover the land, especially where there was no finding that plaintiff relied on the misrepresentations made by the husband.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

Appeal from District Court, Nolan County; Thomas L. Blanton, Special Judge.

Action by R. C. Kirkland against Mabel M. Rutherford and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Beall, Smith & Spencer, of Sweetwater, for appellant. H. S. Garrett, of San Angelo, for appellees.

SPEER, J. R. C. Kirkland instituted this suit against Mabel M. Rutherford and her husband, J. M. Rutherford, in trespass to try title to recover 320 acres of land in Nolan county, being in effect an action for the rescission of a sale or exchange of such land for \$7,100 of the capital stock of the Rutherford Mill & Elevator Company, a private corporation doing business at Chillicothe, the grounds for rescission being the fraudulent representations of the defendants concerning the value of the mill and elevator property. After issues duly joined the court submitted the case on the following special issues, which issues the jury answered or failed to answer as indicated:

"Q. 1. Did Mrs. Mabel M. Rutherford authorize J. M. Rutherford to negotiate a trade

for her mill stock with the plaintiff for the land in controversy? A. No.

"Q. 2. Did the consummation of the deal for the exchange of properties result from negotiations had between the plaintiff and J. M. Rutherford, or between the plaintiff and Mrs. Mabel M. Rutherford, or between the plaintiff and both J. M. Rutherford and his wife, Mrs. Mabel M. Rutherford? A. Mrs. Mabel M. Rutherford and R. C. Kirkland.

"Q. 3. Did J. M. Rutherford, prior to the consummation of the deal for the exchange of properties, represent to the plaintiff that the Rutherford Mill & Elevator Company was entirely solvent and a going concern, that it was capitalized at \$45,000 in stock, all of which was paid up, and that said concern was worth upon the market in Chillicothe par, or 100 cents on the dollar? A. Yes.

"Q. 4. If you should answer the above question 3 in the affirmative, then answer, Did Mrs. Mabel M. Rutherford, at the time she executed such contract with the plaintiff, know that such representations, if any, had theretofore been made by her said husband, J. M. Rutherford, to the said plaintiff? A. No.

"Q. 5. If you should answer question 3 in the affirmative, then answer, Were said representations, if any, made by said J. M. Rutherford to said plaintiff true or false? A. False.

"Q. 6. If you should answer question 3 in the affirmative, then answer, Were the representations made by said J. M. Rutherford, if any, relied upon by plaintiff, and did same induce the plaintiff to consummate said deal? (No answer.)

"Q. 7. Did Mrs. Mabel M. Rutherford, prior to the consummation of the deal for the exchange of properties, represent to the plaintiff that the Rutherford Mill & Elevator Company was entirely solvent and a going concern, that it was capitalized at \$45,000 in stock, all of which was paid up, and that said concern was not in any wise indebted or incumbered, and that such stock was worth upon the market at Chillicothe par, or 100 cents on the dollar? A. No.

"Q. 8. If you should answer question 7 in the affirmative, then answer, Were said representations, if any, made by said Mabel M. Rutherford to said plaintiff true or false? (No answer.)

"Q. 9. If you should answer question 7 in the affirmative, then answer, Were the representations made by the said Mrs. Mabel M. Rutherford, if any, relied upon by the plaintiff, and did same induce the plaintiff to consummate said deal? (No answer.)

"Q. 10. Was the mill stock which was traded for the land in controversy the separate property of Mrs. Mabel M. Rutherford? In connection with the above I instruct you that if when said deal was made J. M. Rutherford then voluntarily gave to his wife \$2,100 of stock theretofore held in his own name for the purpose of enabling her to acquire said land as her separate property, then such stock would be her separate property. A. Yes.

"Q. 11. Did Mrs. Mabel M. Rutherford and her husband, J. M. Rutherford, fraudulently conspire together for the purpose of making false representations to plaintiff concerning the mill stock and to thereby induce plaintiff to consummate said deal? (No answer.)

"Q. 12. In consummating said deal for the exchange of properties, did plaintiff rely upon his own business judgment? A. No.

"Q. 13. In addition to representations, if any, made by either J. M. Rutherford or Mrs. Mabel M. Rutherford, did the plaintiff make any investigation himself concerning the nature and probable value of the stock he was negotiating for? A. Yes.

"Q. 14. If you should answer question 13 in the affirmative, then answer, Did the plaintiff in consummating said deal rely upon his own investigation, if any? A. No."

Upon the answers thus returned the trial court entered judgment for the defendants, and the plaintiff has appealed.

First we hold that the evidence is sufficient to support the findings of the jury in response to the special issues submitted to them. While on the material issues they are contrary to appellant's testimony, they nevertheless are supported by Mrs. Rutherford's testimony, stating specifically that she informed appellant of the existence of the debt and lien for which the mill property was afterward sold out.

[1, 2] Most of appellant's assignments complain of the court's rulings in admitting or rejecting evidence, but these rulings become immaterial in view of the issues under the pleadings and of the findings above set out. To be more specific, the first and second assignments complain that the court erred in excluding certain testimony which would have tended to show that G. F. Wright and H. M. Scarbrough were agents of Mrs. Rutherford, and as such made certain advances and representations to appellant. Appellant's petition, however, nowhere charges that appellees' representations were made through agents, but specifically alleges that the false representations were made by the defendants. Moreover, there is no evidence in the record to justify the inference that the persons named were agents of Mrs. Rutherford. Such agency cannot, of course, be proved by the mere fact that these persons approached appellant with reference to the trade. Such conduct proves nothing. Agency cannot be proved by the mere declarations or acts of the agent alone.

[3, 4] It is next complained the court erred in refusing to permit appellant to testify in regard to investigations made by him into the condition of the affairs of the Rutherford Mill & Elevator Company after the filing of this suit because his testimony would have shown that he had no knowledge of the true condition of the company prior to the time of filing his petition. But there was no issue of laches or limitation, and, besides, it is immaterial if appellant was deceived in regard to the property if appellee Mrs. Rutherford was in no manner responsible for his being deceived.

A number of other assignments, namely, the fourth, fifth, and seventh, also relate to rulings in excluding evidence, the purpose of which was to show that the mill and elevator property was of less value than had been represented to appellant. These, too, become immaterial in the absence of a finding that Mrs. Rutherford misrepresented its value.

[5, 6] There is no merit in the eighth assignment complaining of the court's action in holding a night session when appellant's leading counsel through illness was unable to be present and conduct his suit. The bill fails to show what, if anything, transpired at the night session, but does show that appellant

was represented by two other attorneys, and it is impossible for us to say that any harm could have resulted to his interests by the course pursued. Our conclusion that the evidence supports the findings of the jury virtually disposes of every question raised on the appeal. Under those findings no other judgment than one for appellees could have been rendered. The very gist of appellant's cause of action was false and fraudulent representations concerning the value of the mill and elevator property exchanged to him for his land, upon which he relied to his damage. While the findings do show that this property was misrepresented to him by appellee J. M. Rutherford, they further show that he was not authorized to represent Mrs. Rutherford, and that the exchange in fact resulted from negotiations between Mrs. Rutherford and appellant, and that Mrs. Rutherford made no false representations concerning the mill property. The jury having found that Mrs. Rutherford made no false representations, and having failed to find that the false representations made by her husband were authorized by her, necessarily there could be no judgment rendered against her. Moreover, the jury find that J. M. Rutherford made false representations concerning the value of the mill property, yet they fail to find that appellant ever relied upon these representations. A judgment for appellant would have found no support in the verdict.

We find no error in the judgment, and it is affirmed.

# McMANUS v. SOUTHERN FRUIT JULEP CO. (No. 8030.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 7, 1914.)

## PROCESS (§ 31\*)—NAME OF PLAINTIFF—TRADE-NAME.

Where a petition alleges that plaintiff was doing business in a trade-name, giving both his individual and the trade name, a citation issued only in the trade-name is not invalid, especially where a certified copy of the petition is served on the defendant, and hence a default judgment against defendant is properly entered on the petition.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 25; Dec. Dig. § 31.\*]

Error from Tarrant County Court; Charles T. Prewitt, Judge.

Action by the Southern Fruit Julep Company against J. W. McManus. From a judgment for plaintiff, defendant brings error. Affirmed.

Short & Feild, of Dallas, for plaintiff in error. McGown, Murphy & McGown, of Ft. Worth, for defendant in error.

CONNER, C. J. This suit was instituted on the 17th day of December, 1913, by the Southern Fruit Julep Company, alleged to be entirely owned by A. M. Luckett, against

the Crown Manufacturing & Bottling Company, alleged to have been owned entirely by J. W. McManus, residing in Dallas county, Tex., upon a verified account for goods, wares, and merchandise of the alleged value of \$290. Citation was duly issued commanding the sheriff or constable of Dallas county to summon "Crown Manufacturing & Bottling Company, J. W. McManus, proprietor, to appear before the county court \* \* \* to answer the petition of Southern Fruit Julep Company, plaintiff, filed in said court on the 17th day of December, 1913, against the said Crown Manufacturing & Bottling Company, J. W. McManus, proprietor, for suit, said suit being No. 13586, the nature of which demand is as follows," etc. The return was by a constable of Dallas county certifying that the citation had come into his hands on the "17th day of December, 1913, at 10 o'clock, and executed the 18th day of December, 1913, by delivering to J. W. McManus, the within-named defendants, each in person a true copy of this citation, together with the accompanying certified copy of plaintiff's original petition." On the 7th day of January following a judgment by default was entered, reading, so far as necessary to be stated:

"This cause coming regularly on to be heard, plaintiff, represented by its attorney, and defendant, though having been duly cited to appear and defend this action, appearing not, but wholly making default, the court having heard the testimony, being fully advised in the premises, finds that defendant, J. W. McManus, doing business under the name and style of Crown Manufacturing & Bottling Company, is indebted to plaintiff upon an open account in the sum of \$290.13, and that said defendant agreed in writing to pay 10 per cent. of said amount as attorney's fees if placed in the hands of an attorney for collection, and that said defendant is further indebted to plaintiff in the sum of \$29.01, attorney's fees, making a total of \$319.14, and that plaintiff ought to recover of said defendant the said amount. It is therefore ordered, considered, and adjudged by the court that plaintiff do have and recover of and from said defendant, J. W. McManus, the sum of \$319.14, with interest from this date at the rate of 6 per cent. per annum and its costs in this behalf expended, for which let execution issue."

J. W. McManus prosecutes this writ of error from the judgment above described and presents two questions only. It is first insisted, in effect, that the judgment is unauthorized in that the citation "omits the name of the plaintiff." A scrutiny of that part of the citation we have quoted renders it quite evident that the citation does contain the name "Southern Fruit Julep Company, plaintiff." The petition was so entitled, the suit was so docketed, and the judgment so entered. The fact that A. M. Luckett's name did not appear in the citation cannot nullify the judgment, for it is quite evident, from the averments of the petition, that Luckett was doing business under the name of Southern Fruit Julep Company, and we know of no rule of law which prevents a person from doing business under any name that he may

choose, and, in giving the name "Southern Fruit Julep Company," the citation did give the trade-name of Luckett. Moreover, the omission of A. M. Luckett's name from the citation, if in any event it could be said to be material, was entirely cured by the fact that a certified copy of the original petition was served upon the plaintiff in error in Dallas county, and this petition contained, not only the trade-name, but the individual name of the plaintiff, in whose real interest and for whose real benefit the suit was instituted.

What we have said in disposing of the objection to the citation substantially answers the only other question raised on the appeal. This is embodied in plaintiff in error's second proposition, which reads:

"To authorize a judgment by default, the petition upon which it was rendered must show a cause of action existing in favor of the plaintiff. Where such cause of action is shown to exist in the name of another person, no recovery can be had by the plaintiff."

As already indicated, we do not think it can be said that the cause of action declared upon appears from the plaintiff's allegations "to exist in the name of another person." Under the allegations of the petition, the "Southern Fruit Julep Company" and "A. M. Luckett" identify the same person; one being the trade-name and the other the surname of the plaintiff, which the petition sufficiently discloses.

We are of the opinion that the judgment must be sustained, and it is accordingly in all things affirmed.

**MOORE v. COOPER MFG. CO.** (No. 7236.)  
(Court of Civil Appeals of Texas. Dallas. Dec. 19, 1914.)

**1. APPEAL AND ERROR (§ 731\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

An assignment of error in that the verdict was contrary to the law and the evidence, because it should have been for the full amount of plaintiff's claim, was too general, and violated the rules of practice, and would be considered as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.\*]

**2. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

In an action for services as a salesman and collector, error, if any, in charge on the question of damages raised by the defendant was without prejudice to plaintiff, where the verdict found against defendant on its plea for damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**3. APPEAL AND ERROR (§ 272\*)—INSTRUCTIONS—OBJECTION.**

Under Rev. St. 1911, §§ 1971-1973, 2061, as amended by Acts 33d Leg. c. 59, providing that, where a party fails to object to the charge before it is given, it is to be regarded as approved by him, plaintiff, who did not except to the refusal of his requested special charges, and whose only objection to the charge was filed after judgment, without any showing that it was

ever known to the court, will be held to have approved the charge.

[Ed. Note.—For other cases, Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.\*]

**4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—INDEFINITENESS.**

An assignment of error in that "the court erred in overruling plaintiff's motion for a new trial, because said errors were pointed out in said motion," submitted as a proposition, was too general to be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from Navarro County Court; R. R. Owen, Judge.

Action by R. S. Moore against the Cooper Manufacturing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jack & Jack, of Corsicana, for appellant. Callicutt & Call, of Corsicana, and Seay & Simon and Theodore Mack, all of Ft. Worth, for appellee.

RAINEY, C. J. Appellant sued appellee to recover for services rendered as salesman of vehicles for appellee, and as collector, and sued out a writ of attachment; appellee being a nonresident. Appellee answered by the general issue, and specially that appellant was guilty of fraud in making sales, in that he made false reports as to the purchasers' financial ability, as was his duty to do, which caused appellee to be damaged, etc. The writ of attachment was quashed. A trial on the merits was had, and verdict and judgment rendered for \$10 in favor of appellee, and appellant prosecutes this appeal.

**Conclusions of Law.**

[1] 1. The first and second assignments of error are substantially that the verdict is contrary to the law and evidence; for, according to the evidence, the verdict should have been for the full amount of plaintiff's claim. Appellees objected to the consideration of these assignments, because too general and violative of the rules of practice. This objection is sustained, and said assignments will be considered as waived. *Jenkins v. American Co. (Sup.)* 2 S. W. 726; *Koepsel v. Allen*, 68 Tex. 446, 4 S. W. 856; *Cartmell v. Gammage*, 64 S. W. 315.

[2] 2. The third and sixth assignments complain of the court's charge in instructing the jury on the question of damages pleaded by appellee. The jury by their verdict found against appellee on their plea for damages, and hence appellant was not injured by said charge; therefore said assignments are overruled.

[3] 3. The seventh assignment of error will not be considered because in violation of the rules, in that it complains of the general charge of the court for not charging "the law applicable to the case," and in not giving special charges asked by appellant. There are four special charges asked by appellant.

shown by the record, which were refused, but there is no exception shown to have been taken to the refusal. There is only an objection shown, and that is to paragraph 7 of the main charge, which purports to have been filed January 30, 1914, two days after the judgment was rendered, and there is nothing to show that said objection was ever made known to the court. Acts 33d Leg. p. 113, arts. 1971-1973, 2061; Railway Co. v. Barnes, 168 S. W. 991; Compress Co. v. Saunders, 70 Tex. 699, 6 S. W. 134.

4. There was no error in quashing the writ of attachment as complained of in the eighth assignment.

[4] 5. The ninth assignment is:

"The court erred in overruling plaintiff's motion for a new trial, because said errors were pointed out in said motion."

This assignment is submitted as a proposition. This assignment is too general and indefinite for us to consider, and the same will not be discussed.

6. The judgment is affirmed.

## MARTINEZ v. MEDINA VALLEY IRR. CO. (No. 5357.)

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 5, 1914. Rehearing Denied  
Jan. 6, 1915.)

### 1. APPEAL AND ERROR (§ 218\*)—PRESENTATION BELOW—INSTRUCTIONS—SPECIAL VERDICT.

Where no objection was made to an instruction that, if the jury answered a certain question in the negative, they need not answer the questions which followed, error could not be predicated on the jury's failure, after returning a negative answer, to answer such other questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1321, 1323; Dec. Dig. § 218.\*]

### 2. TRIAL (§ 356\*)—SPECIAL VERDICT—NEGLIGENCE.

Where, in an action for negligent personal injuries, the jury specially found that defendant was not negligent, they need not answer other questions which relate solely to defenses pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 849-854; Dec. Dig. § 356.\*]

### 3. APPEAL AND ERROR (§ 213\*)—OBJECTIONS AT TRIAL—SUBMISSION OF ISSUES.

Where, in an action for injuries to plaintiff's wife from being thrown from defendant's wagon, no objection was made to the submission of the issue of the driver's negligence, and no request was made for the submission of any other theory of negligence pleaded by plaintiff, error could not be predicated on the fact that the judgment was based on the finding on the issue submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1165, 1304-1308; Dec. Dig. § 213.\*]

### 4. APPEAL AND ERROR (§ 707\*)—PRESENTATION FOR REVIEW—SUBMISSION OF ISSUES.

A contention that the judgment for defendant was erroneous, because based on the jury's finding on only one theory of negligence, could not be considered on appeal, where the absence of any statement of facts rendered it impossible to determine whether there was evidence to sup-

port any theory of negligence other than that submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2942; Dec. Dig. § 707.\*]

### 5. NEGLIGENCE (§ 142\*)—SPECIAL VERDICT—JUDGMENT.

In an action for injuries to plaintiff's wife from being thrown from defendant's wagon, a negative reply by the jury to a question whether or not defendant's driver was negligent, and such negligence was the proximate cause of the accident, authorized a judgment for defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400-403; Dec. Dig. § 142.\*]

Appeal from District Court, Bexar County; W. F. Ezell, Judge.

Action by Antonio Martinez against the Medina Valley Irrigation Company. From judgment for defendant, plaintiff appeals. Affirmed.

J. D. Childs and Jas. W. Brown, both of San Antonio, for appellant. Wm. Aubrey and West & McMillan, all of San Antonio, for appellee.

MOORSUND, J. Appellant sued appellee to recover damages for injuries sustained by his wife, who fell or was thrown from a wagon owned by appellee. It was alleged that Clarence Chipman was the driver of appellee's wagon, and that he had been sent by Walter Mitchell, the foreman or vice principal of appellee, to convey appellant's wife, together with other women and children and household furniture, from the big dam to the little dam of appellee, a distance of about four or five miles; that in pursuance of said order Chipman permitted appellant's wife and others to ride in a wagon from the big dam to the little dam of appellee; that the wagon started at nighttime, drawn by a pair of mules, and had no brake attached to it, nor any light, and while proceeding over a rough, hilly, and dangerous road, and going down a steep and curving hill, the mules started in a fast trot and became unmanageable; that the driver was unable to see the condition of the road; that a wheel or wheels of the wagon ran into a chug hole in the road or against a rock, which caused said wagon to upset or tilt or jolt with such violence that it threw out appellant's wife, thereby inflicting upon her injuries which were fully set out in the petition; that appellee was guilty of negligence in improperly loading the wagon, in failing to have a brake on the wagon, in failing to have a light upon the wagon, in failing to have a safe and careful driver, in overloading the wagon, in proceeding in the nighttime over a dangerous road without a light, in failing to route the wagon over another road which was comparatively safe, and in moving said people in the nighttime instead of the daytime.

Appellee, by its answer, joined issue upon all the material allegations of the petition, and alleged that appellant's wife was a tres-

passer, riding in the wagon without right or authority, and in violation of express instructions given by appellee's foreman. Appellee also pleaded assumed risk and contributory negligence. The case was submitted to the jury upon special issues; the first seven questions and answers thereto being as follows:

"(1) Was the plaintiff's wife, Rosa Martinez, invited to ride on said wagon by any employé of the defendants? If so, by whom? Answer, stating name, if you find she was invited, and, if you find she was not, answer 'No.' Answer: Yes, by Chipman.

"(2) Was Clarence Chipman directed by Walter Mitchell to transport Rosa Martinez on said wagon? Answer 'Yes' or 'No.' Answer: Yes.

"(3) Did Walter Mitchell have authority to employ and discharge employes of defendant without first obtaining the consent of his superior officer? Answer 'Yes' or 'No.' Answer: No.

"(4) Was the transporting of plaintiff's wife, Rosa Martinez, for the benefit of the defendant? Answer 'Yes' or 'No.' Answer: No.

"(5) Was Clarence Chipman acting within the scope of his employment and within the scope of his authority in transporting Rosa Martinez on said wagon? Answer 'Yes' or 'No.' If you answer question No. 5 'No,' then you need answer no other question. Answer: Yes.

"(6) Did the wheel or wheels of said wagon run into a chug hole and thereby cause the wagon to tilt or jolt with such violence as to throw Rosa Martinez out of the wagon and injure her, substantially as alleged in plaintiff's petition? Answer 'Yes' or 'No.' Answer: Yes.

"(7) If you answer question No. 6 'Yes,' then state whether or not Clarence Chipman was guilty of negligence in permitting said wagon to run into such chug hole, if he did permit it, in the manner you may find it did, and was such negligence, if any, the proximate cause of the accident? Answer 'Yes' or 'No.' Answer: No."

In addition to the above questions, the court submitted questions Nos. 8, 9, 10, and 11, the first three of which related solely to the defenses pleaded by appellee, while the last related to the amount to be found by the jury, provided they answered the questions favorably to appellant. The court instructed the jury that if, they answered No. 7 "No," they need answer no further questions. Pursuant to such instruction, they did not answer Nos. 8, 9, 10, and 11. Judgment was rendered in favor of appellee.

The only paragraph of appellant's motion for a new trial relating to the verdict contains the following statement of the grounds upon which appellant claimed to be entitled to a new trial, viz.:

"Because all the issues as made in the pleadings have not been answered by the jury in response to the special issues submitted by the court on the trial hereof; the jury having answered in favor of plaintiff all questions submitted to them up to No. 7, which said No. 7 was submitted in such a way as to confuse the jury and was not the only issue in the case, and questions Nos. 8, 9, 10, and 11 were not answered, but should have been, and said answers do not dispose of the case and do not authorize a judgment for defendant in said cause."

No request was made by appellant for the submission of any other theory of negligence than the one submitted by the court in question No. 7, and no objection was made to

the form of said question No. 7, nor any other question submitted by the court; nor was any objection made to the charge of the court in that it instructed the jury not to answer questions Nos. 8, 9, 10, and 11, if No. 7 was answered in the negative. It can hardly be said that the paragraph of the motion for new trial, above quoted from, contains any objection to the verdict based upon the ground that the verdict was uncertain or contradictory. However, appellant, by six assignments of error, contends that the court committed error in rendering judgment upon the verdict, and that such error is fundamental.

[1, 2] One contention is that the court should have required the jury to answer questions Nos. 8, 9, 10, and 11. Aside from the fact that no objection was made to that part of the charge instructing the jury not to answer said questions if No. 7 was answered in the negative, no harm was sustained by appellant by the failure of the jury to answer said questions, as they related to defenses pleaded by appellee and the amount of the recovery if all questions had been answered favorably to appellant. If, in answering question No. 7, it was determined that appellee's employé was not guilty of negligence, or, if guilty of negligence, the same was not the proximate cause of the injuries, then it would certainly be unnecessary for the jury to go further and consider the defenses pleaded by appellee.

[3, 4] Another contention is that the court committed fundamental error in basing its judgment upon the negligence of Chipman, as he was the mere driver or teamster acting under the direction of Walter Mitchell, the authorized agent of appellee. It is a sufficient answer to this contention to say that no objection was made to the submission of the issue of Chipman's negligence, and no request was made for the submission of any other theory of negligence pleaded by appellant. Besides, there being no statement of facts in the record, it is impossible to determine whether there was any evidence to support any other theory of negligence than the one submitted by the court.

[5] The only other contention made by appellant which we will consider is the one that the verdict is insufficient to support the judgment, on the ground of being uncertain and conflicting. Appellant contends that question No. 7 contains three distinct questions, viz.: Whether Clarence Chipman was guilty of negligence; whether Clarence Chipman was not guilty of negligence; and, if guilty of negligence, whether same was the proximate cause of the injuries. This contention is without merit. By asking the jury to state whether or not Clarence Chipman was guilty of negligence, the jury was given plainly to understand that an affirmative answer would be a finding that he was guilty

of negligence, while a negative answer would be a finding that he was not guilty of negligence. It is true that two questions were contained in this interrogatory: One whether Chipman was guilty of negligence, and the other whether such negligence, if any, was the proximate cause of the accident. However, no objection was made to the question on this ground, nor to the instruction of the court to answer same "Yes" or "No," and we doubt not that, had the jury answered it "Yes," appellant would have strenuously contended that such answer amounted to a finding that Chipman was guilty of negligence and that such negligence was the proximate cause of the accident, but the jury answered in the negative, and, if it be contended that such answer should not be construed as a finding that there was no negligence, then it is evident that it must be a finding that the negligence was not the proximate cause of the accident. Taking it either way, appellant was not entitled to a recovery. The answer to question No. 6 does not make a conflict with the answer to No. 7. In answering No. 6 in the affirmative, the jury determined that the wagon was caused to tilt by reason of the wheels running into a chug hole, and thereby appellant's wife was thrown out of the wagon and injured, substantially as alleged in plaintiff's petition. The manner in which the accident occurred was thus determined and the fact established that appellant's wife was injured substantially as alleged in the petition. The issue of negligence was not submitted in said question, nor whether the fact that the wagon ran into the chug hole was the proximate cause of the injuries. Appellant admitted in his brief that the answer to question No. 6 merely fixed what was the immediate cause of the injuries inflicted upon his wife, and that it did not determine whether the failure to have a brake or light upon the wagon, or some one of the other grounds of negligence alleged in plaintiff's petition, was the proximate cause of the injuries in question. The jury evidently found that while the wheels of the wagon ran into a chug hole, causing the wagon to tilt or jolt with such violence as to throw appellant's wife out of the wagon and injure her, yet that Chipman was not guilty of negligence in permitting the wagon to run into the chug hole, or, if he was guilty of negligence, that such negligence was not the proximate cause of the injuries.

We conclude that the verdict of the jury amounts to a finding that appellant had no cause of action, and that, upon such verdict being returned into court, it was the duty of the court to enter judgment thereon in favor of appellee.

The assignments of error are overruled, and the judgment is affirmed.

# JAMESON v. BOARD. (No. 688.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 12, 1914.)

## 1. FENCES (§ 27\*) — DAMAGES BY STOCK — OPENING A FENCE—LIABILITY.

Where defendant removed a portion of his fence to which plaintiff had attached a string of fence completing his inclosure and in consequence thereof defendant's cattle were allowed free access to plaintiff's pasture, and it appeared that defendant knew what would be the consequence, defendant was liable in an action in trespass for the consequential damages, regardless of whether his act was a violation of the "fence statute," though defendant was a lessee of a section of land within plaintiff's inclosure.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 40-44, 52-61; Dec. Dig. § 27.\*]

## 2. FENCES (§ 27\*)—PLEADING—COMMON-LAW LIABILITY—RECOVERY.

That plaintiff alleged in "support of his allegations as to exemplary damages" that defendant, in removing his fence and allowing his cattle access to plaintiff's pasture, violated the "fence statute" did not preclude him from recovering for the trespass, where his allegations were sufficiently broad to comprehend an action of trespass as at common law.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 40-44, 52-61; Dec. Dig. § 27.\*]

Appeal from District Court, Hutchinson County; F. P. Greever, Judge.

Action by S. J. Board against W. F. Jameson. From judgment for plaintiff, defendant appeals. Affirmed.

Crudginton & Works, of Amarillo, for appellant. Newton P. Willis, of Canadian, for appellee.

HENDRICKS, J. The appellee, Board, sued the appellant, Jameson, for damages on account of the removal by appellant of a certain fence and permitting cattle owned by the appellant to go upon the inclosed land of appellee, claiming the destruction of his grass and also alleging the willful removal of said fence, praying for \$200 exemplary damages. The cause was tried to a jury upon a submission by the trial court of special issues, the jury finding that appellant's removal of said fence was a willful act, however, denying exemplary damages, but returning a verdict for actual damages.

[1] The appellee, Board, had connected a certain line of fence with that of appellant which, with other fencing, inclosed the former's pasture. The fence constructed by appellee completing his inclosure was not disconnected from appellant's fence; but a portion of appellant's fence, to which appellee's string of fence was tied, was removed, and on account of which appellant's cattle were allowed free access to the grass of the appellee. It is true that within the inclosure of appellee the appellant was the lessee of a section of land, but considering the excessive number of cattle which were permitted to go within the Board inclosure, we are unable to say that the control of a section in

appellee's pasture derogated from the trespass, as an inherent wrong, for which recovery would be denied.

[2] Appellee alleged a violation of the civil and criminal statutes of the state relative to the unlawful removal of fences, as the pleader expressed it, "in further support of his allegations as to exemplary damages"; and appellant, in attempting to make appellee's action exclusive, says:

"\* \* \* This proceeding is a statutory one, and not an action in trespass generally, and must be controlled by the statute."

Appellee's allegations, however, are broad enough, as well as sufficiently specific, to comprehend an action of trespass as at common law; and appellant's proposition would be akin to an attempted denial of recovery by a plaintiff who sued upon a bond, alleging it as statutory, though the averments were sufficient for relief as a common-law obligation.

Jameson, the appellant, testified:

"I broke down the pasture fence, Mr. Board's pasture. I did it upon purpose. \* \* \* I knew at that time my cattle could go through this inclosure into Mr. Board's pasture."

Appellant, though testifying that he did not tear down the fence to injure Board, and simply did so to use the material for the purpose of fencing the section controlled by him in Board's pasture, the jury, however, though failing to find exemplary damages, expressly found that Jameson's actions were willful, and necessarily, as a cattleman of some experience, he not only knew that his cattle "could go through \* \* \* into Board's pasture," but would do so. If the law as applied to Jameson's acts would impress liability, irrespective of a violation of the "fence statute," his acts in trespass, and the natural consequences of same, which he necessarily contemplated and must be charged with, are so undisputed as that his assignments, criticizing the action of the court in other respects, are immaterial.

On account of pastoral conditions, and the former method of conducting the cattle business in this state, or in a great portion of same, an inclosure being the exception, and the open range the rule, the courts have not adopted the rule of the common law in its strictness, applicable to the involuntary encroachment or trespass of live stock upon the uninclosed land of another. *Davis v. Davis*, 70 Tex. 124, 7 S. W. 826; *Land Co. v. McClelland Bros.*, 86 Tex. 185, 23 S. W. 577, 1100, 22 L. R. A. 105.

Though the rule is relaxed, on account of our own policy in such matters, however, Justice Gaines, in the *McClelland Case*, supra, announced the well-recognized exception. He said:

"If, however, he drives his cattle upon the inclosed land of another, however imperfectly inclosed, he is guilty of a trespass, for which he is liable to answer in damages."

Chief Justice James, in the case of *Claunch v. Osborn*, 23 S. W. 937, after recognizing the general rule, said:

"\* \* \* Still, if one willfully causes stock to go upon another's land, and to remain there, he makes himself liable for the damages that result. If defendant opened the division fence, even upon his own land, at a time and under circumstances that would naturally cause his stock to go into his neighbor's pasture, and there remain, he becomes a trespasser, and is liable for the injury that resulted to his neighbor therefrom."

While Chief Justice James used the language "division fence," he specifically said that the act of March 17, 1887 (Acts 20th Leg. c. 43), did not apply—the same act which appellant says must cover this case, but which he contends does not do so on account of the insufficiency of proof; the statute also being excluded, so he says, on account of the finding of the jury that neither Jameson nor his landlord gave Board an express consent, or agreed that the latter could connect to the former's fence, a portion of which was removed. As stated, we think this matter is entirely immaterial. The doctrine announced by Justice James, so pertinently applicable to this case, was also recognized by the Court of Civil Appeals of the Second District, in the case of *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 20 S. W. 856, and by this court in the case of *Tandy v. Fowler*, 150 S. W. 484.

The judgment of the lower court is affirmed.

#### PAUL STONE CO. v. SAUCEDO. (No. 5362.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 5, 1914. Rehearing Denied Jan. 6, 1915.)

#### 1. APPEAL AND ERROR (§ 1001\*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The jury must pass on the inconsistencies in the testimony and reconcile the same, if possible, and a verdict sustained by evidence will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

#### 2. MASTER AND SERVANT (§ 125\*)—INJURY TO SERVANT — OBLIGATION OF MASTER — SAFE PLACE TO WORK.

An employer using, from time to time, dynamite in loosening stone on which an employé is working at a place selected by the employer is chargeable with knowledge that parts of the ledge may drop on the employé, and is liable for injury to the employé by loose stone falling on him; as the employé may assume that any loose stone had been removed by the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

#### 3. MASTER AND SERVANT (§§ 211, 241\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

Where an employé working at a place fixed by the employer knew nothing of its unsafe condition by reason of the danger of loose stone falling on him, and the employer, using dynamite from time to time in loosening stone, did not exercise any care to prevent accidents to employés

by falling stones, and the danger was not open and apparent, the employé did not, as a matter of law, assume the risk, and was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 557, 757; Dec. Dig. §§ 211, 241.\*]

Appeal from District Court, Bexar County; S. G. Tayloe, Judge.

Action by Reynaldo Saucedo against the Paul Stone Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrews, Streetman, Burns & Logue, of Houston, Kampmann & Burney, of San Antonio, W. L. Cook, of Houston, and H. P. Burney, of San Antonio, for appellant. T. H. Ridgeway, of San Antonio, for appellee.

**FLY, C. J.** This is a suit for damages instituted by appellee, in which it was alleged that he had been injured through appellant, who was his employer, in not using ordinary care in providing him a safe place in which to perform his labor and not warning him of the danger. A trial by jury resulted in a verdict and judgment for appellee in the sum of \$2,000.

Appellee was employed by appellant to break stone, and, while engaged in the place where he had been set to work by appellant, had his leg broken by a stone which fell from a ledge of stone near by. Appellant had been dynamiting the stone previous to the accident, and, although its president and manager was present just before the accident, no inspection was made to ascertain if there were any loose stone on the ledge that might fall. Appellee was ignorant of the fact that no inspection had been made, and appellant failed to warn him of the danger.

[1] The first assignment of error assails the answer of the jury to the effect that a loose rock fell from the side of a bluff or cliff and injured appellee, on the ground that the answer is not sustained by the evidence. The testimony of appellee and his witness Antonio Hurs, copied into the brief of appellant, showed that he was struck by a rock that fell from the ledge or cliff upon him. There are inconsistencies in the testimony of appellee and Hurs, but they were for the jury to pass upon and reconcile, and there is testimony to sustain their finding.

The second, third, fourth, and fifth assignments attack the answers of the jury to the effect that appellant was guilty of negligence in not providing a safe place in which appellee was to work, and in not warning him of the danger. All of the answers are sustained by the facts.

[2] Appellant from time to time used dynamite in loosening the stone on which appellee was working, and was charged with knowledge that parts of the ledge might at any time drop down on the workman, and should have had all loose stone removed. The em-

ployés could assume such duty had been performed by the master. If the loose stone had been removed as it should have been, the accident would not have occurred.

[3] This case is a different one from those in which persons were injured by cotton seed, sand, or earth under which they were working tumbling down. Common sense and reason would teach any human being that if he worked under such substances that they would probably drop down, but not so with stone so solid that it could be broken off only by the use of dynamite. The evidence does not show that appellee knew that there was any loose stone above, and he might, without an inspection, assume that there was none. The duty of inspection devolved upon appellant, and a proper inspection would have disclosed the loose rock, but no inspection was made. Appellee was working where he was told to work, and knew nothing of the unsafe condition of the place. No care whatever was exercised to prevent accidents to the employés, as is freely admitted by the president and general manager of the company. The danger was not open and apparent, and appellee did not know of the danger.

The questions as to whether appellee assumed the risk or was guilty of contributory negligence were submitted to the jury, and they found that he had not assumed the risk, and that he was not guilty of contributory negligence. Each of them was a question of fact, and the evidence sustains the findings of the jury. Even in a case where the rules of the master required the servant to examine the place in which he was working, it was held by this court that it is for a jury to say whether the failure of the servant to examine the place in which he works is negligence or not. *Stag Canon Fuel Co. v. Rose*, 145 S. W. 677. That was a case in which a stone fell on a servant while working in a coal mine. A writ of error was denied by the Supreme Court.

The judgment is affirmed.

VICK et al. v. PARK et al. (No. 8066.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 19, 1914.)

1. FRAUD (§ 25\*)—MISREPRESENTATION—DAMAGES.

Defendants, representing that the entire stock of a corporation was fully paid in, sold the whole of it to plaintiffs. Plaintiffs thereafter improved the property to an amount equal to the amount which was unpaid on the stock. Upon demand of the Secretary of State that they fully pay in the stock, they were allowed to set off the value of the improvements. Held that, as plaintiffs were not required to expend any moneys and received the benefit of such improvements, they could not recover for the misrepresentations of defendants.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 24; Dec. Dig. § 25.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. CORPORATIONS (§ 119\*)—Stock—Effect of Acquisition.

Where plaintiffs acquired the entire stock of a corporation, all of the physical properties of the corporation were conveyed to them.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 499-503; Dec. Dig. § 119.\*]

Appeal from District Court, Young County; Edgar Scurry, Judge.

Action by D. G. Vick and others against J. J. Park and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Arnold & Arnold, of Graham, and Kay & Akin, of Wichita Falls, for appellants. Stephens & Miller, of Ft. Worth, for appellees.

BUCK, J. The appellants D. G. Vick, J. H. Vick, Mary L. Manning, and Lillian Manning, as plaintiffs, filed this action in the district court of Young County, Tex., against J. J. Park and John E. Dowdle, on May 20, 1913, alleging that on or about the 24th day of June, 1909, appellants for a valuable consideration purchased the entire capital stock of the Graham Mill & Elevator Company, a corporation, from the appellees; that the capital stock consisted of 400 shares of the par value of \$100 per share, and that the property of said corporation consisted of a flour mill and elevator, together with fixtures, machinery, furniture, etc., belonging to the same, situated in the town of Graham. In the petition it was further alleged that appellees were in full control of all of said property, having possession of the books and papers belonging to the same, and were charter members of said corporation, and were fully advised of the financial condition of said property and of said corporation; that appellees fraudulently, and for the purpose of swindling and deceiving appellants, knowingly, fraudulently, and falsely represented to appellants that the entire capital stock of said corporation, to wit, \$40,000, had been fully subscribed and paid. The petition further alleged that appellants, believing such representations to be true, and relying on the same as true, paid the defendants in full for such entire capital stock of \$40,000; that appellants did not learn of the fraud and deceit practiced on them by appellees, and did not learn the fact that such capital stock had not been fully paid until about the 15th day of January, 1913, when appellants learned from the Secretary of State that only the sum of \$30,986.93 of said capital stock had been paid into said corporation prior to the purchase of said stock by appellants; that appellants did not discover and had no means of discovering such facts until said January 15, 1913; that on learning that the capital stock was not fully paid in, and for the purpose of preventing the charter from being forfeited, the appellants were compelled to pay into said corporation the sum of \$9,033.07; that such payment became necessary in order that the

charter of such corporation for \$40,000 might be maintained; and that appellants were compelled to make proof of such payment to the Secretary of State as aforesaid, and were damaged in the sum of \$10,000. Appellants prayed for damages and costs of suit and general and special relief.

The appellees on August 28, 1913, filed their answer, consisting of a general demurrer and general denial and the plea of the two years' statute of limitations, and alleged that appellants knew, or could have known, by the exercise of proper diligence, more than two years before the institution of this suit, all of the facts in relation to the capital stock of said corporation, and as to how much had been paid in and as to the value of the assets of said company, and appellees prayed that they be released with their costs.

On March 18, 1914, the cause came on for trial before a jury on special issues, resulting in a verdict and judgment for appellees, from which judgment an appeal was perfected to this court.

It appears from the statement of facts that from September 1, 1909, to September 1, 1910, appellants made certain improvements, repairs, and necessary changes in the mill, which items aggregated the cost of \$2,548.10, and from September 1, 1910, to September 1, 1911, made other improvements, the cost of which aggregated \$1,923.64, and from September 1, 1911, to September 1, 1912, other improvements were made aggregating the cost of \$1,735.57, and from September 1, 1912, to September 1, 1913, further improvements were made in the sum of \$3,037.79, being a total of \$9,245.10; and that, upon proof of expenditures for these improvements by appellants, the demand of the Secretary of State for the payment into the treasury of the corporation of the \$9,033.07 was complied with and satisfied.

It appears from the statement of facts that during the trial of the case evidence was admitted to show what was the fair market value of the property given by appellants to appellees in exchange for the mill and elevator property stock, said property consisting of lands, town property, and a note for \$13,500, and also evidence was introduced to show what was the fair market value of the physical properties belonging to said Graham Mill & Elevator Company. Under the assignments of error, appellants complain of the admission of such testimony over their objection.

In response to the special issues of fact submitted, the jury found, first, that the appellees had represented to the appellants in June, 1909, that the entire capital stock of the Graham Mill & Elevator Company, to wit, \$40,000, had been fully subscribed and fully paid into said corporation; and, second, that said entire capital stock had been subscribed on said date; and, third, that the reasonable

market value of the improvements and additions made by appellees after September 22, 1908, when the application for a charter was made, and June 24, 1909, when the contract of sale between appellants and appellees was consummated, was \$4,300; and, fourth, that the fair market value of the lands, town property, and notes given by appellants to appellees in the trade in controversy was \$36,270; and, fifth, that the fair market value of the physical properties of the Mill & Elevator Company on June 24, 1909, was \$35,266.93; and, sixth, that "D. J. Vick, by the exercise of reasonable diligence, could have discovered the amount of the capital stock of the Graham Mill & Elevator Company which had been paid in prior to June 24, 1909, more than two years before May 20, 1913"; and, seventh, that "D. G. Vick, by the exercise of reasonable diligence, could have discovered how much, if any, of the capital stock of the Graham Mill & Elevator Company had been paid in prior to two years before May 20, 1913"; and, eighth, that, in making the contract in controversy, the parties to said contract had in mind a trade by D. G. Vick for the properties owned by the corporation, and the capital stock of said corporation owned by the appellees.

[1, 2] From the foregoing statement of the case, and irrespective of whether or not the parties to this contract contemplated an exchange on the part of Vick and associates of certain properties, including lands, city property, and the note, for the physical properties of the Mill & Elevator Company, or whether it was contemplated that such contract involved the purchase and sale of the entire capital stock of the Mill & Elevator Company for a specified sum, we think that the appellants have utterly failed to show injury by reason of the verdict of the jury and the judgment of the court below. The evidence discloses that long prior to any demand by the Secretary of State upon Mr. Vick and associates for the payment into the treasury of the corporation the unpaid balance of the capital stock subscribed but not paid, to wit, \$9,033.07, there had been made a large proportion of the improvements which Mr. Vick and his associates were permitted to prove and offer in lieu of, or in payment of, such unpaid balance, and that, if the \$4,300 worth of improvements made by appellees between September 22, 1908, to June 24, 1909, should be added to the amount of the improvements made by Vick and associates, the total sum would exceed said \$9,033.07. But, in any event, it is evident that the corporation, and consequently Vick and associates, received the benefit directly of such improvements made after and before the purchase of the capital stock by said Vick and associates, and we are unable to see how the appellants were injured. Moreover, it is apparent, by the purchase by Vick and

associates of the entire capital stock of the corporation, all of the physical properties of said corporation were conveyed to them and must have been so contemplated in the contract of sale. In this view of the case, the errors complained of in appellant's brief and the assignments predicated thereon become immaterial and are therefore overruled.

It is ordered that the judgment of the trial court be hereby affirmed.

## WILKERSON v. FT. WORTH & D. C. RY. CO. (No. 7227.)

(Court of Civil Appeals of Texas. Dallas. Nov. 28, 1914. Rehearing Denied Jan. 2, 1915.)

### 1. ABATEMENT AND REVIVAL (§ 4\*)—PENDENCY OF ANOTHER ACTION—REQUIRING ELECTION.

The doctrine that the pendency of a prior suit for the same cause is ground of abatement is not recognized in this state, and the utmost extent to which the court may go is to require plaintiff to elect which suit he will prosecute and to abandon the other and pay the costs of it.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-38; Dec. Dig. § 4.\*]

### 2. ABATEMENT AND REVIVAL (§ 4\*)—PENDENCY OF ANOTHER ACTION—REQUIRING ELECTION.

A court's authority to dismiss an action because of the pendency of a prior action for the same cause depends on plaintiff's refusal to elect which suit he will prosecute and to pay the costs of the abandoned suit, and, where a plea in abatement was determined upon the theory that the pendency of the prior suit ipso facto entitled defendant to a dismissal, and no opportunity to elect was given plaintiff, a dismissal of the suit was erroneous.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-38; Dec. Dig. § 4.\*]

Error from District Court, Hunt County; A. P. Dohoney, Judge.

Action by Mrs. Nellie Wilkerson against the Ft. Worth & Denver City Railway Company. Judgment dismissing the suit, and plaintiff brings error. Reversed and remanded.

B. Q. Evans, of Greenville, for plaintiff in error. Thompson & Barwise and J. M. Chambers, all of Ft. Worth, and Yates, Sherrill & Starnes, of Greenville, for defendant in error.

TALBOT, J. On October 9, 1909, the plaintiff in error, Mrs. Nellie Wilkerson, who will hereinafter be referred to as plaintiff, instituted suit in the district court of Tarrant county, Tex., against the defendant in error, the Ft. Worth & Denver City Railway Company, hereinafter referred to as defendant, to recover damages for personal injuries charged to have been inflicted upon her through the negligence of defendant on the 4th day of July, 1908, while a passenger on one of defendant's trains going from Memphis, Tex., to Childress, Tex. It was alleged, in substance, in said suit that the train upon

which plaintiff was traveling was so crowded she could not procure a seat, and was forced to stand on the platform of the coach; that the engine drawing the train was defective, and caused the engine and train to start and stop suddenly; and that because of such defect and sudden movement of the train, plaintiff was thrown against the door of the car and seriously and permanently injured. Plaintiff claimed damages in the sum of \$25,000. The defendant answered, and upon a trial had January 16, 1912, before a jury, the plaintiff recovered judgment against defendant for the sum of \$3,000. From this judgment the defendant appealed, and said judgment was reversed, and the cause remanded for a new trial. Thereafter, and while said cause was pending in the district court of Tarrant county, plaintiff instituted this suit in Hunt county, Tex., and alleged the same facts with respect to her injuries and the causes thereof as were alleged in said suit pending in Tarrant county, and, in addition thereto, charged that, after the reversal of the judgment obtained by her in the district court of Tarrant county, the defendant, acting by and through its authorized agents, by false and fraudulent representations made in Hunt county, Tex., procured from plaintiff for the sum of \$350 a compromise of said suit pending in Tarrant county, and a written release of the cause of action and damages set up and claimed in said suit. She further alleged that her cause of action set forth in said Tarrant county suit was of the value of \$25,000, and prayed as follows:

"Wherefore, plaintiff prays that the defendant be cited to answer this petition; that on final hearing she have a judgment setting aside, canceling, and holding for naught the said written release; and that she be entitled to recover of and from the defendant the sum of \$25,000, same being the reasonable, fair value of said cause of action, which plaintiff was caused and induced to release on account of the defendant's false and fraudulent representations to her, and by reason of the facts alleged in this petition, setting forth her injuries caused by the negligence of the defendant, the same being the reasonable value of her said cause of action which she was fraudulently induced to surrender at the date and under the circumstances above set forth; and for costs of suit and relief both general and special, as in law and equity she may be entitled."

The defendant appeared in this suit and pleaded in abatement thereof the pendency of plaintiff's said suit in Tarrant county. This plea was heard February 9, 1914, and, upon the conclusion of the evidence offered in its support, was by the court sustained and plaintiff's suit dismissed. From this order and judgment of the court plaintiff prosecutes this writ of error, and contends:

(1) That the court erred in sustaining the defendant's plea in abatement, "because the undisputed evidence shows that the suit pending in Tarrant county was and is not the same as this suit pending in Hunt county, but was entirely different, in that the cause of action set up in the plaintiff's petition in the suit pending in Tarrant county is a suit for damages for per-

sonal injuries sustained on the 4th day of July, 1908, while a passenger on one of the defendant's passenger trains between Childress and Memphis, Tex., caused by the negligence of the defendant, its agents and servants, as alleged in said petition, claiming the sum of \$25,000, while the cause of action set up in the petition in this cause is a suit to set aside, rescind, and cancel a certain written release and contract executed by plaintiff on the 17th day of December, 1912, in Hunt county, whereby, in consideration of the sum of \$350, the plaintiff released and surrendered to the defendant in full the cause of action set up in the petition in the suit pending in Tarrant county, Tex., alleging that she was induced to sign and execute said release by the false and fraudulent representations of the duly authorized agents of the defendant, the Denver City Railway Company, which fraud was alleged to have been committed in Hunt county, and claiming the sum of \$25,000, alleging the same to be the reasonable value of the cause of action which plaintiff was caused and induced to release on account of the defendant's fraudulent and false representations, the plaintiff pleading in said petition the facts showing the value of the claim so released and transferred."

(2) That "the doctrine of the common law that a suit pending between parties precludes them from maintaining between themselves another suit on the same cause of action in courts of the same jurisdiction is not enforced in Texas."

There is force in the plaintiff's first contention, but the defendant's answer thereto is of equal force, and inclines us to the view expressed by its counsel in a well-prepared brief filed in this court. We do not, however, find it necessary to definitely pass upon and determine the question, for the reason that we believe plaintiff's second proposition must be sustained.

[1, 2] The doctrine that the pendency of a prior suit for the same cause between the same parties in courts of the same jurisdiction is ground of abatement is not recognized in this state. The utmost extent to which the court may go upon the presentation of a plea setting up the pendency of such a suit is to put the plaintiff to his election of which suit he will prosecute and require him to abandon the other and pay the costs of it. This is the express holding of our Supreme Court in the cases of *Payne v. Benham*, 16 Tex. 364, and *Trawick v. Martin*, Brown Co., 74 Tex. 522, 12 S. W. 216. In *Garza v. Jesse French Piano & Organ Co.*, 126 S. W. 906, this court, speaking through Mr. Justice Bookhout, said:

"The doctrine of the common law that a suit pending between parties precludes them from maintaining between themselves another suit on the same cause of action in courts of the same jurisdiction is not enforced in Texas."

This holding has been followed by this court in the later cases of *Liberty Milling Co. v. Continental Gin Co.*, 182 S. W. 856; *Minchew v. Case*, 143 S. W. 366; *Hartzog v. Seeger Coal Co.*, 163 S. W. 1055. See, also, *Insurance Co. v. Hargus*, 99 S. W. 580; *Ellis v. Tips*, 16 Tex. Civ. App. 82, 40 S. W. 524; *Olschewske v. King*, 43 Tex. Civ. App. 474, 96 S. W. 665; *Simmang v. Braunagel*, 27 S. W. 1032. The defendant questions the correctness of our holding in *Garza v. Jesse French Piano & Organ Co.*, supra, and, conceding the

rule announced in the decisions of the Supreme Court cited above, argues that it was not error for the court to dismiss this suit, because the plaintiff stood silent, upon the presentation of the plea in abatement and the evidence conclusively establishing the pendency of the Tarrant county suit, and failed to elect which suit she would prosecute. In reply we say that we think the decision in Garza's Case correct, and that no relief was asked in the plea in abatement, except the absolute abatement and dismissal of this (the Hunt county) case. If it be true, as contended by defendant, that the only difference between the common law upon the subject and the rule enforced in this state is that the plaintiff may, upon the coming in of a plea setting up the pendency of a former suit, elect which case he will prosecute; still the authority of the court to dismiss, under the rule announced, depends upon the refusal of the plaintiff to elect which suit he will prosecute, and to pay the costs of the abandoned suit. The record fails to show that the plaintiff was given an opportunity to elect which of her suits she would prosecute, and that she failed or refused to exercise such right of election. The plea in abatement was evidently presented and determined upon the theory that the pendency of the suit in Tarrant county ipso facto entitled the defendant to a dismissal of this suit.

This, we think, is not the law, and it follows that at all events the dismissal of plaintiff's suit was error for which the judgment must be reversed, and the cause remanded, and it is accordingly so ordered.

#### E. G. RALL GRAIN CO. v. BURKS-SIMMONS CO. (No. 8017.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 17, 1914, Rehearing Denied Nov. 21, 1914.)

#### APPEAL AND ERROR (§ 742\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.

An assignment of error, complaining of the overruling of a plea of privilege, which does not contain a substantial copy of the only paragraph of the motion for new trial referring to the subject, must be disregarded under Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, and Court Rules 23, 29 (142 S. W. xii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from Comanche County Court; J. H. McMillan, Judge.

Action by the Burks-Simmons Company against the E. G. Rall Grain Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Crenshaw & Boykin, of Ft. Worth, for appellant. Kearby & Kearby, of Comanche, for appellee.

CONNER, C. J. This suit was instituted by the appellee company in the county court

of Comanche county to recover a balance due upon a sale of 12,000 bushels of oats, and the only question presented for our consideration in appellant's brief is whether the court erred in overruling appellant's plea of privilege to be sued in Tarrant county, the place of its domicile.

An examination of the record discloses that the assignment presenting the question suggested cannot be said to be even a substantial copy of the only paragraph of appellant's motion for new trial which refers to the subject. The assignment must therefore be disregarded in accordance with a well-settled rule of practice. See Vernon's Sayles' Tex. Civ. Stat. art. 1612; Gen. Laws 1913, p. 276; Rules 23 and 29 (142 S. W. xii); Edwards v. Youngblood, 160 S. W. 288; Bradshaw v. Kearby & Kearby, 168 S. W. 436.

No other question having been presented, it is ordered that the judgment be affirmed.

#### COMMONWEALTH BONDING & CASUALTY INS. CO. v. WRIGHT. (No. 8016.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 17, 1914. Rehearing Denied Dec. 5, 1914.)

#### 1. INSURANCE (§ 670\*)—ACTIONS ON POLICIES—VERDICT—AMOUNT OF RECOVERY.

Where, in an action on a health and accident insurance policy, the court told the jury that, if they found for plaintiff, they should find for him in a specified amount, with 12 per cent. damages thereon, a verdict for such amount, "with 12 per cent. interest," justified a judgment for 12 per cent. damages, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4746, providing that, where an accident or health and accident insurance company fails to pay a loss within 30 days, it shall be liable, in addition to the amount of the loss, for 12 per cent. damages thereon, together with reasonable attorney's fees; since the use of the word "interest" was evidently inadvertent, and the finding was intended to be responsive to the charge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1785-1787; Dec. Dig. § 670.\*]

#### 2. INSURANCE (§ 665\*)—ACTIONS ON POLICIES—DAMAGES—ATTORNEY'S FEES.

In an action on a health and accident insurance policy, evidence held sufficient to support a verdict for \$100 as attorney's fees under Vernon's Sayles' Ann. Civ. St. 1914, art. 4746.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

#### 3. INSURANCE (§ 310\*)—MISREPRESENTATION—WAIVER—STATUTORY PROVISIONS.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4948, providing that in suits on insurance policies no defense based upon misrepresentations in the application or in obtaining or securing the contract shall be valid, unless defendant shall show that within a reasonable time after discovering the falsity of the misrepresentations it gave notice to the assured, if living, or, if dead, to the owners or beneficiaries of the contract, that it refused to be bound thereby, provided that 90 days shall be a reasonable time, the notice of refusal to be bound must be given in any event within 90 days; and hence, where such notice was not given within 90 days after

the insurer had notice of the misrepresentations, it could not rely thereon as a defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. § 310.\*]

Appeal from Nolan County Court; John H. Cochran, Jr., Judge.

Action by Isham Wright against the Commonwealth Bonding & Casualty Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. H. Haddix, of Ft. Worth, and A. B. Yantis, of Sweetwater, for appellant. H. R. Bondies, of Sweetwater, for appellee.

**SPEER, J.** This is an action by Isham Wright to recover from the Commonwealth Bonding & Casualty Insurance Company upon a policy of accident and health insurance. There was a verdict and judgment for the plaintiff, and the defendant appeals.

[1] The first and second assignments of error are based upon the action of the court in entering judgment for 12 per cent. upon the amount of the recovery under the policy; the contention being that the 12 per cent. is interest under the verdict of the jury, and not damages within article 4746, Vernon's Sayles' Texas Civil Statutes, allowing 12 per cent. damages on the amount of loss under such a policy when the same is not paid within 30 days after demand therefor. It is true the verdict of the jury is for the appellee in "the sum of \$225, with 12 per cent. interest," but the verdict must be construed in the light of the charge, which directs the jury, in the event they found for the plaintiff, to find for him "in the sum of \$225, with 12 per cent. damages thereon," and, as thus interpreted, it is evident the use of the word "interest" was inadvertent, and the finding was intended to be responsive to the charge.

[2] Neither can we say the evidence does not support the verdict and judgment for \$100 as attorney's fees under the article of the statute referred to. The testimony of the attorney who conducted the litigation very clearly is sufficient to support the verdict for attorney's fees in this amount. He testified:

"I have done all the work for the plaintiff in this case, out of court and in court, looking to collection under the policy sued upon. One hundred dollars would not compensate me for my work and labor done and the trouble I have been put to in a professional capacity trying to collect under the policy. The sum named would be a very reasonable fee for the prosecution of this proceeding. The plaintiff has agreed to pay my firm the sum named contingent upon our making collection under the policy. This contingent fee contemplated our giving the matter any and all attention necessary in and out of court in the trial court, and through any appellate court, should an appeal be taken by either party."

[3] The principal question presented on the appeal, however, goes to the merit of appellant's defense, and is based upon the contention that appellee made certain false repre-

sentations in his application for insurance whereby, under the terms of the policy, the company was absolved from liability. It appears to be true that, as written in the application, the facts were misrepresented, in that it was not disclosed that appellee had previously suffered from an attack of chronic rheumatism, but appellee contends that he made a faithful disclosure in this respect to appellant's agent who took the application, and this agent admits as much, and testified that it was his recollection a proper memorandum was indorsed on the application, but in this he appears to have been mistaken. Without deciding appellant's liability upon this point, however, we find it necessary to hold that it cannot urge the defense relied on in view of article 4948, Vernon's Sayles' Texas Civil Statutes, regulating the writing of insurance in this state. That article provides:

"In all suits brought upon insurance contracts or policies hereafter issued or contracted for in this state, no defense based upon misrepresentations made in the applications for, or in obtaining or securing the said contract, shall be valid, unless the defendant shall show on the trial that, within a reasonable time after discovering the falsity of the misrepresentations so made, it gave notice to the assured, if living, or, if dead, to the owners or beneficiaries of said contract, that it refused to be bound by the contract or policy: Provided, that 90 days shall be a reasonable time."

It is undisputed that appellant had notice of the misrepresentations upon which it relies to avoid the policy in this case more than 90 days before it notified appellee that it refused to be bound on the policy. We construe the article of the statute to mean that the notice of refusal to be bound must be given within a reasonable time, not in any event to exceed 90 days. See *Nat. Life Ass'n v. Hagelstein*, 156 S. W. 353.

There is no error in the judgment, and it is affirmed.

MARTIN et al. v. BURR et al. (No. 5358.)†  
(Court of Civil Appeals of Texas. San Antonio.  
Dec. 5, 1914. Rehearing Denied  
Jan. 6, 1915.)

1. ADVERSE POSSESSION (§ 1\*)—"PRESCRIPTION"—"LIMITATION."

There is a distinction between title by limitation and a prescriptive title, in that the latter is based upon a presumed grant to the property or use, while the former is not.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 1-10, 12-65, 67-76; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, First and Second Series, Limitation of Actions; Prescription.]

2. ADVERSE POSSESSION (§ 58\*)—HOSTILE POSSESSION—GROUND OF ACTION.

The entry and holding to build up a prescriptive title which is founded on uninterrupted use and enjoyment time out of mind or for such a length of time that the memory of man runneth not to the contrary must be hostile to the rights of the true owner, and such owner's rights must be invaded by such hostile acts as

\*or other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Writ of error pending in Supreme Court.

would constitute grounds for action against the adverse claimant, and so as to make the possession appear to be for the benefit of the claimant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 279-281; Dec. Dig. § 58.\*]

**3. WATERS AND WATER COURSES (§ 42\*)—RIPARIAN OWNERS—RIGHT TO WATER.**

A riparian owner has the right to take all the water he needs, if such use does not injure other owners, in which latter case he may have his just proportion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 33, 34; Dec. Dig. § 42.\*]

**4. WATERS AND WATER COURSES (§ 140\*)—RIPARIAN RIGHTS—UNUSUAL USE.**

The natural uses of water by a riparian owner take precedence over such unusual uses as irrigation, mills, mining, etc.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 140.\*]

**5. WATERS AND WATER COURSES (§ 138\*)—PRESCRIPTIVE USE OF WATER—NECESSITY OF CAUSE OF ACTION.**

The right of action against riparian owners for using more than their just proportion of the water does not accrue, so as to be ground for a prescriptive title, until an injury is caused or threatened to the complaining owner.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.\*]

**6. WATERS AND WATER COURSES (§ 152\*) — USE OF WATER—PRESCRIPTION—PLEADING.**

Where prescriptive title to the use of the water of a stream as against other riparian owners is set up in a suit to enjoin such use, it must be alleged and proved that none of the plaintiffs were under disability.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**7. WATERS AND WATER COURSES (§ 152\*) — USE OF WATER—PRESCRIPTION—EVIDENCE.**

In a suit to enjoin the unlawful use of water by riparian owners, in which prescriptive title to the use of the water is set up by defendants, evidence *held* to show that during the claimed prescriptive period some of the plaintiffs were under disability.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**8. HUSBAND AND WIFE (§ 262\*)—COMMUNITY PROPERTY—PRESUMPTIONS.**

There is a presumption of law that land acquired during coverture is community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.\*]

**9. WATERS AND WATER COURSES (§ 152\*) — USE OF WATER—PRESCRIPTION—BURDEN OF PROOF.**

In a suit to enjoin the unlawful use of water by riparian owners, in which prescriptive title to the use of the water is set up by defendants, defendants had the burden of showing with reasonable certainty which part of the flow of the stream they were claiming during the time they were maturing their prescriptive rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**10. WATERS AND WATER COURSES (§ 152\*) — USE OF WATER—PRESCRIPTION—EVIDENCE.**

In a suit to enjoin the unlawful use of water by riparian owners, in which prescriptive title to the use of the water is set up by defendants, evidence *held* insufficient to show that there was during the prescriptive period any injury to the complaining owners which would constitute a cause of action.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**11. NEW TRIAL (§ 112\*)—JOINT MOTION—SUFFICIENCY OF EVIDENCE.**

Where defendants filed a joint motion for a new trial, claiming that the verdict is against the weight of the evidence, the motion will be overruled if the evidence supports the verdict as to any of the defendants.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 233; Dec. Dig. § 112.\*]

Appeal from District Court, Kinney County; W. C. Douglas, Judge.

Suit by J. K. Burr and Mrs. Elizabeth Moore, as guardian for G. Bedell Moore, against T. J. Martin and others. From the decree rendered, part of the defendants appeal. Affirmed.

Jones & Thurmond, of Del Rio, Baker, Botts, Parker & Garwood, of Houston, Bogges & Smith, of Del Rio, and W. B. Teagarden, of San Antonio, for appellants. McFarland & Lewright, of San Antonio, and Murray & Murray, of Eagle Pass, for appellees.

CARL, J. This is a suit brought by appellees, J. K. Burr and Mrs. Elizabeth Moore, as guardian for her minor son, G. Bedell Moore, plaintiffs in the court below, seeking to perpetually enjoin the appellants T. J. Martin, R. Stratton, and Chas. Gaebler from diverting from the channel of the Las Moras creek the waters of said creek and using the same upon their lands for irrigation purposes, and appellant Galveston, Harrisburg & San Antonio Railway Company from diverting said waters and using same for supplying their steam engines used in transporting their trains in such quantities as to so reduce the waters flowing in said channel as to cause the same to cease to flow over and across the lands of appellees in sufficient quantities for their domestic purposes and to furnish drinking water for their stock. Each appellant specially denied all issues of fact in plaintiff's pleadings, and by special answer claimed the right to use the water from said stream in the manner and for the purposes and to the extent by each particularly asserted, and that this right had been acquired by limitation and prescription. There were other parties defendant below, all of whom are disposed of by the judgment, none of whom are appealing from the judgment entered except these appellants. The case was tried in the court below before a jury, but at the conclusion of the testimony the court peremptorily in-

structed the jury to return the following verdict:

"We, the jury, find and return our verdict as follows:

"(1) Plaintiffs, and each of them, shall recover and have a right to a continuous flow of the Las Moras creek along and through the lands described in their second amended original petition for the use of water for domestic purposes, including the watering of live stock upon said lands, against each of the defendants, Thomas J. Martin, Max Indlekoffer, John Gilder, Martin McGovern, Chas. Gaebler, R. Stratton, Jack Gay, August Beidler, R. L. Dawson, Emmett Dawson, and Galveston, Harrisburg & San Antonio Railway Company to the use of said water for any purpose.

"(2) Plaintiffs shall recover and have a writ of injunction against the defendants R. Stratton, Thomas J. Martin, R. L. Dawson, and Emmett Dawson restraining them and each of them and their agents, employees, and servants from diverting the waters of the Las Moras creek for irrigation purposes at such time or in such quantities as would cause the said creek to cease to flow on or over the lands of plaintiffs or either of them; that plaintiff shall not recover nor have a writ of injunction against the defendants Max Indlekoffer, Jno. Gilder, Martin McGovern, Chas. Gaebler, Jack Gay, August Beidler, and Galveston, Harrisburg & San Antonio Railway Company.

"(3) That defendants Max Indlekoffer, Jno. Gilder, Martin McGovern, Chas. Gaebler, R. R. Stratton, Thomas J. Martin, and Galveston, Harrisburg & San Antonio Railway Company, and each of them, shall take naught by their respective cross-actions herein."

The jury returned a verdict in accordance with the court's instruction, and judgment was entered accordingly thereon.

The contentions of appellants, briefly stated, are: (1) That they were each entitled to judgment as a matter of law; or (2) in any event the issue was one of fact for the jury to determine.

Appellees contend that the court's action is justified because appellants failed to allege and prove an exclusive, adverse, open, and notorious use of, and claim to, a certain definite quantity of water during the prescriptive period, and that during that time appellees nor any of their grantors were under legal disability, etc.

The Las Moras creek is a water course or stream having its source or head spring on the government reservation in Kinney county, Tex., known as Ft. Clark, which occupies what is known upon the map of said county as survey No. 254, made in the name of Samuel Maverick, and running thence in a southwesterly direction through a portion of Kinney county and Maverick county to a point in the latter county where it empties into the Rio Grande.

"The defendants in this suit are all owners of land along the course of this stream, and the plaintiffs are the owners of the several surveys described in their pleadings, and said stream runs through each of said surveys, or such as it does not run through about thereon. The plaintiffs' (appellees') lands are those nearest the mouth of said stream, extending from the confluence thereof with the Rio Grande up the creek to the upper line of survey No. 219, and the lands of defendants all lie above those of plaintiffs on said stream, and all the irrigated lands of each defendant are riparian to said

stream, with the exception of appellant Thos. J. Martin's two Bruno surveys (No. 1 in name of Zick Bruno, and No. 2 in name of Joseph Bruno), of 160 acres each, which are not riparian, because they do not touch the creek nor call for it, but are detached therefrom by intervening lands. Defendant Galveston, Harrisburg & San Antonio Railway Company owns a right of way through the 'Dolores Town Tract' and across the Las Moras creek, and maintains a pumping plant on its said right of way, which supplies water to two storage tanks, one at the station of Spofford, and the other at the station of Kinney Siding. These tanks furnish water to the engines used by said railway company in the transportation of its trains."

The defense relied upon by appellants was a title by prescription to the use of the water of Las Moras creek. It is said in Kinney on Irrigation and Water Rights (2d Ed.) vol. 2, p. 1876, § 1048:

"There are five principal elements necessary for the acquisition of a permanent title by prescription, namely: First, the possession must be actual occupation or use, open and notorious, and exclusive; second, it must be hostile against the rights of the party against whom the right is claimed; third, it must be held under a certain right as the property of the claimant; fourth, it must be continuous and uninterrupted for the full period prescribed by the statute of limitations; fifth, during all of this period taxes, if any, are assessed against the property claimed, and must be paid by the claimant."

And, continuing:

"If it is a water right so claimed, he must have had the actual use of the water under the right, and have applied the water to some beneficial use or purpose during the full period prescribed by the statute of limitations; otherwise there is no right to the water which can become the basis of an adverse claim. \* \* \* The mere use of water, a right of way, or a ditch, or canal in any particular manner, for however long a period of time, will not ripen prescriptively into a permanent right. There must be something more. The use during the full period of time necessary to acquire the right must have been hostile to the owner. Without a hostile holding against the owner, both in the inception and the continuance of a claimed right, no prescriptive right can be acquired."

[1, 2] There is a distinction between title by limitation and a prescriptive title, in that the latter is based upon a presumed grant to the property or the use, while the former is not. Under the common law, the mode of acquiring title by what is called "prescription" is founded on uninterrupted use and enjoyment "time out of mind, or for such a length of time that the memory of man runneth not to the contrary." The entry and holding in order to build up a title by prescription must be hostile to the rights of the true owner. The true owner's rights must be invaded by such hostile acts as would constitute grounds for action against the adverse claimant or intruder, and so as to make the possession appear to be for the benefit of the claimant. *Swan v. Munch*, 65 Minn. 500, 67 N. W. 1022, 35 L. R. A. 743, 60 Am. St. Rep. 491. And there are a number of authorities which hold that a right of action must exist on account of the invasion of the owner's rights and injury to him during the entire prescriptive period, in order to

mature a prescriptive title. *Logan v. Williams*, 159 Ky. 412, 167 S. W. 124; *White v. McNabb*, 140 Ky. 828, 181 S. W. 1021; *Stratton v. Boys' School*, 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57; *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751.

[3-5] For all riparian owners have the right to use their just proportion of the water flowing past their lands. And the natural use of such waters takes precedence over such unusual use as irrigation, mills, mining, etc. Every riparian owner has the right to take all the water his needs require as long as such use does not injure his riparian neighbors, in which latter case he may use only his just proportion. No cause of action accrues until the one, by using more than his rightful share of the water, causes or threatens injury to complaining party. Thus, it will be seen, the right to use water is a variable one; for, while one man may use the water both for his stock and domestic purposes, as well as for the irrigation of his farm, his neighbor may require it only for stock and domestic uses; or, possibly, he may not need the water at all. He may intend to use his land at some future day for the purpose of establishing an irrigated farm, and yet at present be not using it for any purpose. If he is not using the land, he has no use for the water flowing past, and would not be injured even by his neighbors above him using all of the water, and certainly there would be, in that instance, no injury to him, and it follows that no cause of action exists. As long as appellees had sufficient flowing water for their stock and domestic purposes, they had no cause of action against appellants, because they had not been injured. They were not deprived of any right, and must they be held to presume that they will be denied that which the law says is theirs when they do have occasion to use it? Must they go into court and say virtually that they have all the water they need now; that they have suffered no injury, but may do so in the future, and, on account of that fear, crave relief at the hands of the court? It is the policy of the law to encourage rightful use of the public resources, but at the same time it looks with disfavor on monopolies. As westward the star of empire takes its way and population becomes more dense, the untrammelled rights of the frontier must to some extent give way to the growing needs of a more complex social system. When appellants first began watering their herds and farms from the Las Moras there was an abundance for the scattering residents of that western country, and no discordant note was heard save the distant plaintive wail of a disgruntled coyote.

In support of the reasoning above, we cite from *Featherman v. Hennessy*, supra, where Chief Justice Brantly of the Supreme Court of Montana says:

"But use of water does not begin to be adverse as against a prior appropriator unless it results in a deprivation to such appropriator, or amounts to such an invasion of his rights as will enable him at any time during the statutory period to maintain an action against the adverse user. In *Bullerdick v. Hermismeyer*, 32 Mont. 541, 81 Pac. 334, it was said: 'The use of the waters in the streams in this state is declared by the Constitution to be a public use. Const. art. 3, § 15. Such being the case, every citizen has a right to divert and use them, so long as he does not infringe upon the rights of some other citizen who has acquired a prior right by appropriation. Each citizen may divert and use them without let or hindrance when no prior right prevents. When his necessary use ceases, he must restore them to the channel of the stream; whereupon they may be used by any other person who needs them. In no case does such use become adverse until some superior right is infringed and the owner of it suffers deprivation. It if becomes and continues adverse and exclusive for the full period prescribed by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription.' In *Talbot v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111, we find this language: 'The plaintiffs had use for the water only for agricultural and mining purposes, and, when not so using it, the law required them to turn it back into the stream for the use of this defendant, or any other person or corporation which might have a right to use it. No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the prior appropriator has no use for it invades no right of his, and cannot even initiate a claim adverse to him.'"

The following authorities also support the views above expressed: *Lakeside Irrigation Co. v. Kirby*, 166 S. W. 715; *Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Stratton v. Hermvan Boys' School*, 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57; *Elliot v. Fitchburg*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Kinney on Irrigation and Water Rights* (2d Ed.) § 1606, 1612; *San Joaquin, etc., Co. v. Fresno, etc., Co.*, 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; *St. Martin v. Skamania Boom Co.*, 79 Wash. 393, 140 Pac. 355; *Well on Water Rights in Western States*, § 588; *San Juan Ditch Co. v. Cassin*, 141 S. W. 815; *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751; *Kinney on Irrigation and Water Rights*, § 1050; *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. 1054; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623; *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523; *Carson v. Hayes*, 39 Or. 97, 65 Pac. 814; *Brossard v. Morgan*, 7 Idaho, 215, 61 Pac. 1031; *Bree v. Wheeler*, 129 Cal. 145, 61 Pac. 782; *Clark v. Ashley*, 84 Colo. 285, 82 Pac. 588; *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743. In addition to the above, we have a statutory provision which provides that, when water is diverted to nonriparian land, the same shall not be done to the prejudice of a lower owner without his consent, except after condemnation of such water as provided by law.

[6] The appellants, in their cross-action to establish prescriptive title to the water they were using, did not allege, neither did they prove, that none of appellees nor their grantors during the period it is claimed the prescriptive title was matured labored under disability of any kind. It seems to be well settled in Texas that, where it is sought to maintain a prescriptive right to a highway, it is necessary to allege and prove that none of the owners of the servient estates, nor their grantors, labored under disability during the prescriptive period. *City of Austin v. Hall*, 93 Tex. 595, 57 S. W. 563; *Evans v. Scott*, 37 Tex. Civ. App. 373, 83 S. W. 874; *Saunders v. Simpson*, 97 Tenn. 382, 37 S. W. 195; *Wright v. Fanning*, 86 S. W. 786; *Dees v. Harrison*, 95 S. W. 1093; *Travis v. Hall*, 27 Tex. Civ. App. 95, 65 S. W. 1077; *West v. City of Houston*, 163 S. W. 679; *Railway Co. v. Gaines*, 27 S. W. 266; *Williams v. Kuykendall*, 151 S. W. 629.

Kinney, in his work on *Irrigation and Water Rights* (volume 3, p. 2797, 2d Ed.), says, in reference to the pleadings necessary by the respective parties:

"Where, however, the plaintiff chooses to set up his claim as having been acquired by adverse user sufficient to amount to a prescriptive right, it is necessary that he plead all of the essentials necessary for the acquisition of the right by that manner, or as prescribed by the statutes for pleadings in such cases. Where, however, in answer to the claims set forth by the plaintiff, the defendant relies upon adverse user amounting to prescription, he is held to a much stricter rule in his pleading than is the plaintiff. The weight of authority holds that it is not sufficient to simply set up a general allegation of ownership of the right, but that he must plead his adverse user with all the particularity required for such pleadings in the jurisdiction where the action is pending. The defendant may plead the statute, by reference to the appropriate section thereof; or, if he chooses, he may plead the facts constituting the limitation or prescriptive right. In doing the latter, however, it is incumbent upon him to plead all the elements entering into a prescriptive right."

This is given to show the strictness required in pleading a prescriptive title. It will not be denied that, if any riparian owner should be under legal disability during the prescriptive period, title would not mature against him. There is no essential difference between a prescriptive right to a road and a title to use the water of a stream. In the one case the right by prescription to the road rests upon a presumption that the owners of the servient lands granted the easement and the grant has been lost; while in the other case the same presumption is the basis of the prescriptive right or title to the water. Judge Brown, in *City of Austin v. Hall*, *supra*, says:

"To sustain this claim, it must appear that the use upon which the right is predicated has continued for the requisite time, during which the owner was not under disability to resist the claim. 2 Washburn on Real Property, 327, § 20; *Watkins v. Peck*, 13 N. H. 376 [40 Am. Dec. 156]; *Melvin v. Whiting*, 13 Pick. [Mass.] 188; *Ferrell v. Ferrell*, 1 Baxt. [Tenn.] 332; *Saunders v. Simpson* [97 Tenn. 382] 37 S. W.

195. Mr. Washburn states the rule in this language: "To give a user this effect, it must be uninterrupted in the land of another by the acquiescence of the owner, for a period of at least 20 years (or the period of limitation of the state where the land lies), under an adverse claim of right; while all persons concerned in the estate in or out of which it is derived are free from disability to resist it, and are seized of the same in fee and in possession during the requisite period."

There is no sufficient reason why there should be any stricter requirements in the highway case than in case of water rights. It has been argued that one is an easement and the other is property; but the method of acquiring them are identical, and we think the requirements of the pleading should be the same.

Appellants did not plead that none of appellees nor their grantors, during the prescriptive period, were not under disability; and any evidence thereon would not be responsive to the pleadings.

[7, 8] For that matter, taking all the testimony from appellants' standpoint on the matter of legal disability, it only inferentially goes to show that none of the parties were under legal disability, while the direct and positive evidence of appellees showed that the Thompsons, who were appellees' predecessors in title during the prescriptive period, left a minor son whose minority extended over a good portion of time prescriptive title is claimed to have been matured. The lands owned by appellees and involved in this suit were purchased by P. W. Thompson June 1, 1889. Thompson was married to Jeanette Aitchson, June 16, 1885, and she died in October 1892, leaving three children, the oldest of whom could not have become 20 years old before about March 16, 1907. P. W. Thompson died in 1910. This suit was filed February 12, 1912, and appellees had not owned the land 10 years at the time the suit was filed. The presumption of law would be that the land acquired by Thompson during coverture was the community property of himself and his wife, and, when she died, that the surviving child would take an interest in the property.

There is no evidence to show that appellee or their predecessors in title were injured by the cessation of the flow of Las Moras creek on or prior to February 12, 1902, and this suit was filed February 12, 1912; and we have held that no cause of action existed until an injury was shown. *Biggs v. Liffingwell*, 132 S. W. 902; *Cluck v. Railway Co.*, 34 Tex. Civ. App. 452, 79 S. W. 80; *Santa Rosa Co. v. Pecos Co.*, 92 S. W. 1014; 40 Cyc. 608, 696-698. Some of the witnesses say that at different times they had seen the creek when it was not running, but whether from drouth or from diversion of the water for irrigation does not appear. We do not recall any evidence showing a cessation of flow or a diminution thereof by reason of appellants' use prior to February

12, 1902, which must have been shown to fill out the prescriptive title.

[8,10] The evidence does not show with any degree of certainty how much water appellants took regularly during the prescriptive period, but it is urged that they take prima facie to the full capacity of their ditches. This, however, is not shown, and common knowledge tells us that the flow in any stream or ditch will depend on other conditions, such, for instance, as the water fall or decline, whether it be a swift flowing stream or slow and sluggish. A small ditch, in one instance, might carry more water than one twice as large which came from a slow-flowing stream and had little decline. In so far as the amount of water regularly appropriated, or what was reasonably necessary, to irrigate the lands is not shown, with any degree of certainty, and since title is claimed by reason of appropriation and use, appellants had the burden of showing with reasonable certainty what part of the flow of the stream they were laying claim to during the time they are maturing their prescriptive title. *Biggs v. Miller*, 147 S. W. 632; *Biggs v. Lee*, 147 S. W. 709; *Salem Co. v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; *Irving v. Media*, 194 Pa. 648, 45 Atl. 482; *Farmers' Co. v. Irrigation Dist.*, 16 Idaho, 525, 102 Pac. 481; *Salt Lake City v. Water Co.*, 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648; *Cyc.* vol. 40, pp. 734, 736; and *Hall v. Carter*, 33 Tex. Civ. App. 230, 77 S. W. 19. They have not alleged, neither have the appellants proven, that every year during the prescriptive period their diversion and appropriation of water caused the stream to cease to flow by appellees' land. *Hall v. Carter*, 33 Tex. Civ. App. 230, 77 S. W. 19; *Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579, 110 Pac. 535; *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981, 133 Am. St. Rep. 582; *Meng v. Coffee*, 67 Neb. 500, 93 N. W. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697. Neither was it pleaded or proven how much water was reasonably necessary for the irrigation of appellants' land when properly prepared for cultivation and in reasonably good condition for irrigation. *Farmers' Co. v. Irrigation Dist.*, 16 Idaho, 525, 102 Pac. 481. Likewise the quantity of water used by the Galveston Harrisburg & San Antonio Railway Company is shown to have varied, and for the last few years it was shown that it had varied from 50,000 gallons to 75,000 gallons per day.

[11] But even if this were not true, the railway company made a common cause with the other defendants and filed a joint motion for a new trial, in which it was claimed that the verdict was against the weight of the evidence. And it has been held that, where this is done, the same should be overruled, if the evidence supports the verdict as to any of the defendants. *M., K. & T. Ry. Co. v. Brown*, 155 S. W. 979.

The judgment entered is in the very nature of the litigation, somewhat uncertain, but in matters of this kind we think it is about as certain as it can be made. There is not such uncertainty but that appellants may understand its terms.

We have carefully examined all assignments, and, finding no reversible error, they are overruled, and the judgment is in all things affirmed.

# SCARBOROUGH v. DARNELL & STAGNER. (No. 8025.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 31, 1914.)

## 1. BROKERS (§ 65\*)—LIABILITY—ACTION FOR NEGLIGENCE—ESTOPPEL.

Where a broker represented to a purchaser that the owner's lot was larger by about one-seventh than it really was, so that the purchaser refused to perform except at a reduced price and the owner's son represented her in signing the contract with the purchaser, the owner could not complain that she had been prejudiced by the misrepresentations of the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

## 2. BROKERS (§ 38\*)—LIABILITY—ACTION FOR NEGLIGENCE.

An owner, the dimensions of whose lot had been misrepresented by his broker, so that the purchaser, on discovering that the actual dimensions were less, required the owner to remit part of the purchase price, could not recover that amount from the broker, since such misrepresentation did not damage him in any sense.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 31-36; Dec. Dig. § 38.\*]

## 3. BROKERS (§ 65\*)—COMPENSATION—ACTING FOR BOTH PARTIES.

A broker, who represented an owner and effected an exchange of his property upon terms finally satisfactory to him, and who in no way represented the purchaser, was entitled to his commission; the fact that a third person represented both the broker and the purchaser being a matter of which the owner could not complain.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\*]

Appeal from Eastland County Court; E. A. Hill, Judge.

Action by Darnell & Stagner against Mrs. Willie L. Scarborough. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. J. Butts, of Cisco, for appellant. Mahaffey & Fulwiler, of Abilene, for appellees.

SPEER, J. Darnell & Stagner sued Willie L. Scarborough to recover commissions as real estate brokers for having effected an exchange of her real property with one W. P. Pulley. The defendant answered admitting the plaintiffs' cause of action, except in so far as the same might be defeated by her affirmative plea that she had been damaged in an amount in excess of the commissions sued for by reason of the fact that plaintiffs as her agents had wrongfully and negligently misrepresented her property to Pulley, upon dis-

covering which Pulley had declined to go on with the trade unless she would release him from the payment of some \$995, which she had been forced to do, to her damage in this amount. The case was tried before the court without a jury, and judgment rendered for the plaintiff, and the defendant has appealed.

[1, 2] There are only two assignments of error. The first is to the effect that the judgment is contrary to, and not supported by, the law and evidence, in this, that the evidence shows appellees as appellant's agents represented to the purchaser, Pulley, that her lot was 80 by 140 feet in size, whereas, the same was only 75 by 130 feet, thereby inducing him to agree to pay therefor \$995 more than he was willing to pay after having learned the real size of her lot. The facts further show, if it be conceded, as it must, that appellees did misrepresent the size of appellant's lot to Pulley, that appellant's son, a man of mature years, was authorized to represent appellant, and did represent her, in the matter of signing up the contract with Pulley, whereby the exchange of the property was agreed on, and for this reason, if no other, appellant cannot complain that she has been prejudiced by the representations of the brokers, Darnell & Stagner. But aside from this, we cannot conceive of any principle of law, to say nothing of ethics, that would authorize appellant to recover damages of her agents for having misrepresented her property whereby an intending purchaser was induced to agree to pay more therefor than he otherwise would. It is undisputed appellees (unintentionally no doubt) did misrepresent the size of appellant's lot, and that, upon Pulley's discovering this fact, appellant remitted \$995 of the agreed purchase price. To permit her to recover this sum from her agents upon their false representations to Pulley would be to permit her to recover something she has never lost. The misrepresentations of appellees, though they failed, through the timely discovery of Pulley, to benefit her, certainly have not damaged her in any sense.

[3] The remaining assignment embodies the proposition that appellees should not recover the commission because one Mayfield, a sort of go-between, demanded and received a commission for bringing about the exchange, both from appellees and from the purchaser, Pulley. The principle invoked by appellant, to wit, that an agent cannot recover his commissions from his principal where he, without the knowledge of his principal, also represents the other party to the contract, has no application to the facts of this case. Appellees at no time and in no sense represented Pulley. They did represent appellant, and under the undisputed facts effected an exchange of her property upon terms finally satisfactory to her, or at least which she accepted, and are therefore entitled to the

commissions. If there was any duplicity upon the part of any one, it was upon the part of Mayfield, who represented both appellees and Pulley; but this was a matter of which they alone can complain.

The judgment is affirmed.

**TANNEHILL et al. v. TANNEHILL et al.**  
(No. 8021.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 24, 1914.)

**1. HUSBAND AND WIFE (§ 221\*)—WITNESSES (§ 139\*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.**

Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624), enlarging the property rights of married women, and giving them control over their separate estates, does not expressly or by necessary implication repeal Rev. St. 1911, art. 1841, providing that the husband and wife shall be jointly sued for all separate debts and demands against the wife, and hence, in a suit to partition land which a married woman claimed by gift from her deceased brother, the husband was a necessary party and could not, by filing a disclaimer, become a competent witness concerning the gift.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 707, 802-806, 968, 973, 976½; Dec. Dig. § 221; \*Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

**2. WITNESSES (§ 140\*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.**

Acts 38d Leg. c. 32, giving a married woman control over her separate property and over the rents from her separate real estate, does not deprive such rents of their character as community estate, and hence, in an action to partition land which a married woman claimed by gift from a decedent, her husband, even though not a formal party, had such an interest as rendered him an incompetent witness within the statute relative to testimony concerning transactions with a decedent in suits by or against his heirs.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598-618; Dec. Dig. § 140.\*]

**3. WITNESSES (§ 139\*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.**

In a suit to partition the land of a decedent, the testimony of a defendant that she claimed the land in controversy by gift from the decedent was properly excluded, as it violated the statute relative to testimony concerning transactions with a decedent in suits by or against his heirs.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

**4. APPEAL AND ERROR (§ 499\*) — RECORD — MATTERS PRESENTED FOR REVIEW.**

The refusal of special charges will not be reviewed, where the bill of exceptions fails to show that they were requested before the main charge was read to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

**5. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF STATEMENT ACCOMPANYING ASSIGNMENT.**

An assignment of error complaining of the refusal of special instructions will not be considered, where it is not followed by a statement from the record showing that such charges were called for by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**6. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF STATEMENT ACCOMPANYING ASSIGNMENT.**

In a suit to partition land of a decedent which defendant claimed by gift from the decedent, a statement under an assignment of error complaining of a peremptory instruction for plaintiff, stating that defendant introduced a letter, "testimony as admitted reasons for gift and capacity of donor, \* \* \* evidence of completed gift, \* \* \* testimony of permanent and valuable improvements with separate means of defendant, \* \* \* and knowledge and acquiescence of donor until his death two years after delivery of the property and execution of gift," with references to the names of the witnesses and pages of the statement of facts, was insufficient, under rule 34 for Courts of Civil Appeals, providing that, in propositions relating to fundamental errors apparent upon the record, enough must be stated to make the error which pervades the case obviously apparent without requiring the court to search through the record to find errors which it will not do unless properly pointed out, if the judgment is one which the trial court is competent to render.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Action by Harriet Tannehill and others against Della Tannehill and others. From a judgment in favor of plaintiffs, the defendant named appeals. Affirmed.

J. P. Graham, of Comanche, for appellant. Goodson & Goodson, of Comanche, for appellees.

SPEER, J. This was an action for partition brought by appellees against appellants, seeking to partition a number of blocks of land in the city of Comanche, wherein appellant Della Tannehill claimed, in addition to her one-third interest as heir, a fee-simple title to the E. ½ of the S. E. ¼ of block No. 39 by virtue of a parol gift from her deceased brother, Milo Wright, the common source of title. After the evidence was in, the trial court instructed a verdict for the plaintiffs, and the defendant Della Tannehill has appealed.

[1, 2] The first ground of error alleged is that the court erred in overruling the disclaimer of J. A. Tannehill, appellant's husband, and in sustaining objections to his testifying as to statements by and transactions with the deceased, Milo Wright, tending to show a completed gift of the property in controversy to appellant. The argument is advanced that the recent act of the Thirty-Third Legislature (Acts 33d Leg. p. 61), enlarging the property rights of married women, and especially giving them control over their separate estates, makes it unnecessary for the husband to be sued with the wife in actions such as this, and makes admissible the testimony offered in the present case. While it is true the act in question does very materially enlarge the right of control of married women over their separate estates, it is also true the act does not

expressly nor, as we think, by necessary implication repeal article 1841 of the Revised Statutes, declaring that:

"The husband and wife shall also be jointly sued for all separate debts and demands against the wife, but, in such case, no personal judgment shall be rendered against the husband."

In all suits against the wife, it is necessary that the husband be sued with her, and it would be error to dismiss as to him and proceed against the wife alone. Speer's Law of Married Women, § 296; Taylor v. Bonnett, 38 Tex. 521. Besides, if the husband were not a formal party to the action, he would yet have such interest in the subject-matter of the litigation as to preclude his testifying to a transaction with the deceased by which his wife became owner of the property. While the recent amendment already referred to gives the wife control over her separate property and over the rents from her separate real estate, it nevertheless does not change the character of such rents so as to make them the wife's separate property. They continue to belong to the community estate, and the husband, therefore, is the owner of a one-half interest therein. It follows he has a very substantial interest in the wife's separate lands, and such an interest as to make him a party, within the meaning of the statute forbidding one to testify to transactions with the deceased in suits by or against the heirs.

[3] There was no error in refusing to permit appellant herein to testify that she claimed the land in controversy by gift from her deceased brother, Milo Wright, since such testimony very clearly was a violation of the statutes last above referred to.

[4, 5] The fourth assignment of error is not considered, for the reason it complains of the court's refusal to give special instructions Nos. 1, 2, 3, 4, 5, 6, and 7, because of an improper grouping, and because the bills of exception fail to show that the special charges were requested before the court had read his main charge to the jury, and because, further, the assignment is not followed by a statement from the record sufficient to show that such charges were called for by the evidence.

[6] The fifth assignment of error complaining of the peremptory instruction to find for the appellees is overruled, because the statement submitted thereunder is insufficient under the rules, and we are not required to search the record for the facts, even in a case of fundamental error, where the judgment is one which the trial court is competent to render in the case. See rule 34 (142 S. W. xlii). The statement under this assignment, which we hold to be insufficient, after a recitation of the pleadings of the appellant, is as follows:

"Della Tannehill was introduced in evidence; letter from Milo Wright to Della Tannehill. Facts, p. 11. Witness Jacobs Facts p. 13;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexer

appellant Della Tannehill's testimony as admitted reasons for gift and capacity of donor, facts page 12; J. A. Tannehill's testimony, facts page 9; Evidence of completed gift witness Jack Tannehill's testimony facts pages 16 and 17; Testimony of permanent and valuable improvements with separate means of defendant, J. A. Tannehill's testimony, facts pp. 9 and 10. Della Tannehill's page 12; and knowledge and acquiescence of donor until his death two years after delivery of the property and execution of gift already cited. Jack Tannehill and Jacob's testimony before cited."

This very clearly is a violation of the rules according to the decisions of this court. *Gibson v. Oberfelder*, 148 S. W. 829.

The seventh, eighth, and ninth assignments are overruled, for the reason immediately above given; the only statement under these assignments being a mere reference to the preceding statement, which we have held to be insufficient.

We find no error in the judgment, and it is affirmed.

**ELSER v. PUTNAM LAND & DEVELOPMENT CO. (No. 8032.)†**

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 7, 1914.)

**1. APPEAL AND ERROR (§ 263\*)—PRESENTATION BELOW—ISSUE—EVIDENCE.**

Under Acts 33d Leg. c. 59, providing that rulings on instructions shall be regarded as approved unless excepted to, an objection that the undisputed evidence rendered erroneous the submission of a special defense that the plaintiff broker had failed to comply with his contract could not be considered by the appellate court, where defendant did not except below to the submission of such defense, or request an instructed verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.\*]

**2. APPEAL AND ERROR (§ 263\*)—"INVITED ERROR"—INSTRUCTIONS NOT EXCEPTED TO.**

Since under the express provisions of Acts 33d Leg. c. 59, an instruction not excepted to is deemed approved, error in giving same when not authorized by the evidence is an "invited error" of which no advantage can be taken on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.\*]

For other definitions, see Words and Phrases, First and Second Series, Invited Error.]

**3. BROKERS (§ 88\*)—ACTION FOR COMMISSION—SUBMISSION OF ISSUES—SUFFICIENCY OF EVIDENCE.**

In a broker's action for a commission, a witness' testimony that he was pretty certain that plaintiff never sold, or caused to be sold, one lot, and that he did not work at his contract any, but took up a line of development work for another company, authorized submitting to the jury whether plaintiff had abandoned his contract before any sales had been made.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

Error from District Court, Callahan County; Thomas L. Blanton, Judge.

Action by Max Elser against the Putnam Land & Development Company. Judgment

for defendant, and plaintiff brings error. Affirmed.

J. J. Butts, of Cisco, and J. Rupert Jackson, of Baird, for plaintiff in error. F. S. Bell, of Baird, for defendant in error.

CONNER, C. J. Max Elser prosecutes this writ of error complaining of a judgment against him in a suit that he instituted against defendant in error to recover real estate commissions alleged to be due upon the written contract declared upon. By the terms of the contract the development company employed Elser as its exclusive agent to sell certain lots of land in the town of Putnam, agreeing to pay him 20 per cent. of the proceeds realized upon all sales by whomsoever made during the life of the contract. The contract contained a stipulation that:

If Elser should fail "to diligently, industriously and continuously push and prosecute the sale of said lot as herein provided, then this contract shall be void at the option of said company."

The clause of the contract above quoted was made the ground of one of the special defenses, which was submitted as an issue to the jury, both in the general charge and by a special instruction, to neither of which has error been assigned.

[1] Substantially but one question is presented for our determination, and that is whether the evidence supports the verdict and judgment against the plaintiff in error. The contentions are that the "uncontroverted evidence shows that from January 10, 1910 (the date of the contract), to June 30, 1910 (the date of the last sale), property covered by said contract of agency was sold to the value of \$6,969," upon which the plaintiff was entitled to commissions as specified in the contract; and further that:

"The uncontradicted evidence shows that if plaintiff did abandon the contract of agency, or cease to make any effort to perform his duties under it, he did so after the last sale of property on which he claims a commission."

The act approved March 29, 1913 (Gen. Laws 1913, p. 114), which we have several times had occasion to consider, provides, among other things, that:

"The ruling of the court in giving, refusing or qualifying of instructions to the jury shall be regarded as approved unless excepted to as provided for in the foregoing articles."

In the case before us, the issues raised by the pleadings and evidence were generally submitted to the jury by the court's charge, including the special defense that the plaintiff had failed to comply with his contract "by diligently, industriously, and continuously pushing and pursuing a sale of the lots" involved in the controversy. No objections to the court's general charge, nor to the special charge submitting the defense noted, were made in accordance with the terms of the act of the Legislature referred

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on motion for rehearing, see 171 S. W. 1200.

to. So that, if we are to give the effect that the law says shall be given, when the issues are submitted without objection, the plaintiff in error is in the attitude of a litigant who, after the introduction of the evidence, has submitted to him the charge of the court and special charges given, and who has "approved" such charges, thus legally assuming the position that the evidence before the court requires the submission of the issue to the jury for determination. If the facts were clearly uncontroverted which entitled the plaintiff in error to a judgment, he should have requested an instructed verdict. This he did not do, but assumed, as we have seen, the inconsistent position of saying to the court, in effect, this case cannot be taken from the jury on the ground that there is no evidence to support the cause of action or defense.

[2] In the case of Cleburne Street Ry. Co. v. Barnes, 168 S. W. 991, this court, among other things, said:

"If, as provided by the amended statutes (act of 1913 above mentioned), a charge given without objection must be regarded as approved, it follows logically, we think, that parties who thus approve the charge are in the same situation as if that charge had been requested by them."

If the proposition embodied in the quotation is correct—and we think it is—it can hardly be contended that plaintiff in error, under the circumstances stated, will now be heard to say that the evidence in his favor is "uncontroverted," for by a long line of decisions in this state it has been held that an appellant cannot complain of a charge given at his request. It is held to be an invited error of which he can take no advantage on appeal. We conclude that plaintiff in error cannot now be heard upon the only propositions he urges before us.

[3] Moreover, if for any reason what we have said is not a sufficient answer to plaintiff in error's assignments, the court, among other things, charged the jury, in substance, that if "plaintiff abandoned said contract, \* \* \* you could not find for the plaintiff for any sales made by said company after said abandonment," etc. As already stated, no proper objection was made to this charge, and, among other things, Mr. Carter for the defendant in error testified that:

"I am pretty certain that plaintiff never sold nor caused to be sold one lot. He did not work at his contract any, but took up a line of development work for another company."

This testimony is broad enough to include the conclusion that plaintiff in error abandoned the contract before any sales were made upon which he was entitled to commissions, and indulging every reasonable inference arising from the testimony so quoted in aid of the verdict and judgment, as it is our duty to do, we would feel unable to support plaintiff's contention that the uncontro-

verted evidence entitled him to the verdict. We are of the opinion that the judgment must be affirmed, and it is so ordered.

Affirmed.

### HANCOCK v. HAILE. (No. 8018.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 14, 1914. Rehearing Denied Nov. 21, 1914.)

#### 1. INSANE PERSONS (§ 79\*)—CONTRACTS—RECOVERY OF PROPERTY—CONVERSION.

Where plaintiff, while insane, conveyed personal property to defendant in consideration of care, etc., and, after having been restored to capacity, alleged that defendant, as soon as the contract was delivered, appropriated the property, and that the necessities furnished by defendant were much less in value than the property, plaintiff was entitled to recover the difference, though defendant's appropriation did not amount to a technical conversion.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 138, 141; Dec. Dig. § 79.\*]

#### 2. INSANE PERSONS (§ 73\*) — CONTRACTS — VOIDABLENESS.

A contract by an insane person transferring all his personal property to defendant in consideration of care, etc., was voidable only.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 125, 132-138, 153; Dec. Dig. § 73.\*]

#### 3. INSANE PERSONS (§ 75\*)—CONTRACTS—NECESSARIES—EXTENT OF LIABILITY.

The extent of an insane person's liability for necessities is their reasonable value, regardless of the price he agreed to pay.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 89, 128, 129; Dec. Dig. § 75.\*]

#### 4. INSANE PERSONS (§ 79\*) — LIABILITY FOR NECESSARIES—REASONABLE VALUE.

Where plaintiff, while insane, transferred his personal property to defendant in consideration of the latter's agreement to care for him, and the property transferred was worth much more than the necessities furnished, plaintiff was not required to prove an actual tender of the value of the necessities in order to recover the difference between their value and that of the property.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 138, 141; Dec. Dig. § 79.\*]

#### 5. JUDGMENT (§ 256\*)—FORM—VERDICT.

A judgment must follow the verdict, though there be good grounds to set the verdict aside on a motion for new trial.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 446-454; Dec. Dig. § 256.\*]

#### 6. TROVER AND CONVERSION (§ 53\*)—DAMAGES—INTEREST.

Where plaintiff was entitled to recover the value of certain animals as damages for defendant's wrongful appropriation thereof, he was entitled also to interest, as a part of such damages, from the date of the conversion.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 254; Dec. Dig. § 53.\*]

#### 7. INTEREST (§ 66\*)—PLEADING.

Plaintiff, in a suit for conversion, in his original petition prayed for general relief, but limited his claim for interest to the time beginning January 8, 1900, and ending December 1, 1913. Defendant's answer, however, alleged that the property was delivered to him under contract March 21, 1898, and asserted title

thereto by virtue of the contract, whereupon plaintiff replied by supplemental petition, alleging that, after the execution of the contract, defendant took possession of the property and converted it to his own use. *Held*, that the pleadings justified an award of interest from March 21, 1898, and that plaintiff was not limited to interest from January 8, 1900.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 147; Dec. Dig. § 66.\*]

**8. TROVER AND CONVERSION (§ 46\*) — VALUE OF PROPERTY.**

Where, in trover for certain horses, the jury found that the conversion took place March 21, 1898, at which time the horses were worth \$10 a head, plaintiff was not entitled to recover at the rate of \$15 a head, because of proof that they were worth that amount in January, 1900.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 263; Dec. Dig. § 46.\*]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Action by E. L. Haile against J. B. Hancock. Judgment for plaintiff, and defendant appeals. Affirmed.

Marshall Ferguson and Keith & Johnson, all of Stephenville, for appellant. Chandler & Pannill, of Stephenville, for appellee.

DUNKLIN, J. E. L. Haile was plaintiff in the trial court, and, from a judgment in his favor against J. B. Hancock, the defendant Hancock has appealed.

In his petition plaintiff alleged that in January, 1900, he was convicted of lunacy, and thereafter confined in the insane asylum at Terrell until March, 1910, when his reason was restored and he was duly discharged from said asylum; that, immediately after his conviction for lunacy, the defendant unlawfully took possession of all of plaintiff's property, consisting of a stock of horses and mules, farming implements, etc., of the value of \$6,572, and converted the same to his own use. He prayed for judgment for the value of said property so converted, together with 6 per cent. interest thereon from the alleged date of conversion. He also prayed for general relief.

In reply to that petition the defendant denied the alleged wrongful conversion of the property, and further alleged that he purchased the property from the plaintiff on March 21, 1898, under a written contract signed by both parties, by the terms of which all of the property mentioned in plaintiff's petition was transferred to the defendant in consideration of the defendant's obligation to "care for and provide good food and clothing and a home and take care of said E. L. Haile as long as the said Haile shall live, unless the said Haile shall become dangerous and confinement shall become necessary," and further to pay to said Haile the sum of \$300 additional if said Haile should be restored to sanity at the end of three years from the date of the contract. The defendant alleged that plaintiff was of sound mind at the time said contract was executed;

that the same was executed at plaintiff's suggestion; that plaintiff was moved to enter into said contract by reason of the fact that he had theretofore suffered from several attacks of epileptic fits and had been advised by competent physicians that epilepsy was incurable, that he would gradually grow worse, and that he would likely eventually go mad, and that it was advisable and important for him to adjust his business and to make adequate preparation for such consequences. The defendant further alleged that the plaintiff did not recover from said disease within three years, and that the defendant fully performed the obligations under said contract by furnishing board and lodging, clothing, medicine, physicians' bills, etc., from the date of the execution of the contract up to January, 1900, an itemized account of which was specifically pleaded by the defendant, and all of which expenditures the defendant alleged were necessary for the maintenance, care, and support of the plaintiff. Defendant further alleged that all the property conveyed to him did not exceed in value the sum of \$750, while the amount claimed for necessities furnished to the plaintiff was alleged to be a sum far in excess of the value of the property received by him.

By supplemental petition plaintiff alleged that, at the time the contract was executed, he was of unsound mind, suffering from epilepsy, and unable to know and comprehend the legal effect of said contract, which was therefore void, and that such unsoundness of mind continued from March 21, 1898, the date of the contract, to January 5, 1900, at which time he was committed to the insane asylum and there confined until March, 1910; that after the execution of the contract defendant took possession of plaintiff's property and converted the same to his own use and benefit. Plaintiff further alleged, in effect, that he was willing for the reasonable value of all such necessities as were furnished to him by the defendant to be deducted from the amount which the defendant justly owed him for the property converted, but further alleged that the amounts claimed by the defendant for the same were unreasonable and far less than the value of the property converted.

The trial of the case was before a jury, who returned findings upon special issues submitted by the court. As shown by the verdict, the jury found that on March 21, 1898, the date of the execution of the contract, plaintiff was of unsound mind, and that he did not at that time have the capacity to know and understand the legal effect of the contract; that such unsoundness of mind extended up to January 5, 1900; that on January 5, 1900, it became necessary, on account of plaintiff's insanity, to place him in confinement, and that he did not recover his sanity until March, 1910, about 16 or 17

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

months prior to the institution of this suit; that from March 21, 1898, to January 5, 1900, a period of 21 months and 15 days, the defendant provided food and clothing and a home for plaintiff, all of which was necessary for plaintiff's welfare; and that his services for so doing were reasonably worth \$32 per month (aggregating \$688); and that defendant also expended the additional sum of \$256 for the purchase of clothing, medicine, for doctors' bills, railroad fare, and other items claimed in the defendant's answer, all of which additional expenditures were likewise necessary. The jury further found that the defendant Hancock did not exercise any undue influence over plaintiff to induce him to execute the contract pleaded by the defendant, and which was introduced in evidence. The jury further found that the defendant received from the plaintiff under said contract 125 head of horses on March 21, 1898, which were then worth \$10 per head (aggregating \$1,250), and that said horses were worth \$15 per head in January, 1900 (aggregating \$1,875); that defendant also received from plaintiff under the contract certain farming implements and other items of personal property of the value of \$7.50. The jury further found that the horses received by the defendant from plaintiff under the contract were converted to defendant's own use and benefit in March, 1898.

By different assignments of error appellant insists, substantially, that as the contract in question was executed by the plaintiff without any undue influence exercised upon him by the defendant, and without any knowledge on the part of the defendant of the insanity of plaintiff at the time, and that as the consideration passing from the defendant to the plaintiff for said contract was for necessities, the same was binding upon the plaintiff until he elected to rescind it and tender back the consideration received by him; that the contract was not void, but voidable only; that plaintiff's suit was for damages for a wrongful conversion of the property based upon the claim that the contract was absolutely void; that the contract being voidable only, and not void, and as plaintiff did not elect to rescind the same and restore to the defendant the consideration received by him and did not elect to affirm the contract and sue for damages for its breach, the facts found by the jury would not support a recovery for any amount.

[1] We do not think that the designation by plaintiff of the wrongful acts of the defendant as amounting technically to a conversion of the property would, in any event, be of controlling effect. Besides, according to the allegations of plaintiff's pleadings and also those contained in the defendant's answer, the defendant did appropriate plaintiff's property to his own use and benefit, under a claim of title thereto, as soon as the contract in controversy was executed and delivered. If, as alleged by the plaintiff,

he was of unsound mind at the time the contract was executed, and if the value of the property conveyed to the defendant exceeded the reasonable value of necessities furnished to him by the defendant, then a cause of action to recover was alleged, independent of the question whether or not the appropriation of the property by the defendant could be technically termed a conversion thereof. Furthermore, in his pleadings plaintiff prayed for general relief upon all the facts alleged. *Lewis v. Blount*, 139 S. W. 7.

[2] It is well settled by the authorities that the contract was not void, but was voidable only. *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115; *Mitchell v. Inman*, 156 S. W. 290.

[3] It is also well settled that, while an insane person or a minor is bound by his contract for necessities furnished him, the extent of his obligation thereunder is to pay the reasonable value of such necessities, irrespective of the price which he has agreed to pay. *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Smith v. Crohn*, 37 S. W. 469; 1 *Elliott on Contracts*, § 295.

[4] Plaintiff having offered in his pleadings to allow as a credit upon his demand the reasonable value of the necessities furnished him by the defendant, which plaintiff alleged was far less than the value of the property belonging to him and converted by the defendant, it was unnecessary to allege or prove an actual tender of money in a sum equal to the value of such necessities. *G., H. & S. A. Ry. Co. v. Cade*, 93 S. W. 124; *I. & G. N. Ry. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189; *Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117.

By another assignment appellant insists that the court erred in rendering judgment for plaintiff because the finding of the jury that defendant converted the property to his own use is unsupported by any evidence to show such a conversion.

[5] It would be a sufficient answer to this assignment to say that the judgment must always follow the verdict, even though there be good grounds to set aside the verdict upon a motion for a new trial. *Fant v. Sullivan*, 152 S. W. 515, and cases therein cited. However, aside from that rule, we are of the opinion that the verdict imports a finding in accordance with the undisputed evidence and the pleadings by the defendant himself that he did appropriate plaintiff's horses to his own use on March 21, 1898. If the purpose of this suit had been to recover title and possession of the horses, and if such relief was granted, then perhaps there could be no recovery of interest *eo nomine*, upon the value of the horses during the time plaintiff was deprived of their possession.

[6] But if, under the pleadings, evidence, and the verdict of the jury, plaintiff was entitled to recover the value of the animals as damages for the wrongful appropriation of

them by the defendant, then we can perceive no valid reason why interest should not be allowed as a part of such damages from the date of such wrongful appropriation. *Barron v. San Angelo Nat. Bank*, 138 S. W. 142. We do not construe *Lewis v. Blount*, 139 S. W. 10, cited by appellant, to support his contention that no interest could have been allowed until demand of the defendant for restoration of the property or to pay the value thereof, as contrary to our conclusion last stated.

[7] Appellant insists further that it was error to allow plaintiff interest for a period of 15 years, as he insists was done by the court in rendering judgment upon the verdict. One of the reasons assigned for this contention is that plaintiff limited his claim for interest to the period of time beginning January 8, 1900, and ending on the date of the judgment, December 1, 1913. While it was alleged in the original petition that the defendant converted the property on January 8, 1900, yet the defendant in his answer alleged that the property was delivered to him under the contract on March 21, 1898, and that he asserted title thereto under and by virtue of that contract. In reply to this answer, plaintiff filed a supplemental petition alleging that, after the execution of the contract, defendant took possession of the property and converted the same to his own use and benefit. Further in this petition, as in his original petition, plaintiff prayed for general relief. Such being the pleadings, plaintiff was entitled to recover interest from March 21, 1898, instead of from January 8, 1900.

[8] By cross-assignments appellee insists that judgment should have been rendered in his favor for a sum in excess of the amount of his recovery. By his first assignment the contention is made that the judgment should have been for the sum of \$2,207. This contention is based upon the finding of the jury that the horses were worth \$15 per head in January, 1900, and that interest should be allowed on that sum, and the further contention that in defendant's answer he limited his claim for board and care of appellee to 15 months instead of 21 months and 15 days, as found by the jury. This assignment is overruled, first, because of the finding by the jury that the conversion took place March 21, 1898, at which time the value of the horses was \$10 per head. Furthermore, in defendant's account for necessities furnished, filed as a part of his answer, we find two items, one for personal care and board of the plaintiff for 15 months, and one for money advanced to plaintiff's brother, C. G. Halle, for board and clothing of the plaintiff, which the evidence sustains. Evidently the finding of the jury that the defendant provided food, clothing, and a home for the plaintiff from March 21, 1898, to January 5, 1900, a period of 21 months and 15 days, and that the same

was reasonably worth \$32 per month, was intended to cover the amount advanced by the defendant to plaintiff's brother for such necessities, as well as the services of the defendant himself in furnishing such necessities. From this latter conclusion, it follows further that there is no merit in appellee's second cross-assignment, in which the contention was made that the judgment should have been for \$1,011.31, as that contention is based upon the proposition that defendant should not be allowed for board and care of the plaintiff for a longer period of time than 15 months.

All assignments of error are overruled, and the judgment is affirmed.

#### LEE v. WHITE. (No. 8019.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 17, 1914. Rehearing Denied Nov. 14, 1914.)

#### 1. USURY (§ 22\*)—PAYMENT OF USURY—EVIDENCE.

Where a note dated February 22, 1913, for \$594, represented an indebtedness of \$248.19 and a further sum of \$200 with interest at 10 per cent. to be furnished during the year, and the maker paid during the year on the indebtedness sums aggregating \$761.82, he paid usurious interest at least amounting to \$125, for which judgment in double that amount could be rendered as authorized by *Vernon's Sayles' Ann. Civ. St. 1914, art. 4982*.

[Ed. Note.—For other cases, see *Usury*. Cent. Dig. §§ 41, 58-61, 63-65; Dec. Dig. § 22.\*]

#### 2. APPEAL AND ERROR (§ 747\*)—CROSS-ASSIGNMENT—REVIEW.

A cross-assignment, wherein appellee insists that the judgment awarded him should have been for a greater amount, will not be considered where no statement was submitted under the assignment.

[Ed. Note.—For other cases, see *Appeal and Error*. Cent. Dig. §§ 3053-3056; Dec. Dig. § 747.\*]

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Action by Henry White against W. A. Lee. From a judgment for plaintiff, defendant appeals. Affirmed.

H. J. Cureton, of Austin, for appellant. J. P. Word, of Meridian, for appellee.

CONNER, C. J. Appellee instituted this suit against appellant to recover double the amount of usurious interest, alleged to have been paid to appellant, as provided in article 4982, *Vernon's Sayles' Tex. Civ. Statutes*, upon contracts for the payment of money specified in the petition. The trial was before a jury, and the case submitted upon special issues, upon the answers to which the court entered judgment in appellee's favor in the sum of \$250 with a cancellation of the obligations upon which the usurious interest had been paid, from which judgment this appeal has been perfected.

[1] It was admitted that appellee on the

22d day of February, 1912, executed to appellant a promissory note for the sum of \$485, which was renewed on February 22, 1913, for the sum of \$594. The jury found in answer to an issue submitted that the note for \$485 was made up of a debt of \$330, principal and interest, and an account for \$51.30 which appellant had assumed and paid for appellee, and appellant attacks the finding on the ground that it is unsupported by the evidence. Appellee testified that he was indebted to one Carter upon a note for \$300, which with its interest appellant had paid for him, and that the new note for \$485 should have been for this amount only. Appellant, on the other hand, testified that, in addition to the Carter note, it was agreed that an additional sum of \$100 should be included for future advances and a further small sum which he had paid for appellee, and all of which equaled the sum for which the note had been given. The jury's finding, being in the nature of a mere step, so to speak, in the ascertainment of the final result, does not seem to be directly material; for it is undisputed that, after the partial payments made by appellee upon the \$485 note in 1912, there was a considerable balance which was included in the renewal note of the following year, after which appellee made his further payments, and the material question presented is whether upon appellee's debt as a whole he paid to appellant interest beyond that permitted by law as alleged. The finding under consideration therefore merely goes to show that the note for \$485 was made for an excessive amount, and inasmuch as it is undisputed that but \$188.87 was paid upon the note for \$485, it is manifest that no actual usury was paid on this particular note. Moreover, if it could be said that the finding is material, the finding of the jury that in addition to the Carter debt the account for \$51.30 entered into the \$485 note was in appellant's favor, for to the extent of such account the note was questioned in the testimony of appellee. A reading of the testimony suggests that this finding of the jury was probably based upon the theory that appellant, as he testified, included in the \$485 note \$100 for advances during the year 1912, but that only the sum of \$51.30 had in fact been advanced, thus determining that appellee's first note ought, including all interest, to have been made in the sum of \$414.30, instead of for the sum of \$485.

Another finding of the jury is to the effect that the amount that should have been included in the note for \$594 executed on the 22d day of February, 1913, was a balance, including interest, of \$248.19 due on the \$485 note, and a further sum of \$200 with interest thereon at the rate of 10 per cent. for one year to be furnished appellee during 1913, thus fixing the amount for which the \$594 note should have been made at \$468.19. This

finding appellant also attacks, but we are unable to say that it is unsupported by the evidence. It is true appellant testified to advancements during the year 1913, amounting to \$702.85; but a number of these advancements were specifically denied by appellee, and all of them in excess of \$200 were denied in a general way. In the light of the evidence, we interpret the verdict of the jury to mean that the \$594 note justly represented the indebtedness of the balance as found by them due on the \$485 note, plus advances made by appellant during the year 1913 to the extent only of \$200; the remaining items of such advancements as testified to by appellant being rejected.

[2] Appellant further urges that it has not been made to appear that appellee actually paid usurious interest, but the findings further show, and there seems to be little, if any, controversy in the evidence as to the fact that during the year 1913 appellee paid to appellant upon his indebtedness sums aggregating \$761.82, from which it must appear, when considered in connection with the findings already adverted to, that appellee certainly paid usurious interest to the extent of \$125 which is the basis of the court's judgment. Indeed, appellee by cross-assignment insists that the judgment should have been for a greater amount than was entered, but no statement whatever was submitted under such cross-assignment, and we therefore have not considered it.

On the whole, we conclude that all assignments of error should be overruled, and the judgment affirmed.

# FIRST STATE BANK OF AMARILLO v. JONES. (No. 7989).†

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 21, 1914. On Rehearing, Dec. 12, 1914.)

## 1. APPEAL AND ERROR (§ 934\*) — PRESUMPTIONS—JUDGMENT.

Where the trial court filed no findings of fact or conclusions of law, the court on appeal must indulge every reasonable presumption in support of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

## 2. MORTGAGES (§ 319\*)—PAYMENT—FINDINGS—EVIDENCE.

A recital in a release executed by the president of a mortgagee bank that the note secured by the mortgage had been paid in full, and that at the time of payment the bank was the owner thereof, is alone sufficient independent of other circumstances to support a finding of payment of the note in full.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855-863, 875, 913, 1356, 1366; Dec. Dig. § 319.\*]

### On Rehearing.

## 3. MORTGAGES (§ 298\*)—PAYMENT OF DEBTS SECURED—EFFECT.

Where the original debt secured by mortgage was paid in full, the original lien was dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 171 S.W.—67

† Writ of error pending in Supreme Court.

charged, and it could not be continued as against a subsequent judgment creditor of the mortgagor by the execution of a new mortgage after the judgment, purporting to correct the recital in a release that the mortgage had been paid.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 836-854, 864, 871; Dec. Dig. § 298.\*]

**4. JUDGMENT (§ 772\*)—LIEN—ERROR IN JUDGMENT—EFFECT.**

A mistake in the amount of a judgment does not render the judgment lien ineffective, but until corrected in some proper manner the judgment is valid for the full amount, and the correction does not destroy the lien as of the date of the original entry of the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1329-1332, 1335, 1337; Dec. Dig. § 772.\*]

Appeal from District Court, Clay County; P. A. Martin, Judge.

Action by T. K. Jones against W. S. Roberts and the First State Bank of Amarillo. From a judgment for plaintiff, the First State Bank of Amarillo appeals. Affirmed.

Turner & Wharton, of Amarillo, and W. T. Allen, of Petrolia, for appellant. R. E. Taylor, Wantland & Parrish, and Leslie Humphrey, all of Henrietta, for appellee.

DUNKLIN, J. T. K. Jones instituted this suit against W. S. Roberts and the First State Bank of Amarillo to foreclose an alleged judgment lien upon land situated in Clay county consisting of two lots in the town of Henrietta and a tract of 103.2 acres. Plaintiff alleged in his petition that the bank was asserting some claim to the property and prayed that the judgment lien sought to be foreclosed be established as superior to any claim asserted by the bank. From a judgment in favor of the plaintiff granting the relief prayed for, the defendant bank alone has appealed.

On the original hearing the judgment was reversed and judgment was here rendered in favor of the bank, but upon a motion for rehearing by appellee Jones the judgment was affirmed. Appellant has now moved for a rehearing, and, in order to set out more fully and more accurately the facts shown in the record, both original opinions are withdrawn, and this is filed as a substitute therefor. The judgment upon which the alleged lien was predicated was rendered in favor of Jones against Roberts on October 8, 1912, and an abstract of same was filed in Clay county on October 9, 1912. The evidence shows that plaintiff's judgment against Roberts was rendered for \$12,986.74, and as so rendered it was abstracted. Three days after the rendition of the judgment a remittitur of \$860.48 was filed by the plaintiff in the judgment reciting that to that extent the judgment was excessive, and that the error was due to a mistake in calculation of the amount due upon the promissory notes which formed the basis of that suit.

The controversy between Jones and the bank in this suit is a question of priority of liens, the bank claiming a lien upon the land in controversy superior to that of the judgment lien. The following evidence appears in the statement of facts: On December 21, 1911, Roberts executed a deed of trust upon the property in controversy and another tract of land consisting of 50 acres also situated in Clay county to secure the bank in the payment of a promissory note for the principal sum of \$5,500, dated December 1, 1911, and due 20 days after date with 10 per cent. interest and 10 per cent. attorney's fees. This deed of trust was duly filed for record in Clay county on December 22, 1911. On April 18, 1912, the bank, acting through its president, Mike C. Le Master, executed a release in words and figures as follows:

"State of Texas, County of Potter.

"Know all men by these presents: Whereas, on the 1st day of December, 1911, W. S. Roberts of Potter County, Texas, did execute, acknowledge and deliver to Mike C. Le Master, trustee, for benefit of First State Bank, Amarillo, of Potter County, Texas, a certain deed of trust on the following described real estate, situated lying and being in the county of Clay in said state of Texas, which deed of trust is recorded in Book 17, page 253, Mortgage Records of Clay County, Texas, to wit: A certain fifty acres of land, which is described by metes and bounds in the above-mentioned deed of trust, and being part of a certain deed recorded in Book 49, page 18, Deed Records of Clay County, Texas, and specifically described in a deed, dated Amarillo, Texas, dated April 17, 1912, executed by W. S. Roberts to E. C. Carter, to secure the prompt payment of one certain promissory note executed by the said W. S. Roberts and payable to the order of First State Bank, Amarillo, Texas, as, follows: One note of fifty-five hundred dollars, due March 1, 1912, and bearing interest from maturity at the rate of ten per cent. per annum; and whereas, said note with accrued interest has been fully paid, and at the time of such payment said note was the property of First State Bank, Amarillo, Texas: Now, therefore, know all men by these presents, that I, Mike C. Le Master, president of First State Bank, Amarillo, of Potter County, Texas, in consideration of the premises and of the full and final payment of said note, the receipt of which is hereby acknowledged, have this day and do by these presents, remise, release and quitclaim unto the said W. S. Roberts, his heirs and assigns, the lien heretofore existing on said premises by virtue of said deed of trust, and do hereby declare the same fully released and satisfied."

That release was properly filed for record in Clay county on May 27, 1912. On October 15, 1912, W. S. Roberts executed another deed of trust to Mike C. Le Master, trustee for the First State Bank of Amarillo, which was filed for record in Clay county October 17, 1912, and duly recorded in Deeds of Trust Records of that county, upon all the land described in the original deed of trust, except that described in the release, which recited the execution and record of the deed of trust dated December 21, 1911, also the execution and record of that release of date April 18, 1912, from the First State Bank of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Amarillo to W. S. Roberts, stating, in substance, that said release was intended only to release the two tracts of land therein described and referred to containing one 5-acre tract and one 50-acre tract, two of the tracts described in the deed of trust of date December 21, 1911; that the execution of said release was in consideration only of the payment of the sum of \$900 and not the whole indebtedness secured by the deed of trust; that it was the intention of all the parties to the instrument that the release should be made to said 55 acres only and no more, and that the recital in the release of the full payment of the \$5,500 note was a mistake made through inadvertence on the part of the person who prepared the release and on the part of Mike C. Le Master, president of the bank. This instrument further stipulated that it was given to secure the payment of the balance due the bank evidenced by a note for \$4,798.85, dated September 9, 1912, due November 1, 1912, with 10 per cent. interest from maturity and 10 per cent. attorneys' fees; that said note was in renewal of said original indebtedness of \$5,500 secured by the first deed of trust; and that the deed of trust then being executed was given to continue in full force and effect the original deed of trust executed by Roberts and mentioned above.

The defendant also introduced in evidence the following promissory notes all executed by W. S. Roberts, payable to the order of the First State Bank of Amarillo: The first for the principal sum of \$5,500 dated December 1, 1911, due 90 days after date; the second for the principal sum of \$4,798.85, dated September 6, 1912, due November 1, 1912; the third for the principal sum of \$5,253.59, dated August 8, 1913, due October 1, 1913. It does not appear from the statement of facts that either the second or third note purports upon its face to be a renewal of any other note. Mike C. Le Master testified upon the trial as follows:

"I was president of the First State Bank of Amarillo during the latter part of 1911, the year of 1912, and the first half of 1913, and was president of said bank on the 18th day of April, 1912. I am now familiar with the release executed by me as president of said bank to W. S. Roberts, dated April 18, 1912, recorded in Volume 67, page 512, Deed of Trust Records of Clay County, Tex., but was not familiar with the contents thereof at the time of its execution. The statement in said release to the effect that the note for \$5,500, secured in the deed of trust of December 21, 1911, recorded in Volume 17, page 253, Deed of Trust Records of Clay County, Tex., made by W. S. Roberts to me as trustee for First State Bank of Amarillo, is not true. The note mentioned has never been paid, except in part. There was paid on it \$900 about the time of the execution of said release. An error of the stenographer in failing to cancel a portion of the printed form of said release, which was overlooked by myself when signing such release, accounts for the mistake in said release. My intention was to release certain lands, about 55 acres, described in a certain deed from W. S. Roberts to E. C. Carter, dated the 17th day of April, 1912, and now of rec-

ord in the Deed Records of Clay County, Tex., in Volume 66, page 110, and it was not my intention to release all the property covered by said deed of trust, dated December 21, 1911, of record in the Deed of Trust Records of Clay County, Tex., in Volume 17, page 253. \$900 was paid about the time of the execution of said release. There remains now \$5,253.59 principal and interest due First State Bank of Amarillo on said note. I am not now employed in any capacity by the First State Bank of Amarillo. The first time I learned that the release did not set forth the facts was about the 15th day of October, 1912. It was discovered when Mr. Roberts offered to deed us the property in settlement of his debt to us, at which time we sent our attorney, Mr. Thos. E. Turner, to Henrietta to look into the title of this property, and he discovered the error at that time, and instructed us to have a corrected deed of trust executed, which we did, and the same is filed in the Deed of Trust Records of Clay County, Tex., and recorded in Volume 17, pages 429, 430."

Defendant W. S. Roberts testified as follows:

"I signed the deed of trust dated December 21, 1911, to secure the payment of a note for \$5,500 described in said deed of trust. There has never been paid on said note except about \$900, at the time I sold the land to E. C. Carter described in my deed to him, dated April 17, 1912, which has already been introduced in evidence, and I have paid in addition thereto some small payments of interest, so that there is now due on said original indebtedness the principal sum of \$5,253.59, evidenced by the note made by me to said bank and already introduced in evidence. That note was but a continuation of the old indebtedness secured by said original deed of trust, and I executed and delivered to said bank from time to time renewal notes, so that this last note for \$5,253.59 is a continuation of an unbroken chain of notes given by me for said indebtedness. When I sold the land to E. C. Carter, it was necessary for me to get a release of the 55 acres I was selling to him in order to make him a good title, and I agreed with the bank that I would pay \$900 out of the money received from him and the sale of the note I got from him if the bank would release these two tracts of land. I got a cash payment of \$500 from Mr. Carter and sold the notes he gave me and paid the bank \$900 as soon as I sold the notes. The bank executed a release, but I never did see this release. I think it was sent to a bank at Henrietta along with my deed to Mr. Carter to be delivered to Mr. Carter. I did not intend for the bank to release anything but the 55 acres, nor did I ever know that the release recited that the whole \$5,500 note had been paid until about the time I executed the second deed of trust on October 15, 1912. Mr. Le Master told me that there was some mistake in the release which he desired to have correct, and I then executed the second deed of trust dated October 15, 1912, in order to correct the mistake in the release wherein it was recited that the whole of the note had been paid. At the time the plaintiff's abstract of judgment was filed in Clay county, I owed the First State Bank of Amarillo a note for \$4,798.85, dated September 6, 1912, due November 1, 1912, and it was secured by said original deed of trust of December 21, 1911, and was a continuation of the original indebtedness secured by said original deed of trust, after deducting the \$900 which I had paid; this last note being the amount due with whatever interest I owed the bank. It was understood between me and the bank all the time, of course, that these renewal notes were secured by said original deed of trust."

There was no evidence showing the particular items and dates of the several inter-

est payments testified to by Roberts. Plaintiff introduced no witness to contradict the testimony of Mike C. Le Master and Roberts. The two deeds of trust, the three promissory notes, and the release set out above were all specially pleaded by the two defendants, who further pleaded that only \$900 was paid to the bank by Roberts at the time the release was executed and that the recitals contained in the release of full payment of the original debt were inserted by mutual mistake of the parties to that instrument.

From the facts recited above, it will be noted that the renewal deed of trust was filed for record six days subsequent to the record of the abstract of judgment under which plaintiff claimed a lien.

Appellant insisted that no lien was created by the filing of the abstract of judgment, since it did not show the correct amount due upon the judgment; in other words, that the remittitur entered should be construed as having the same legal effect as if a payment had been made upon the judgment on the date of its rendition. Appellant insists further that the uncontroverted evidence showed that the recitals contained in the release of full payment of the original debt was a mutual mistake; that the equitable right to correct the mistake as was done by the second deed of trust dated October 15, 1912, and recorded October 17, 1912, was not affected by our registration statutes, and hence the lien shown by the original deed of trust continued in force to the exclusion of any judgment lien acquired by the plaintiff under such decisions as *Grace v. Wade*, 45 Tex 522, *Blankenship v. Douglass*, 28 Tex. 226, 82 Am. Dec. 608, *Cetti v. Wilson*, 168 S. W. 996, and other decisions there cited. The evidence relied on to conclusively establish such mutual mistake consists chiefly of the testimony of Le Master and Roberts set out above, the execution by Roberts of the second deed of trust, and the second and third promissory notes subsequent to the date of the release, and the fact that the release refers specifically to the original deed of trust and does not purport to release any property except the 50 acres.

[1, 2] The trial was by the court without the aid of a jury, and no findings of fact or conclusions of law are filed by the trial judge. We must indulge every reasonable presumption to be drawn from the record which would support the judgment rendered. We are of the opinion that the specific recitals in the release executed by the president of the bank that the original \$5,500 note had been paid off in full, and that at the time of such payment the bank was the owner thereof, such recitals being against the interest of the bank, were sufficient of themselves, independent of other circumstances noted above, to support a finding by the trial judge that the recitals were true. See

3 Jones, *Blue Book of Evidence*, § 437; *Parker v. Beavers*, 19 Tex. 406; *E. L. & R. R. Ry. v. Garrett*, 52 Tex. 133. If the note was thus paid, then the lien upon the property in controversy, as well as the 55 acres specifically mentioned in the release, was discharged as a matter of course, and the judgment of the trial court in favor of plaintiff against the bank must be affirmed, irrespective of any question as to what would have been the relative rights of plaintiff and the bank in the absence of such payment. In its answer the bank sought to establish the lien asserted against the property in controversy as against Roberts, who in his answer, in effect, admitted that claim, and judgment was rendered in favor of the bank against Roberts for that relief but subject to the superior lien of plaintiff.

And as Roberts has not appealed, that part of the judgment establishing the lien against him is not disturbed, but in all other respects the judgment is affirmed, and appellant's motion for rehearing is overruled.

#### On Rehearing.

[3] As shown by its own recitals, the second deed of trust executed by Roberts was not executed upon any new consideration passing from the bank to Roberts, but was executed for no other purpose than to correct the alleged mistake in the recitals in the release that the original indebtedness had been fully paid and to continue in force the original deed of trust given to secure its payment. If the original debt had been paid in full, as found by the court, then the original lien was discharged, and, if it was dead at the time the second deed of trust was executed, that instrument could not continue it in force as against Jones, and for that reason the second deed of trust could be given no effect.

[4] The mistake made in the amount of the judgment in favor of Jones did not render the judgment lien ineffective as contended by appellant. Until corrected in some proper manner, it was valid for the full amount, and the correction entered did not operate to destroy it any more than would the entry of a credit upon a judgment after it had been properly abstracted.

Except as shown above, appellant's motion for further findings is overruled.

Appellant's motion for rehearing, also, is overruled.

#### EXLINE-REIMERS CO. v. LONE STAR LIFE INS. CO. (No. 7117.)

(Court of Civil Appeals of Texas, Dallas.  
Nov. 7, 1914. Rehearing Denied  
Jan. 2, 1915.)

1. CORPORATIONS (§ 448\*)—DEBTS INCURRED BY PROMOTERS—LIABILITY OF CORPORATION.  
A debt incurred by a promoter of a corporation on its behalf, prior to the filing of its charter, is not an original liability of the cor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

poration, notwithstanding any promises or representations of the promoter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.\*]

## 2. CORPORATIONS (§ 448\*)—DEBTS INCURRED BY PROMOTER—RATIFICATION—ADOPTION.

A contract by a promoter of a proposed corporation on its behalf cannot, in a technical sense, be ratified after legal existence of the corporation, since "ratification" presupposes a principal existing at the time of the making of the unauthorized contract, but liability arises rather by adoption of the contract by acceptance of its benefits.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.\*]

## 3. CORPORATIONS (§ 448\*)—DEBTS INCURRED BY PROMOTER—LIABILITY.

Where corporators of an insurance company, after the filing of its charter, attempted to assign it to a third person with a right to constitute a board of directors, and subsequently the third person selected a board of directors composed of persons not bona fide stockholders, who selected officers, one of whom accepted for the corporation material ordered by the promoter, and promised that the corporation would pay for it, the corporation was not bound for the debt, notwithstanding Rev. St. 1895, art. 3096h, giving corporators the direction of affairs and the perfecting of the organization of the corporation until they shall call a special meeting of the stockholders, for the acts of the corporators and of the directors and officers were void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.\*]

## 4. CORPORATIONS (§ 289\*)—OFFICERS—"DE FACTO OFFICER."

Officers of a corporation, not selected in the statutory manner, are not even "de facto officers," and their acts are not binding on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1240-1245; Dec. Dig. § 289.\*]

For other definitions, see Words and Phrases, First and Second Series, De Facto Officer.]

## 5. CORPORATIONS (§ 426\*)—DEBTS—LIABILITY—ACQUIESCENCE.

Where the legally elected officers of a corporation repudiated a promise by an officer, who was not even a de facto officer, to pay a debt, when they first learned it was asserted against the corporation, there was no acquiescence in the unauthorized acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.\*]

## 6. CORPORATIONS (§ 425\*)—DEBTS—LIABILITY—ESTOPPEL.

Legally constituted officers of a corporation are not estopped from denying unlawful acts done by officers who were not even de facto officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.\*]

## 7. CORPORATIONS (§ 398\*)—DEBTS—LIABILITY.

Officers of a corporation, who are not even de facto officers, are without authority to make a purchase of goods for the corporation or to bind it by adopting an unauthorized contract of the promoter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.\*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by the M. P. Exline Company, prosecuted by the Exline-Reimers Company, against the Lone Star Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

L. C. McBride and Allen & Flanary, all of Dallas, for appellant. Coke & Coke, of Dallas, for appellee.

RASBURY, J. This suit was instituted by M. P. Exline Company against appellee, but, pending its determination, appellant, Exline-Reimers Company, acquired the former company's assets and prosecuted the case in its name. The suit was to recover a balance on an account for certain items of stationery, office furniture, supplies, etc., for which appellee was alleged to be liable. Appellee denied by proper pleading all liability for the items of account. No further statement of the pleadings are necessary, since no question of their sufficiency arises.

The rights of the parties on this appeal depend upon the law arising upon practically undisputed facts; the following, supported by the record, being those essential to a disposition of the case: The articles specified in the account sued on were articles necessary to the conduct of the business of life insurance companies and were purchased on requisitions signed Lone Star Life Insurance Company, by J. M. Dawson, who represented L. H. Morgan, to whom the supplies, etc., were delivered. Morgan, claiming to represent the Lone Star Life Insurance Company, promised the account would be paid by the company, and upon such representations appellant relied without other inquiry or investigation. At the time the requisitions were made upon appellant for the supplies, etc., and at the time the same were delivered to Morgan, he was attempting to organize said Lone Star Life Insurance Company, and in pursuance of that object had, on February 2, 1909, interested Messrs. Worsham, Keating, Slaughter, Gannon, Reardon, Baker, Green, Hamilton, and Edwards, all of Dallas, Tex., except the first named, to the extent that they signed articles incorporating the proposed company under certain statutory provisions then existing and delivered same to L. H. Morgan. Morgan retained possession of the articles of incorporation until May 28, 1909, at which time same were filed in the office of the commissioner of insurance, etc., and approved by that official. All the articles covered by the account sued on, except certain items hereafter referred to, were purchased by Morgan, claiming to represent the company, prior to the time of filing the articles of incorporation in the office of the commissioner of insurance. Those who signed the articles of incorporation, learning that Morgan had filed same with the commissioner, called a meeting June 7, 1909, of the incorporators for the purpose of dis-

cussing the status of the company. Morgan attended the meeting. The result of the meeting was that the project was abandoned, and it was agreed that each incorporator should be released from prior tentative subscriptions to the stock of the company; the cause of the abandonment being the inability or refusal of any one of the incorporators to assume direction of the affairs of the proposed company. At this time Morgan requested that the incorporators assign the charter to him if they intended to abandon the matter, since he had spent much time and money in attempting its promotion, and since he believed he could organize same without reference to the participation therein of those present. This the incorporators agreed to do, and by direction of counsel for Morgan, in writing, assigned to him all their respective rights, title, and interest in the charter, on condition that the assignors should be released absolutely from all liability to the proposed company on their proposed subscriptions to stock, and giving to Morgan by the assignment the further right to assign to other persons the interests so assigned to him, as well as the right to constitute a board of directors for the company. Thereafter, on June 11, 1909, in pursuance of the authority contained in said assignment, a meeting of certain gentlemen claiming to be stockholders of the company was held; those present being Messrs. Morgan, Swain, Dawson, and Clark. These purported stockholders by their recorded minutes of the meeting, recited that L. H. Morgan had contributed \$6,000 in money to the company, and directed that in lieu thereof stock in the company be issued to him in the sum of \$4,000; the remainder so contributed to be subject to future adjustment. By direction of Morgan those acting as stockholders further directed that one share of stock directed to be issued to him be issued in turn each to Swain, Clark, Anderson, and Hannah, and 36 shares to J. M. Dawson. The assignment of the charter to Morgan by the incorporators of the company was acknowledged and ratified at said meeting, and all liability on the part of the incorporators to the company on account of their subscriptions declared canceled.

The individuals above named, acting as stockholders, also elected themselves a board of directors, and adjourned, and immediately convened as directors and elected Swain president, Hannah vice president, Dawson secretary and treasurer. This action was in turn approved, and the president authorized to make such contracts for stock subscriptions and to transact such other business as the interests of the company should require. Neither Morgan nor those to whom stock was directed to be issued at the time of the related stockholders' and directors' meetings were actual subscribers to the stock of the Lone Star Life Insurance Company. A few

days after the meetings just mentioned, and on June 15, 1909, the gentlemen who had signed the articles of incorporation and executed the assignment of the charter to Morgan individually and collectively signed letters addressed to L. H. Morgan & Co., indorsing the proposed company, referring to themselves as charter members, and in some instances as subscribers to the stock or as intending to subscribe thereto. Subsequent to all the transactions detailed, and in December, 1909, or January, 1910, the incorporators, due to complaints of those who had subscribed to stock at the solicitation of Morgan, concluded that liability attached to them as incorporators, notwithstanding the assignment of the charter and the attempted cancellation of any liability on their part by those nominated by Morgan at the claimed stockholders' meeting of June 11, 1909, whereupon they assumed control of the corporation without objection, so far as the testimony discloses, on the part of Morgan and the officers selected by him, subscribed enough stock or secured subscriptions for enough stock to comply with the laws in that respect, as well as other things necessary to place the company in a position to commence operations, which was accomplished about March, 1910, at which time all connection of the directors and officers selected by Morgan with the company ceased. The directors and officers selected as last detailed promptly denied all liability for appellant's debt when presented for payment, and repudiated the acts of Dawson in accepting the articles and promising payment.

At the conclusion of the trial and upon the evidence as adduced, the substance of the essential features of which we have related, the trial judge instructed verdict for the defendant, and in accordance with which judgment was entered.

[1] The controlling question in the case, and the one upon which the final disposition of the case depends, is whether appellee is liable for the debt sued on by reason of the related acts of the corporators and the subsequent acts of the officers of the corporation claimed to have been elected by the directors of the corporation at the meeting of June 11, 1909, and for that reason we shall not discuss the assignments *seriatim*. We think it can be safely said, based upon the evidence in the record, that liability in no respect can be urged against the corporation as such for the acts either of Morgan, who was promoting the company at the time the debt was incurred, or those who intended to become corporators, had prior to the act of legal incorporation, which was at the time when the articles were filed in the office of the commissioner of insurance, or May 28, 1909. The reason is obvious, since without legal existence by the corporation there can be no liability. *Railway v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; *Lancaster Gin & Compress Co v. Murray*, etc., 19

Tex. Civ. App. 110, 47 S. W. 387. As shown by our statement of the facts, the debt sued on, except certain items to be hereafter referred to, was incurred by Morgan, the promoter, on behalf of the corporation prior to the filing of the charter, and hence there was no original liability on the part of appellee, nor could any be created by any promise or representations of Morgan, who was promoting the company.

[2] It is said in effect in *Railway Co. v. Granger*, supra, that contracts made by a promoter on behalf of a proposed corporation, even though within the scope of its general authority, cannot in a technical sense be ratified after legal existence, since ratification presupposes a principal existing at the time of making the unauthorized contract. Liability in such cases, it is further said, arises rather by adoption of the contract by acceptance of its benefits than by a recognized technical ratification by the corporation after its legal organization. The rule is said in other language to be that:

"Those who undertake to organize a corporation are not in any sense its agents before it comes into existence. They cannot affect it by their declarations or representations, or bind it by their engagements made in its behalf; but, after coming into existence, the corporation may make their engagements its own by express agreement or by ratification; and this ratification or adoption may be by express corporate action or by any of the other modes by which corporations may ratify or adopt the unauthorized or officious acts of others made in their behalf, as where the corporation voluntarily accepts the benefits accruing to it from the engagement of its promoters, after full knowledge, and having full liberty to decline the same." 10 Cyc. 282.

[3] Such, then, being the rule, we find, on the issue of adoption after incorporation, that the facts in the instant case show no more nor less than that, after the charter was filed and approved, the corporators attempted to assign it to Morgan with the concurrent right to constitute thereunder a board of directors, and that thereafter Morgan did select and constitute a board of directors, who in turn selected officers, one of whom accepted the material, etc., and promised appellant that the appellee would pay it. Upon such facts, counsel for appellant ably and earnestly urges appellee is bound for the debt, and bases such contention largely upon the provision of the act under which the appellee was incorporated. This act is chapter 4, tit. 18, Revised Statutes 1895, authorizing the incorporation of home life and accident insurance companies, and since repealed and substituted. Aside from those provisions having reference to the manner, method, and other details of incorporation in reference to capital stock, etc., the act directs, in effect, that, before companies organized thereunder may sell stock or do the other things contemplated thereby, it shall present to the commissioner of insurance its articles of incorporation for approval and filing. After such approval and filing, the

required capital stock subscriptions must be secured, and the securities in which such subscriptions have been invested submitted to and approved by the commissioner. When such provisions of the law have been complied with, the commissioner of insurance is required to furnish the corporation a certificate reciting such compliance, whereupon the corporation is permitted to transact the business contemplated by the act. The act also provides that the corporators named in the charter shall have the direction of its affairs and the perfection of its organization from the issuance of the permit until such corporators shall call a meeting of the stockholders, and who in turn shall have elected directors and officers for the purpose of transacting a general business. Articles 3096h, 3096j, 3096n, R. S. 1895.

Keeping in mind the fact that no one claiming to represent the corporation after incorporation had promised to pay the debt sued for, and that it was at no time originally liable therefor, did the assignment to Morgan and the election of stockholders, directors, and officers thereunder, and their acceptance of the articles sued for, create any liability against appellee by virtue of the authority conferred upon the corporators by article 3096h? We conclude not, since in our opinion the acts of the corporators, as well as those of the stockholders, directors, and officers elected as stated, were void. That portion of the act that confers upon the corporators authority to perfect the organization of the company and direct its affairs pending final authority from the state to transact a general business was not intended to be used as a means of conferring upon the corporators greater authority than may be found in the act itself. There is nothing in the act which would by reasonable deduction or inference authorize the corporators by simple assignment of the charter to confer upon others even the authority conferred upon them, much less authorize their assignee to do that which the state denied the original corporators the right to do. Without in the least restricting the authority conferred upon the corporators, it is clear that their authority, after the charter was approved, was to do the things specified by the act; i. e., sell stock, invest same, call a meeting of the stockholders, and to do any and all other incidental or necessary things thereto or reasonably to be inferred. The reason why such authority was not intended to be conferred are not far to find.

[4] Those who are to become stockholders, and upon whom the right and duty of selecting directors and officers for the transaction of the general business of the corporation is conferred, after sufficient stock is subscribed, may not be made responsible in such manner. They have the right to assume and demand, before the funds they have contributed to the company are expended, that directors and officers will be selected

in the manner pointed out by the act authorizing the incorporation, and not otherwise. Officers selected in any other manner are not officers, certainly not de jure officers, and in our opinion not even de facto officers. It is said:

"A defacto authority cannot arise when there has been absolutely no election or appointment, or, what is equivalent, one that is absolutely null and void, and not merely irregular or informal;" or "where there has been no assertion of the right to exercise the office, except in the very instance where it is questioned;" or "where there has been no acquiescence in the official acts of the person claiming such authority, either on the part of the body for whom he professes to act or of any one else. Otherwise the simple bold assertion of a right to an office would bind such corporation or body by the acts of the usurper, and parties suffering from his unlawful acts could never question them." *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

[5] The testimony in the instant case brings the acts of the pretended officers of appellee well within the rule, since the election of Dawson, who agreed on the part of the corporation to pay the debt, as well as the other officers, was void in that it was the right of the subscribers to the stock, not the corporators, to elect their directors and officers, and the corporators, as a consequence, were without authority to confer that right upon Morgan. Nor was there any acquiescence in the acts of such officers, since the officers of the company legally constituted repudiated the promise to pay the debt when they first learned it was being asserted against them.

[6] It is further said in the case cited:

"It is only where the act of the corporation sought to be denied is merely irregular or informal or defective in no vital respect that any one participating in it is estopped to deny its validity. If it be absolutely void, and liable to be treated as a nullity in any proceeding where called in question, no participation in such act could give it vitality, even as to one who took part in it."

Thus it further appears that not only the officers legally constituted are not estopped to deny the unlawful acts, but even those who attempted to confer that right are not, so far as relates to the corporation as such. Nor do the facts proven on trial bring this suit within the modification of the general rule stated in the case last cited, being instances where those entitled to complete the organization, while having the right of organization, have neglected in the organization to observe some of the details provided by the act authorizing incorporation, such as a failure to secure subscriptions for the full amount of the capital stock. Such a case is not presented by the record before us. Gentlemen, neither corporators nor stockholders, acting upon authority not conferred by law, and which, as a consequence, could not be conferred by the corporators pretending to be stockholders, met and agreed to reimburse Morgan for certain money expended

in promoting the corporation by issuing him stock in the corporation, a portion of which he in turn issued to them, and whereupon, based upon the stock so acquired, they held a stockholders' meeting, electing directors, who in turn elected officers, and the officers so elected in turn accepted the articles sued for and promised to pay for same. It is not necessary to discuss the acts of the corporators, since same is in no sense an issue in the suit.

[7] A portion of the articles specified in the account sued on was furnished after the pretended election of directors and officers, but we think such officers had no more authority to make an original purchase than they had to bind the present corporation by adopting the unauthorized contract of Morgan.

Entertaining the views expressed, it becomes our duty to affirm the judgment of the lower court.

Affirmed.

#### FLEMING & ROBERSON v. FRED MILLER BREWING CO. (No. 8057.)

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 5, 1914.)

#### LANDLORD AND TENANT (§ 34\*)—LEASE—CON-DITIONS—LICENSE.

A lease of a building for the sale of liquor, stipulating that the lessee could cancel if unable to procure a license from the local authorities, does not require the lessee to sue in court to enforce his right to a license, and where an ordinance was passed putting such building in a prohibited district, and the lessee's applications for license were refused, the lessee properly vacated and refused to pay rent for the balance of the term, though the ordinance was enjoined before final publication by other parties, and the city finally consented to abide by the injunction.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 97; Dec. Dig. § 34.\*]

Error from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by Fleming & Roberson against the Fred Miller Brewing Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Mike E. Smith and G. W. Dunaway, both of Ft. Worth, for plaintiff in error. Roy, Rowland & Young, for defendant in error.

DUNKLIN, J. James F. Moore leased a business house situated in the city of Ft. Worth to the Fred Miller Brewing Company for a period of one year. Before the expiration of that period, the lessee vacated the premises, and, having refused to pay the rent stipulated in the lease contract for the unexpired period, Fleming & Roberson, who purchased the property from the lessor, Moore, instituted this suit to recover rents for the period that was unexpired at the time the lessee vacated the building. From a judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment in favor of the defendant, plaintiff prosecutes this writ of error.

The lease contract contained this stipulation:

"It is hereby agreed that the lessee shall have the privilege and right to cancel this lease should it be unable to procure a license from the local authorities to sell beer and liquors in Tarrant county, or in the demised premises."

The building was leased and used for the sale of beer and liquors.

Under the provisions of a special charter of the city, its board of commissioners had authority to confine the sale of intoxicating liquors within such district as might seem advisable, and, acting under that charter authority, the commissioners passed an ordinance fixing the territorial limits within which such traffic would be confined and prohibiting the same in all other parts of the city. The leased premises fell within the prohibited limits so fixed. Before vacating the building, the lessee made three applications for license to continue its business in the leased premises; the applications being made to the deputy tax collectors who were in charge of the business of issuing liquor licenses, and all of said applications were refused. Thereupon the lessee, acting under the stipulation contained in the lease quoted above, canceled the lease contract and vacated the premises. All rents were paid up to that date, and the only claim presented by the plaintiffs in this suit was for the sums that would have been due under the lease for the remainder of the year if the lease had continued in full force.

The ordinance was passed September 15, 1909. On September 21, 1909, suit was instituted in the district court by other persons attacking the validity of the ordinance and seeking to enjoin the mayor and board of city commissioners from publishing the ordinance for the period of time required by the charter to put it in force, and prohibiting them from attempting to enforce the ordinance in the prohibited territory. A temporary writ of injunction was issued as prayed for. On November 3, 1909, upon trial of the case before a jury, a judgment was rendered in favor of the plaintiff; the judgment being based upon a finding by the jury that the ordinance was unreasonable. On December 4, 1909, a new trial was granted on the motion of the city; but nothing further was ever done with the case, the city withdrawing any further opposition to the injunction and taking no further action to avoid it. Prior to the issuance of the injunction, the ordinance was published once; but by reason of the injunction further publication of the same for the period of time required by the city charter was prevented. It seems that, notwithstanding the ordinance, licenses were issued to other parties to sell beer and intoxicating liquors within the prohibited district, but,

according to the agreement of the parties appearing in the statement of facts in this case, the licenses so issued were issued by mistake on the part of the officials and would have been refused had such officials known that the premises so licensed were within the district prohibited by the ordinance.

Fleming & Roberson insist that as an injunction against the enforcement of the ordinance was granted by the district judge, who had jurisdiction to do so, it is apparent that the defendant by resort to judicial process could have forced the proper authorities of the city to grant a license for the pursuit of defendant's business in the leased premises; that it was thus shown that defendant was able to procure such license, and therefore was not entitled to cancel the lease under the stipulation quoted above authorizing a cancellation of the same if the lessee should be "unable to procure license." Hence the question to be decided is whether the strict construction of the contract invoked by Fleming & Roberson should obtain. Evidently, the trial judge construed the contract in the light of the surrounding circumstances and reached the conclusion that the parties thereto never contemplated that the lessee should be required to resort to the extreme measure of a suit for mandamus to compel the issuance of a license with the necessary expense and uncertainty incident to such suit, but that application for license made to the duly constituted authorities of the city would be the extent of the efforts that the lessee should make to procure such license. We are of the opinion that there was no error in that interpretation of the contract, and, as that ruling is the only specification of error presented here, the judgment is affirmed.

Affirmed.

#### KILLMAN v. YOUNG. (No. 8038.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 21, 1914. Rehearing Denied  
Dec. 19, 1914.)

#### 1. APPEAL AND ERROR (§ 736\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS — MULTIFARI- OUSNESS.

An assignment of error, which states that the court erred in overruling and in sustaining plaintiff's objections and exceptions to the general charge and in not charging as pointed out in the exceptions and objections, which, as set forth, consist of several paragraphs, one of which is divided into subdivisions, is objectionable as multifarious, where the paragraphs as a whole refer to different clauses of the court's charge and embody several separate and distinct questions of law and of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3028, 3029; Dec. Dig. § 736.\*]

#### 2. APPEAL AND ERROR (§ 722\*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS.

Though, under the law, a motion for new trial may constitute assignments of error, the statutes and rules governing the requi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sites of assignments of error prevail, and they must specify the errors complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.\*]

### 3. PLEDGES (§ 53\*)—ENFORCEMENT—LIABILITY OF PLEDGOR.

One delivering his chattels to a third person consenting to a pledge thereof by him to secure a loan for his own benefit is not liable for a personal judgment in favor of the pledgee, who can only foreclose the pledge in satisfaction of the debt.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 129-132; Dec. Dig. § 53.\*]

### 4. APPEAL AND ERROR (§ 1169\*)—REVERSAL—ERRONEOUS SUBMISSION OF ISSUE.

Where the court on appeal cannot determine on which of two issues the verdict was rendered, the error in instructions submitting one of the issues necessitates a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.\*]

### 5. PLEDGES (§ 57\*)—ENFORCEMENT—RIGHTS AND LIABILITIES OF PARTIES.

Where one pledged his chattels to secure a debt due from a third person to the pledgee, the pledgee, to foreclose the pledge, must first obtain a judgment establishing the debt.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 184, 185; Dec. Dig. § 57.\*]

### 6. REPLEVIN (§ 63\*)—RECOVERY—BURDEN OF PROOF.

An owner of chattels in the possession of another is entitled to recover the same, unless the latter shows his right to possession on grounds alleged in his special defenses, the burden of proving which is on him.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 225-238; Dec. Dig. § 63.\*]

### 7. REPLEVIN (§ 70\*)—RECOVERY—BURDEN OF PROOF.

The fact that plaintiff, suing for chattels in possession of defendant, alleged in her amended petition that she had not consented to a third person pledging the chattels with defendant, and denying the effect of a bill of sale relied on by defendant, presented in the nature of defenses to special issues raised by defendant, did not constitute an assumption of the burden of proof, though proof of the facts alleged may be required to defeat defendant's defenses.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 280-284; Dec. Dig. § 70.\*]

Appeal from Johnson County Court; J. B. Haynes, Judge.

Action by Mrs. Nora Killman against L. B. Young. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

Phillips & Rice, of Cleburne, for appellant. F. E. Johnson and Ramsey & Odell, all of Cleburne, for appellee.

CONNER, C. J. Mrs. Nora Killman instituted this suit for the recovery of three diamond rings alleged to be her property and to be in the defendant Young's possession. Appellee, Young, answered to the effect that the rings had been deposited with him with the knowledge and consent of the plaintiff by one Creale to secure a promissory note of the said Creale's for \$110, which had been

given for a loan of money to him, and which was unpaid. He further answered that, after the pledge stated, the plaintiff had been fully advised of the circumstances under which the defendant obtained possession of the rings, and that she ratified and confirmed the delivery of the same to him as security for the loan mentioned, and alleged that, in consideration of the surrender to her of the note executed by Creale, she had assumed the Creale debt and executed a bill of sale to the rings to secure the debt so assumed by her. A trial before a jury resulted in a verdict and judgment in favor of the defendant, and the plaintiff has appealed.

[1, 2] Appellant's first assignment must be disregarded as multifarious. It is that:

"The court erred in overruling and not sustaining plaintiff's objections and exceptions to his general charge and in not charging the jury the law of the case as pointed out in said exceptions and objections, which are as follows, to wit:"

Then follow the objections made consisting of the first, second, third, fourth, and fifth paragraphs, the fifth paragraph being further divided into the first, second, third, fourth, fifth, and sixth subdivisions; the paragraphs as a whole referring to different clauses of the court's charge and embodying several separate and distinct questions of law and of fact. The only proposition submitted under the assignment is that:

"The foregoing assignment of error sufficiently disclosing appellant's objections, it is here adopted and submitted as a proposition under the first assignment of error."

Such an assignment and proposition cannot be said to be of that specific character entitling them to consideration. The assignment is a copy of the first paragraph of appellant's motion for new trial, but the fact that the motion for new trial by our amended law now constitutes the assignments of error does not render less necessary an observance of the statutes and rules which give the requisites of assignments of error. Appellant's first assignment is accordingly overruled.

Appellant's second assignment relates to a charge which authorized a verdict for the plaintiff and need not be considered.

[3] The third assignment, however, we think well taken. It is that the court erred in the second paragraph of his charge, which is as follows:

"If you should believe, however, that said F. E. Creale for the purpose of obtaining a loan upon the same, or that the plaintiff consented that the said F. E. Creale might use said rings for the purpose of obtaining a loan, then you will find for the defendant."

The error of this paragraph of the court's charge is made manifest by the sixth paragraph, which reads as follows:

"If you find for the defendant, the form of your verdict will be as follows: 'We, the jury, find in favor of the defendant against the plain-

tiff the sum of \$110, with a foreclosure of his lien upon the diamonds in question."

The verdict rendered was in the form thus given and the judgment follows the verdict. It will be thus seen that the second paragraph of the court's charge, when considered in connection with the sixth paragraph, required a finding of the jury against the appellant personally for the \$110 indebtedness of Creale's on the theory of the special defense that the plaintiff had merely delivered the rings to Creale and consented that he might pledge the same. There is nothing in the evidence that suggests that Creale borrowed the money in question for appellant, but, on the contrary, it seems undisputed that the money was secured for his own benefit; and, while the defendant might be entitled to a foreclosure of a lien upon the rings in the event the jury found that the plaintiff had delivered the rings to Creale and consented that he might pledge them, such facts would not authorize a personal judgment against her in defendant's favor.

[4] Such a verdict and judgment was authorized only upon the theory of appellant's second special defense, which was that plaintiff, for a sufficient consideration, later assumed the Creale debt, and which issue was likewise submitted to the jury. We have no means from the record before us of determining upon which issue the jury found in appellee's favor, and we conclude, therefore, that the error is one for which the judgment must be reversed.

[5] In this connection, and in view of another trial, we should perhaps also call attention to the fact that the record fails to disclose that Creale has been made a party to the suit, nor is any reason alleged for the failure. On the theory of the case that appellee merely consented to the pledge of her rings, the rings occupy the attitude of a surety, and a valid judgment establishing the debt to secure which the property had been pledged would be a condition precedent to a decree of foreclosure, and we fail to see just how such a judgment is to be secured under the circumstances stated.

[6] It is further insisted in behalf of appellant that the court improperly put the burden of proof upon her, and we think, in view of the record, that this objection is well taken. It was undisputed that the rings in question were the property of appellant, and the court so instructed the jury. She therefore was entitled to recover their possession, unless appellee was able to support one or the other of the special defenses pleaded by him, the burden of establishing which it is very evident was upon him.

[7] It is true that the plaintiff in her amended petition alleged that she had not consented to Creale's pledge of the rings, and denied the legal effect of the bill of sale relied upon by appellee as her own obligation; but these allegations were merely in the nature of de-

fenses to the special issues presented by appellee, which the plaintiff anticipated. Proof of these facts may have been required to defeat appellee's defenses, but, in the absence of such defenses, they certainly were not necessary to the plaintiff's recovery; it being undisputed, as stated, that the rings belonged to her.

We conclude that the judgment must be reversed, and the cause remanded for a new trial.

WATSON et al. v. COCHRAN, County Judge.  
(No. 8150.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 28, 1914.)

1. CONSTITUTIONAL LAW (§ 68\*)—INJUNCTION (§ 85\*)—ELECTIONS—DECLARATION OF RESULT.

The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125–127; Dec. Dig. § 68; \*Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.\*]

2. COURTS (90\*)—CONTROLLING DECISIONS.

A decision of the court of criminal appeals adjudging constitutional Vernon's Sayles' Ann. Civ. St. 1914, arts. 6319a–6319n, providing for local option elections to determine whether pool halls shall be prohibited in a county or any subdivision thereof, will be followed by a Court of Civil Appeals, especially where another Court of Civil Appeals has also decided that the statute is valid, for the Court of Criminal Appeals has final jurisdiction in the determination of criminal prosecutions arising under the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313–321, 351; Dec. Dig. § 90.\*]

3. INJUNCTION (§ 80\*)—ADEQUACY OF REMEDY AT LAW.

Irregularities which may be invoked in a proceeding to contest a local option election to determine whether pool halls shall be prohibited in a county as provided by Vernon's Sayles' Ann. Civ. St. 1914, art. 6319k, are not grounds for an injunction to restrain the county court from publishing the result of the election and entering an order declaring the statute effective in the county.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 151; Dec. Dig. § 80.\*]

Appeal from District Court, Nolan County;  
W. W. Beall, Judge.

Action by Charles W. Watson and others against John H. Cochran, Jr., County Judge. From a judgment denying a temporary injunction, plaintiffs appeal. Affirmed.

W. E. Ponder, of Mt. Pleasant, and A. B. Yantis, of Sweetwater, for appellants. Chas. W. Lewis and Geo. T. Wilson, both of Sweetwater, for appellee.

DUNKLIN, J. By the Acts of the Legislature of 1913 (Acts 33d Leg. c. 74) appearing in 4 Vernon's Sayles' Tex. Civ. Statutes as Title 107A, it was provided that the commissioners' court of any county in the state

"may when they deem it expedient, and shall when petitioned by ten per cent. of the qualified voters of the county or a number of the qualified voters, equal to twenty per cent. of the qualified voters of any political subdivision" mentioned in the act, order an election to be held to determine whether or not pool halls shall be prohibited in such county or subdivision thereof. The act then gives directions for the holding of such an election and by article 6319m, the same being section 14 of the act, it is provided that, if it be determined by a majority vote at such election that pool halls shall be prohibited, the district judge of such district may, upon application of the county attorney or district attorney, enjoin the operation of such halls. It is further provided by the act that, when such election results in favor of the prohibition of such pool halls, the operation of a pool hall within the territory in which such prohibition applies shall be punished by fine or imprisonment in the county jail.

This suit was filed by Chas. W. Watson and E. Cranfill in the district court of Nolan county against the county judge of said county, alleging that under the statute above mentioned an election was held on September 12, 1914, in Nolan county to determine whether or not the operation of pool halls should be prohibited in that county; that at such election 394 votes were cast for, and 280 votes against, prohibition of pool halls. It is further alleged that the election was held in compliance with the petition theretofore presented to the commissioners' court of Nolan county signed by the requisite number of qualified voters of the county. Plaintiffs further alleged that they were resident citizens, qualified voters, property owners, and taxpayers in said county; that they each were owners of a pool hall interest in that county in which they had invested large sums of money prior to said election; and that the prohibition of their said business would result in great financial loss and irreparable injury to them. They prayed for a writ of injunction restraining the defendant county judge from publishing the result of said election and from entering an order declaring the statute above mentioned effective in Nolan county, as required of him by articles 6319f and 6319g. The trial judge sustained general and special demurrers to the petition and refused plaintiffs' application for a temporary writ of injunction based thereon. From that order plaintiffs have appealed.

The principal contention made by appellants' assignments is that the pool hall statute referred to above is unconstitutional and void because it involves a delegation of legislative authority to counties and subdivisions thereof. In other words, that it delegates to counties and subdivisions of counties authority to enact a law prohibiting the operation of pool halls contrary to article 2, §

1, and article 3, § 1, of the Constitution, limiting the power of enacting laws exclusively to the Legislature, and that it delegates further to such counties and subdivisions thereof authority to suspend a law of the state contrary to article 1, § 28, of the Constitution, prohibiting the suspension of laws of the state by any authority except the Legislature, in that it revokes plaintiffs' lawful right theretofore existing under the laws of the state of pursuing a business not prohibited by any law and expressly recognized as lawful by the statutes imposing a license tax thereon. The further contention is made that the statute is in conflict with article 1, § 19, of the state Constitution, providing that no citizen shall be deprived of his property, his privileges, or immunities, except by due course of law, and is a violation of the fourteenth amendment to the Constitution of the United States, prohibiting the enactment of any law by the state depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

[1, 2] In *City of Austin v. Cemetery Ass'n*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114, and in *Wade v. Nunnely*, 19 Tex. Civ. App. 256, 46 S. W. 668, it was held that an injunction will lie to restrain the enforcement of a void city ordinance where it is shown that the enforcement of the ordinance would result in irreparable injury to the applicant. It will be observed that in the two cases cited the injunctions granted were to restrain the enforcement of void ordinances, while in the present case plaintiffs seek to enjoin the county judge from publishing the returns of the election and making an order declaring the results thereof, as required of him by articles 6319f and 6319g, *Vernon's Sayles' Tex. Civ. Stat.* In *City of Dallas v. Dallas Consol. Elec. St. Ry. Co.*, 148 S. W. 292, our Supreme Court held that courts have no power to enjoin the performance of such statutory duties, even though the statute be unconstitutional and void and even though parties complaining thereof may have a proper remedy against the enforcement of such a statute. This of itself would seem to be a sufficient answer to the assignments now under discussion. The constitutional objections to the statute noted already were discussed and overruled in the case of *Roper & Gilley v. Lumpkins*, 163 S. W. 110, by the Court of Civil Appeals for the Fifth District, and in *Ex parte Francis*, by the Court of Criminal Appeals reported in 165 S. W. 147. In the case last cited Justice Davidson filed a very forceful argument against the constitutionality of the statute, but as that court is a court of final jurisdiction for the determination of criminal prosecutions arising under the statute, and as it is in the interest of public policy that harmony, and not conflicts, should prevail between the decisions of that court and our Supreme Court and

Courts of Civil Appeals upon the same statutes, we feel that, if it were incumbent upon us to determine the question of the constitutionality of the statute, we should follow the decisions above cited without attempting a discussion of the merits of the arguments advanced in support of the majority and minority opinions rendered in *Ex parte Francis*.

[3] It was further alleged in the petition, as a basis for the injunction sought, that the officers holding the election gave erroneous advice to several voters as to how to make out their ballots, thus causing many voters through misunderstanding to erase the words appearing on the ballots, "Against the Prohibition of Pool Halls," leaving on such ballots, "For the Prohibition of Pool Halls," when they intended to vote against the prohibition of such halls, and would have done so, but for such erroneous instructions by such officers of the election. Plaintiffs further allege that but for such erroneous instructions a majority of the votes polled would have been cast against the prohibition of pool halls. They alleged that they had been informed and believed such erroneous ballots had been cast at all the voting boxes in the county, that they were not advised of the names of such voters except two, but that they were informed that the officers holding the election would testify that such erroneous instructions were given by them.

If these allegations are true, they constitute irregularities which could have been invoked in a proceeding to contest the election as provided by article 6319k, Vernon's Sayles' Tex. Civ. Stat., and hence did not constitute proper grounds for the injunction prayed for, by reason of that fact, and for the further reason that the acts of the county judge sought to be enjoined were statutory duties, which under the rule announced in *City of Dallas v. Dallas Consol. Elec. St. Ry.*, supra, could not be enjoined even though it should appear that the election, if contested, would be declared invalid by reason of such irregularities.

The judgment is affirmed.

TEXAS & P. RY. CO. v. MILLER et al.  
(No. 378.)

(Court of Civil Appeals of Texas. El Paso.  
Dec. 17, 1914.)

1. JUDGMENT (§ 460\*)—EQUITABLE RELIEF—  
PETITION—PRAYER.

A suit in which the petition alleged that a judgment was obtained surreptitiously against a railway company, after the opposing attorneys had agreed to dismiss the case and prayed that a perpetual injunction be issued against the enforcement of the judgment and for other relief to which plaintiff might be entitled, was a suit to vacate the judgment; such relief being included within the general prayer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882-891; Dec. Dig. § 460.\*]

2. JUDGMENT (§ 456\*)—EQUITABLE RELIEF—  
LIMITATION.

Rev. St. 1911, art. 4648, limiting to one year the time within which to bring suit to enjoin the enforcement of a valid judgment, does not apply to a direct suit to vacate the judgment upon equitable grounds, the time for the commencement of which is limited to four years by article 5690, limiting actions for which no limitation is otherwise prescribed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 863-866; Dec. Dig. § 456.\*]

3. JUDGMENT (§ 427\*)—EQUITABLE RELIEF—  
GROUNDS—AGREEMENT TO DISMISS.

Where a case had been remanded by the Court of Civil Appeals on appeal by defendant, with instructions to direct a verdict for defendant if no new facts were established on the second trial, an agreement by plaintiff's attorney to dismiss the case was within the apparent scope of his authority, and a judgment thereafter taken by plaintiff through another attorney, without notice to defendant, must be vacated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 805-807; Dec. Dig. § 427.\*]

Appeal from Ward County Court; Burch Carson, Judge.

Suit by the Texas & Pacific Railway Company against Ed Miller and another, to restrain the enforcement of a judgment against the railway company. From an order dissolving a preliminary injunction, plaintiff appeals. Reversed and remanded.

See, also, 127 S. W. 566.

John B. Howard, of Pecos, for appellant.  
T. F. Slack, of Barstow, for appellees.

HIGGINS, J. Appellant filed this suit on February 18, 1914, alleging that on April 13, 1908, the defendants Ed and Jim Miller, filed suit in the justice court of Ward county against it, to recover the sum of \$150, alleged to have been sustained through the killing of a horse by a locomotive belonging to said railway company; that said cause was tried in the justice court, and, from the judgment there rendered, an appeal taken to the county court, where it was tried and judgment rendered against the railway company, from which judgment the company perfected an appeal to the Court of Civil Appeals at Ft. Worth, by which latter court the cause was reversed and remanded, with instructions to the lower court, upon retrial, to instruct a verdict in favor of the company, unless other facts be introduced tending to show negligence on the part of the company; that the mandate of said Court of Civil Appeals was issued September 24, 1910; that, during the time above mentioned, Hon. J. F. McKenzie was the attorney for the company and W. A. Hudson and J. E. Starley were attorneys for Ed and Jim Miller; that, at the time of the return of said mandate to the county court of Ward county, Hon. J. E. Starley was the county judge of the county and disqualified from taking any action in the said cause, by reason of his attorneyship for the Millers, and that Hudson, who continued to act for the Millers, advised Judge McKenzie, the

company's attorney, that said cause would not be further prosecuted, but he would permit same to remain upon the docket until there was a special judge who could dismiss the same, or until Judge Starley's term of office should expire, when he would have the cause dismissed, agreeing that, under the opinion of the Court of Civil Appeals, the Millers had no cause of action; that Judge McKenzie informed John B. Howard, of Midland, Tex., who became the attorney for the company, representing it in all cases at Barstow (the county seat of Ward county), that plaintiff's attorney had agreed to have said cause dismissed as soon as there was a judge upon the bench who was qualified to take such action; that thereafter Hudson informed the said Howard that he would make a motion to dismiss said cause and would have same dismissed as soon as there was a judge upon the county court bench who was qualified to take such action, giving as his reason that the Court of Civil Appeals had passed upon the facts in the case, and in effect held that plaintiff had no cause of action; that, relying upon said representations of Millers' attorney, he (plaintiff's attorney) did not give further attention to said cause, in good faith believing that it would be dismissed as soon as a judge came upon the bench who was qualified to dismiss, and relying upon such promise of the attorney in the cause; that, at all times since the return of the mandate, the company has been ready and willing to try the case on its merits, and so informed the attorney for the Millers, but said attorney always informed these plaintiffs' attorneys that the case would not be tried, but would be dismissed, as above stated; that, in the latter part of the year 1912, the Hon. Burch Carson became judge of said county court, and the plaintiff, relying upon the promise to dismiss, believed that the cause had been dismissed, and was no longer pending; that on the 4th day of February, 1913, at a regular term of said county court, the Millers appeared in court with an attorney, other than the said Hudson, and without any notice whatever to the company, or its attorney, or any one connected with it, took a default judgment against the company in the sum of \$99; that neither the company, its attorneys or agents, had any notice or knowledge whatever of said proceedings in taking such judgment, and the company knew nothing of the judgment until long after the adjournment of the term at which it was rendered; that the Millers had procured the issuance of an execution on the judgment and placed same in the hands of H. C. Cantrell, sheriff of Ward county, who threatened to levy the same upon the company's property and sell same to satisfy said judgment; that the judgment for \$99 was surreptitiously obtained by the Millers, by them concealing from the company and its attorneys all knowledge of the fact that they intended to proceed in

said cause; that the company has been imposed upon and advantage taken of it by the Millers. The petition concluded with the prayer that the Millers be restrained from proceeding further in the matter and Cantrell enjoined from levying said execution on any of the company's property, and that on final hearing plaintiff have a perpetual injunction forever restraining said defendants, and each of them, from further prosecuting said writ of execution, "and for all other relief, legal and equitable, to which this plaintiff may be entitled."

A preliminary injunction was forthwith issued, restraining the defendants as prayed for, and thereafter the defendants answered in the cause, pleading the terms and provisions of article 4648 of the Revised Statutes, and further that, if Hudson had agreed with the company's attorney to dismiss the suit as alleged in the petition, such agreement was made without authority from the Millers and without their knowledge or consent, and that they at no time advised plaintiff, or its attorney, that they would have said suit dismissed; that Hudson had voluntarily severed his connection as their attorney in December, 1911, and that the judgment had not been surreptitiously obtained, but had been procured in open court after they (the Millers) had introduced their evidence and established their right to said judgment to the satisfaction of the court, and in securing the judgment no undue advantage was taken, and, if the company was not present at the term of court at which the judgment was rendered, it was through no fault of theirs, but through its own negligence, or that of its attorneys, wherefore they prayed the injunction be dissolved. Upon this answer, the court in chambers dissolved the preliminary injunction theretofore issued, and from this order the railway company prosecutes this appeal.

[1] As we construe the petition, it is a suit on equitable grounds to vacate the judgment rendered in Millers' favor, and to enjoin its execution. It is true the special prayer of the petition asks only that a preliminary injunction be issued, and on final hearing it be perpetuated, and there is no specific prayer that the judgment be vacated and set aside. There is a general prayer, however, "for all other relief, legal and equitable, to which the plaintiff may be entitled." The facts pleaded in the petition show that plaintiff is entitled to have the judgment vacated and its execution enjoined, and, under this general prayer for relief, it would be entitled thereto upon the final hearing if the facts pleaded be substantiated by proof; the rule being that, under a prayer for general relief, there shall be awarded the appropriate relief to which, upon the allegations and proof, plaintiff may appear to be entitled. *Garvin v. Hall*, 83 Tex. 295, 18 S. W. 731; *Kempner v. Ivory*, 29 S. W. 538; *Trammell v. Watson*.

25 Tex. Supp. 216; *Zadick v. Schafer*, 77 Tex. 501, 14 S. W. 153; *Silberberg v. Pearson*, 75 Tex. 290, 12 S. W. 850; *McCullough v. Rucker*, 53 Tex. Civ. App. 89, 115 S. W. 323; *Cravens v. Wilson*, 48 Tex. 324.

[2] Since the petition, upon its face, shows that plaintiff is entitled to have the judgment complained of vacated and set aside, it necessarily follows that its execution should be restrained, pending the final determination of the case upon its merits. Article 4648 of the Revised Statutes, which inhibits the issuance of an injunction to stay the execution of a valid judgment after the expiration of one year from its rendition, does not apply to a direct suit based upon equitable grounds to vacate a judgment and enjoin its execution, and the period within which such a suit may be brought is fixed by article 5690 of the Revised Statutes. *Lane v. Moon*, 46 Tex. Civ. App. 625, 103 S. W. 211, and cases there cited.

[3] With reference to that portion of the answer and motion to dissolve, setting up that, if Hudson agreed with the company's attorneys to dismiss the suit, same was made without authority from the Millers, and without their knowledge or consent, it is sufficient to say that, in making this agreement, Hudson was certainly acting within the apparent scope of the authority possessed by an attorney in charge of litigation, and the company's attorneys could rightfully assume that he, in fact, had the authority to make the agreement in question. The issue of actual authority in such case is immaterial, and the Millers are precluded from questioning same, since Hudson acted within the apparent scope of his authority, and it was relied upon and acted upon by the company's attorneys. Under this view of the case, the other allegations set up in the answer and noted above are immaterial and present no defense. For the reasons indicated, the order of the lower court, dissolving the preliminary injunction, is reversed, and the cause remanded for trial upon its merits, and, pending final trial upon the merits, the preliminary injunction heretofore issued shall remain in full force and effect.

Reversed and remanded.

THOMAS et al. v. BARTHOLD et al.  
(No. 8014.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 24, 1914. Rehearing Denied  
Nov. 28, 1914.)

# 1. APPEAL AND ERROR (§ 1003\*)—REVIEW—VERDICT.

A verdict reasonably supported by the evidence will not be overturned because against the preponderance thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1003.\*]

# 2. CORPORATIONS (§ 99\*)—ACTIONS AGAINST DIRECTORS—IMPROPER ISSUANCE OF STOCK.

Directors, who received stock in return for a franchise, cannot be required to account for the stock by a dissatisfied stockholder, in the absence of a showing of the value of the franchise when acquired by the corporation, even though it appeared that the directors paid nothing for the franchise.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444–446; Dec. Dig. § 99.\*]

# 3. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT.

A verdict on sharply conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.\*]

# 4. APPEAL AND ERROR (§ 548\*)—BILL OF EXCEPTIONS—NECESSITY.

Assignments complaining of the admission of testimony will not be considered, unless preserved by bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433–2440; Dec. Dig. § 548.\*]

# 5. TRIAL (§ 252\*) — INSTRUCTIONS — SUFFICIENCY.

Where a stockholder asserted he was damaged by the mismanagement of the directors, a charge on the duty of the directors, which did not submit any measure of damages to be allowed the stockholder, and did not confine itself to the issues of negligence, raised by the petition, is too general and must be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.\*]

# 6. CORPORATIONS (§ 320\*) — MISCONDUCT OF OFFICERS—DAMAGES—INTEREST.

Where a stockholder was damaged by the negligence of the directors, he can only recover 6 per cent. interest on his damages, which interest must not be compounded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.\*]

# 7. CORPORATIONS (§ 320\*)—ACTION AGAINST—PARTIES—JOINER.

Where plaintiff claimed he was induced to acquire stock in a corporation by the misrepresentations of the directors, and that his stock depreciated because of their negligent mismanagement, others, who acquired stock at different times, cannot intervene as parties plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.\*]

# 8. CORPORATIONS (§ 320\*)—DIRECTORS—ACTIONS AGAINST.

In an action by a dissatisfied stockholder, who asserted that the defendant directors mismanaged the corporate affairs, the question whether they failed to account for certain funds received held for the jury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.\*]

Error from District Court, Parker County; F. O. McKinsey, Judge.

Action by H. D. Thomas and others against C. C. Barthold and others. There was a judgment awarding plaintiffs partial relief, and plaintiffs bring error. Affirmed.

T. Wesley Hook, of Kingsville, and J. M. Richards and Preston Martin, both of Weatherford, for plaintiffs in error. R. L. Stennis, of Dallas, and Jas. C. Wilson, of Ft. Worth, for defendants in error.

DUNKLIN, J. H. D. Thomas recovered a judgment against C. C. Barthold, G. M. Bowie, G. S. White, and John Prince for \$750 expended by him in the purchase of  $7\frac{1}{2}$  shares of preferred stock in the Weatherford Gas, Light, Heat & Power Company, a private corporation, of whom defendants were officers and directors, and from the further judgment rendered in the case denying him a recovery for the additional sum of \$1,500, the amount paid by him for 15 shares of common stock in the same corporation, he has prosecuted a writ of error.

The basis of the claim asserted by plaintiff consisted in allegations, substantially, that defendants as officers of the corporation, and as constituting a majority of four out of a total of five of its board of directors and controlling and managing its affairs, were guilty of negligent mismanagement of the business of the company, thereby causing losses which rendered all of plaintiff's stock worthless. One of the specifications of such mismanagement alleged to have of itself wrecked the company consisted in the act of defendants in borrowing \$25,000 upon the promissory note of the company secured by mortgage upon all its assets, for the payment of which debt it became necessary thereafter to sell all the assets of the company and terminate its operations. This issue was presented in the court's charge, but the verdict shows a finding for the defendant thereon.

Another contention presented in plaintiff's pleadings and submitted in the court's charge was that defendants wrongfully sold all the assets of the company for an inadequate consideration to the Crystal Ice Company, another corporation, which was likewise controlled by the defendants, who were officers thereof, and who constituted a majority of its board of directors; that such sale terminated the business of the selling company, leaving it without assets, and thus rendering plaintiff's capital stock worthless. In the court's charge this issue was presented to the jury, who were told that such sale was unauthorized in law if made without plaintiff's consent, and that, if it should be found from the evidence that plaintiff sustained damage by reason of the sale, a verdict should be returned in plaintiff's favor for the amount of damages so sustained by him. Upon this issue the jury likewise found in favor of the defendants.

Another contention made by plaintiff's pleadings and submitted in the court's charge to the jury consisted in allegations that he was induced to subscribe for the  $7\frac{1}{2}$  shares of preferred stock and to pay \$750 therefor by reason of certain misrepresentations made to him by defendants, to induce him to sub-

scribe for same, and of the falsity of which he was excusably ignorant at the time. The verdict of the jury shows a finding for plaintiff upon this issue, and the judgment in plaintiff's favor was predicated upon that finding.

In plaintiff's petition other issues of negligent mismanagement were tendered, but the same were not submitted to the jury in the court's charge; the issues noted above being the only ones submitted.

Numerous objections have been made by defendant in error to the consideration of the assignments presented in plaintiff in error's brief, including objections for improper grouping, that propositions submitted under the assignments are not germane thereto, etc. It will not be necessary for us to consider such objections further than as hereinafter indicated, in view of our conclusion that plaintiff in error's assignments present no reversible error.

[1] In plaintiff in error's motion for new trial filed in the trial court, it was alleged that the verdict of the jury was contrary to the law and the preponderance of the evidence in several particulars set out in separate paragraphs of the motion, and different assignments of error have been presented, each embodying one of those paragraphs. Each of those assignments reads: "The verdict is contrary to the law and the preponderance of the evidence in this"—following that statement with one of the paragraphs of the motion for new trial noted above. It is a sufficient answer to all these assignments to say that the fact that the verdict was contrary to a mere preponderance of the evidence would be no ground for sustaining the assignment of error in this court, since the rule is that, if there was any evidence beyond a mere scintilla to reasonably support the verdict, the judgment could not be disturbed by this court on the ground of insufficiency of evidence to support it. Furthermore, as a counter proposition to these assignments, the evidence shown in the statement of facts was abundantly ample to sustain the finding of the jury denying the plaintiff a recovery upon the two issues first noted above.

[2] It might be said that the first three assignments are improperly grouped, since they raise different questions of law. However, independent of that objection, the three propositions submitted under those assignments cannot be sustained. The first of those propositions presents the contention that plaintiff was induced to subscribe for his 15 shares of common stock by fraudulent misrepresentations made by the defendant. Even the plaintiff's own testimony, independent of that of the defendants, tends very strongly to show that no misrepresentations were made by the defendants in order to induce plaintiff to subscribe for the common stock. Two other propositions are submitted under the first three assignments, which are, in effect, that defendants were legally bound

to account to the plaintiff for a part of the secret profits made by them upon the franchise granted to the corporation by the city of Weatherford to transact its business in that town. The evidence does show that the franchise was obtained without the expenditure of any money by the defendants, who, after first obtaining the same, transferred it to the corporation, taking capital stock in the corporation in payment therefor. The propositions now under discussion proceed upon the theory that, as the franchise cost the defendants nothing, the stock issued to the defendants therefor was without any consideration, and that accordingly defendants should be held to an accounting therefor. A sufficient answer to these propositions is that no evidence was introduced tending to show the value of the franchise at the time it was acquired by the company. For aught that appears in the record, it may have been worth more than the face value of the stock issued to the defendants as a consideration therefor.

[3] The fifth assignment reads as follows:

"The court erred in charging that but 6 per cent. could be recovered on the preferred stock, or but \$2,250 exclusive of cost."

This assignment is likewise improperly grouped with the fourth, which is that the verdict is contrary to the law and the preponderance of the evidence, and the proposition submitted thereunder might be disregarded on that ground. However, the first proposition under that assignment, namely, that the sale of all the assets by the gas company to the ice company was for an inadequate consideration, was at all events a disputed issue, and the negative of which seems to have been supported by evidence as cogent as that introduced to support the affirmative, to say the least.

[4] Another assignment complaining of the admission of certain testimony over plaintiff's objection thereto is overruled because there is no bill of exception to such ruling.

[5] By the ninth assignment complaint is made of the refusal of the following special requested instruction:

"During its entire existence the defendants were four of the five directors of the corporation, Weatherford Gas, Light, Heat & Power Company. As such they were the managing agents of the company. They were bound to exercise, in the handling of its affairs, such diligence as a reasonably prudent, careful, and skillful man would exercise in the conduct of his own affairs. If you find that they remained ignorant of what they might have discovered by the exercise of good business diligence, or if you find that they did not themselves, even though they employed inferior officers, exercise a reasonable supervision of the affairs of said company, or if you find that they neglected their duties as directors in failing to hold sufficient directors' meetings, and as a result the corporate funds or property were wasted or lost, you will find for the plaintiff, with interest from date of such negligence at the rate of 6 per cent. per annum."

There was no error in refusing that instruction for the reason that it was entirely too general in that it did not submit any

measure of damages to be allowed to the plaintiff and was not confined and applied to the issues of negligent mismanagement, as the same were alleged in plaintiff's petition.

[6] Another assignment reads as follows:

"The verdict of the jury was insufficient for the reason that it did not find interest at 10 per cent. and compound it annually."

We know of no rule which would allow a recovery of more than 6 per cent. interest on the damages alleged in the plaintiff's petition. Neither are we aware of any statute or decision which would allow such interest to be compounded.

The foregoing disposes of all of the assignments of error presented by plaintiff in error H. D. Thomas, who was the sole plaintiff in the suit.

[7] F. R. Putnam, W. J. Milmo, Alex Rawlins, and Wm. Hemphill, who also purchased stock in the Weatherford Gas, Light, Heat & Power Company, filed separate pleas of intervention in the suit. Each alleged in his plea that he was induced to purchase stock in the same corporation by fraudulent misrepresentations of the defendants, and further adopted portions of plaintiff's petition alleging negligent mismanagement of the affairs of the company by the defendants. According to the allegations contained in the pleas of intervention, the purchases of stock by interveners were on dates and in amounts different from each other and from the purchases of the plaintiff, and each of such purchases constituted a transaction separate and distinct from any of such other purchases. Exceptions to these pleas of intervention urged by the defendants on the ground of misjoinder of parties and of causes of action were sustained, and to this action of the court errors have been assigned by the interveners. As indicated by statements already made relative to the causes of action asserted by plaintiff and the interveners, it is clear that there was no error in sustaining the exceptions.

[8] Defendants in error have presented the following cross-assignment of error:

"The court erred in refusing to give special charge No. 1 requested by the defendants in writing as follows: 'Gentlemen of the Jury: You are instructed to find for defendants.'"

Much evidence is quoted to refute all the allegations relied on in plaintiff's petition as a basis for recovery. But plaintiff introduced a witness, an expert accountant, who testified that he had examined the books of the company, together with the checks issued, and that it appeared therefrom that defendants had failed to account for several thousands of dollars which had come into their hands as the officers of the company. While the evidence offered by the defendants tended strongly to overcome that testimony, yet we are unable to say that such rebutting proof was so conclusive as to warrant the court in taking that issue from the jury. The fact that the issue of mismanagement

which was embraced in plaintiff's petition was not submitted to the jury in the court's charge makes no difference, since the merits of the assignment now under discussion must be determined independent of that fact.

For the reasons noted, all assignments of error are overruled, and the judgment is affirmed.

### CHILSON v. OHEIM. (No. 8029.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 31, 1914.)

#### 1. EVIDENCE (§ 130\*)—RES INTER ALIOS ACTA.

In an action against a landlord on a promise to pay for goods furnished his tenant, that the landlord had given checks to the tenant to buy groceries with is *res inter alios acta*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.\*]

#### 2. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL—DEDUCTION FROM EVIDENCE.

In an action against a landlord on a promise to pay for groceries furnished his tenant, the deduction of counsel in argument from the proven fact that the landlord stood for the tenant in 1910 that it was likely that he again stood for him in 1911, the year in controversy, is permissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.\*]

#### 3. NEW TRIAL (§ 103\*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

Where, in an action on an alleged promise of a landlord to pay for groceries furnished his tenant, it was proved that the landlord made such a promise in 1910, and plaintiff testified that he made the same promise in 1911, when plaintiff's claim was presented, and he afterwards reminded the clerk of the conversation, newly discovered evidence consisting of the affidavit of the clerk that he once heard such a conversation, but that he never had any conversation with plaintiff about it, though tending to discredit plaintiff's testimony, is not so material to the issue as to render the refusal of a motion for a new trial reversible.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. § 103.\*]

Appeal from Clay County Court; W. T. Allen, Judge.

Action by H. Oheim against W. H. Chilson. From a judgment for plaintiff, defendant appeals. Affirmed.

Wantland & Parrish, of Henrietta, for appellant. R. E. Taylor and Leslie Humphrey, both of Henrietta, for appellee.

DUNKLIN, J. H. Oheim instituted this suit against W. H. Chilson to recover an indebtedness incurred by Joe Moore for groceries purchased by him from plaintiff, who was at the time engaged in the mercantile business. Plaintiff alleged that before the goods were sold to Moore, Chilson contracted and agreed to pay therefor, and that the sales were upon the faith of that agreement. From a judgment in favor of plaintiff, Chilson has appealed.

The account in controversy accrued during the year 1911, and during the years 1910 and 1911 Moore was a tenant on Chilson's farm.

The evidence shows without controversy that plaintiff sold groceries to Moore during the year 1910, upon the credit of defendant, who afterwards paid the account. Plaintiff testified that prior to any of the sales made in 1911 defendant requested him to furnish Moore groceries for that year, and promised to pay for same just as he had promised during the previous year. Defendant unequivocally denied making that contract, and further testified that at the time he paid the account incurred in 1910 he expressly notified plaintiff that he would not be responsible for any more goods sold to Moore.

[1] Defendant offered to testify that from time to time during the year 1911 he gave Moore checks amounting in the aggregate to the sum of \$153.55, with which to buy groceries for himself and family for the season of 1911. He also offered in evidence checks signed by him payable to Joe Moore, with indorsements upon the same, of divers dates during the year 1911, amounting in the aggregate to the sum above stated. All of this evidence was objected to by the plaintiff because the same related to transactions between Chilson and Moore alone, and was therefore irrelevant to the issues in this case. These objections were sustained, and to those rulings error has been assigned. The following decisions are cited in support of the assignment: Carver v. Power State Bank, 104 S. W. 892; Paine v. Argyle Merc. Co., 133 S. W. 895; Kocher v. Mayberry, 15 Tex. Civ. App. 342, 39 S. W. 604. In those decisions it was held, in effect, that where there is a dispute in the testimony as to the price agreed to be paid for certain articles of property, evidence of the reasonable value of the same is admissible as a circumstance helpful to the solution of the conflict in the testimony of the witnesses upon that issue. We are of the opinion that the evidence offered came within the rule which excludes proof of transactions between either of the parties and strangers, and for that reason there was no error in excluding it. Stuart v. Kohlberg, 53 S. W. 596, Beakley v. Rainier, 78 S. W. 702, Stockton v. Brown, 106 S. W. 423, and other decisions noted in 6 Encyc. Dig. of Texas Repts. pp. 1189, 1190; 1 Jones' Blue Book of Evidence, § 140. Proof of the market value of an article is proof of a circumstance only, which, like proof of custom and other circumstances, does not come within the rule of *res inter alios acta*, and hence the decisions relied on by appellant and noted above are not in point. 1 Jones' Blue Book of Evidence, § 141a.

[2] There was no error in the court's refusal to exclude the argument of plaintiff's counsel which was objected to by the defendant, and upon which plaintiff's second assignment of error is predicated. The argument was, in effect, that as Chilson had stood for Moore in the year 1910, it was

quite natural that he would stand for him again in 1911. We think this was a deduction that counsel had a right to draw.

[3] Another assignment is addressed to the refusal of the court to grant a new trial upon the showing made by the defendant of newly discovered evidence. Plaintiff testified on the trial that in February or March, 1911, before any of the goods were sold to Moore, and when the defendant agreed to pay for such goods as might be furnished to Moore during that year, his clerk, J. M. Baker, was present and heard the conversation; that thereafter he reminded Baker of the conversation; and, further, that when Chilson so agreed to pay the account, he (plaintiff) remarked that Chilson was as good as gold. The affidavit of said J. M. Baker was attached to the defendant's motion for new trial. He states in that affidavit that he was present and heard a conversation between Chilson and Oheim in which the former told the latter he would pay for any goods that might be furnished to Joe Moore, and that he would pay the bills monthly, and that, in reply thereto, Oheim said he considered Chilson as good as gold; that after that time goods were sold to Moore and paid for by the defendant about the 1st of each month; that thereafter Oheim refused Moore further credit. The witness further stated in the affidavit that the conversation just referred to was the only one he ever heard in which the defendant agreed to pay for any goods sold to Moore, and that he never discussed such conversation with Oheim at any time. It is true that this evidence would have tended to discredit the testimony of the plaintiff upon that issue. But whether or not Baker was present at the time of the alleged agreement was collateral to the main issue, and not of such a material character as to require a reversal of the judgment for the refusal of appellant's motion for a new trial. *Fears v. Albea*, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78, G., C. & S. F. Ry. Co. v. *Hays*, 40 Tex. Civ. App. 162, 89 S. W. 29, and other decisions cited in 13 Encyc. Dig. Tex. Repts. 457.

The judgment is affirmed.

#### HOLLAND v. PIERCE-FORDYCE OIL ASS'N. (No. 8027.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 31, 1914.)

#### SALES (§ 71\*)—CONTRACT—CONSTRUCTION.

Where defendant agreed to sell 15,000 gallons or such additional quantities of gasoline, not exceeding 25,000 gallons, as plaintiff might order for his own consumption during a year, defendant cannot be required to supply gasoline beyond the minimum amount, except for plaintiff's own use during the term of the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 189-196; Dec. Dig. § 71.\*]

Appeal from Taylor County Court; E. M. Overshiner, Judge.

Action by Kirk D. Holland against the Pierce-Fordyce Oil Association, which counterclaimed. From a judgment for defendant, plaintiff appeals. Affirmed.

Scarborough & Hickman, of Abilene, for appellant. J. M. Wagstaff, of Abilene, for appellee.

CONNER, C. J. On April 1, 1912, by contract in writing, appellee agreed to sell and deliver to appellant "during a period of 12 months commencing April 1, 1912, 15,000 gallons, or such additional quantities of pennant gasoline or engine naphtha as the second party (appellant) may order for its own consumption, not exceeding, however, 25,000 gallons of engine naphtha at nine cents per gallon." As the findings of the court show, appellant, who operated a line of autos for the transportation of passengers and freight, and who also supplied the retail trade of several towns in which he maintained garages, at various times during the year covered by the contract ordered and received 15,000 gallons of gasoline under the contract; the last order so received being 6,000 gallons on March 13, 1913. On the 26th of March, 1913, he ordered 10,000 gallons additional, which, for the most part, he had sold at wholesale, but which appellee refused to deliver, on the ground that the order did not come within the terms of the contract. On the 27th of March, 1913, appellant again ordered 10,000 gallons for his own use in operating his autos and to supply his retail trade with gasoline. Appellee again declined to fill the order, and this suit was instituted by appellant to recover the difference in price of the oil so ordered as contracted for and as worth on the market, at the time of the refusal to deliver. The defendant by its answer contested the plaintiff's claim and pleaded over upon an unpaid balance of account in the sum of \$298. The trial, which was before the court without a jury, resulted in a judgment against the plaintiff upon his claim and in favor of the defendant oil company on its cross-action for the sum of \$213.10.

The only question presented is whether appellant, under the terms of his contract, had the legal right a few days before the expiration of his contract to order the 10,000 gallons of gasoline for use after the contract had expired. The trial court concluded that he had no such right, and we concur in that conclusion. It is evident from the court's conclusions of fact that the oil last ordered was not necessary for the appellant's use during the operation of the contract, which we think only bound appellee to deliver beyond the minimum number of gallons named in the contract (15,000) such gasoline as was required for his own con-

sumption. A very similar contract was so construed by the Court of Civil Appeals for the Fourth District in the case of *Gulf Ref. Co. v. Pegues Merc. Co.*, 164 S. W. 1113.

On the authority of that case and of the cases therein cited, the trial court's conclusions of fact and law are adopted, and the judgment is affirmed.

**FT. WORTH HORSE & MULE CO. v. BURNETT.** (No. 8024.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 31, 1914.)

**APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.**

Where there is evidence to support the verdict, it cannot be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by the Ft. Worth Horse & Mule Company against S. Q. Burnett. Judgment for defendant, and plaintiff appeals. Affirmed.

M. B. Harris, of Ft. Worth, for appellant. Speer & Weldon, of Bowie, and McLean, Scott, McLean & Bradley, of Ft. Worth, for appellee.

CONNER, C. J. Appellant sued in the district court to recover a balance alleged to be due on account for the sum of \$2,429.08. The defendant, among other things, denied various items of the account as stated in an exhibit to the plaintiff's petition, and alleged that he was entitled to a number of credits which the plaintiff had not allowed, the defendant stating the items disputed and the credits he claimed, the account as so stated by defendant showing an indebtedness in his favor for the sum of \$1,369.62, for which he prayed a recovery. The trial before a jury resulted in a verdict in favor of the defendant for the sum of \$223.42, from which the plaintiff appealed.

We think no useful purpose is to be served by a discussion of appellee's objections to the assignments of error. Regardless of such objections, therefore, we will state that the only material question sought to be presented is whether the evidence is sufficient to support the verdict and judgment, and we think it very plainly is. It appears that the defendant Burnett was a dealer in horses and mules on his own account, and also as a member of a firm composed of himself and R. P. Fox. It further appears that the appellant company furnished the money upon which both Burnett and the firm operated, and that when stock was bought, Burnett or the firm, as the case was, would draw upon the appellant company in payment therefor, and when such stock was sold the

proceeds would be remitted to the appellant company and credit therefor given either the individual or firm engaged in the transaction. In this way a large number of debits and credits arose which, as stated by the appellant company, amounted to the balance for which they sued, but appellee, Burnett distinctly testified to certain items which he specified in his testimony had been incorrectly charged against him, and as distinctly testified to a number of credits to which he was entitled that had not been given him, leaving the balance according to his testimony in his favor. Appellant sought to show by affidavit of one of the jurors after the trial that the verdict had been arrived at by allowing the defendant credit for four checks, which the evidence showed had been credited to the firm. The trial court evidently disregarded this affidavit, and regardless of whether the affidavit is entitled to any consideration, it is apparent that if the items of the plaintiff's account which the defendant distinctly denied be deducted from the balance against him as stated in the plaintiff's petition, and that from the remainder there be deducted the credits not given, to which the defendant also distinctly testified was his right, the balance amounts to the sum found by the jury in the defendant's favor. We do not see how we can disregard this testimony of the defendant.

The judgment is accordingly affirmed.

**CONNELLEE et al. v. CHAS. C. THOMPSON CO.** (No. 8026.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 31, 1914.)

**SALES (§ 418\*)—BREACH OF CONTRACT—PROFITS—NOTICE.**

Though the seller breached its contract by delaying shipments of books, and the purchaser lost profits he would have made on resale, he cannot recover such profits, where the seller had no notice of the expected profits.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174-1201; Dec. Dig. § 413.\*]

Appeal from Eastland County Court; E. A. Hill, Judge.

Action by the Charles C. Thompson Company against C. U. and R. S. Connellee, who counterclaimed. From a judgment for plaintiff, defendants appeal. Affirmed.

D. G. Hunt, of Eastland, for appellants. Earl Conner, of Eastland, for appellee.

DUNKLIN, J. The Chas. C. Thompson Company instituted this suit against R. S. Connellee and C. U. Connellee to recover an indebtedness claimed against R. S. Connellee as principal and against C. U. Connellee as guarantor.

R. S. Connellee was engaged in the business of selling books at auction, and the indebtedness for which plaintiff sought a recovery was for sales made covering several

months; the purchases having been made at different times and in different amounts. R. S. Connellee was a traveling salesman, and would order the books from plaintiff, doing business in the city of Chicago, to be shipped to different towns, where he would sell them at auction on certain days previously advertised by him. Before plaintiff agreed to extend credit for such purchases, it required, and was given, the written guaranty, to the extent of \$500, of the defendant C. U. Connellee, the uncle of R. S. Connellee. The defendant R. S. Connellee filed a counterclaim against the plaintiff, alleging, in substance, that plaintiff had breached its contract in delaying shipments of certain orders to certain towns at which he had previously advertised sales, and that, by reason of such delays, he was unable to meet such appointments, and by reason thereof lost profits in a sum named, which was in excess of the amount of plaintiff's demand.

The case was tried by the court without the aid of a jury, and his findings of fact and conclusion of law appear in the record. The counterclaim was denied by the trial judge, and judgment was rendered in plaintiff's favor for the amount of its demand. Defendants have appealed.

But one assignment of error is presented here, which reads:

"The court below erred in finding and rendering judgment accordingly that defendant R. S. Connellee was not entitled to recover damages against the plaintiffs on his cross-action by reason of their breach of the contract they had entered into with the plaintiffs."

This assignment is not a copy of any paragraph of appellant's motion for new trial which appears in the record, but was filed in the trial court separately as an assignment of error. By reason of that fact, and upon the further proposition that the assignment is too general, appellee objects to a consideration thereof. It is unnecessary to determine the merits of these objections, since the judgment should be affirmed for the reasons hereinafter stated.

The court found, in effect, that plaintiff breached its contract by delaying certain shipments of books to R. S. Connellee, and that by reason of such delays R. S. Connellee lost profits in his business as a salesman of the books at public auction in the sum of \$360. But the court further made the following finding:

"I find that plaintiffs had no notice of the expected profits testified about by R. S. Connellee that he contemplated making by the sale of the books and goods purchased from plaintiffs."

This finding has not been challenged by any assignment presented here, and under it no other judgment could have been rendered than to deny a recovery of the profits so claimed by R. S. Connellee.

Therefore the judgment is affirmed.

**Affirmed.**

# FORD v. SIMMONS et al. (No. 5384.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 23, 1914.)

## 1. JUDGES (§ 25\*)—SPECIAL JUDGES—ELECTION BY MEMBERS OF BAR—POWERS.

Under Rev. St. 1911, art. 1741, providing, relative to special judges elected by the practicing lawyers present at a term of court, in the absence of the county judge, that such special county judge shall have all the power and authority of the county judge while in the trial and disposition of all the cases pending in such court during the absence of the county judge, such a special county judge may try all cases in which he is not disqualified, even though the county judge would be disqualified.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 99-106; Dec. Dig. § 25.\*]

## 2. JUDGES (§ 25\*)—SPECIAL JUDGES—ELECTION BY MEMBERS OF BAR—POWERS.

A special county judge elected by the members of the bar in the absence of the county judge had jurisdiction to try a case, though because of the disqualification of the county judge and the failure of the parties to agree upon a special judge at a previous term the Governor had appointed a special judge to try such case pursuant to Rev. St. 1911, art. 1738, where the special judge appointed by the Governor had not qualified.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 99-106; Dec. Dig. § 25.\*]

Appeal from Cameron County Court; Ira Webster, Special Judge.

Action between J. Stanley Ford and G. N. Simmons and others. From a judgment against him, Ford appeals. Affirmed.

Harbert Davenport, of Brownsville, for appellant. Rich & Searle, Graham, Jones, West & Dancy, and J. C. George, all of Brownsville, for appellees.

**MOURSUND, J.** This case was tried before Hon. Ira Webster, who was duly elected special judge of the county court of Cameron county, on account of the absence of Hon. H. L. Yates, county judge of said Cameron county. A motion for new trial was filed by appellant in which it was contended that said Ira Webster was without jurisdiction to try the case because Judge Yates was disqualified to try the case and prior to the election of said Webster as special judge the disqualification of Judge Yates and the failure of parties to agree upon a special judge at the preceding term had been duly certified to the Governor, who had thereupon duly appointed Hon. F. W. Seabury as special judge to try this case. The commission from the Governor appointing said Seabury was attached to said motion, but had not theretofore been filed in the case. It appears from exhibits attached to a reply to said motion that said Hon. F. W. Seabury had never qualified as special judge, nor even received notice of his appointment. The docket entries failed to show that Judge Yates had noted his disqualification upon the docket. There was nothing upon the minutes at the time the case was tried or

among the papers indicating that a special judge might have been appointed to try the case. So far as disclosed by the record, none of the attorneys or parties had notice of the appointment made by the Governor except attorney for appellant.

Appellant relies for a reversal solely upon the proposition that fundamental error was committed in that Special Judge Webster was without jurisdiction to try the case.

Articles 1738, 1739, and 1741 (R. S. 1911), relating to the appointment by the Governor and election by the bar of special county judges, have all been recognized by our courts to be valid. *Porter v. State*, 48 Tex. Cr. R. 125, 86 S. W. 767; *Dulaney v. Walsh*, 90 Tex. 329, 38 S. W. 748.

[1, 2] Under article 1741 a special judge elected by the bar is given "all the power and authority of the county judge while in the trial and disposition of all the cases pending in said court." This means that he is given the power to try all cases in which he is not disqualified, and not that he is given the power to try all cases in which the county judge is not disqualified. Therefore, in this case, the special judge elected by the bar was authorized by law to try the case unless the fact that an appointment of a special judge had been made by the Governor prevented him from acquiring jurisdiction to try the case. The appointment alone could confer no jurisdiction upon the appointee to try the case, as he could decline to qualify or fail to qualify, and therefore when this case was reached by Special Judge Webster the appointed special judge had acquired no jurisdiction to try the case. Judge Webster therefore had jurisdiction to try the case. We express no opinion upon the question whether Judge Webster could have legally tried the case if Judge Seabury had qualified as special judge prior to the trial of the case.

The judgment is affirmed.

#### RIDENHOWER v. COLLINS. (No. 8022.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 24, 1914.)

#### BROKERS (§ 86\*)—ACTIONS FOR COMPENSATION—SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions on the sale of a farm, evidence held to warrant a jury finding that it was the understanding of the parties that the price at which the farm was listed with the broker and for which it was sold should be net to defendant, and that the broker was to add his commission thereto in fixing the selling price.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

Appeal from Comanche County Court; J. H. Milam, Judge.

Action by Ray Ridenhower against J. S. Collins. From a judgment for defendant, plaintiff appeals. Affirmed.

Smith & Palmer, of Comanche, for appellant. Goodson & Goodson, of Comanche, for appellee.

DUNKLIN, J. Ray Ridenhower sued J. S. Collins to recover \$200 claimed as a broker's commission earned in negotiating the sale of a farm belonging to Collins, and from a judgment denying him a recovery the plaintiff has appealed.

The original statement of facts filed in the trial court has not been sent up, as provided by article 1932, Vernon's Sayles' Texas Civil Statutes, but a copy of the same is embodied in the transcript. Appellee has moved to strike out such copy from the transcript, contending that only the original statement of facts can be considered in this court. It will be unnecessary to pass upon the merits of this motion, or upon objections to a consideration of the one assignment of error presented in the record, since we have decided, as hereinafter shown, that the judgment should be affirmed, even though such motion and objections should be overruled.

The assignment of error presented is, in effect, that the evidence conclusively and without controversy establishes a right in the plaintiff to recover the commissions claimed. The evidence does show without controversy the following facts: Defendant listed his farm with plaintiff for sale, naming \$4,000 as his price therefor. Plaintiff was engaged in the business of a real estate broker, and that fact was known to the defendant at the time of such listing. The plaintiff procured a purchaser for the land at the price named, and the defendant sold it to such purchaser at that price, and before such employment of the plaintiff as such broker had been revoked. But whether or not, under the contract of employment, it was understood and agreed between the parties that the price for which the land was listed was to be net to the defendant, and the plaintiff should realize a commission from the purchaser by adding the same to such net price, as contended by the defendant, was a disputed issue under the evidence. While both parties testified that at the time of the employment of plaintiff under which the sale was made the question of the payment of a commission was not mentioned, yet they both testified further that some three or four years prior to that employment the land was first listed with the plaintiff for the same price, no mention being then made of a commission for selling the land, but that, after such listing, plaintiff drew up a written contract of employment, which was signed and delivered to him by the defendant, and in which the price of the land was stated as \$4,200, instead of \$4,000. Both parties testified, in effect, that they understood at that time that the \$200 added to the price named by the defendants was for com-

mission to plaintiff for making the sale, and that the \$4,000 was to be net to the defendant. At the time of the second listing of the land with the plaintiff substantially the same conversation occurred as when it was first listed, but no written contract of employment was thereafter drawn up, as was done in the first instance. The defendant testified, substantially, that it was his understanding that when the land was listed the second time he should receive \$4,000 net to him, and that plaintiff should add his commission to that price and price the land to the purchaser for \$4,000, plus such added commission, just as it was understood and agreed at the time of the first employment. We are of the opinion that the facts and circumstances related were sufficient to warrant a finding by the jury that such was the understanding by both parties at the time of the second listing of the land.

Hence the assignment is overruled, and the judgment is affirmed.

Affirmed.

**MOLLOY v. BROWER et al. (No. 8035.)**  
(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 7, 1914. Rehearing Denied  
Dec. 5, 1914.)

**1. EXECUTION (§ 172\*)—ACTION TO RESTRAIN  
—EVIDENCE—DEEDS.**

Where the pleadings in a wife's action to enjoin an execution sale, in satisfaction of her husband's debt, of property deeded to her by him, alleged that the deed to the wife was in fee simple as her separate estate, but did not purport to set out the tenor of the deed or more than its legal effect, it was not error to admit the deed in evidence, though it did not, in terms, limit the property to her separate use.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.\*]

**2. HUSBAND AND WIFE (§ 119\*)—CONVEYANCE  
TO WIFE — EFFECT TO VEST SEPARATE ES-  
TATE.**

A deed from husband to wife necessarily vests the wife with a separate estate in the property conveyed, and is in law a conveyance to her separate use.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 424-429, 447; Dec. Dig. § 119.\*]

**3. EXECUTION (§ 172\*)—LEVY—INJUNCTION—  
SUFFICIENCY OF EVIDENCE.**

Evidence, in a wife's action to enjoin a sale of her property under an execution against her husband, held to sustain an implied finding that the writ of execution had been levied on her property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.\*]

**4. APPEAL AND ERROR (§ 1051\*)—HARMLESS  
ERROR—ADMISSION OF EVIDENCE.**

In a wife's action to enjoin a sale of her property under an execution against her husband, permitting plaintiff to testify to circumstances tending to make the property her separate estate, if error, was harmless, where the deed from the husband on which she relied, and which was offered in evidence, vested her with the separate estate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Injunction by Mrs. L. M. Brower and her husband against A. W. Molloy and another. From judgment for plaintiffs, the defendant named appeals. Affirmed.

Jas. O. Scott, of Ft. Worth, for appellant. Lindsley M. Brower and G. R. Lipscomb, both of Ft. Worth, for appellees.

**SPEER, J.** Mrs. L. M. Brower, joined by her husband, A. A. Brower, instituted this suit in the district court of Tarrant county to restrain A. W. Molloy and L. W. Allen, the latter as sheriff of Williamson county, from making a sale of a tract of land on a writ of execution issued out of the county court of Tarrant county for civil cases on a judgment in favor of A. W. Molloy against A. A. Brower, the plaintiff claiming the property as her separate estate. There was a trial before the court, resulting in a judgment in favor of the plaintiff perpetuating the injunction prayed for, and the defendant Molloy appeals.

The trial court found as matter of fact that the property in controversy was deeded by A. A. Brower to his wife, L. M. Brower, upon an understanding between both that the same should be her separate property, and that at the time of the conveyance the grantor was solvent, and furthermore that at that time appellant was not a creditor at all of the said A. A. Brower. The court further found that there was a consideration moving from Mrs. L. M. Brower to her husband to sustain the conveyance.

[1, 2] The first ruling of which the appellant complains is that the court erred in admitting the deed from A. A. Brower to Mrs. L. M. Brower because it varied from the deed pleaded by appellees, in that the pleading declared the conveyance was to the wife in fee simple as her separate estate, whereas the deed offered in evidence did not in terms limit the property to her separate use. We overrule this assignment for two reasons: First, because the pleadings did not undertake to set out the tenor of the deed evidencing Mrs. Brower's ownership, but merely the legal effect of the same; and, second, because since a deed from the husband to the wife can have no other effect but to vest in her a separate estate in the subject-matter of the conveyance, the deed was therefore in fact and in law a conveyance to her separate use. See *Jones v. Humphreys*, 39 Tex. Civ. App. 644, 88 S. W. 403, and cases there cited.

[3] It is next complained that the record contains no proof of a levy of the writ of execution alleged by appellees. The petition alleging in detail the levy of the execution was properly verified, and the appellants nowhere specifically deny such allegation. So that, it is doubtful if the same was an issue on the trial, but if so, the testimony of Mrs.

Brower is sufficient, we think, to support the implied finding that the writ had been levied on her property. She said:

"My husband sold and traded me a tract of land in Williamson county, Tex. It is the tract of land the defendant A. W. Molloy is seeking to sell under execution in satisfaction of a judgment rendered against my husband, A. A. Brower, in the county court of this county, and my husband and I are plaintiffs in this case for the purpose of stopping the sale of said land for the reason that it is my separate property. I know it is the same land levied upon in this case because the sheriff sent me a notice describing the land by metes and bounds."

We adopt the trial court's finding of fact that the deed from A. A. Brower to Mrs. L. M. Brower was based upon a consideration, as the evidence is sufficient to show an indebtedness to her of many years' standing. It is therefore unnecessary for us to pass upon the sufficiency of the evidence to support the finding that appellant was not a creditor of appellee A. A. Brower at the time of the conveyance, and we, accordingly, will not do so.

[4] The rulings whereof it is complained that appellees were permitted to testify to facts and circumstances tending to make the property her separate estate present no possible error since, as we have already indicated, the legal effect of the deed was to vest in the wife the separate estate.

There is no error in the judgment, and it is affirmed.

ST. LOUIS & S. F. RY. CO. et al. v. STAPP.  
(No. 8036.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 14, 1914.)

APPEAL AND ERROR (§ 345\*)—TIME FOR APPEAL—NEW TRIAL.

Under Rev. Civ. St. 1911, art. 2086, requiring that a writ of error be sued out within 12 months after rendition of final judgment, where a judgment was rendered December 11, 1912, and a motion for new trial was overruled January 21, 1913, a writ of error filed January 19, 1914, was not filed in time; the time of the commencement of the 12-month period not being changed by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612) effective April 4, 1913, which amends article 1612, and Supreme Court rule 24 (142 S. W. xii), making the filing of a motion for new trial a condition precedent to the taking of a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.\*]

Error from Wichita County Court; C. B. Felder, Judge.

Action by G. W. Stapp against the St. Louis & San Francisco Railway Company and others. Judgment for plaintiff, and defendants bring error. Writ of error dismissed.

Carrigan & Householder, of Wichita Falls, and S. C. Rowe, of Ft. Worth, for plaintiffs in error. Jno. C. Kay, of Wichita Falls, and Theodore Mack, of Ft. Worth, for defendant in error.

BUCK, J. At the threshold of the consideration of this case we are met with the motion of defendant in error to dismiss the appeal of plaintiffs in error because it was not filed in this court within 12 months from the rendition of the judgment in the trial court, and he cites in support of his motion article 2086, Revised Civil Statutes 1911, which reads as follows:

"The writ of error may, in cases where the same is allowed, be sued out at any time within 12 months after the final judgment is rendered, and not thereafter,"

—and also the case of *Cooper v. Yoakum*, 91 Tex. 391, 43 S. W. 871.

By reference to the transcript it is shown that the judgment in the trial court was rendered December 11, 1912; motion for new trial was overruled January 21, 1913; and that the plaintiff filed his petition for writ of error in the trial court on January 19, 1914. So it will be seen that more than 12 months had elapsed between the rendition of the judgment in the trial court and the filing of plaintiffs in error's petition for writ of error, but that it lacked 2 days of being 12 months from the date of the overruling of the motion for new trial.

In the case of *Cooper v. Yoakum*, above referred to, the Supreme Court, on certified question by the Court of Civil Appeals for the Fourth District, held that the 12 months allowed by statute after the final judgment in the trial court in which to file the writ of error dates from the rendition of the main judgment, and not from the overruling of the motion for a new trial. This construction of the statute has been followed uniformly since, so far as we have been able to determine. In *Carpenter v. Carpenter*, 142 S. W. 633, the court adheres to the ruling made in the case of *Cooper v. Yoakum*.

But the plaintiffs in error urgently insist that the motion to dismiss the writ of error filed by defendant in error should not be sustained because:

"The petition for writ of error and error bond herein have been filed subsequent to the amendment of article 1612, Revised Civil Statutes of 1911, as amended by chapter 136, p. 276, of Acts of the Thirty-Third Legislature, which article as amended, when considered in connection with rule 24 promulgated by the Supreme Court November 26, 1911 (142 S. W. xii), makes it necessary to file a motion for new trial before an appeal or writ of error can be taken; whereas, under the law as it was previously to the enactment of said amendment and the formulating of said rule, such motion was not a necessary prerequisite to appeal or error. Therefore the judgment in this cause overruling the motion for new trial was the final judgment therein and the writ of error herein was sued out in time."

The amendment to article 1612, Revised Civil Statutes 1911, found in chapter 136, p. 276, Acts 33d Leg., to which counsel for plaintiffs in error cites us, became a law April 4, 1913. In *Evans v. S. A. Tract Co.*, 166 S. W. 408, the Court of Civil Appeals for

the Fourth District, speaking through Carl, J., uses the following language:

"This cause is brought to this court on writ of error from a judgment rendered on the 14th day of October, 1912. The motion for a new trial was overruled on November 30, 1912, and notice of appeal then given. The petition for writ of error was filed November 29, 1913."

And, after quoting article 2086, Revised Statutes, he further says:

"Where a petition for a writ of error is not filed within 12 months from the time final judgment is rendered, as provided in article 2086 of the Revised Statutes of 1911 (article 1389, Revised Statutes 1895), the writ will be dismissed; since the condition is jurisdictional. And this article of the statute has been construed to mean 12 months from the time the judgment was rendered, and not from the time the motion for a new trial is overruled"—citing *Cooper v. Yockum*, 91 Tex. 391, 43 S. W. 871; *Carlton v. Ashworth*, 45 S. W. 203; *Converse v. Trapp*, 29 S. W. 415; *Uvalde v. Uvalde*, 31 S. W. 327; *Schleicher v. Runge*, 90 Tex. 456, 39 S. W. 279; *Milo et al. v. Nuske et al.*, 95 Tex. 243, 66 S. W. 544.

As will be seen, the decision in *Evans v. S. A. Traction Co.*, supra, was rendered more than 12 months after the amendment of article 1612 referred to, and the court must have had in mind such amendment at the time it rendered the decision.

While the plaintiffs in error cite us to what appears to be a contrary holding with reference to appeals from the justice court to the county court, as persuasive of the reasonableness and justice of a different construction than the one which has heretofore been adhered to of article 1612, yet we do not feel at liberty to depart from the construction of this article given by our Supreme Court and by courts of co-ordinate jurisdiction.

The writ of error is dismissed, at the cost of plaintiffs in error.

## RHOME MILLING CO. v. CUNNINGHAM et al. (No. 8023.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 31, 1914.)

### 1. VENUE (§ 32\*)—ASSIGNMENT—EVIDENCE—FRAUD.

Evidence, in an action by the assignee of a claim for damages for a seller's delivery of inferior, damaged mill products, held not to sustain defendant's contention that the assignment was fraudulently made for the purpose of affecting the venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.\*]

### 2. CORPORATIONS (§ 503\*)—VENUE—PLACE WHERE CAUSE OF ACTION AROSE.

Under section 24, art. 1830, *Vernon's Sayles' Ann. Civ. St.* 1914, providing that suits against any private corporation or joint-stock company may be commenced in any county in which the cause of action or a part thereof arose, the assignee of a claim for damages for defendant's delivery of inferior or damaged goods bought in C. county from defendant's traveling salesman, to be paid for by taking up defendant's drafts for shipments f. o. b. C. county, might sue defendant in C. county, since the

cause of action at least in part arose in that county.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.\*]

### 3. CUSTOMS AND USAGES (§ 17\*)—PAROL EVIDENCE TO VARY CONTRACT.

Where a written contract for the sale of goods provided that no agreement, conditions, or stipulations, verbal or otherwise, except those mentioned in the contract, would be claimed, parol evidence that it was customary for the buyer to furnish shipping directions was inadmissible.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.\*]

### 4. SALES (§ 416\*)—ACTION FOR DAMAGES—EVIDENCE.

In an action for damages from a seller's delivery of inferior or damaged goods, evidence of a custom of the buyer to furnish shipping directions held inadmissible, since a violation of such custom did not induce the seller's breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.\*]

Appeal from Comanche County Court; J. H. McMillan, Judge.

Action by W. B. Cunningham and others against the Rhome Milling Company and another. Judgment for plaintiffs in justice's court was affirmed on appeal, and defendant company appeals. Affirmed.

W. T. McPherson, of Comanche, for appellant. Goodson & Goodson, of Comanche, for appellees.

SPEER, J. C. F. Williams, of Comanche county, purchased from the Rhome Milling Company, a corporation doing business in Wise county, certain mill products, and, upon its failure to deliver the same, transferred and guaranteed his claim for damages to W. B. Cunningham, also of Comanche county, whereupon the latter sued both the milling company and Williams in the justice court of Comanche county. The plaintiff had judgment, and the cause was duly appealed to the county court, where he again recovered judgment against both parties, and the milling company appeals.

[1] The first complaint goes to the action of the court in overruling the plea of appellant to be sued in the county of its own residence; the contention being that the facts showed a fraudulent transfer of the claim from Williams to Cunningham. We cannot disturb the judgment in this respect, however. Cunningham testified:

"I in good faith bought this claim from C. F. Williams, and it was transferred to me, and I own it absolutely. I would not have bought the claim unless its payment had been guaranteed to me at Comanche, Tex., by Mr. Williams, who lived there, and after the claim was bought by me I directed suit to be brought thereon."

Williams testified that he in good faith sold the claim to Cunningham and guaranteed its payment at Comanche; that he had no interest in the claim, except that as an indorser and guarantor he is liable to Cunningham.

ham; that Mr. Cunningham gave him credit for the amount on the books of the bank; and that he has long since used the money put to his credit at the bank and has never repaid any part of the same to Mr. Cunningham.

[2] Besides, section 24 of article 1830, Vernon's Sayles' Tex. Civ. Stat., prescribes that: "Suits against any private corporation, association, or joint-stock company may be commenced in any county in which the cause of action, or a part thereof, arose."

The undisputed facts show that Williams bought the goods in question in the town of Comanche from the traveling salesman and agent of appellant, and that payment for the same was to be made at that place at the Farmers' & Merchants' National Bank by taking up drafts for shipments which were to be made f. o. b. Comanche, Tex., and that the Comanche bank, to whom appellant was to send its drafts upon the payment by Williams, was to remit the proceeds to appellant. It thus appears that the cause of action, at least in part, arose in Comanche county. *Kell Milling Co. v. Bank of Miami*, 155 S. W. 325.

[3, 4] Those assignments complaining of the action of the court in refusing to admit evidence tending to show that appellee Williams was to furnish appellant shipping instructions and directions, or at least that such was customary between merchant and merchant, are overruled for the reason the contract appears to have been in writing and to contain the following stipulations: "It is understood that no agreement, conditions, or stipulations, verbal or otherwise, except those mentioned in this contract, will be claimed," and that "this order is taken subject to the approval of the Rhome Milling Company and is not subject to countermand," and furthermore because if any such agreement was made, or any such custom existed, its violation did not induce appellant's breach of the contract. Its dereliction lay, not in failing to ship at all, but in shipping inferior or damaged merchandise.

We overrule the other assignments complaining of the incompetency of the witness Williams and of the insufficiency of the evidence to support the judgment. The evidence was sufficient to authorize the recovery shown, and the judgment is therefore affirmed.

Affirmed.

MEMPHIS COTTON OIL CO. v. GARDNER.  
(No. 861.)

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 14, 1914. Rehearing Denied  
Dec. 12, 1914.)

1. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an employé by the falling on him of sacks of meal stacked

in a room where he was required to work, evidence held to sustain a finding of negligent failure to provide a reasonably safe place in which to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

2. MASTER AND SERVANT (§§ 288, 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

Whether an employé, injured by the falling of sacks of meal, assumed the risk or was guilty of contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1090, 1092-1132; Dec. Dig. §§ 288, 289.\*]

3. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

4. MASTER AND SERVANT (§ 103\*)—INJURY TO SERVANT—NONDELEGABLE DUTY.

Where sacks of meal were negligently stacked, so as to render the place unsafe for an employé to work, the employer was liable for injury to the employé, though the duty to stack the sacks had been delegated to another, for the duty to provide a reasonably safe place is nondelegable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.\*]

5. MASTER AND SERVANT (§ 125\*)—INJURY TO SERVANT—SAFE PLACE TO WORK.

An employer is not liable for a mere temporary unsafe condition of place of work of which he has no notice or of which the exercise of ordinary diligence would not have informed him, but is liable where he could have known of the condition by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

6. MASTER AND SERVANT (§ 107\*)—INJURY TO SERVANT—LIABILITY.

Mere temporary dangers created by fellow employés, due to no fault of the plan or construction, are not within the rule imposing on an employer the duty to provide a safe place for employés in which to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

7. MASTER AND SERVANT (§ 107\*)—INJURY TO SERVANT—LIABILITY.

Where a working place is made unsafe by the material therein or the construction thereof, and is in that condition when an employé is directed to work thereat, the employer, negligent in permitting it to remain in that condition, is liable for injuries received by the employé.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

8. MASTER AND SERVANT (§ 125\*)—INJURY TO SERVANT—SAFE PLACE TO WORK.

Where the employer's vice president and the general foreman frequently passed through a room when the work of stacking sacks of meal was being negligently done, the employer was chargeable with notice of the danger, and was liable for subsequent injury thereby to an

employé, not assisting in the work and knowing nothing of the conditions and not warned. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

9. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—NEGLIGENCE—LIABILITY.

Where the negligence of an employer concurred with the negligence of fellow servants in stacking sacks of meal in a room, an employé injured by the falling of the stack while at work could recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

10. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—NEGLIGENCE OF EMPLOYER AND FELLOW SERVANT.

Where the negligence of fellow servants in removing sacks of meal stacked in a room, where an employé was injured by the falling of the stack, concurred with the negligence of the employer in the construction of the stack, the negligence of the fellow servants would not defeat a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

Appeal from District Court, Hall County; J. A. Nabers, Judge.

Action by W. E. Gardner against the Memphis Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Presler & Thorne, of Memphis, and R. E. Taylor and Leslie Humphrey, both of Henrietta, for appellant. S. A. Bryant and J. M. Elliott, both of Memphis, for appellee.

HUFF, C. J. W. E. Gardner, appellee, brought an action for damages against the Memphis Cotton Oil Company, for alleged personal injuries received December 24, 1912, and obtained a verdict and judgment against appellant for \$250. He alleged that he was employed by appellant's foreman P. M. Holland, and worked under his direction and control; that he was assigned by the foreman to the work of unloading cake from cars when shipped to the mill for grinding into meal, which was his special work; and that he was not familiar with the conditions of the meal room further than the placing of the cake in the same for grinding would render him. On December 24, 1912, he was ordered by Holland to stop the work of unloading and to go to work assisting in removing, retagging, and loading certain sacks of meal from appellant's meal room into a car set for the purpose of being loaded; that some time prior thereto defendant, its foreman and employé, stacked a great number of sacks filled with cotton seed meal in its meal room in close proximity to the sacks which he was commanded to handle, and in doing so carelessly and negligently failed to tie or interlock said sacks in such manner as to insure the stacks standing against jars or shaking incidental to the running of the machinery therein; that the sacks weighed about 100 pounds each and were stacked one

upon another to a great height, thereby rendering the same topheavy and liable to fall and dangerous to the life and limb of such employés of the company who were required to work in close proximity thereto; that the row of sacks nearest to where appellee was about to work were stacked with the ends towards his position, giving it the appearance of safety, and that he was ignorant of the true condition of the stack of sacks; that he was not informed of the danger attending the performance of the work to which he had been temporarily assigned; that the particular work he thus began to do was the lifting of sacks from the floor or from low stacks commencing but little above the place of the meal room and setting same at or near the door to retag, and which were taken away and loaded in the car by other hands. While thus engaged, and in a short time after beginning the work, and without knowledge on his part of danger and from causes unknown to him other than the negligent, careless, and insecure stacking above set out, a great number of sacks of meal fell from their high and insecure position and struck and bruised him, mashing him to the floor beneath their weight. It is alleged that the putting of the sacks in the stacks, as above described, in the negligent manner in which they were placed was the direct and proximate cause of appellee's injuries, and that defendant, its foreman and employés, did not stack the said sacks as a person of ordinary prudence would have done under the same circumstances, and as was their duty to do, all of which was known to defendant, its foreman and employés, and could have been known, by the use of ordinary care and diligence, at the time and before the injury, and that they were negligent in failing to warn plaintiff of the danger in which he had been so suddenly placed by order of the foreman. The appellant denied negligence in the particulars alleged, and alleged that the plaintiff voluntarily engaged in the work and was not working at said time under the direction of defendant or any agent authorized or empowered to direct him to engage in such work; that his injuries were caused and due to his own negligence, which contributed to said injuries, his negligence being due to his own carelessness in removing and loading the sacks of meal whereby he incurred danger not necessarily incident to the work in which he was engaged; that the sacks were visible to him and all the dangers incident to said sacks stacked as they were at said time were openly visible to him, and he really knew or could have known of the danger incident to the work by the use of ordinary care; and that he is thereby deprived of any right of recovery.

The first assignment attacks the finding of the jury because the finding that defendant did not provide plaintiff a safe place in

which to work is against the undisputed evidence, which is to the effect that there is no danger in the place in which plaintiff was at work, and the only danger to which plaintiff was exposed was caused by his own carelessness and his negligent manner in doing the work; that he was not engaged in tagging and retagging the sacks of meal, but was pulling down sacks in a negligent manner by pulling sacks from beneath instead of removing them from the top, which work he was doing voluntarily without instructions either as to doing or the manner in which he was to do the work from any one, and with full knowledge of the danger to which he was exposing himself by the way he was removing said sacks of meal. Appellant submits this assignment as a proposition, and two other propositions are submitted thereunder: First, that plaintiff based his cause of action upon the negligence of defendant failing to stack the sacks in the meal room as an ordinarily prudent person would have done and upon no other ground. It was incumbent upon the plaintiff to establish the same by a preponderance of the evidence, and, if he failed, the court should not have submitted the issue to the jury. And, second, plaintiff could only recover upon the allegation of negligence alleged, and, if the evidence did not support same, it was error to submit a right of recovery upon any other ground, even if the evidence supported the other ground not alleged, and the court should have instructed a verdict for the defendant.

[1-3] The first issue submitted to the jury in effect is:

"Did defendant company, its foreman and employes, fail to stack the sacks with a view of avoiding injury, as an ordinarily prudent person would have done?"

The jury answered this issue in the affirmative. We are at a loss to understand what issue was here submitted that had no pleading to support it. The jury further found that the appellee was not guilty of contributory negligence, and further answered that the danger in handling the sacks was not open and visible, so that plaintiff could see or know of it, or, from the nature of the work, would reasonably acquire knowledge of such danger; and further that he did not voluntarily assume the risk. They also found that P. M. Holland, the foreman of the mill, instructed him to move the sacks and to work in the place where the sacks were being moved. The testimony of appellee and that introduced by him is to the effect that P. M. Holland, the foreman and manager of the mill, who had the authority to employ and discharge, directed the appellee to assist in tagging and retagging the sacks, and that, in obedience to such instructions, appellee left the work to which he had been assigned, and which he had theretofore been doing (that is, unloading cotton seed cake and carrying it into the mill or crusher to

be ground into meal); that he went into the room where the meal was stacked to assist those engaged in tagging and retagging the sacks. In order to tag and retag the sacks, it was necessary to take the sacks from the stacks and place them so the old tags could be taken off and new ones put on, and, while he was removing the sacks, a stack of the sacks fell on him, covering him up, injuring his ankle, etc. His evidence is that he did not know who had or how the stacks had been constructed previous to his going to work, and that no one warned him of the danger therefrom. He further testified that he thought he would be perfectly safe in getting the sacks, and, if he had not so thought, he would not have gone in after the sacks. The evidence shows that sacks had been taken by others from the two tiers when appellee went into the room to work, and these two tiers extended about one-third the height of the stack at his side, or about six or seven high. It was out of these tiers that appellee commenced to remove the sacks, and he had been there but a short time when the stack fell over and caught him. He further states that the ends of the sacks next to those he was moving were towards him, and he did not think this tier would fall towards him, but that, if they fell, they would roll off to the side from him. From the evidence we do not find that he undermined the tiers of sacks next to the ones he was removing, but only took off the tier which adjoined the ones that fell. Up to the time of the injury he was not aware of the manner in which the stack had been constructed.

It appears from the evidence that the back tier of the stack next to the stack, with the ends towards appellee, the sacks therein for several tiers were piled one upon the other, without being tied or interlocked, and that these tiers pushed out the tier next to appellee and toppled it over on him. At least the jury were authorized to find that the failure to tie or interlock the rear sacks caused them, by reason of their weight, to force over the tier, the ends of which were next to appellee, and, if they had been tied, the sacks would not have so fallen, and that they were negligently stacked. It appears from the evidence that, after this accident, appellant caused stacks in the room to be tied or interlocked by persons then at work in that room. There is evidence to the effect that two weeks previous to the accident sacks so stacked had fallen in that room. There is evidence that in removing the sacks from the stack it was the rule at that mill, and the manager and foreman had so instructed the employes, to take the sacks down by tiers and leave the other tier with the straight wall of sacks. This, however, is denied, and there is evidence that the employes were instructed to commence removing the sacks from the top. As a matter of fact, every issuable fact in this case was

controverted, and the testimony thereon is conflicting. The evidence in this case tends to show that appellee had not been at work in removing sacks for tagging exceeding 30 minutes when the accident occurred, and he says that he had only removed seven or eight sacks and pulled the tags off ready for retagging. The evidence shows that Holland, the superintendent, the day of the accident, or the day after, told the appellee that it was through appellant's carelessness that he was hurt, and that they would pay his doctor's bill, and for his time while confined, and that, if it had been his negligence, they would not do so. The evidence shows they did pay his doctor's bill and for his time lost. We do not feel authorized, therefore, to say there was no fact which authorized the jury to find negligence, or in holding that the uncontroverted facts show that appellee was guilty of contributory negligence, and that he assumed the risk.

As usual in cases of this character, there is a perfect wilderness of contradiction and conflicting testimony, but on that ground alone we do not feel justified in holding the verdict is without support. We do not think that it can be said, as a matter of law, that an inexperienced man, relying upon the assumption that the master knows his duty to the employes, and will perform it, would have known the manner of doing the work was not a reasonably safe one. We do not think within the 30 minutes' work that he acquired such knowledge as to apprise him of the danger he encountered in continuing the work. These questions, we think, were for the jury, and, having passed upon the facts, we do not believe we should disturb their findings. *Bonnet v. Railway Co.*, 89 Tex. 72, 33 S. W. 334. There is evidence at least tending to support the findings of the jury. The same may be said as to contributory negligence. The appellee is not shown to have conducted himself out of the usual and ordinary way of performing the work, and the testimony is that the method of reducing the pile of sacks was resorted to in the instant case that had theretofore been used and directed. True, some of the witnesses say it would have been better and safer to take the sacks from the top, but at least the question was for the jury to say whether an ordinarily prudent man would have acted as did appellee under the circumstances.

The second assignment is to the effect that the court erred in submitting the third special issue, wherein the alleged negligence of defendant's foreman in placing plaintiff in an unsafe place to work was submitted; that the answer of the jury thereto is without evidence to support it; and that the undisputed evidence shows the place to have been safe, and the danger arose from the negligence of plaintiff, and with full knowledge that the work was dangerous, it being open and obvious, and the facts which show his

attention was called thereto while doing the work. The proposition thereunder is that a verdict against defendant is erroneous, where the undisputed evidence shows that the place in which the plaintiff was directed to work was not of itself dangerous, but that the danger resulted from the manner in which plaintiff undertook to perform the work without any direction on the part of the principal. This assignment and the proposition thereunder, we think, is substantially disposed of by our findings under the first assignment. The first and second assignments have included therein a proposition that the court should not have submitted to the jury issues Nos. 1 and 3, whether the place was a safe one in which appellee could work, because it asserted that the uncontroverted evidence is that it was safe. The issue as to the place was not directly submitted in issue No. 1, but was submitted in issue No. 3. It is doubtful from appellant's brief whether the issue of a safe place is properly presented for consideration in this court. There are no propositions following the assignments which present the question, and the assignments themselves cannot be treated as a proposition under the rules. This case, however, presents the question of a safe place and the question of fellow servant, which appellant has not presented, as we understand it, by its propositions, but the case is such that it has been forced upon our attention.

[4] If the sacks of meal were negligently constructed, thereby rendering the meal room an unsafe place for the appellee to do the work, then under the rule requiring the master to provide and maintain a reasonably safe place in which its servants are to work would render the appellant liable in this case, even if it had delegated that duty to another. The duty to provide a reasonably safe place is nonassignable and nondelegable by the master. *Hugo, etc., v. Paiz*, 104 Tex. 563, 141 S. W. 518; *Lantry v. McCracken*, 105 Tex. 407, 150 S. W. 1156. The authorities cited by appellant upon other issues treat the rule of a safe place as not applying to the manner in which freight or the like is loaded in a place by other servants. It has been held by a Court of Civil Appeals that, where a night crew had stacked cross-ties so that they toppled over and injured a member of the day crew required to work near the place where they were stacked, "it was the duty of the railroad company," says that court, "to provide a safe place for its servants to perform their work, and to that end to exercise ordinary diligence. This duty extended also to the maintenance of the premises in a reasonably safe condition." As soon as "it was shown that the remnant stack of ties was liable to topple over and fall upon the men while at work, and injure them, the dangerous condition in which it was rendered the premises unsafe." *Railway Co. v. Echols*, 17 Tex. Civ. App. 677, 41 S. W. 488. A writ of error was

denied in that case, and previous thereto the case had been passed upon by the Supreme Court. 87 Tex. 339, 27 S. W. 60, 28 S. W. 517. In the last report the question of safe place is suggested by the Supreme Court.

[5] Appellant would not be liable for a mere temporary unsafe condition of which it had no notice, or by the exercise of ordinary diligence would not be charged with notice, but, if it could have known of the same by ordinary care, the company would be liable. *Ray v. Railway Co.*, 40 Tex. Civ. App. 99, 88 S. W. 466.

[6, 7] Mere temporary dangers created by fellow servants, due to no fault of plan or construction, do not fall under the rule imposing the duty of the master to provide a safe place, but we believe the authorities will support the proposition, when the place has been rendered unsafe by the material therein or the construction thereof, and is in that condition when the servant is directed to work thereat for the master, if the master was negligent in permitting it to remain in that condition, the servant may recover for injuries occasioned by the unsafe place. In such case, negligence appearing, it is a question of fact for the jury whether that negligence was in respect to what was done or undertaken by the fellow workmen or was the negligence of the master. *Arkerson v. Dennison*, 117 Mass. 407.

[8] The first issue submitted to the jury was as follows:

"Did the company and its foreman and employes fail to stack the sacks of meal, testified about, as a person of ordinary prudence would have done, with a view of avoiding injury to workmen?"

The jury answered, "Yes." And they answered that such failure was the proximate cause of said sacks falling on the plaintiff.

And the third issue was as follows:

"Was defendant's foreman negligent in placing plaintiff to work in an unsafe place, if you find that he did, without warning him of the danger, if you find that he did not? You will answer the above question in the negative, unless you find that said foreman knew that said place was unsafe, or by the exercise of ordinary care could have known it, and in this connection you are instructed that it is the duty of an employer to exercise ordinary care to furnish employes with a reasonably safe place to work."

The jury answered this question, "Yes."

An employe of appellant, by the name of Blosser, testified that he assisted and directed in the stacking of the meal in the room the week previous, and that he was the foreman of the meal room. He did not have the right to employ and discharge. The vice president, Bennett, and Holland, the general foreman, frequently passed through the room when the work was being done. The appellee did not assist in the construction of the stacks, and says he knew nothing of its condition and was not warned with reference thereto, which the jury found was true. We

think under such condition, if the master was negligent in failing to furnish a reasonably safe place, that the acts of other servants would, in the construction of the piles of sacks, be the act of the master, and not of a fellow servant, in so far as the appellee in this case is concerned.

[9, 10] If the master was negligent, and such negligence concurred with that of fellow servants, in the construction of the stacks, appellee would have the right of recovery. If the fellow servants, in removing the sacks, were negligent, and such negligence concurred with the negligence of the master in the construction of the stacks resulting in injury to appellee, this would not defeat a recovery by appellee. The jury found appellee himself was not guilty of negligence contributing to his injury, and, under the finding, appellee was entitled to a verdict.

We find no reversible error, and the judgment will be affirmed.

KYNARD et al. v. TUCKER. (No. 8042.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 28, 1914.)

1. VENDOR AND PURCHASER (§ 269\*) — VENDOR'S LIEN — ENFORCEMENT — EQUITIES OF ADVERSE PARTY.

If a vendor can have foreclosure, he is limited to that remedy, and is not permitted to assert his superior title against his vendee or those claiming under him, when the equities of such persons so require.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 759-763; Dec. Dig. § 269.\*]

2. VENDOR AND PURCHASER (§ 260\*) — VENDOR'S LIEN — ENFORCEMENT — EQUITIES OF ADVERSE PARTY.

A vendor of a section of land retained a vendor's lien, as shown by vendor's lien notes and stipulation in the deed. A remote purchaser, assuming the payment of the notes, reconveyed the south half to his grantor, who assumed the payment of the notes, and conveyed to plaintiff the north half for a valuable consideration, without assumption of payment of the notes. Plaintiff had notice of the lien. Subsequently defendant obtained title to the south half by quitclaim, and also the vendor's lien notes, and obtained a judgment removing clouds on his title on the entire section, but plaintiff was not a party to the action. *Held*, that plaintiff had such equities as against the enforcement of the vendor's lien as to require satisfaction first out of the south half and a sale of his half for any balance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 664-669; Dec. Dig. § 260.\*]

3. VENDOR AND PURCHASER (§ 285\*) — PURCHASERS OF INCUMBERED PROPERTY — PERSONAL LIABILITY.

Where a purchaser of a part of a tract subject to a vendor's lien for the price did not assume to pay the debt or any part thereof, the holder of the vendor's lien notes could not recover a personal judgment against him.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 800-807; Dec. Dig. § 285.\*]

#### 4. VENDOR AND PURCHASER (§ 260\*) — VENDOR'S LIEN—ENFORCEMENT.

Where defendant acquired vendor's lien notes for a section and a quitclaim deed of the south half and a judgment for the whole section, the north half of which had been previously purchased for a valuable consideration by plaintiff, who had notice of the lien, but who did not assume to pay it, and who was not a party to the action in which the judgment was rendered, defendant must first ascertain the value of the south half, and, if that be less than the debt, he could foreclose for the balance against the north half.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 664-669; Dec. Dig. § 260.\*]

Appeal from District Court, Eastland County; Thomas L. Blanton, Judge.

Action by M. O. Tucker against J. B. Kynard and another. From a judgment granting relief, defendants appeal. Affirmed.

Harris & Burton, of Ft. Worth, for appellants. J. M. Wagstaff, of Abilene, for appellee.

DUNKLIN, J. Chas. J. Canda and others sold to J. F. Battle section 25, township 7, block 51, Texas & Pacific Railway Company survey in Reeves county, in part consideration for which conveyance Battle executed eight vendor's lien notes payable to the grantors in the sum of \$192 each. In this deed, and also in the notes given, a vendor's lien was expressly retained to secure the payment of the note. Battle then sold the section to J. T. H. Lipscomb, who assumed the payment of the notes. Lipscomb sold the survey to A. H. Darnell in consideration of his assumption of the payment of the notes. Darnell then reconveyed the south one-half of the survey to Lipscomb, who, in consideration of that conveyance, assumed the payment of the vendor's lien notes above mentioned. Eight days later Darnell sold the north one-half of the survey to M. O. Tucker by warranty deed for a cash consideration of \$3,200. This deed was duly recorded. There were several subsequent sales of the south one-half of the survey; the grantee in the first being L. F. Sensabaugh, and in the second Frank Riley, both of whom assumed payment of the notes mentioned. Riley's title was later sold to W. W. Haggard by H. M. Hood, trustee, by virtue of a deed of trust executed by Riley to secure the payment of notes executed by him. W. W. Haggard in turn conveyed the same property to W. T. Banes. As consideration for that conveyance Banes executed vendor's lien notes, payable to Haggard, but it was expressly recited in the deed that those notes were inferior liens to the seven vendor's lien notes then outstanding in favor of Canda, one of the eight of said notes having already been paid. Banes and Battle then executed quitclaim deeds to J. B. Kynard and T. P. Boyd, by the terms of which they quitclaimed all the right, title, and interest in and to the entire survey. Prior to the

execution of that deed Canda and the other payees in the original vendor's lien notes mentioned instituted suits upon the entire survey to collect seven of the notes, alleging payment of the other note; Battle, Riley, and Banes and others being made defendants in the suit. Pending this suit the plaintiffs in the case conveyed the notes, and also the superior title outstanding in them, to Boyd and Kynard. Boyd and Kynard then intervened in the foreclosure suit, and by their plea claimed the superior title to the entire survey, and prayed for judgment therefor and for cancellation of all deeds held by Battle and other defendants and for the removal of the cloud from the plaintiffs' title by reason thereof. Judgment was rendered granting them that relief. In that suit, however, M. O. Tucker was not made a party. Boyd and Kynard paid taxes on the entire survey for the year 1912, and M. O. Tucker has never lived on nor improved the north one-half claimed by him.

The present suit was instituted by M. O. Tucker against Boyd and Kynard to recover the north one-half of the survey. In his petition plaintiff set out, substantially, the history of the title as shown above, specially alleging that he was not a party to the suit by Canda and others which resulted in a judgment in favor of Kynard and Boyd for the entire survey, and that he was not bound thereby. He further alleged that the defendants had actual and constructive notice of his claim of title; that he should be decreed title to the north one-half free from any of the notes in favor of Canda and his covendores, but that, if he should be mistaken in that claim, then he prayed that judgment be rendered establishing the amount of the indebtedness due on said seven notes; that the same be adjudged a prior lien on the south one-half of the survey; and that the south one-half be sold for the purpose of satisfying said indebtedness before resort to the north one-half. He further alleged that the south one-half of the survey was of greater value than the entire debt evidenced by said seven notes.

In their answer the defendants Kynard and Boyd, claimed the superior title to the entire survey as against plaintiff, and sought judgment accordingly, with the further prayer that plaintiff's claim of title be canceled and held for naught. Defendants further alleged that plaintiff had notice of such superior title before he purchased the north one-half of the survey. Defendants further set out the seven vendor's lien notes, and prayed for a foreclosure of the vendor's lien retained by Canda and his covendores as against the entire survey; this prayer being in the alternative to the prayer for recovery of title as against the plaintiff. Defendants further alleged the payment by them of \$9.60 taxes on the survey, and, as a part of the alternative plea mentioned above, they

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

also prayed for foreclosure of lien by reason of payment of those taxes.

Judgment was rendered denying defendants' prayer for recovery of title to the north one-half of the survey, but establishing an indebtedness in favor of the defendants upon the notes executed to Canda and others of \$1,767.36, the amount paid therefor by the defendants, with a decree of foreclosure of vendor's lien upon the whole survey subject to the provision that the south one-half of the survey should be first exhausted to pay the indebtedness before resort to the north one-half, and that the north one-half be sold in the event only the proceeds of the sale of the south one-half should be insufficient to satisfy the indebtedness. From that judgment defendants Kynard and Boyd have appealed.

[1, 2] The first question to be determined is whether or not the superior title remaining in Canda and his covendors, of which Tucker had due notice at the time he purchased, and which superior title was acquired by Kynard and Boyd, should prevail as against Tucker's title to the north one-half of the survey. Notwithstanding the fact that Tucker was charged with notice of the superior title remaining in Canda and his associates, yet, if the holders of the superior title can be fully protected in their rights, equity would not sanction a decree forfeiting Tucker's title in favor of the superior title, if Tucker's failure to pay off the prior vendor's lien notes has not, under the rules of equity, deprived him of the right to claim protection. Kynard and Boyd insist that, as Tucker has never paid, nor offered to pay, said notes, he has no standing in a court of equity to deny their right to recover the superior title to the property. It will be noted, however, that in purchasing the north one-half of the survey Tucker did not assume the payment of the notes, and in his petition he expressly alleged that the south one-half of the survey, which, as to him, was primarily liable for debt, was of a value in excess of the amount due on the notes. Furthermore, after asserting a claim of title to the exclusion of the notes, he prayed that the entire survey be sold and the amount found to be due upon the notes to be satisfied first out of the proceeds of the south one-half of the survey before resort to the proceeds of the north one-half of the survey. Under those circumstances, we are of the opinion that it would be inequitable to say that he should be required to pay off the entire debt as a condition precedent to his resistance of the defendants' suit to recover title to the north one-half of the survey, when, as between him and his vendor and all other grantees in the several deeds above mentioned, he clearly had the right to have the south one-half of the survey exhausted for the payment of the debt before resort

to the north one-half. While it is well settled that when a vendor's lien is expressly retained to secure the payment of purchase money for the land the superior title remains with the vendor, it is equally well settled that, if the vendor can have a foreclosure of his lien, and thus secure payment of the full purchase price of the land in accordance with the terms of his conveyance, he will be limited to that relief to the exclusion of the assertion of the superior title against his vendee, or any one claiming under him, when the equities of such persons so require. *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821; *Stone Land & Cattle Co. v. Boon*, 73 Tex. 548, 11 S. W. 544.

[3, 4] According to the terms of the seven vendor's lien notes, there was due thereon at date of the judgment \$2,126.13. Kynard and Boyd had purchased those notes for the sum of \$1,767.36, which was the face value of the notes at that time, in March, 1912, the date of the defendants' purchase of the same, and which was nearly two years prior to the date of judgment. In the judgment rendered the court decreed foreclosure upon the entire survey for the amount so paid, and appellants complain that reversible error was committed in refusing a foreclosure for the sum of \$2,126.13, the amount appearing to be due upon the notes at the date of the judgment. In the judgment it is recited that no proof was offered to show the value of the south one-half of the survey. As noted already, appellants were not entitled to any personal judgment against Tucker for the debt, because he had not obligated himself to pay the same. In the absence of a recovery of the land, the most that appellants could rightfully expect would be to subject Tucker's half of the survey to payment of the balance due on the notes after applying the value of the south one-half of the survey as a credit thereon. Appellants could not properly ask for a foreclosure of the lien against the south one-half of the survey, which was their own property. If they desired to sell the south half of the survey for the purpose of paying the notes, they could do so without the aid of the court, and we know of no decision that would grant them such aid. Instead of foreclosing the lien upon the south half of the survey, as well as the north half, the proper procedure would have been to ascertain the value of the south half, and, if that value was less than the amount of the debt, to have decreed a foreclosure for the balance against the north half of the survey. In the absence of proof, we cannot say that the value of the south half is less than the full amount appearing to be due upon the notes, and hence it does not appear that the error, if any, now complained of resulted in injury to appellants. Rule 62a, 149 S. W. x.

All assignments of error are overruled, and the judgment is affirmed.

ANDERSON & DAY v. DARSEY. (No. 375.)  
(Court of Civil Appeals of Texas. El Paso.  
Dec. 17, 1914.)

1. APPEAL AND ERROR (§ 736\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment complaining of the overruling of distinct and unrelated motions for a directed verdict cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3028, 3029; Dec. Dig. § 736.\*]

2. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error, which set out the substance of the bills of exception referred to simply by number, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

3. APPEAL AND ERROR (§ 501\*)—PRESERVATION OF GROUNDS OF REVIEW IN COURT BELOW—BILLS OF EXCEPTION.

Assignments on the refusal of special charges will not be reviewed, unless exceptions were preserved by bills taken according to Acts 33d Leg. c. 59.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.\*]

4. APPEAL AND ERROR (§ 1060\*)—REVIEW—HARMLESS ERROR.

Defendant's counsel said of one of the plaintiffs, "God help you if you fall into the hands of one of these town lot salesmen." He also spoke of his client as an honest old farmer and of the income of town lot salesmen as ill-gotten gains. Exceptions to these remarks being overruled, he stated that to his knowledge more town lot salesmen had been indicted for swindling and sued for fraud than any other class of men. On objection the jury were directed to disregard the remarks, and counsel apologized, but said that he believed what he said was true. Objections to this remark were overruled. *Held*, that the argument of defendant's counsel, which was wholly without the record, was so calculated to inflame the jury that it constituted prejudicial error necessitating a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

Error from District Court, Culberson County; Dan M. Jackson, Judge.

Action by J. R. Day and Levi Anderson against G. E. Darsey. From a judgment for defendant, plaintiffs bring error. Reversed and remanded.

Chilton & Chilton, of Dallas, and S. W. White, of Douglas, Ariz., for plaintiffs in error. Joe Irby, of Van Horn, and R. M. Reed, of El Paso, for defendant in error.

HIGGINS, J. On October 26, 1911, plaintiffs in error sued Darsey in trespass to try title. A writ of sequestration was issued, and the premises in controversy seized thereunder, and Darsey dispossessed; his household effects and certain feedstuff being removed from houses upon the premises.

Defendant answered by plea of not guilty, and in reconvention pleaded that he was entitled to the possession of the premises until

January 1, 1912, under a rental contract with plaintiffs, and that the writ of sequestration had been wrongfully and maliciously issued, whereby he had sustained actual damages in the sum of \$610 and \$5,000 exemplary damages, for which he prayed judgment.

[1] Upon trial, verdict and judgment was rendered in plaintiff's favor for title and possession of the premises sued for and in defendant's favor, upon his cross-action, for actual damages in the sum of \$146 and \$854 exemplary damages.

The first assignment reads:

"The trial court erred in refusing to grant the several motions of plaintiffs to peremptorily charge the jury to find a verdict for the plaintiffs in said cause against the defendant, for the reasons set out in said motions."

[2] The assignment cannot be considered. It relates to the action of the court in overruling distinct and unrelated motions. It is also too general. Neither is the substance of the bills of exception to which we are referred by the assignment, set out in the subjoined statement, as required by the rules. For the reasons indicated, the assignment will not be considered. *Burrow v. Brown*, 167 S. W. 254.

The second and third assignments relate to rulings upon evidence. The substance of the bills of exception taken thereto are not given; we being referred, simply, to the bill by its number. This is not sufficient, for which reason the assignments are not considered. *Canal Co. v. Southwell*, 50 Tex. Civ. App. 92, 109 S. W. 435; *Walker v. Railway Co.*, 54 Tex. Civ. App. 406, 117 S. W. 1020; *Railway Co. v. Lane*, 118 S. W. 847.

[3] The fourth, eighth, and ninth assignments complain of the refusal of special charges. Our attention is not directed to bills taken to the refusal of these charges, as required by chapter 59, Acts of 1913, for which reason the assignments are overruled. *Railway Co. v. Wadsack*, 166 S. W. 42; *Railway Co. v. Galloway*, 165 S. W. 546; *Insurance Co. v. Rhoderick*, 164 S. W. 1067; *Heath v. Huffhines*, 168 S. W. 974.

[4] In the course of his argument to the jury, counsel for Darsey several times referred to the plaintiff Day as "that Dallas town lot salesman," and made the following remark: "God help you if you fall into the hands of one of these town lot salesmen"—and referred to the income of town lot salesmen as "ill-gotten gains," and thereafter several times referred to the defendant as "an honest old farmer." Counsel for plaintiff in error objected to these remarks, which was overruled by the court and exception taken. The offending counsel in the course of his argument further said:

"To my own personal knowledge, more town lot salesmen have been indicted for swindling and more have been sued for fraud than any other class of men on the face of the earth."

Objection was likewise made to these remarks, sustained by the court, and the jury instructed not to consider same. Whereupon counsel made the further remark:

"Gentlemen of the Jury: If I have made a mistake or have done Mr. Day wrong, I want to apologize to you for it, and will say that I was honest in it and believed I was right in what I said."

To which objection was likewise made, and the court requested to instruct the jury not to consider same, which objection and request was overruled and proper exception taken.

The remarks complained of were highly improper and well calculated to inflame the passions and prejudices of the jury against the plaintiff. The so-called withdrawal or retraction of a part of the remarks only added to the injury theretofore inflicted. They were wholly dehors the record and could have had no proper influence upon the jury, and it is most likely that they were improperly swayed thereby, and their verdict prompted other than by a fair and impartial consideration of the evidence. The remarks are considered so improper and so likely to have fulfilled the purpose for which they were evidently made as to necessitate a reversal, and it will be so ordered.

Reversed and remanded.

#### FT. WORTH & R. G. RY. CO. v. DUBOSE. (No. 8059.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Dec. 12, 1914.)

##### 1. CARRIERS (§ 247\*)—WHO ARE PASSENGERS—PERSON TAKING WRONG TRAIN.

Where a passenger at a transfer point is told that her train would arrive at 1:30 a. m., and she at that time, in the absence of a watchman and sufficient light, boarded an excursion train of another road using the depot, from which train she was evicted, she was a passenger on the excursion train, and such carrier was bound to use a high degree of care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.\*]

##### 2. CARRIERS (§ 382\*)—EVICTION OF PASSENGER—EXCESSIVE DAMAGES.

Seven hundred and fifty dollars held not excessive damages for wrongful eviction from a passenger train of a woman 67 years of age and infirm, where she was accompanied by her daughter and five grandchildren, two of whom were sick, and the eviction took place five or six miles from the starting place, and the return course led through a squalid part of the city inhabited by negroes, and they were incumbered with baggage and compelled to carry some of the children, all of which made plaintiff sick for over a month afterwards.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.\*]

Error from District Court, Erath County; W. J. Oxford, Judge.

Action by Lizzie Dubose against the Ft. Worth & Rio Grande Railway Company.

From a judgment for plaintiff, defendant brings error. Affirmed.

Andrews, Streetman, Burns & Logue, of Houston, and Marshall Ferguson, of Stephenville, for plaintiff in error. Chandler & Pannill and A. P. Young, all of Stephenville, for defendant in error.

CONNER, C. J. On October 25, 1910, Lizzie Dubose, the defendant in error, together with her daughter, Mrs. J. W. Hales, and five grandchildren, purchased tickets at Wallace, in Austin county, over the Gulf, Colorado & Santa Fé and the Texas & Pacific Railways to Colorado City, in Mitchell county. The party arrived at Ft. Worth, the connecting point between the railways named, about 8 o'clock p. m. on the same day, and went over to the Texas & Pacific passenger station, where they were informed that the west-bound passenger train of that company was late but would leave Ft. Worth for Colorado City about 1:30 a. m. on the next morning. That night an excursion train from the East, belonging to the Ft. Worth & Rio Grande Railway Company, plaintiff in error, reached the Texas & Pacific station, whose depot and facilities it uses, at Ft. Worth, about 1:30 a. m. of the morning of October 26th. Mrs. Dubose, her daughter and grandchildren, boarded this train through mistake. Mrs. Dubose testified that the night was dark; that there was no watchman neither at the depot entrance to the passenger sheds, nor at the train, thus accounting for her mistake. Shortly after Mrs. Dubose and party had taken passage, the train proceeded on its way to a destination other than Colorado City, and according to the testimony of Mrs. Dubose, her daughter, and another witness, after the train had gone five or six miles, the conductor discovered the presence of the party upon the train and ejected them therefrom upon a lonely prairie, and they were required to walk back to the Texas & Pacific station.

It was alleged that plaintiff in error was guilty of negligence in ejecting the party at the time and under the circumstances it did; that at the time Mrs. Dubose was 67 years of age, weak and infirm; that part of the way led through a dangerous, squalid part of the city of Ft. Worth inhabited by negroes; that she suffered fright, physical pain, exhaustion, and fatigue, and was thereby made sick, and suffered great physical and mental pain, and would continue to so suffer during the remainder of her life.

The railway company answered by a general denial, and that the plaintiff had boarded its train without its knowledge or consent through her own mistake and her own negligence, and that she departed from the train voluntarily. The trial before a jury resulted in a verdict in plaintiff's favor for \$750.

Among other things, the court charged the jury that:

"The defendant would be bound to use that high degree of care that a very cautious, prudent, and competent person would use under the same or similar circumstances."

[1] It is insisted that the plaintiff was but a licensee or trespasser upon the defendant's train, and that the charge quoted was erroneous in that it placed upon the defendant too high a degree of care; that defendant, under the circumstances, was only bound to exercise ordinary care.

While it is true that Mrs. Dubose did not have transportation over the railway line in question and did not intend to become a passenger on one of the plaintiff in error's passenger trains, and that she boarded the train in question without any express invitation on the part of plaintiff in error, yet the evidence supports the verdict to the effect that in doing so she was without negligence, and, under such circumstances, it seems to be definitely settled in this state that she became a passenger upon plaintiff in error's train, and as such was entitled to receive that high degree of care imposed by the charge objected to. *I. & G. N. Ry. Co. v. Gilbert*, 64 Tex. 586; *St. L. S. W. Ry. Co. v. Pruitt*, 79 S. W. 598.

[2] The sufficiency of the evidence to support the verdict and judgment is attacked in but one respect. It is insisted that the amount of the damages assessed by the jury and adjudged by the court is excessive. The evidence seems to fully support the plaintiff's allegations to the effect that she was old and infirm, of which the conductor was informed, and that the party was unaccompanied; that two of the five children were sick; that they were also incumbered with their baggage; and that the conductor was requested to return them to the depot, which he refused to do in a rough manner, requiring the party to leave the train. According to other testimony, the night was dark and cold, and Mrs. Dubose, as well as her daughter, testified that they were badly frightened and alarmed; that they were compelled to carry some of the children and their baggage and were greatly fatigued by the walk back to the Texas & Pacific station; that Mrs. Dubose suffered great mental and physical pain; that she was sick over a month afterwards on account of the hardships suffered that morning; and that in fact she had never fully recovered therefrom. As has been often said, there can be no accurate measure for damages in cases of this character; the amount to be assessed resting very largely in the discretion of the jury and trial court. Under the circumstances stated, therefore, we do not clearly see our way to disturb the verdict.

No other question having been presented, it is ordered that the judgment be affirmed.

**GULF, C. & S. F. RY. CO. v. MCKINNEL.**  
(No. 8064.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Dec. 19, 1914.)

**1. NEW TRIAL (§ 44\*)—MISCONDUCT OF JURORS—IMPROPER ARGUMENT.**

A showing that certain jurors in a personal injury action agreed to a verdict for a larger amount than they thought necessary to compensate plaintiff for the injury sustained because of the argument of other jurors that he would have to pay from \$1,500 to \$2,500 for attorney's fees was sufficient to entitle defendant to a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 80-85, 105; Dec. Dig. § 44.\*]

**2. EVIDENCE (§ 477\*)—OPINION EVIDENCE—PHYSICAL CONDITION—FOUNDATION.**

Testimony by a physician that if plaintiff had a partial dislocation of his hip witness could make a rational guess as to what was the matter with him, and he doubted whether he could be cured of the pain in his hip, was improper, where there was no evidence that plaintiff had a partial dislocation of the hip.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.\*]

**3. DAMAGES (§ 168\*)—EVIDENCE—PHYSICAL CONDITION.**

In an action for personal injuries, where plaintiff testified that after a wreck he suffered pain in his hip and that his ability to walk had been greatly impaired, it was proper to permit other witnesses to testify that after the injury they observed that plaintiff walked with a limp.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 480, 482-486; Dec. Dig. § 168.\*]

**4. EVIDENCE (§ 127\*)—DECLARATIONS—PHYSICAL PAIN.**

In an action for personal injuries, declarations of plaintiff to his physician that he became tired when standing and could not work as long as formerly, and did not sleep as well, were not admissible as complaints of present pain and suffering.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

**5. DAMAGES (§ 166\*)—EVIDENCE—PHYSICAL CONDITION—OPERATION.**

In an action for personal injuries, testimony concerning an operation performed on plaintiff was inadmissible, where there was no evidence that it was made necessary by the injury sustained in an accident.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 478, 479, 481; Dec. Dig. § 166.\*]

**6. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

In an instruction on the measure of damages for personal injuries, a statement, that the jury might consider the earning capacity of plaintiff before and since the accident if from a preponderance of the evidence in the case they found a difference therein, was not objectionable as a charge upon the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 184.\*]

**7. DAMAGES (§ 38\*)—PERSONAL INJURIES—DIMINISHED EARNING CAPACITY.**

A railway mail clerk, whose earning capacity in certain lines of business had been diminished as a result of personal injuries, can recover for such diminished earning capacity, though he received his regular compensation while un-

able to work, and since then had been receiving a greater compensation than before the accident.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 237-241; Dec. Dig. § 38.\*]

Appeal from District Court, Tarrant County; Marvin H. Brown, Judge.

Action by Harry L. McKinnell against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Terry, Cavin & Mills, of Galveston, and Lee & Lomax and W. D. Smith, all of Ft. Worth, for appellant. Clendenen & Simmons, of Ft. Worth, for appellee.

DUNKLIN, J. As a result of a collision between two trains operated by the Gulf, Colorado & Santa Fé Railway Company near the town of Davis, Okl., Harry L. McKinnell, a railway mail agent, who was riding on one of those trains, sustained personal injuries, and he instituted this suit against the company to recover damages therefor. He recovered judgment for the sum of \$6,500, and the company has appealed.

[1] As one of the grounds stated in the defendant's motion for new trial, it was alleged, in substance, that the jury during their retirement for the purpose of reaching a verdict improperly considered and were influenced by suggestions and arguments, made by some of them to the rest, that plaintiff would be required to pay from \$1,500 to \$2,500 to his attorneys for their services in prosecuting the suit, and that damages should be allowed in a sum sufficient to cover that expense in addition to the amount necessary to compensate him for his injuries. An affidavit of Geo. L. Wilkinson, one of the jurors, was attached to the motion. That affidavit reads in part as follows:

"That before the jurors had agreed on the amount of the verdict affiant stated to the other jurors that he thought \$3,000 would be full compensation to the plaintiff, and that he thought the verdict should be returned for that amount. That following the suggestion of affiant as to the amount the verdict should be for, several of the jurors stated that plaintiff would have to pay his attorneys, and there was quite a general discussion as to attorney's fees, it being stated by some of the jurors that the attorneys would get \$2,000 to \$2,500. That this was stated, as affiant understood, as a reason why affiant and others who were in favor of giving plaintiff an amount in the neighborhood of \$3,000 should consent to give more. That affiant was influenced by the argument as to attorney's fees and finally consented to give \$6,500 to plaintiff because of the argument that plaintiff would have to pay his attorneys out of the judgment he recovered."

In addition to that affidavit, the court, in considering the motion, heard the oral testimony of Samuel Calcaterra, C. I. Brown, and S. C. Skieldig, also members of the jury, who corroborated the affidavit of Geo. L. Wilkinson, to the effect that plaintiff would likely be required to pay from \$1,500 to \$2,500 as attorney's fees, and from whose tes-

timony it clearly appears that that suggestion and argument influenced them, and probably other jurors, who did not testify, to allow damages in a sum to cover such expenses over and above the amount necessary to compensate plaintiff for his injuries. No testimony was offered to rebut the testimony of these jurors, and we are of the opinion that the court erred in refusing to grant a new trial. For this error the judgment must be reversed.

[2] In view of another trial, we will make some observations upon questions presented by other assignments. Dr. McLean, witness for the plaintiff, testified that:

"If the plaintiff had a partial dislocation of the hip, the witness could make a rational guess as to what was the matter with the plaintiff's hip and that he doubted if plaintiff could be cured of the pain in the hip."

Objection was urged to this testimony by the defendant; one of the grounds of the objection being that no evidence was introduced to show any partial dislocation of plaintiff's hip. We are of the opinion that the testimony should have been excluded upon that objection, the truth of which we find was sustained by other evidence, which was uncontroverted.

[3] Appellant insists that the court erred in admitting testimony of the witnesses O'Sullivan and Dr. McLean, to the effect that after the wreck in question plaintiff was observed to walk with a limp; the ground of the objection to such testimony being that there was no competent evidence to show that such limp was the proximate result of any injury received in the wreck. That objection was without merit, in view of plaintiff's testimony as follows:

"After I was extricated from the wreck, I felt smart sensations in my hip, in my groin, and in my leg, and a feeling of pain on standing," and further that following the accident his former ability to walk had been greatly impaired.

[4] Dr. McLean testified that during the six or eight months subsequent to the wreck, and while plaintiff was under his observation, plaintiff complained of a tenderness in his spine and of becoming tired when standing on his feet, that he could not work as long as previously on account of getting exhausted, and that he did not sleep as well as he formerly did. This testimony was objected to as a whole upon the ground that it was hearsay, and therefore incompetent. It is a familiar rule that testimony of complaints of present pain and suffering is admissible upon the principal of *res gestæ*. Evidently the testimony was admitted under that rule. It does not appear whether or not complaint of tenderness in the spine was made under circumstances that would make it admissible under that rule, and therefore we cannot say that it affirmatively appears that the court erred in admitting that statement; but it is apparent that the rest of the

testimony was not admissible under that rule, being hearsay and subject to the objection urged.

Complaint is made of the refusal of the court to give the defendant's requested charge No. 6, which was, in effect, that plaintiff was not entitled to recover for a certain physical condition mentioned in that instruction, and alleged in plaintiff's petition. Some evidence was offered relative to that condition which was of such a nature as might influence the jury in the rendition of their verdict, and, while the court did not submit that issue in his general charge, we are of the opinion that the requested instruction should have been given to insure the defendant against any possible harm by reason of the testimony relative to that condition.

[5] The sixth assignment of error is addressed to the admission of testimony relative to an operation performed for the particular physical condition last referred to. The objection to the testimony was that there was no proof that such operation was made necessary by reason of the accident. Upon a careful review of the record, we are of the opinion that the objection should have been sustained.

[6, 7] The charge of the court upon the measure of damages reads as follows:

"In arriving at the amount of damages, if any you give to the plaintiff, you may take into consideration the physical pain, if any, sustained by the plaintiff by reason of said wreck; and such as you may find, if any, he will suffer in the future. You may also take into consideration the earning capacity and ability of the plaintiff before and since said accident, if from a preponderance of the evidence in the case you find a difference therein, and if from a preponderance of the evidence in the case you find that the plaintiff has sustained injuries, if any, from which he has not yet recovered, if you so find, or from which he will not in the future recover, if you so find, then you may take such fact or facts into consideration, if any you find, in arriving at the amount of damages, if any, that you may assess against the defendant and for the plaintiff."

Error has been assigned to that instruction upon the ground that the language used, "you may also take into consideration the earning capacity and ability of the plaintiff before and since said accident, if from a preponderance of the evidence in the case you find a difference therein," is a charge upon the weight of the evidence, and upon the further contention that there was no proof that plaintiff's earning capacity had been lessened by reason of his alleged injuries. Clearly, the charge is not subject to the criticism that it was upon the weight of the evidence. It is a correct statement of the law upon that issue. Testimony offered by the plaintiff tended to show that his ability to earn money in some lines of business at least had been diminished by reason of the injury which he claimed to have received in the accident. Such testimony was not neces-

sarily overcome by proof that he received his regular pay from the government during the six months he was "laid off" after the accident, and, since resuming the duties of his employment, his salary has been increased to a sum greater than he received before the accident. Accordingly, the assignment last noted is overruled.

For the reasons noted, the judgment is reversed, and the cause remanded.

#### MAHANAY v. LEE et al. (No. 8040.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 14, 1914. Rehearing Denied  
Dec. 19, 1914.)

#### 1. APPEAL AND ERROR (§ 51\*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Where a petition alleged that plaintiffs sold defendant a horse for \$75, that defendant, having failed to pay for the horse, agreed to either return it in satisfaction of the debt or give a secured note for \$116, covering the price of the horse and another debt due from defendant to plaintiffs, and that defendant had failed to return the horse or execute the note and mortgage, and prayed judgment for possession of the horse or \$75, the value thereof, and for the \$41 due on the other debt, it was sufficient to authorize a recovery of \$116 and give the Court of Civil Appeals jurisdiction of defendant's appeal from an adverse judgment, especially where defendant urged a counterclaim for \$154.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 237, 267; Dec. Dig. § 51.\*]

#### 2. SALES (§§ 19, 20\*)—REPURCHASE—CONTRACT—CONSIDERATION—SUFFICIENCY.

A seller's agreement to repurchase, not being an obligation growing out of the original sale, was a sufficient consideration for a new contract obligating the buyer to either return the horse bought or give a secured note for the price and another debt, though the buyer's debt for the horse was barred by limitations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 31, 32; Dec. Dig. §§ 19, 20.\*]

#### 3. SALES (§ 377\*)—PLEADING CONCLUSIONS OF LAW FROM FACTS ALLEGED.

Where the petition in a seller's action alleges a breach of a new contract obligating the buyer to either return the horse bought or give a secured note for the price and another debt and prays judgment for the agreed face of the note, it is not demurrable for failure to specifically allege an agreement that the old contract should be merged in the new; such being the necessary effect of the new contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.\*]

Appeal from Stonewall County Court; W. J. Arrington, Judge.

Action by W. H. Lee and another against C. L. Mahaney. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. M. Carter, of Texarkana, for appellant.  
T. E. Knight, of Aspermont, and Theodore Mack, of Ft. Worth, for appellees.

DUNKLIN, J. This was an action for title to and possession of a horse and for debt, instituted by W. H. Lee and J. M. Lee against C. L. Mahaney, and from a judgment in favor of plaintiffs for the recovery of the

horse, and in the alternative, for \$75, the value of the horse, the defendant has appealed.

[1] In their petition plaintiffs alleged that in the spring of 1910 they sold the defendant a horse for the sum of \$75 to be paid in the fall of 1910; that on March 3, 1913, the defendant, having failed to pay for the horse, agreed with plaintiffs to return him in full satisfaction of said debt, unless defendant should execute and deliver to plaintiffs a promissory note in their favor for the sum of \$116 to cover the purchase price of said horse of \$75 and for \$41, which defendant then owed plaintiffs for ginning cotton, and would also execute a mortgage on the horse and two bales of cotton to secure the payment of said note. It was further alleged that defendant wholly breached his contract last mentioned by refusing either to return the horse, or to execute said note and mortgage. Plaintiffs further alleged that the horse was reasonably worth \$75 and prayed for a judgment for the possession thereof or for \$75, the value thereof, in the event he could not be returned, and also for judgment for the \$41 due by the defendant for ginning cotton.

Appellees have suggested that \$75 was the only amount in controversy, and that therefore this court is without jurisdiction to entertain this appeal. We are of the opinion that as against the general demurrer the petition was sufficient to warrant a recovery of the \$41, which was specifically alleged to be due for ginning cotton, as well as for \$75, the value of the horse. Furthermore, defendant urged a counterclaim for \$154, which we do not think was abandoned, as appellees insist, since we find in the record that evidence was introduced to sustain it. Hence appellees' contention now under discussion is overruled.

[2, 3] Appellant insists that the court erred in overruling his general demurrer to the plaintiffs' petition. This assignment is predicated upon the proposition that the petition showed a demand based upon the alleged agreement entered into March 3, 1913, which was a new contract made in lieu of defendant's contract of purchase of the horse and was without any new consideration to support the same, and because the petition failed to contain an allegation of any specific agreement that the old contract should be liquidated and merged into the new contract. By another assignment it is further insisted that as the alleged agreement of March 3, 1913, was a parol contract to pay the pre-existing debt for the purchase price of the horse and was without any new consideration to support it, the court erred in overruling defendant's plea of two years' limitation urged to plaintiffs' suit. According to the alleged agreement of March 3, 1913, plaintiffs bound themselves, in effect, to re-

purchase the horse from the defendant, and in consideration therefor to cancel defendant's obligation for \$75. Clearly, this agreement to repurchase the horse was not an obligation growing out of the original sale, and was a sufficient consideration to support the new contract, and the fact that the debt which defendant owed for the horse was then barred by the statute of limitation of two years could make no difference. *Cotton States Bldg. Co. v. Jones*, 94 Tex. 497, 62 S. W. 741. We are of the opinion further that it was not necessary for the petition to contain a specific allegation that it was agreed between the parties that the old contract should be merged into the new, since such was the necessary effect of the new contract. As the new contract was based upon a valuable consideration, and as the suit was instituted within less than two years from the date it was entered into, the court did not err in overruling defendant's plea of limitation.

By another assignment of error appellant insists that the evidence fails to support the judgment. We are of the opinion that the evidence set out in the assignment was sufficient of itself to sustain the judgment, and therefore the assignment is overruled.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. et al. v. BOYCE et al. (No. 680.)

(Court of Civil Appeals of Texas. Amarillo. Nov. 28, 1914.)

1. CARRIERS (§ 223\*) — CARRIAGE OF LIVE STOCK—DAMAGES FOR DELAY—DEFENSES.

Where a carrier knew that an unprecedented flood had carried away a bridge on its line, but accepted a shipment of cattle without informing the shipper of that fact, it cannot justify delay on account of the flood; for it was its duty, if the shipment would be delayed, to notify the shipper, so that he might seek accommodations on other lines.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 932; Dec. Dig. § 223.\*]

2. APPEAL AND ERROR (§ 1140\*) — DETERMINATION—REMITTITUR.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2014, authorizing a remittitur in vacation, a judgment must be affirmed where appellee, after the perfection of an appeal, remitted damages improperly awarded, though costs will be taxed against the appellee.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

3. CARRIERS (§ 183\*) — ACTIONS — JOINT LIABILITY.

Under the amendment to the Interstate Commerce Act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592, pars. 11, 12]) § 20, providing that the holder of a bill of lading shall not be deprived by that section of any right he has under existing law, and that the carrier issuing the bill of lading shall be entitled to recover from the carrier on whose lines loss occurs the amount which it may be required to pay to the owner, a shipper of live stock may jointly sue the initial and con-

necting carrier for damages for delay occurring on the line of the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 830, 831; Dec. Dig. § 183.\*]

**4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

An assignment of error unaccompanied by the required statement will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from Dallam County Court; T. S. Mills, Judge.

Action by J. H. and L. H. Boyce, partners as Boyce Bros., against the Atchison, Topeka & Santa Fé Railway Company and others. From a judgment for plaintiffs, certain defendants appeal. Affirmed.

Terry, Cavin & Mills, of Galveston, Madden, Trulove & Kimbrough and H. O. Pipkin, all of Amarillo, Thompson & Barwise, of Ft. Worth, and Moore & Powell, of Dalhart, for appellants. W. Boyce, of Amarillo, for appellees.

**HUFF, C. J.** This is an action instituted by the appellees, Boyce Bros., a copartnership composed of J. H. and L. H. Boyce, against the Atchison, Topeka & Santa Fé Railway Company, the Southern Kansas Railway Company of Texas, and the Ft. Worth & Denver City Railway Company, for damages alleged to have been sustained by reason of the delay in the shipment of 59 head of cattle, under a contract of through shipment from Hartley, Tex., to St. Joseph, Mo., over the lines of the defendant railways. Trial was had in the county court of Dallam county, and judgment rendered for appellees against the Ft. Worth & Denver City Railway Company and in its favor against the Atchison, Topeka & Santa Fé Railway Company.

The appellant the Atchison, Topeka & Santa Fé Railway Company presents its first assignment that the court erred in refusing its third specially requested instruction to the jury, which charge is to the effect, after defining "act of God" and "unprecedented flood," if appellant exercised ordinary care to build and maintain a bridge across Driftwood creek at the point of the washout, to accommodate the ordinary and usual flow of water thereunder and floodwaters, and so constructed and maintained said bridge, that it was sufficient to withstand and accommodate ordinary and usual floodwaters and such as had been before known in that country and might have been reasonably anticipated by the exercise of caution, prudence, and foresight, and if the jury found—

"on or about the 5th day of August, A. D. 1911, there came an unprecedented and unexpected flood down said stream and under said bridge, so that it washed out a portion of said bridge, so that it made said bridge impassable by trains of this defendant, and if you further find and believe from the evidence in this case that such washout was of such an unprecedented nature

that it was the act of God, as same is above defined, and you further find and believe from the evidence that said defendant exercised ordinary care to properly prepare said bridge for transportation of said shipment thereover at the earliest time after said washout in the exercise of ordinary care, and if you further believe and find from the evidence that the delay of said cattle or any part thereof was caused directly and proximately by said unprecedented flood washing out said bridge, then in that event you will find for the defendant for all the damages, if any, by reason of the delays to said shipment incident to said unprecedented flood and washout of said bridge."

The appellant, by its answer, with reference to the matter of the washout of the bridge, alleged that the bridge was a good and substantial one maintained for many years prior to August, 1911; that it had never been washed out by the rising or flooding of the stream; that by reason of an extraordinary heavy rain or cloud-burst it became flooded as never before. The flood was unusual, unprecedented, and could not, in the exercise of ordinary care, prudence, and foresight, have been foreseen, anticipated, etc.

The appellees, Boyce Bros., by a supplemental petition, alleged in reply thereto that, if such washout was caused by an unprecedented flood, nevertheless the railroad would be responsible, because said washout occurred before the cattle were loaded at Hartley, and before they were accepted by the Santa Fé lines at Amarillo, and that such fact was well known to the defendants at the time of acceptance of such shipment, and was unknown to appellees.

The defendant the Ft. Worth & Denver City Railway Company alleged that it notified the other defendants of such shipment, and that the other defendants accepted said shipment for transportation. The evidence shows that the cattle were loaded at Hartley, Tex., at 12:50 p. m. August 5th, and that they arrived at Amarillo over the Denver road, and were by it delivered to the Southern Kansas Railway Company of Texas at 5:30 p. m. the same day. The Ft. Worth & Denver City Railway Company gave the Atchison, Topeka & Santa Fé Railway Company advance notice of the loading of the shipment at 12:50 p. m. August 5th. The shipment left Amarillo August 5, 1911, over the line of the Southern Kansas Railway Company of Texas, at 6:40 p. m., and reached Canadian, a distance of 99 miles, at 9:55 p. m. that day. It left Canadian, Tex., at 10:50 p. m. August 5th, and arrived at Wynoka, Okl., at 10:20 a. m. August 6, 1911, and on account of the washout there were no trains, outside of work trains, taken out of Wynoka August 6, 1911. The cattle were unloaded at Wynoka and held there until the succeeding day, leaving that point at 12:45 p. m. August 7, 1911. The bridge was washed out at 10:30 a. m. August 5, 1911, and the superintendent of that road had notice of such fact at 11 a. m. on that date. The first train passed

over the bridge after its repair at 12:10 p. m. August 7th. The evidence introduced by appellants tends to show that the flood was an unusual one and unprecedented in that neighborhood. It also tends to show that it used ordinary care in constructing and maintaining a bridge across the stream, giving to the bridge sufficient strength to withstand an ordinary and usual flood on the creek at the point where its line of road crossed. Boyce Bros. had no notice of the washout at the time they loaded out the cattle for shipment. The trial court instructed the jury as follows:

"Although you may find said shipment of cattle was delayed in course of transportation, still, if you should further find and believe from the evidence that such delays, if any, or any part thereof was caused by a washout on the line of the Atchison, Topeka & Santa Fé Railway Company, as alleged, and you should further find that said washout was caused by an unprecedented flood, then the defendant the Atchison, Topeka & Santa Fé Railway Company and its connecting line would not be liable to the plaintiffs for damages caused by any delay resulting from said washout, unless you should further find that the defendant the Southern Kansas Railway Company of Texas, in accepting said shipment at Amarillo, Tex., had notice of the fact of the washout, or that the Atchison, Topeka & Santa Fé Railway Company was guilty of negligence in failing to inform its connecting line, the Southern Kansas Railway Company of Texas, or the Ft. Worth & Denver City Railway Company, of the fact of such washout on said line of road. But if you find and believe from the evidence that said washout had already occurred at the time of the acceptance of said shipment at Amarillo, Tex., by the defendant the Southern Kansas Railway Company of Texas, and find that said defendant at such time had knowledge of the condition with reference to said washout, then said railway companies, the Southern Kansas Railway Company of Texas and the Atchison, Topeka & Santa Fé Railway Company, nevertheless, would be responsible for the delay, although it was caused by a washout resulting from an unprecedented flood. Or, if you should find that said washout occurred prior to the acceptance of said shipment of cattle at Amarillo, and that, in the exercise of ordinary care, it was the duty of the Atchison, Topeka & Santa Fé Railway Company to notify its connecting lines, the Southern Kansas Railway Company of Texas or the Ft. Worth & Denver City Railway Company, of the condition existing on its said line, and you further find that it failed to give notice to said other defendants or either of them, and that such failure to give such notice was negligence, and that by reason thereof said shipment was accepted either by the Ft. Worth & Denver City Railway Company or by the Southern Kansas Railway Company of Texas in ignorance of the condition existing on the line of the Atchison, Topeka & Santa Fé Railway Company, and that the plaintiffs were also ignorant of such condition at the time of the delivery of said shipment at Hartley, Tex., and its acceptance by the Southern Kansas Railway Company of Texas at Amarillo, then, and in such event, the defendant the Atchison, Topeka & Santa Fé Railway Company would be responsible for the damages, if any, resulting from the delay, if any, that may have been caused by the washout on its line."

[1] In paragraph 4 the court defined the term, "unprecedented flood." The effect of this charge was to tell the jury that the

appellees could not recover if the delay was caused by the washout occasioned by an unprecedented flood, unless they further find that the washout occurred before the cattle were accepted by either of the roads for shipment, and that appellant was negligent in not notifying the shipper and the connecting carrier of the then condition of the road. We believe the charge requested by appellant, if given as requested, without the qualification added by the trial court, would have been error under the facts of this case. If there were unusual conditions existing at the time of receiving the cattle for transportation and because of the then condition of the road, and the shipment could not be made in the usual time, the carrier should have notified the shipper of such condition. Such notice would have given the shipper the opportunity to choose the different courses then open to him. *Railway Co. v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410; *Nelson v. Great Northern Railway Co.*, 28 Mont. 297, 72 Pac. (7), on page 651; *Railway Co. v. Word*, 159 S. W. 383. If the delay was caused by the washout, which could not have been prevented by the use of ordinary care in the construction and maintenance of the bridge across the stream, yet, if the injury to the shipment of cattle was brought about by the negligent failure of appellant to notify the appellees of the then known condition of the road, or, when the cattle were accepted for transportation, if the appellant then knew of the unusual condition, and undertook to carry the cattle to their destination within a reasonable time, we think it should be required to answer for the consequences, if such acts were negligent, as though this negligence on its part was the sole cause. *Fentiman v. Railway Co.*, 44 Tex. Civ. App. 455, 98 S. W. 939; *Railway Co. v. Boyce*, 39 Tex. Civ. App. 195, 87 S. W. 395.

[2] The second assignment is that the verdict of the jury and the judgment of the court is excessive, in that a recovery was allowed for a decline in the market on the cows involved in the shipment, when the evidence does not show a decline in the market on the cows. In vacation the appellees filed the following:

"Now come the plaintiffs, J. H. Boyce and L. H. Boyce, and remit the sum of \$46.16 of the judgment rendered in this court in the above numbered and entitled cause on the 30th day of January, 1914, the sum of \$46.16 hereby remitted being the sum of \$37.26, with interest thereon from the 9th day of August, 1911, to this date—said sum of \$37.26 being the amount in the judgment rendered herein on account of decline in market on cows in said shipment, to wit, 24,840 pounds at 15 cents per cwt.; and the said J. H. Boyce and L. H. Boyce, composing said partnership, do hereby release said defendant in said judgment therefrom as to the extent of said sum of money, to wit, \$46.16."

This remittitur was filed March 9, 1914, in the county court. The motion for new trial set up the error herein complained of, and was presented to, and overruled by, the

court February 7, 1914. In the order overruling the motion notice of appeal was given. Appellant the Atchison, Topeka & Santa Fé filed its appeal bond February 27, 1914, and the Ft. Worth & Denver City Railway Company its bond February 21, 1914. The trial court adjourned February 7, 1914.

The appellees having remitted this damage recovered in the judgment after appeal had been perfected under article 2014, Vernon's Sayles' Civil Statutes, we think the judgment should be affirmed as to appellant for the amount of the judgment, less the remittitur, but that appellees should pay the costs of this appeal. *White v. Glover*, 31 Tex. Civ. App. 8, 71 S. W. 319; *Insurance Co. v. Herbert*, 48 Tex. Civ. App. 195, 106 S. W. 421.

[3] The Ft. Worth & Denver City Railway Company assigns error No. 1, and claims that there was error on the part of the trial court in overruling its second special exception to plaintiffs' petition, which is to the effect that the plaintiffs were attempting to hold it, as the initial carrier, for all the damages and each of the defendants for the same damages, asking the trial court to require the plaintiffs to elect whether they are attempting to hold the defendant as an initial carrier or under its common-law liability. Plaintiffs, appellees herein, sued the defendant railroads jointly for the damages, alleging a contract entered into between themselves and the Ft. Worth & Denver City Railway Company for a through shipment of 59 head of cattle from Hartley, Tex., to St. Joseph, Mo., over the lines of the road operated by the defendants from the point of origin to point of destination. The allegations clearly bring the case under the amendment to the Interstate Commerce Act, § 20. That portion of the act applicable is as follows:

"Provided that nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action which he has under existing law; that the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

The act was passed for the benefit of the shipper. He can sue the initial carrier alone or any one of the connecting carriers, or all jointly for the damages. *Railway Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; *Railway Co. v. Ray*, 127 S. W. 281; *Railway Co. v. Word*, 159 S. W. 376; *Railway Co. v. Ward*, 169 S. W. 1035. We do not understand that an election can be required where a party's rights are analogous, consistent, or concurrent. As we understand, under the Interstate Commerce Act, the contract is made by the initial carrier for all connecting carriers, by the terms of which each and all are bound, and a failure of duty

or the negligence of either gives the shipper a right of action against either or all under the act against the initial carrier for all the damages and the connecting carriers for the damages occurring on their respective lines.

[4] The second assignment of the Ft. Worth & Denver Railway Company is overruled. There is no statement under this assignment, such as required by the rules, and we cannot therefore tell therefrom whether the judgment was excessive or not, as asserted under the assignment.

The third assignment has been discussed under the Atchison, Topeka & Santa Fé Railway Company's second assignment. It is therefore unnecessary to notice this assignment further.

The judgment of the trial court, after allowing the remittitur filed, will be affirmed, but the appellees will be taxed with the costs of this appeal.

### GULF, T. & W. RY. CO. v. DICKEY. (No. 8011.)

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 31, 1914. Rehearing Denied  
Dec. 12, 1914.)

#### 1. APPEAL AND ERROR (§§ 1040, 1050\*)—HARMLESS ERROR—PLEADING—EVIDENCE.

Where, in an action for injuries to plaintiff's eight year old son from being scalded while on a locomotive in charge of a hostler, the uncontradicted evidence showed that the boy's presence was known to the hostler, error, if any, in overruling exceptions to the allegations of the petition that defendant made a practice of permitting children of tender years to enter and ride upon its engines and in admitting testimony to sustain such allegations was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4089-4105, 4153-4157, 4166; Dec. Dig. §§ 1040, 1050.\*]

#### 2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for injuries to plaintiff's son from being scalded while on a locomotive in charge of a hostler, the uncontradicted evidence showed that the presence of the boy was known to the hostler, the admission of evidence of statements by the hostler to the boy's grandmother that he liked to have children talk to him while he was at work and the grandmother's reply that she could not understand what manner of man the hostler was that he would allow a child around the engine, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

#### 3. APPEAL AND ERROR (§ 547\*)—PRESENTATION BELOW—INSTRUCTIONS.

Assignments of error complaining of instructions to which no proper bills of exception were reserved below will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429-2432; Dec. Dig. § 547.\*]

#### 4. APPEAL AND ERROR (§ 553\*)—BILL OF EXCEPTIONS—OBJECTIONS AND ORDER.

A statement of facts contained exceptions to the court's charge, which were signed by attorneys for defendant and marked filed by the clerk. It also appeared that an order reading,

"On this day came on to be heard the objections and the exceptions of the defendant to the court's general charge, \* \* \* and the court \* \* \* is of the opinion that the law is against said objections and exceptions, and it is \* \* \* ordered \* \* \* that \* \* \* same are hereby in all things overruled, to which the defendant excepted," was entered on the minutes, dated the same as the date of the filing of the exceptions to the charge and of the court's general charge. *Held*, that the purported objections and the order of the court so entered did not constitute a bill of exceptions to the charge given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.\*]

#### 5. NEGLIGENCE (§ 138\*)—REFUSAL OF INSTRUCTION—EVIDENCE.

Where, in an action for injuries to plaintiff's son from being scalded while on a locomotive in charge of a hostler, the hostler admitted that he knew the boy was on the engine when he turned on the hot water and scalded him and made no previous effort to exclude him from the engine, it was not error to refuse an instruction that the uncontradicted evidence showed that the boy was on defendant's engine without invitation, and that defendant owed him no duty except not to willfully or wantonly injure him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354-370; Dec. Dig. § 138.\*]

#### 6. TRIAL (§ 194\*)—INSTRUCTION—PROVINCE OF JURY—NEGLIGENCE.

A requested instruction that, if the hostler cut off the valve through which the hot water escaped, and thereafter some person, unknown to the hostler, opened the valve, the verdict should be for defendant was properly refused; it being, in effect, a peremptory instruction that the hostler was not negligent in allowing the boy on the engine and in turning on the injector without investigating to discover whether the valve connecting the hose with the injector was closed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 7. NEGLIGENCE (§ 139\*)—REFUSAL OF INSTRUCTION—INJURY TO CHILD.

In such action an instruction that the hostler was not negligent unless he knew the valve was open when he turned on the injector or, unless he intentionally and wantonly inflicted the injury, was properly refused.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371-377; Dec. Dig. § 139.\*]

#### 8. APPEAL AND ERROR (§ 547\*)—PRESENTATION BELOW—INSTRUCTIONS.

Error in such case could not be predicated on the refusal of instructions submitting the issue of the hostler's negligence in turning on the water and making defendant's liability hinge on an affirmative finding on that issue, where no proper bill of exceptions was taken to the court's charge on the issue of liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429-2432; Dec. Dig. § 547.\*]

#### 9. DAMAGES (§ 177\*)—PERSONAL INJURIES—MEASURE OF DAMAGES—ADMISSION OF EVIDENCE.

Plaintiff's testimony as to the amount he was earning was inadmissible in such case to show, as an element of the damages recoverable, the value of the time lost by him while engaged in nursing the injured boy.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 466, 494; Dec. Dig. § 177.\*]

Appeal from District Court, Baylor County; Jo. A. P. Dickson, Judge.

Action by William Dickey against the Gulf, Texas & Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed conditionally.

Ben B. Cain, of Dallas, Sporer & McClure, of Jacksboro, and J. A. Wheat, of Seymour, for appellant. D. A. Holman, of Seymour, for appellee.

DUNKLIN, J. Maryland Dickey, the eight year old son of William Dickey, was scalded while on a locomotive owned by the Gulf, Texas & Western Railway Company, and while the locomotive was in charge of Ed Moss, its hostler. At the time of the injury the locomotive was at a station and Moss was preparing the same for a trip. Moss turned on what is called the injector in order to refill the boiler with water from the engine tank. At the time he did so hot water and steam escaped from a hose lying on the floor of the engine cab and badly scalded Maryland Dickey, who was then upon the engine. The hose was connected with the injector by means of a valve. When this valve was closed no water could escape through the hose. The hose was used to sprinkle down the coal in the tender in order to settle the dust, and, in order to do this, it was necessary to open the valve connecting it with the injector. Moss was engaged in loading the tender with coal, and had already sprinkled the same by using the hose in the manner indicated. It seems that after doing this he shoveled more coal into the tender from the coal bin, then went back to the engine and turned on the injector. He testified that after sprinkling the coal he closed the valve connecting the hose with the injector, and that when he turned on the injector he did not know the valve was open.

This suit was instituted against the railway company by William Dickey, father of the boy, to recover damages for loss of services of the boy, for services of plaintiff and his wife in nursing the boy, and for expenses for his medical treatment while suffering from the injuries he sustained. From a judgment in favor of plaintiff, the defendant has appealed.

One of the contentions made by the defendant was that, without the knowledge of Moss, the valve in question must have been opened by Maryland Dickey or his brother, another boy who was also upon the engine with him, or by some other person unknown to Moss.

[1, 2] Several assignments of error have been presented to the action of the court in overruling special exceptions to certain portions of plaintiff's petition containing allegations that defendant had made a practice of permitting and inviting children of tender years residing in that vicinity to enter and

ride upon its engine, a place of known danger to children. Assignments have also been presented to the admission of testimony tending to prove those allegations. All of those assignments are overruled, because the proof shows without controversy that the presence of the boy in the cab of the engine was known to the hostler at the time he turned on the injector. For the same reason there was no reversible error in admitting proof of declarations made by Moss, on the morning following the accident, to the grandmother of the boy, and her replies thereto; such declarations of Moss being, in effect, that he liked to have children come around and talk to him while he was at work, and the statement by the grandmother being that the child had been burned up and she could not understand what manner of man Moss was that he would allow a child around such a place as the engine.

[3, 4] Several assignments are presented to the charge given by the court to the jury, all of which are overruled, for the reason that no proper bills of exception were reserved to the instruction. We find in the statement of facts certain exceptions to the court's charge which are signed by attorneys for the defendant and marked filed by the clerk of the court. We also find an order of the court entered upon the minutes dated January 8, 1914, which is the same date of the filing of the exceptions to the charge and of the same date that the court's general charge was filed. Said order of the court reads as follows:

"On this day came on to be heard the objections and the exceptions of the defendant to the court's general charge, which were presented to the court before the reading of his charge to the jury, and, the court having heard the same, he is of the opinion that the law is against said objections and exceptions, and it is therefore ordered and considered by the court that the same be, and the same are hereby, in all things overruled, to which the defendant excepted."

Such purported objections and the order of the court so entered upon the minutes did not constitute a bill of exception to the charge given. It is well settled that objections not taken to a charge given by the court must be shown by bills of exception. Objections to the charge which do not constitute a part of a bill of exception have no proper place in the record, and, if that be true, we cannot assume, as a matter of law, that the objections to the court's charge appearing in the record were the objections considered by the court and referred to in the order entered upon the minutes copied above. *Cleburne Street Ry. Co. v. Barnes*, 168 S. W. 991; *Taylor v. Butler*, 168 S. W. 1004; *Mutual Life Ins. Co. v. Rhoderick*, 164 S. W. 1067; *Simpson v. Tex. Tram Ry. Co.*, 51 S. W. 655, and decisions there cited; *Railway Co. v. Wadsack*, 166 S. W. 42.

[5] Proper bills of exception were taken to the refusal of several special instructions requested by the defendant, and to which re-

fusal several assignments of error are presented. Some of the instructions so requested were, in effect, that it was shown by uncontradicted evidence that Maryland Dickey was upon the defendant's engine without invitation, and that defendant owed him no duty except not to willfully or wantonly injure him. A sufficient answer to that contention is that, according to the testimony of Moss himself, he knew that the boy was upon the engine at the time he turned on the hot water and scalded him, and at that time made no effort to exclude him from the engine before turning on the water.

[6] By requested charge No. 3 defendant sought to have the jury told that, if Moss cut off the valve connecting the injector with the hose after he had sprinkled the coal, and that between that time and the time he went back into the engine and turned on the injector the valve was opened by Maryland Dickey, or his brother, or some person unknown to Moss, then a verdict should be returned for the defendant. This instruction was properly refused, because it was, in effect, a peremptory instruction that Moss was guilty of no negligence in turning on the injector while the child was upon the engine without making some investigation to discover whether or not the valve connecting the hose with the injector was closed, nor in permitting the presence of the child upon the engine at that time.

[7] Special instruction No. 4 was properly refused, because it, in effect, embodied the proposition that Moss was guilty of no negligence, unless he knew the valve was open at the time he turned on the injector, or that he intentionally or wantonly inflicted the injury.

[8] By special charges Nos. 5 and 7 the issue of negligence *vel non* on the part of Moss in turning on the water was requested to be submitted as a disputed issue, and the liability of defendant made to hinge upon an affirmative finding upon that issue. Appellant cannot complain of the refusal of these instructions, since no proper bill of exception was taken to the charge of the court upon the issue of liability, as noted already, which, therefore, must be considered as having been approved by the appellant. *Cleburne Street Ry. Co. v. Barnes*, 168 S. W. 991; *McKenzie v. Imperial Irr. Co.*, 166 S. W. 495; *Ry. Co. v. Sharpe*, 167 S. W. 814; *Lester v. Hutson*, 167 S. W. 321; *Saunders Live Stock Com. Co. v. Kincaid*, 168 S. W. 977.

[9] Over objection by the defendant, the plaintiff, William Dickey, was permitted to testify that, while engaged as a carpenter and working upon a certain house, he had been receiving \$2.50 a day, and was furnished a horse and buggy to go and return from his work daily. The testimony was offered by the plaintiff to prove the value of the time he lost while engaged in nursing the injured boy. The objection urged to that testimony

was that the same was no proper proof of the value of plaintiff's services in nursing the boy. The plaintiff was also permitted to testify, over defendant's objection, that the time lost from his business while nursing his boy was reasonably worth \$220. One of the objections to this testimony likewise was that it did not relate to the correct measure of damages. Clearly, the testimony of the amount plaintiff could have earned in any business that he was pursuing or could follow was not admissible to prove the value of his services in nursing the boy, and the error in admitting it was especially harmful to the defendant, in view of the fact that the court, in charging upon the measure of damages, told the jury that, in the event of a verdict for plaintiff, he should be allowed the value of the time so lost. Hence these assignments must be sustained.

For this error the judgment must be reversed, and the cause remanded, unless appellee shall, within ten days from the date of this opinion, file a remittitur of \$220. If such remittitur is so filed, then the judgment will be affirmed.

#### WILLIAMS v. PHELPS. (No. 8031.)

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 7, 1914. On Motion for Rehearing, Dec. 12, 1914.)

#### 1. BROKERS (§ 49\*)—RIGHT TO COMMISSION—PERFORMANCE OF CONTRACT.

Where a broker procures the execution of an enforceable written contract of purchase on the terms authorized by the principal, he has earned his commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

#### 2. BROKERS (§ 84\*)—ACTION FOR COMMISSION—BURDEN OF PROOF.

Where a broker's written employment contract authorized only a sale, the burden was on the broker, in an action for commissions on an exchange, to show that his principal and the other party to the exchange had reached a definite agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

#### 3. EVIDENCE (§ 445\*)—PAROL EVIDENCE—BROKER'S EMPLOYMENT CONTRACT.

Where, in a broker's action for commission on an exchange of properties, it appeared that plaintiff's employment contract authorized him only to sell, evidence of a parol agreement between plaintiff and defendant that defendant would pay no commission on an exchange of properties, unless the exchange should be fully consummated, was properly admitted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

#### 4. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—PLEADING.

In a broker's action for commission on an exchange of properties, the overruling of an exception to a paragraph of the answer alleging that the value of the property for which defendant agreed to trade was falsely represented to him, if error, was harmless, where no such issue was submitted to the jury, and no assign-

ment was presented to the admission of any testimony thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

#### 5. APPEAL AND ERROR (§ 1040\*)—PLEADING—HARMLESS ERROR.

In a broker's action for a commission on an exchange of property, error could not be assigned to the overruling of exceptions to allegations of the answer alleging that the contract of exchange was invalid, where no bill of exceptions was taken to the court's instruction that such contract was nonenforceable for uncertainty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

#### 6. BROKERS (§ 85\*)—ACTION FOR COMMISSIONS—EXECUTION OF ORAL CONTRACT—EVIDENCE.

Where, in a broker's action for commission on an exchange of properties, the evidence was conflicting whether any definite oral agreement of exchange was made, evidence of the market values of the respective properties was properly admitted.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106-115; Dec. Dig. § 85.\*]

#### 7. APPEAL AND ERROR (§ 1052\*)—HARMLESS ERROR—ADMISSION OF TESTIMONY.

Under Rules of Courts of Civil Appeals, rule 62a (149 S. W. 2d), providing that no judgment shall be reversed for immaterial errors, any error in admitting testimony as to value over an objection that the witnesses were not properly qualified was not ground for reversal, where such testimony related only to a collateral circumstance and other witnesses, who were qualified, testified to the same effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.\*]

#### 8. TRIAL (§ 36\*)—BEST EVIDENCE—FACTS NOT CONTROVERTED.

Where, in a broker's action for commission, the execution of the written contract of employment was not disputed, the exclusion of another instrument offered by plaintiff to prove such employment was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 89; Dec. Dig. § 36.\*]

#### 9. APPEAL AND ERROR (§ 547\*)—PRESENTATION BELOW—INSTRUCTIONS.

Assignments of error complaining of instructions to which no proper bills of exceptions have been taken will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429-2432; Dec. Dig. § 547.\*]

#### 10. APPEAL AND ERROR (§ 553\*)—BILL OF EXCEPTIONS—OBJECTIONS BELOW—INSTRUCTIONS.

Objections to the charge which do not show that they were presented before the charge was read, or that they were overruled and exception taken, will not be considered on appeal, though they are signed by plaintiff and marked "Approved" by the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.\*]

#### 11. BROKERS (§ 86\*)—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.

Evidence in a broker's action for commissions on an exchange of properties, held to sus-

tain a verdict for defendant based on a finding that no definite contract of exchange was made.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

**12. TRIAL (§ 317\*)—MISCONDUCT OF JURORS—WAIVER OF OBJECTION.**

The right to object that jurors were guilty of misconduct in engaging in social games with defendant's wife at the hotel was waived, where plaintiff and his counsel were present and saw the games, and failed to call the matter to the court's attention prior to filing a motion for new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 751, 752; Dec. Dig. § 317.\*]

**Appeal from District Court, Bosque County; O. L. Lockett, Judge.**

**Action by G. H. Williams against M. Phelps.** From judgment for defendant, plaintiff appeals. Affirmed, and rehearing denied.

James M. Robertson, of Meridian, and C. M. Templeton, of Ft. Worth, for appellant. H. J. Cureton, of Meridian, and S. C. Padel-ford, of Cleburne, for appellee.

DUNKLIN, J. M. Phelps, who owned a ranch in Bosque county consisting of 3,000 acres of land, upon which he resided, employed G. H. Williams, who resided in Ft. Worth, to find a buyer for the ranch, agreeing to pay Williams for his services in so doing the sum of \$1,000. The contract of employment was by letter dated at Morgan, Tex., March 19, 1912, addressed to Williams at Ft. Worth, and in that contract no price was named by Phelps for his property. Pursuant to that employment, Williams instituted negotiations to effect an exchange of Phelps' property for property in North Ft. Worth. At his insistence Phelps came to North Ft. Worth and examined property there situated belonging to Sam Rosen, with whom Williams had been negotiating, and to whom he introduced Phelps, consisting of several lots, some of which were improved with buildings. After Phelps had examined the property, a written contract was executed by him and Rosen, by the terms of which the ranch was to be exchanged for Rosen's property, provided Rosen should elect to make the exchange after an examination of the ranch. This contract was never executed, and, in a suit by Rosen to enforce specific performance thereof, this court held that the contract was nonenforceable by reason of uncertainty in the description of the property which Rosen proposed to exchange. For that decision see *Rosen v. Phelps*, 160 S. W. 104.

The present suit was instituted by Williams to recover the commission of \$1,000 named in the contract of his employment mentioned above. In his petition Williams alleged the execution by Phelps and Rosen of the contract above mentioned and the breach thereof by Phelps after Rosen had examined the ranch and agreed to accept it.

He further alleged that his efforts to bring about the trade were the procuring cause which resulted in the contract, and that Rosen was ready, willing, and able to comply with the obligations imposed upon him by the terms of the contract, and offered so to do before Phelps declined to make the exchange, and that the refusal of Phelps so to do was without cause. From a judgment in favor of Phelps, Williams has appealed.

In plaintiff's third amended petition it seems that the right of action asserted is limited to the one contention that the commission claimed had been earned by reason of the fact that plaintiff had procured the execution of the written contract of exchange, and that Rosen was ready, willing, and able to make the exchange in accordance with the terms of the contract after he had examined the ranch in accordance with the option so to do as provided in the contract. In other words, it seems that the theory upon which plaintiff's petition was drafted was that Williams had earned his commission by procuring the execution of the written contract by Phelps and Rosen.

[1] It is well settled that when an agent procures the execution of a written contract of purchase upon terms authorized by the principal, which is satisfactory to the principal, and which can be specifically enforced by him, then the agent has earned his commissions. *Moss & Raley v. Wren*, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847. If the contract was not enforceable against Phelps, then it was not enforceable against Rosen, and, if unenforceable against Rosen, it did not of itself furnish a proper basis for recovery of the commissions claimed. *Hagler v. Ferguson*, 102 Tex. 432, 118 S. W. 133, 132 Am. St. Rep. 895; 3 *Elliott on Contracts*, § 2282. But the court tried the case upon the theory that plaintiff would have the right to recover if he induced Rosen to agree with Phelps on an exchange of properties, whether or not the agreement was clearly and properly expressed in the written contract. It is unnecessary for us to definitely determine whether or not a trial upon that theory was warranted by the pleadings; since we have decided that the judgment should be affirmed for the reasons hereinafter stated.

[2] We think proper to note in the outset that the written contract of employment upon which plaintiff's suit is founded authorized a sale only of Phelps' property. Under that contract Williams was not authorized to exchange Phelps' property for other property. *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1, 95 S. W. 696; 31 Cyc. 1363. In order, then, for plaintiff to recover, it was incumbent upon him, at all events, to show by parol testimony in connection with the written contract that Phelps and Rosen reached a definite agreement for the exchange of properties.

[3] Complaint is made of the action of the

court in overruling a special exception to allegations in the defendant's answer which were, in effect, that after the execution of defendant's written contract of employment of Williams to sell the property, and to pay him a commission of \$1,000 for finding a buyer, and before the transaction already noted between plaintiff and Rosen, the plaintiff and defendant entered into a parol agreement, that in the event of an exchange of defendant's property for other property, defendant would pay no commission for any contemplated exchange, unless such exchange should be fully consummated. This agreement did not come within the rule invoked by appellant that parol evidence will not be heard to vary or change the terms of a written agreement.

[4] In another paragraph of defendant's answer it was alleged that in the negotiations between the defendant and Rosen, which resulted in the execution of the written contract of exchange, the values of Rosen's property were falsely represented to the defendant at sums far in excess of their real values. There was no reversible error in overruling appellant's exception to those allegations on the ground that they were irrelevant to the material issues involved; since no such issue was submitted to the jury in the court's charge, and no assignment is presented to the admission of any testimony to sustain such allegations.

[5] In defendant's answer it was alleged that the contract of exchange between Phelps and Rosen was in contravention of the statute of frauds, and therefore invalid, and also that Rosen by suit had sought a specific enforcement of the contract, and that, by reason of such invalidity of the contract, a judgment had been rendered denying him that relief. Error has been assigned to the action of the court in overruling special exceptions to those allegations upon the ground that they were immaterial and irrelevant to any issue in the case. A sufficient answer to those assignments is that the court expressly charged the jury that the written contract of exchange was nonenforceable, because of uncertainty in its terms, and no bill of exception was taken to that instruction.

[6] Whether or not Phelps and Rosen reached any definite oral agreement for exchange of properties was a sharply controverted issue; Phelps testifying in the negative, and plaintiff and other witnesses testifying in the affirmative. In view of this conflict, it was permissible to introduce evidence to show the market values of the respective properties of the parties to such contract of exchange, as such values were circumstances which could be looked to for the purpose of solving the conflict. See *Carver v. Power State Bank*, 164 S. W. 892; *Paine v. Argyle Merc. Co.*, 133 S. W. 895; *Kocher v. Mayberry*, 15 Tex. Civ. App. 342, 39 S. W. 604.

[7] The testimony of the witnesses Tom

Frazier and W. H. Abernathy shows that they were properly qualified to give opinions upon those values. If the witness H. C. Odle did not sufficiently qualify to give his opinion upon the same subject, as insisted in another assignment, the error in admitting his testimony over appellant's objection would not be such as would require a reversal of the judgment, in view of the fact that it related to a collateral circumstance only, and in view of other testimony to the same effect as that of Odle. See rule 62a (149 S. W. x).

[8] The execution of the written contract of employment of the plaintiff by the defendant, which was alleged in plaintiff's petition, was not controverted by any evidence offered by defendant. Hence there was no error in excluding another letter offered by the plaintiff from Phelps to Williams to prove such employment.

[9,10] Several assignments of error are presented to the charge given by the court to the jury, all of which must be overruled, for the reason that no proper bills of exception were taken thereto. We find in the record what purport to be objections to the charge which are signed by the plaintiff and are marked "Approved" by the trial judge. But they do not purport to show that they were presented before the charge was read to the jury, nor that the objections were overruled by the trial judge, nor that the plaintiff excepted to such ruling. See *Gulf, Texas & Western Ry. Co. v. Wm. Dickey* (No. 8011) 171 S. W. 1097, by this court, not yet officially published; *Cleburne Street Ry. Co. v. Barnes*, 168 S. W. 99.

[11] By other assignments the contention is made that the verdict of the jury is without evidence to support it, or, at all events, contrary to the great preponderance of the evidence. It is insisted that the evidence shows conclusively that, after the execution of the contract of exchange between Rosen and Phelps, Rosen went to Morgan, and, after inspecting the ranch, told Phelps that he would accept it in exchange for his (Rosen's) property; that then, and not until then, did Phelps decline to make the exchange. Phelps testified that Rosen, after looking over the ranch, declined to take it, and that thereupon Phelps declared the trade off, and thereafter declined the further offer of Rosen to consummate the contract. In view of this testimony of Phelps, together with his further testimony; which was, in effect, that no definite agreement was ever made between him and Rosen for exchange of properties, and the further testimony that the value of the ranch was greatly in excess of the value of Rosen's property, and other circumstances not necessary to enumerate, these assignments must be overruled.

[12] By another assignment complaint is made of the action of the court in overruling plaintiff's motion for new trial based upon allegations of misconduct of some of the

jurors during the trial of the case. The alleged misconduct consisted of the fact that defendant's wife, a charming and attractive lady, boarded at the same hotel with the jurors, and during the recesses of court engaged in social games of dominoes with some of the jurors in the parlors of the hotel. If this could be considered such misconduct on the part of the jurors as to require their verdict to be set aside, the error was waived by reason of the fact, appearing from the affidavits attached to the motion, that both plaintiff and his counsel were also boarding at the same hotel, were present and saw the alleged games in progress, and failed to call the matter to the trial court's attention until the motion for new trial was filed.

The judgment is affirmed.

#### On Motion for Rehearing.

We were in error in stating that the contract of employment contemplated nothing but a sale of the property. Upon further examination we find that the letter from Phelps to Williams requesting his services and promising to pay Williams \$1,000 for finding a buyer, and the acceptance of which letter by Williams constituted the contract sued upon, concluded as follows: "I will trade or will sell on a credit; interest is all I want."

With this correction, the motion for a rehearing is overruled.

#### PECOS & N. T. RY. CO. v. AMARILLO ST. RY. CO. et al. (No. 643.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 19, 1914.)

##### 1. ACTION (§ 27\*)—NATURE AND FORM—CONTRACT OR "TORT"—"ACTION EX DELICTO."

In the strict legal sense, a "tort" is a wrong done independent of contract, but there are wrongs committed in the nonobservance of contract duties; so that, if a transaction has its origin in a contract placing the parties in such relation that the wrong is committed in performing or attempting to perform the contract, the breach of the contract is not the gravamen of the action, but is a mere inducement, and it is the wrong outside the contract which is the gravamen of the action, and such action is an "action ex delicto," or at common law an action for which case would lie.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, First and Second Series, Action Ex Delicto; Tort.]

##### 2. PLEADING (§ 58\*)—INDUCEMENT—CONTRACT.

In an action ex delicto, outside the contract which induced the occasion for the wrong, the contract is a mere inducement and should be so pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 123; Dec. Dig. § 58.\*]

##### 3. ACTION (§ 27\*)—NATURE AND FORM—"ACTION EX DELICTO"—"ACTION EX CONTRACTU."

A cause of action arising from breach of a promise is an "action ex contractu," and when a

duty, for the breach of which an action is brought, would not be implied by law by reason of the relation of the parties and depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort; but a cause of action arising from a breach of duty growing out of the contract is in form an "action ex delicto."

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, Action Ex Contractu.]

##### 4. ACTION (§ 32\*)—NATURE AND FORM—CONTRACT FOR TORT.

Under the system of pleading in Texas, distinctions between actions do not exist, but the facts alleged determine the character of the action, and the courts determine therefrom whether it is one of tort or contract.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 257-261, 316; Dec. Dig. § 32.\*]

##### 5. ACTION (§ 27\*)—NATURE AND FORM—CONTRACT FOR TORT.

A petition, alleging that defendant street railroad did not perform the obligation of its written contract to keep its roadway under plaintiff's bridge free from inflammable material, but permitted such material to accumulate and remain in the subway, where it became ignited from some unknown cause and the fire destroyed plaintiff's bridge to its damage, and that the destruction was not due to any failure of duty on the part of plaintiff, but was the proximate result of defendant's failure to keep the subway free from inflammable material, stated an action for breach of contract; and defendant was not relieved from its contract to indemnify against damages, simply because it was not shown to be negligent in permitting such accumulation of material.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

##### 6. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICATION TO ISSUES—NEGLIGENCE—CONTRACT.

In an action for breach of defendant street railroad's contract that in consideration of the use of a subway under plaintiff's railroad it would keep the subway free from combustible material and indemnify the railroad for damages from fire, instructions making the street railroad's liability turn upon the question of negligence in not keeping the subway clear of such material were erroneous, and the plaintiff's requested charge that the liability rested upon breach of contract, and if the destruction of the bridge was caused by fire originating in such material it was liable, should have been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

##### 7. EVIDENCE (§ 220\*)—ADMISSION—ACQUISITION OR SILENCE.

Where the superintendent of a railroad met representatives of a street railroad to discuss the widening of a subway under the railroad, and no mention was made of the street railroad's contract liability for the burning of a bridge over the subway, the statement of the railroad superintendent that he supposed the bridge had been set on fire by tramps, without then stating that the railroad held the street railroad liable, under its contract, for the destruction of the bridge, was not an admission that the street railroad was not liable thereunder, since the situation of the parties and the nature of the discussion did not call upon the superintendent to assert the liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.\*]

# 8. EVIDENCE (§ 242\*)—DECLARATIONS AND DISCLAIMER—AGENT.

To render an agent's disclaimer admissible against his principal, it must have been made concerning an act within his authority and when the act was being performed by him, and, if made before or after such act, was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 893-907; Dec. Dig. § 242.\*]

# 9. CONTRACTS (§ 349\*)—ACTION FOR BREACH—EVIDENCE—PRESENTATION OF CLAIM.

In an action by a railroad company against a street railroad company for the breach of its contract to keep its subway free from inflammable substances, and to indemnify the plaintiff for any loss by fire, a letter written by the plaintiff, inclosing a bill for damages for the destruction of its bridge by fire, was inadmissible to prove the time of presentation of its claim, in the absence of any evidence showing the date when the letter was mailed or sent out by the plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.\*]

# 10. APPEAL AND ERROR (§ 759\*) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment presenting in one group some 13 assignments to the court's action in overruling that many special exceptions, with a statement referring to the record for the exceptions, was improperly briefed and would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3094; Dec. Dig. § 759.\*]

# 11. EVIDENCE (§ 441\*)—PAROL—VARYING CONTRACT.

In an action for breach of a contract to keep a subway under plaintiff's railroad free from inflammable material and to indemnify plaintiff for damages from fire, where the answer did not allege fraud, mistake, etc., in inducing the contract, parol testimony of prior negotiations wherein it sought to vary the terms of the contract were inadmissible under the pleadings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

Appeal from District Court, Potter County; Jas. N. Browning, Judge.

Action by the Pecos & Northern Texas Railway Company against the Amarillo Street Railway Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Terry, Cavin & Mills, of Galveston, and Madden, Trulove & Kimbrough, of Amarillo (F. M. Ryburn, of Amarillo, of counsel), for appellant. Crudgington & Works, of Amarillo, for appellees.

HUFF, C. J. This suit was instituted by the appellant, the Pecos & Northern Texas Railway Company, against the Amarillo Street Railway Company, appellee. The statement of the cause of action by appellant, and acquiesced in by appellee, is as follows:

"This suit was instituted in the district court of Potter county, Tex., by appellant, against appellee the Amarillo Street Railway Company,

to recover the value of a bridge erected for the support of its track over a subway to be used by the appellee, and that the street railway company crosses the track of appellant at Twenty-Fifth street, in the city of Amarillo, Tex.; appellant alleging that said subway was constructed and such bridge built at its own expense under a written contract entered into between it and the appellee on the 12th day of August, 1908. Said contract containing the terms and conditions under which said subway was constructed, among which was a provision that the street railway company should drain and keep passable and free from all rubbish and inflammable material such subway or underground crossing, and should indemnify and save harmless and free from loss the appellant from any damage on account of the destruction of such subway or bridge or any part thereof, which might be directly or indirectly caused or originate from inflammable material which should be allowed to accumulate in said subway by appellee, whether said fire should be set by trains of the appellant or by the electric wires or cars of appellee or by the public. It is further alleged in such petition that in violation of such contract appellees permitted trash, weeds, paper, and other inflammable material to accumulate in said subway, and that such trash and inflammable material so accumulated in such subway were ignited from some cause and fire thereby transmitted to the timber supporting and composing said bridge, and said bridge was as a result thereof, on or about the 19th day of April, 1910, completely destroyed by fire, to appellant's damage in the sum of \$10,000."

It will be unnecessary at this time to set out the answer of the appellee.

The first assignment of error is to the effect that the verdict of the jury is contrary to the law and evidence, in that the evidence conclusively shows that the defendant permitted the accumulation of trash, rubbish, etc., in the subway, and that they caught fire, which was communicated to the bridge and caused its destruction.

Without discussing the evidence or setting it out, we overrule this objection, holding that the testimony is not conclusive that the fire originated in the rubbish, etc., and the fire was thereby communicated to the bridge. For that reason the assignment will be overruled; and, in this connection, we overrule appellee's contention that the evidence is conclusive that the fire did not so originate as would render it liable, and that any error the court might have committed would be harmless for the reason that the jury could not have lawfully rendered any other verdict than they did. The evidence we do not regard as conclusive as against either the appellant or the appellee; but there are facts and circumstances for and against both, from which an inference might be drawn by the jury, either supporting the one or defeating the other. Contention on the part of both appellant and appellee in this particular will be overruled.

The second, third, and fourth assignments of error relate to the charge of the court given in this case, and the sixth assignment, to the refusal of the court to give the appellant's specially requested charge. The court,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the third paragraph of its charge, instructed the jury as follows:

"By 'ordinary care,' as used in this charge, is meant the exercise of that degree of care under given circumstances which a person of ordinary prudence would exercise under the same circumstances, and a failure to exercise such ordinary care is 'negligence' in the sense that the term negligence is used in this charge. 'Negligence,' in other words, is the doing of that which an ordinarily prudent person would not do, or the failure to do that which a person of ordinary prudence would do under the same circumstances."

The fifth paragraph is:

"Under the terms of the written contracts of March 28, 1908, and of August 12, 1908, between plaintiff and the defendant street railway company, read in evidence before you, it was the duty of the said street railway company to exercise ordinary care to keep the entire subway or underground crossing under plaintiff's bridge free from all rubbish and inflammable material which could or might cause fire to originate and damage or destroy said bridge."

In the sixth paragraph the court instructed the jury to bear in mind the foregoing instructions, and if they should find from the evidence the defendants "negligently allowed rubbish and inflammable material," etc., to accumulate, and that the bridge caught fire from any cause which was communicated to the bridge from such burning material, and destroyed, etc.

The appellant requested the court, in specially requested charge No. 1, to charge the jury that under the contract sued on the liability of the parties would be governed thereby with reference to the causeway, and instructed them what the provisions of the contract were with reference to fire, and concluded:

"Therefore, if you believe from the evidence before you that the defendant street railway failed to keep said entire subway free from all rubbish and inflammable matter as provided in said contract, and that said bridge or any part thereof was destroyed by fire directly or indirectly originating from such inflammable matter, if any, which may have been allowed to accumulate in said subway by the defendant Amarillo Street Railway Company, then you will find in favor of the plaintiff, whether said fire may have been set in such inflammable material, if any, by the train of the plaintiff company, or by the public."

This charge the court refused.

Section 2 of article 1 of the contract, is as follows:

"The Amarillo Company (appellee) shall construct its railroad on the P. & N. T. Company's right of way into and through the subway or undergrade crossing, as herein provided, at its own cost and expense, and shall at all times during its right to use said subway or undergrade crossing, at its own cost and expense properly drain and keep passable and free from all rubbish and inflammable matter the entire subway."

Section 6 of article 2 is that:

"The Amarillo Company shall indemnify and save harmless and free from all loss the Pecos & Northern Texas Company against the damage or destruction of said subway or any part thereof by fire, which may be directly or indirectly caused by or originated from inflammable material which may be allowed to accumulate in said subway by the Amarillo Company, whether said fire may be set by the trains of the Pecos

& Northern Texas Company or the electric wires of said Amarillo Company, or by the public."

As the appellee contends in this case that the action brought by appellant is one sounding in tort or for negligence, we quote the following paragraph from the petition:

"(7) Plaintiff further says that defendant did not and has not performed the duties and obligations made incumbent upon it by the terms of said written contract, but, on the contrary, permitted trash, weeds, paper, chips, and various other inflammable and combustible material to accumulate and remain within and about the subway or underground crossing, and that on or about the 19th day of April, A. D. 1910, such inflammable and combustible material so permitted to collect and remain within and about said subway by the defendant was ignited from some cause unknown to the plaintiff, and fire was thereby transmitted to the timbers supporting and crossing said bridge, thereby burning the whole and destroying said bridge and injuring plaintiff's railway to plaintiff's damage in the sum of \$10,000.

"(8) That the burning and destruction of said bridge was in no wise owing to the failure of duty of plaintiff in any respect nor to any acts of negligence on its part, but was the proximate result of defendant's failure to keep said subway or underground crossing free from inflammable matter and combustible substance."

[1, 2] In testing the charge of the court given in this case, it will be necessary to inquire into the nature of the action brought; that is, whether it is ex contractu or ex delicto, and whether a breach of a contract or a suit in tort. It could not in the strict legal sense be a suit in tort; that is, "a wrong done independent of contract." But there are wrongs which will maintain an action on the case, known to the common-law pleading, committed in the nonobservance of duties which are but the implication of contract obligation. Wherever there is carelessness, want of reasonable skill, or the violation or disregard of duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, an action in tort lies in favor of the party injured. If the transaction had its origin in a contract which places the parties in such relation as that in performing or attempting to perform the service promised the wrong is committed, then the breach of the contract is not the gravamen of the action. There may be no technical breach of the letter of the contract; the contract in such case is a mere inducement and should be so pleaded. It induces, causes, creates the conditions or state of things which furnishes the occasion for the wrong. It is the wrong outside the letter of the contract which is there the gravamen of the suit. Such an action, as we understand, would be ex delicto or at the common law, an action for which case would lie. A familiar example is given by the Alabama court:

"The contract of a carpenter to repair a house, partly decayed, or otherwise defective, the implications of the contract are, that he will bring to the service reasonable skill, good faith, and diligence. If he failed to do the

work, or leave it incomplete, the remedy, and the only remedy against him, is *ex contractu*. Suppose, in the attempted performance, he, by his want of skill or care, destroys, or damages, or needlessly wastes the materials furnished by the hirer; or, suppose that in making the needed repairs he did it so unskillfully or carelessly as to damage other portions of the house. This is tort, for which the contract only furnished the occasion." *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170.

[3] "Perhaps the best criterion is this: If the cause of action, stated in the declaration, arises from a breach of promise, the action is *ex contractu*; but if the cause of action arises from a breach of duty, growing out of the contract, it is in form, *ex delicto* and case." *Wilkinson v. Mosely*, 18 Ala. 288; *Myers v. Gilbert*, 18 Ala. 467.

"Where the duty for the breach of which the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort." *Ruling Case Law*, vol. 1, p. 322, § 7; *Russell v. Polk County Abstract Co.*, 87 Iowa, 233, 54 N. W. 212, 43 Am. St. Rep. 381; *Railway Co. v. Becker*, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 314, 77 Am. St. Rep. 78; *Tuttle v. Gilbert*, 145 Mass. 169, 13 N. E. 465; *Flynn v. Hutton*, 43 How. Prac. (N. Y.) 333.

[4] While under our system of pleading distinctions between actions do not exist, the facts alleged control and determine the character of the action, and the courts determine therefrom whether the action is one of tort or contract, and if a contract appears to be the gravamen of the suit it will be so determined. This question frequently occurs in suits against common carriers as such. See *Elder v. Railway Co.*, 105 Tex. 628, 154 S. W. 975, for allegations in a suit for breach of the contract of carriage, in which it was determined that the suit was not for the failure to perform its legal duty, as a common carrier, but was held to be upon the contract of carriage, and was therefore a suit *ex contractu*, and not *ex delicto*, and the four years' statutes of limitations applied in that case. In the case of *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. St. Rep. 623, the sum paid to send a message is held to be recoverable on the contract, but mental distress occasioned by the negligence of the agent is recoverable from the wrong done. It is there said:

"If the facts stated show a breach of contract, and also that the breach is of such character as to authorize a suit as for a tort, all the damages recoverable for the thing done or committed, either in an action *ex delicto* or *ex contractu*, may be recovered in the one suit."

"The reform procedure has abolished forms of action *ex contractu* and *ex delicto*, but the principles of law governing these actions remain unchanged, and while an action of tort may be allowed to stand as an action for breach of a contract, when the complaint states facts sufficient to constitute a cause of action for such breach, the other allegations of the complaint may be treated as surplusage. The two causes of action are still entirely distinct, and there can be no recovery for a breach of contract when the complaint shows a cause of action in tort." *Ruling Case Law*, vol. 1, p. 332, § 15.

And we take it if the petition shows the cause of action on contract a recovery cannot be had in tort. The pleader "must now state his facts; he must state them truly; and he must prove them as alleged to succeed." It has been said, in action on torts founded upon express or implied contracts, the act complained of must have resulted from misfeasance or malfeasance, and that tort cannot be based upon nonfeasance alone. As illustrating, when a case may be based on tort arising out of a contract, we refer to the decision by the Massachusetts court: The city agreed to furnish water to a greenhouse, which the latter heated to keep his plants from freezing, but during sewer construction the supply pipe was negligently uncovered and the water froze, and thereby the water supply was cut off. It was held that an action for tort would lie, even though a suit on the contract would be proper. *Stock v. Boston*, 149 Mass. 356, 21 N. E. 871, 14 Am. St. Rep. 430; The Indiana court; in the case of *Flint v. Beckett*, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924, held where a party undertook to erect a windmill on another building, comes into such relation to the owner as will render him liable in tort in case the work is done so negligently that the windmill falls and injures the other building.

It will be observed from an examination of the facts in these cases that there was no contract to pay the damages in case of uncovering the water pipe in the first instance; or in the second in case the windmill fell and damaged the building. The above cases cited we do not believe would fall under the rule heretofore quoted by us from *Ruling Case Law*, § 7, p. 332. As we understand the decisions in our own state, they are in accord with the authorities above set out. We quote from the headnote which appears to be a fair representation of the opinion of the cause of *Galveston, H. & S. A. Ry. Co. v. Hennigan*, 33 Tex. Civ. App. 314, 76 S. W. 452:

"(1) Where an employer fails to furnish an employé medical attendance, as he has agreed to do, the employé's cause of action is for breach of contract, and not in tort for negligence. (2) The cause of action being breach of contract, and the pleadings and trial being in form for negligence, such error, though unassigned, requires reversal."

In the case of *Gunter v. Robinson*, 112 S. W. 134, the controversy was over a contract to cultivate certain land. The party agreeing to so cultivate sought to excuse himself for not having done so on the grounds that the land was deep "hog wallow" black land, and that it rained so that the hog wallows kept full of water and he could not for that reason cultivate it. The court said the character of the land was evidently known to the party when he entered into the contract, "and no provision seems to have been made to relieve him of the performance" on

account "of excessive rains. \* \* \* When a party voluntarily undertakes, and by contract binds himself, to do an act or thing without qualification, and the performance thereof becomes impossible by some contingency which should have been anticipated and provided against in the contract, and such provision is not made, the nonperformance will not be excused." The court and judge rendering the above opinion also rendered the opinion in the case of *Houston Ice Co., etc., v. Keenan*, 99 Tex. 79, 88 S. W. 197. That case was a suit for the rent on a lease contract of a house for saloon purposes. The lessee sought to avoid the contract on the ground that after its execution local option had gone into effect. It was held that the subsequent adoption of local option did not absolve the lessee, and the court applied the maxim, "As a party binds himself, so shall he be bound." This holding was not only approved by the Supreme Court, but that court adopted the opinion and directed its publication. The same proposition is involved in the case of *Bastrop, etc., v. Cochran*, 138 S. W. 1188, where it is held the destruction of work by flood before its delivery by the builder to the owner does not excuse nonperformance of the contract. To the same effect are the following cases of *Bartlett v. Bisbey*, 27 Tex. Civ. App. 405, 66 S. W. 70; *Burke v. Purifoy*, 21 Tex. Civ. App. 202, 50 S. W. 1089-1091.

[5] If the parties who so contract cannot be released from their obligations to perform the contract on account of agencies over which they have no control, we think one who contracts that if he is given an easement over another's property he will see to it that no trash and combustible material shall accumulate and will keep the premises free therefrom, so that if fire is caused thereby or communicated to the property he will indemnify against the damages, ought not to be relieved from his contract simply because negligence is not shown against him in permitting such accumulation. It was expressly held that a charge to a jury would be improper which was to the effect that the defendant was only required to use ordinary care to perform the contract. This was a suit brought upon a breach of a contract to thresh rice. *Kerr v. Blair*, 105 S. W. 584.

It is urged by the appellee in this case that the petition of appellant alleges negligence, and therefore the charge of the court was proper.

In the case of *Russell v. Polk County Abstract Co., supra*, the court says:

"The duties arising upon contracts are, of course, legal duties, within the most comprehensive meaning of the term; but the sanction of the law making them so is invoked by the contract, and hence, in an important and practical sense, we regard and express the obligations and duties thus arising between parties as contractual, and in that way distinguish them from other legal duties or obligations. \* \* \* In the case at bar the defendant, independent

of the contract, owed no duty to the plaintiff. The neglected duty was one alone enjoined by contract. The failure to perform by the defendant was a failure to discharge its agreement, which is solely a breach of contract. No refinement of reasoning can, or should, avoid the conclusion. The fact that the act is alleged as negligently done does not change the situation. It is an allegation only as to the manner of making the breach. The liability of the defendant company in no way depends on the fact of negligence. The allegations of the petition show an absolute undertaking 'to furnish a full, complete and correct abstract to the plaintiff, correctly showing the liens of mortgages, judgments and otherwise.' The demurrer admits such an undertaking, and the allegation of negligence cannot have the effect to change the action from one on contract to one for tort. If A. should engage to deliver to B. a quantity of wheat at a certain time and place, and he failed to do so, he would be liable upon his undertaking, and, in an action for damages because of the failure, a mere allegation that he negligently failed to perform would not affect the character of the action. The liability in either case attaches without the negligence."

[6] In this case we interpret the pleading of the plaintiff to be one upon a suit for the breach of the contract, and in permitting the combustible material to accumulate from which fire was communicated to the bridge, and upon the agreement of the appellee to indemnify appellant against loss or damage so occasioned, the question of negligence is not involved in the consideration of this case. The court, by his charge, made the liability of the appellees to turn upon the question of the appellees' negligence to keep clear and prevent the accumulation of the rubbish. In this we think the court was in error. The jury may have found as a fact that the rubbish accumulated and that the fire was communicated to the bridge therefrom, yet have found that the appellee was not negligent in so permitting the trash to accumulate. We are inclined to believe that the special charge requested by the appellant was a proper charge in this case. The assignments of appellant as to the charge of the court and the refusal to give this specially requested charge will be sustained.

[7] The eighth assignment complains at the action of the court in permitting J. W. Crudginton to testify:

"He (Starkweather) told us there about the burn, and they supposed tramps had set the subway afire. At any rate, he made no intimation of any character whatever that we were in any way responsible for the fire. He said he had been to the fire. He made no claim against our company at all in that connection."

As we gather from the bill, the objections to the introduction of this testimony were that it is immaterial, irrelevant, and hearsay testimony, and the fact that his failure to say anything is not binding on the company (appellant), and there are no pleadings to support it. This is the statement made in the brief. From the statement so made, we cannot determine whether the court was in error or not; but, as the case will be reversed, perhaps we should give our views on the question. Upon reading the bill as

taken, we understand the court did not admit the statement "that he supposed tramps had set the subway on fire"; and one of the counsel for appellee stated, "We do not offer his supposition." The witness' supposition was not admissible, but this was not offered or admitted by the court, as we gather from the bill. The record in this case shows that Starkweather was superintendent of the appellant company, presumably with the right to look after the subway and bridge. It appears that Crudginton and witness Nobles, acting for appellee, went to the general offices of appellant to talk over, as we gather from the testimony, widening the subway, for the reason that there was some complaint by the public that the roadway for a public road, which also passed under the subway, was too narrow. The two contracts evidence the fact that the public road was to be so changed as to pass through the subway instead of over the railroad of appellant. While discussing the project of widening the roadway under the viaduct, the conversation objected to was had. Under the contract, the question of appellees' liability or nonliability from the fire does not appear to have been mentioned between the parties in that conversation. The suggestion made was a theory as to how the fire originated, supposedly by tramps, which, as we gather from the record, was not admitted by the court or really offered by appellee. The evidence that no mention was made of appellees' liability was then mentioned, is the only question to be determined. Starkweather in failing to then state that appellant held appellee on the terms of the contract for the burning of the bridge, we do not think can be taken as an admission that appellee was not liable thereunder. This was not the matter under discussion. The purpose of the conference was to discuss the question of widening the public roadway. *Life Insurance Co. v. Calvert*, 101 Tex. 128, 105 S. W. 320. Unless a party is called upon to speak by the conversation or by the circumstances then surrounding him, his silence is not an admission. 16 Cyc. 956(7).

"There is no ground for presuming acquiescence in such statements unless they are of such character as would naturally call for a response and unless the party sought to be charged was in such situation that he would probably have replied to them." *Jones on Evidence*, § 289.

[8] The situation of the parties on this occasion did not call upon Starkweather to assert liability on the part of appellee under the contract. The evidence was immaterial and irrelevant and in its nature hearsay. Even though Starkweather was the superintendent of the road, it does not follow that he had the right to make the claim or to assert liability. It is not shown that it was his duty as the agent of the road to call for or demand payment or in any way to adjust the claim. The fact that he may have had the right to widen the causeway does not

imply authority to adjust claims for damages sustained thereto.

"To render the disclaimer of an agent admissible against the principal, such disclaimer must have been made concerning an act within the scope of authority of the agent and at the time the act was being performed by the agent. If the declaration be made before or after the act was done, it is no part of the *res gestae*, and therefore not admissible." *Waggoner v. Snody*, 98 Tex. 512, 85 S. W. 1134; *Railway Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Railway Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Railway Co. v. Culver*, 168 S. W. 514, 517.

[9] The ninth assignment complains of the action of the court in not permitting appellant to read in evidence a certain letter dated June 7, 1910, with an attached bill for \$10,037.91, dated May 27, 1910, for damages in the destruction of the bridge. Appellee objected to the introduction of this testimony because immaterial and irrelevant. Testimony was offered by the appellee that there was no claim presented to it until some time during the following summer. H. A. Nobles, an officer of appellee, testified he received the letter and claim inclosed therein January 7, 1911, after the fire. There appears to be no testimony when this letter and bill were mailed or sent out by appellant to appellee. It was not admissible, of course, as proof of the claim, and was only admissible in contradiction of the witnesses of appellee. We think no error is shown, as there is nothing showing that the claim was made prior to its reception from the post office by Nobles. To have shown it admissible for the purpose of contradicting the witnesses, we think it should further be shown that the bill was presented at an earlier date. At any rate, there is no error in the ruling of the court in this particular.

[10] The tenth assignment is improperly briefed. There are some 13 assignments presented in one group, all to the action of the court in overruling that many special exceptions. In the statement we are referred to the record to find out what the exceptions were to the answer of the appellees.

[11] The eleventh assignment presents error upon the action of the court in permitting J. W. Crudginton and H. A. Nobles to testify to the parol negotiations had between appellant and appellee before the written contract sued on in this case was executed. We will state inasmuch as the case will be reversed that the answer of appellee does not allege fraud, mistake, or the like inducing the appellees to sign and make the contract set up, and for that reason the pleading is bad. The parol testimony of the prior negotiations was inadmissible wherein it sought to vary the terms of the contract and should have been excluded. The trial court, however, ignored this testimony in submitting the case to the jury. We think, nevertheless, it was error in admitting it in the state of the pleadings in this case. We do not decide whether the preliminary written contract dated March

26, 1908, was admissible. The briefs are not in such condition as to present the question so we can fully determine whether this part of the plea was excepted to or whether the introduction of the preliminary contract was properly objected to. If we gather correctly, there is no serious objection urged to the admission of this contract. At this time we see no reason why it was not admissible, but do not wish to make a ruling thereon in the absence of specific objections being urged to its admission. What we have said above will dispose of the twelfth assignment.

The judgment of the trial court will be reversed.

### NEVILLE v. MILLER et al. (No. 672.)

(Court of Civil Appeals of Texas. Amarillo. Nov. 21, 1914.)

#### 1. APPEAL AND ERROR (§ 655\*)—MOTION TO STRIKE EXCEPTIONS—TIME.

Where the transcript was filed May 11th, the 30 days after filing the transcript allowed for motions by rule 8 for Courts of Civil Appeals (142 S. W. xi), excluding the day on which the transcript was filed, expired June 10th, and a motion to strike a bill of exceptions filed June 11th was too late to be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.\*]

#### 2. APPEAL AND ERROR (§ 669\*)—BILL OF EXCEPTIONS—IMPEACHMENT—AMENDMENT IN LOWER COURT.

Where the trial judge is misled by appellant's attorney into signing a bill of exceptions, the bill incorporated into the record cannot be impeached by the judge's affidavit that he was misled, but the proper proceeding is to have the record corrected in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2864; Dec. Dig. § 669.\*]

#### 3. APPEAL AND ERROR (§ 648\*)—BILL OF EXCEPTIONS—AMENDMENT IN TRIAL COURT—PENDING APPEAL.

The district court has jurisdiction to correct the record, notwithstanding an appeal has been perfected and the transcript filed in the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2803-2806; Dec. Dig. § 648.\*]

#### 4. APPEAL AND ERROR (§ 649\*)—BILL OF EXCEPTIONS—MOTION TO STRIKE—VACATION.

The district court in vacation may entertain a motion to strike out a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2807-2811; Dec. Dig. § 649.\*]

#### 5. APPEAL AND ERROR (§ 938\*)—PRESUMPTION—STRIKING BILL OF EXCEPTIONS—APPEAL.

Order of the trial court striking out appellant's bill of exceptions filed within the time allowed, and substituting a bill prepared and offered by appellee, made when attorneys for both parties were present and in order to make the record speak the truth, if erroneous, should be directly appealed from, and the objection of appellant's attorney at the time brought up by affidavit aliunde the record could not be considered in the nature of an appeal, and in the

absence of an appeal the court would assume that the order was properly made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.\*]

#### 6. APPEAL AND ERROR (§ 274\*)—SUFFICIENCY OF EXCEPTIONS—EXCLUDING EVIDENCE AND MATERIALITY.

In an action against a sheriff and his bondsmen for failure to record an attachment and the return thereon, whereby plaintiff lost his debt and costs, a substituted bill of exception to the exclusion of the writ of attachment and the amended return, which did not show the original return or the amendment, or the property attached, nor contain any copy of the writ and amended return, nor any order authorizing the amendment, was insufficient, because not disclosing what the excluded testimony was and that it was material, since it could not be determined whether the attachment created a lien; and hence the exception would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1624, 1631-1645; Dec. Dig. § 274.\*]

#### 7. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In such action, the defendant's admission, if any, of the issuance and the levy of the attachment on the property alleged, rendered the exclusion of the attachment and the levy by virtue thereof immaterial and harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

#### 8. APPEAL AND ERROR (§ 719\*)—REVERSAL—FUNDAMENTAL ERROR.

Error, if any, in instructing a verdict for defendant when the admitted and proven facts entitled plaintiff to a judgment, was fundamental error, as to which no assignment of error is needed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

#### 9. PLEADING (§ 376\*)—ANSWER—ADMISSION.

In an action against a sheriff and his bondsmen for failure to record an attachment lien, an answer, alleging that defendant received the writ of attachment and upon a certain day levied upon the land described in the plaintiff's petition, was an admission dispensing with plaintiff's proof of the attachment and the return thereon.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.\*]

#### 10. SHERIFFS AND CONSTABLES (§ 138\*)—ACTION FOR FAILURE TO RECORD ATTACHMENT LIEN—BURDEN OF PROOF.

In an action against a sheriff and his bondsmen for failure to record an attachment lien, issued in an action by plaintiff against one S., the plaintiff had the burden of showing that he lost his lien thereby, and that had the proper record been made he would have secured a right superior to that of a purchaser from S., and that he had not been paid, or that his debt could not be collected, with evidence as to the value of the land attached, and that he had no actual notice of the conveyance by S. prior to the attachment.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 290-296; Dec. Dig. § 138.\*]

#### 11. SHERIFFS AND CONSTABLES (§ 130\*)—LIABILITY—FAILURE TO RECORD ATTACHMENT LIEN.

In such action, plaintiff, if at the time he caused the levy and attachment to be made he had actual notice of its prior conveyance by the

defendant therein, could not recover damages for the sheriff's failure to perpetuate the lien by having it recorded.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 267-271; Dec. Dig. § 130.\*]

**12. ATTACHMENT (§ 180\*)—SUBSEQUENT RECORD OF DEED—EFFECT—STATUTES.**

Under Rev. St. 1911, art. 207, declaring a writ of attachment to create a lien, it is the levy of the attachment that gives the lien from the date thereof, and a failure to record the attachment does not destroy the lien; and a prior purchaser from the defendant in the attachment suit, merely by recording his deed after the attachment, would not affect the respective rights of the parties.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 453, 550-575; Dec. Dig. § 180.\*]

Appeal from Hartley County Court; R. B. Elkin, Judge.

Action by B. F. Neville against J. N. Miller and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jno. W. Veale, of Amarillo, J. S. Bailey, of Dalhart, and Durell Miller, of Channing, for appellant. W. B. Chauncey, of Wichita Falls, and Tatum & Tatum, of Dalhart, for appellees.

**HUFF, C. J.** This is an action brought by the appellant, Neville, against the appellee J. N. Miller, sheriff of Hartley county and his official bondsmen, for the sum of \$369.60, and \$11.65 costs, in a certain suit, which sums were sought to be recovered as damages. Appellant alleges: That on the 29th day of June, 1912, he instituted suit in the county court of Dallam county, against G. M. Sharr, for a debt, and at that time sued out a writ of attachment directed to the sheriff or any constable of Hartley county, Tex. The number of the cause on the Dallam county docket was 331. That the attachment was placed in the hands of appellee J. N. Miller, as sheriff of Hartley county, and that the same was levied on certain land in that county, describing the land, as the property of G. M. Sharr, and that the sheriff failed to make a copy of the attachment together with the return thereon and file with the county clerk of Hartley county, to be recorded in the attachment lien records of that county. That after the levy of the attachment aforesaid on the 25th day of July, one C. S. Davis filed for record in the county clerk's office of Hartley county a deed to the land in question for record, which was recorded on the 31st day of July, in the deed records of that county. That the deed from Sharr to Davis was dated the 27th day of May, 1912. The appellant alleges and claims that by reason of the failure to so record the attachment lien there was no sale under a foreclosure proceeding for the land that he has lost his debt, interest, and the costs of that suit. Appellees answered this petition, which will not

now be set out in detail, but some portions of it noticed later on.

The appellees in this case present their motion to strike out bill of exception No. 1, because: (1) The bill does not set out the documentary evidence which the trial court excluded, and it has not informed the court as to what evidence was offered, etc.; and (2) it does not properly belong in the transcript for the reason that it was withdrawn by the trial court and does not state the action taken by the trial court. This case was tried in the county court of Hartley county, February 2, 1914; the term of that court ending February 16, 1914. Bill of exception No. 1 shows that:

"The plaintiff offered in evidence a certain writ of attachment issued out of the county court of Dallam county, Tex., together with the return and amendment of the return thereon, said writ being issued June 29, 1912, in cause No. 331, on the civil docket of the county court of Dallam county, Tex., styled B. F. Neville v. G. M. Sharr, directed to the sheriff or any constable of Hartley county, Tex., and the return and amendment of the return thereon being made by J. N. Miller, defendant herein, sheriff of Hartley county, Tex., under the direction of the county judge of Dallam county, Tex."

The objection urged and sustained by the trial court as set out in this bill is:

"That the amendment to said return was dated February 5, 1913, long after the land attached under said writ had passed out of the hands of the said G. M. Sharr, and a writ of attachment was excluded from evidence."

This bill appears to have been approved the 6th day of February, 1914. On the 5th day of February, 1914, the motion for new trial was overruled and notice of appeal was given. On the 13th day of March, 1914, the county judge, who presided at the trial, made an order granting 60 days from adjournment of the February term of court in which B. F. Neville should have "to file his statement of facts and assignments of error," reciting therein that on the 4th day of February, 1914, appellant was granted 60 days, which was entered on the judge's trial docket but never "reduced to writing in a separate order."

The court on April 3, 1914, prepared and filed what is designated in the record as "bill No. 2," reciting in the body of the bill the offer in evidence of the writ of attachment, the return, and amendment thereon substantially as did bill No. 1, and contains a further statement:

"And said amended return being made on February 5, 1913, and at the time," etc. "The objections therein recited are: (1) Because the original return of the officer on said writ of attachment recited that said writ came to hand the 6th day of July, A. D. 1912, and was executed on the 1st day of July, A. D. 1912, and that \* \* \* such return shows an impossible date of levy. (2) The amended return dated February 5, 1913, was made by order of the county court of Dallam county that there was no certified copy of the order offered in evidence and it was not shown that it was made in open court and prior to the judgment in cause No.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

331, in that court; and that the land levied on was conveyed prior to the issuance of the writ but recorded after the writ was issued and long prior to that date on which the original return was amended. (3) Because the return failed to point out and identify the land attempted to be levied upon, which objection No. 1 the court sustained, to which ruling plaintiff excepted."

Appended to this bill the judge made a statement that the attorneys could not agree upon a bill of exceptions, the return thereon, and the order for the amendment, and that he prepared and filed the above bill, "as a true statement of facts therein, and I have this day withdrawn the bill of exceptions heretofore filed in this case on the 6th day of February, A. D. 1914, and hereby substitute the above bill of exceptions for said former bill of exceptions and hereby approve the above bill." The appellant controverts the motion to strike out the bill of exception No. 1 and appends thereto the affidavit of the county judge trying the case, which is to the effect that counsel for plaintiff and defendant failed to agree upon a bill, and on that plaintiff prepared bill No. 1, which he (the judge) signed and filed "within the 20 days allowed by law." After approving the first bill, on April 3, 1914, counsel for defendant prepared what he said was a bill showing the exact status of the facts as they occurred, and persuaded him to allow same and strike out bill No. 1, which he did and withdrew it, and approved and ordered filed bill No. 2. Counsel J. S. Bailey, for plaintiff, was not present at the time bill No. 2 was approved and filed, but counsel Durell Miller, for plaintiff, was present and protested that bill No. 1 should not be stricken from the record, and that bill No. 2 should not be filed, but that he (the judge) disregarded the protest.

[1] The appellant excepts to the consideration of the motion at this time, because not placed upon the motion docket within 30 days after the filing of the transcript in this court, in accordance with rule No. 8 (142 S. W. xi). The transcript was filed May 11, 1914, and the motion filed June 11, 1914. Excluding the day on which the transcript was filed, 30 days after that day fell on June 10th. *Burr v. Lewis*, 6 Tex. 76; *Lubbock v. Cook*, 49 Tex. 96. The motion was not filed within 30 days, and it is too late and cannot be considered under rule 8 for this court; but, as the issue presents a question of practice, we deem it advisable to call attention to the rule established by the courts of this state in preparing bills of exception under circumstances similar to the method adopted in this case.

[2] In the case of *Railway Co. v. Elliott*, 148 S. W. 1125, the court there held, where the judge of the trial court made an affidavit to the effect that he was misled by appellant's attorney into signing the bill and that the bill incorporated into the record could not be impeached in that way, "but that

the proper proceeding would have been to have the record corrected in the trial court."

In *Stark v. Harris*, 106 S. W. 887, cited by appellant, it is said:

"Undoubtedly the district court had the right to correct the altered bills of exceptions, and cause them to speak the truth; but it did not have the authority to strike the bills of exception from the record, in the absence of fraud or sharp practice having been used in procuring their approval, simply on the ground that they had been altered after being signed."

[3] And in that case the Court of Civil Appeals considered the bill of exceptions or such part of the bill as they found had not been interpolated. The Supreme Court, however, upon writ of error, reversed the Court of Civil Appeals, *Harris v. Stark*, 101 Tex. 587, 110 S. W. 737, holding:

"It does not require the citation of authority to sustain the proposition that the district court had jurisdiction to correct the record of this case as made in that court, notwithstanding the appeal had been perfected and the transcript filed in the Court of Civil Appeals."

From the report of the case it appears a motion was made to strike out the bill of exceptions presented to the district court. One of the grounds alleged therefor in a motion to strike out was because it had been altered by blotting out and striking out a great deal of other matter set out in the motion filed by appellee's attorney and served on appellant's attorney. The Supreme Court further said in that case:

"No appeal or writ of error was taken from the order of the trial court, nor was there any resistance offered by the appellant or his attorney to such action of the court. \* \* \* The judgment of the trial court was conclusive upon the Court of Civil Appeals except upon appeal or writ of error"—citing *Wichita Valley Railway Co. v. Peery*, 88 Tex. 378, 31 S. W. 619.

In the case of *Railway Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 507, 13 Am. St. Rep. 805, the Supreme Court said:

"The trial court has the power, in a proper proceeding, and upon proper proof, so to amend its records as to make them speak the truth, even after the jurisdiction has attached in the appellate court."

[4] In the case of *Ford v. Limer*, 24 Tex. Civ. App. 353, 59 S. W. 943, cited by the appellant, the court there held the district court could not entertain a motion in vacation to strike out a bill of exceptions. This case does not appear to be supported by the authorities but, as we understand the question, is in conflict with the holding of the Supreme Court. *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 585; *Willis v. Smith*, 90 Tex. 635, 40 S. W. 401; *Ennis v. Wathen*, 93 Tex. 622, 57 S. W. 946; *Johnston v. Arrendale*, 71 S. W. 44.

[5] In the absence of a direct appeal from the order directing the bill of exceptions No. 2 to be considered as part of the record, we are authorized to presume that the order was properly made. *Railway Co. v. Cox*, 105 Tex. 40, 143 S. W. 606, 157 S. W. 745. Under the statute, the court had granted 60 days in

which to file statements of fact and assignments of error at the request of appellant. The first bill approved was filed during the term of the court, and the other some time after adjournment, April 3, 1914. It appears at the time the last bill was prepared attorneys for both parties were present before the trial court. If the order then entered by the court was erroneous and should not have been made, that order should, under the holdings of the Supreme Court, have been appealed from. We have no right to disregard it upon an affidavit in this court impeaching it; it does not affect the jurisdiction of this court. We should presume, in the absence of a direct attack by appellee therefrom, that the court prepared a correct bill of exceptions and made the proper order substituting it for the one theretofore approved. The trial court had the right to have the record speak the truth, and the actual objections urged and ruled upon presented in the bill. If there was an error in the first bill in stating the proceedings, then before him, he had the right to correct it; that he did so by an order and substituted bill we believe we should presume was properly done when there is no appeal therefrom. The objection of the attorney, at the time, cannot be considered by us as in the nature of an appeal. It is not brought up in the record in this court, but by an affidavit alunde the record, and in the absence of evidence impeaching the order of the court, properly brought up in the record, we believe we should presume the facts warranted the action of the court.

[6] The appellant's first and only assignment of error is to the action of the court in sustaining objections to the admission of the writ of attachment, the return, and the amendment thereof, for the reason that the writ shows to be regularly issued, levied, and returned, and was relevant and material, going to sustain plaintiff's cause of action, and was indispensable to plaintiff's cause of action. The assignment purports to set out a literal copy of the writ, the return and amended return thereon, and what purports to be an order of the county court of Dallam county, authorizing the amendment of the return. The statement under this assignment simply sets out bill No. 1, hereinbefore quoted. The appellee objects to the consideration of this bill. As seen from what has been said by us heretofore, the bill cannot be considered by us for the reason that the same was stricken out. In looking to the record we find bill No. 2, in which there are several other objections made to the testimony other than that quoted in bill No. 1. The objection sustained, as set out in bill No. 2, was objection No. 1, which is that the levy is shown to have been made on an impossible date. The judgment against Sharr in the county court of Dallam county shows to have been rendered February 6, 1913. The bill of exception prepared by the court and by

him ordered substituted for the former bill shows the return was amended February 6, 1913, on the same day the judgment was rendered. Neither bill shows what the original return was or what the amendment was; neither bill shows upon what property it was levied; and we find nothing in the record except the judgment of foreclosure, which describes the property, except the pleadings. We find no order authorizing the amendment of return except what is stated in the assignment. The record does not otherwise contain a copy of the writ, return, and the amendment thereof. The assignment itself copies an affidavit of Miller as to what he had done, but does not appear to have been indorsed by him on the writ as an amendment of his return. Where the bill of exceptions does not disclose what the excluded testimony was and that it was material, it will not be considered. The bill must show the materiality of the evidence. The issue in this case was: Did the levy of the attachment create a lien on the land owned or claimed by appellee? Unless the return of the writ showed a levy on the land and that it was prior to the recordation of appellee's deed, the levy would be immaterial. We cannot tell from either of the bills just when the levy was made or upon what levied. It has been the rule of the courts of this state from the beginning that the bill should set out the evidence excluded and show its materiality. *Beeman v. Jester*, 62 Tex. 431; *Pennington v. McQueen*, 3 S. W. 315; *Jones v. Cavazos*, 29 Tex. 429. It is contended that because appellant alleged the levy on the land by virtue of an attachment we should therefore look to the pleadings. There is quite a difference in allegation and proof. Because simply it was alleged that the levy was made as shown by the return and amendment on the writ, it will not necessarily follow that the return on the writ offered in evidence showed the levy as alleged. We do not think we are authorized to presume that such return proved the allegation. The case of *Fox v. Sturm*, 21 Tex. 407, cited by appellant, is clearly distinguishable and is not in point on this question.

[7] The appellant, by proposition 2, asserts that he alleged the issuance of the attachment, the levy, return, and amendment thereof, and that appellee admitted the issuance and the levy thereof on the property in question, and that the lack of descriptive matter in the bill is unnecessary. If this is true, then the exclusion of the attachment and levy by virtue thereof was immaterial and harmless, as the fact sought to be proven thereby was admitted and did not require proof. This is true whether the act of the 33d Legislature, chapter 127 (*Vernon's Sayles' Ann. Civ. St. 1914*, arts. 1827-1829, 1902, 1829a, and 1829b), applies or not. The rule has been and is now that that which is admitted is not necessary to prove. *Ogden v. Bosse*,

86 Tex. 344, 24 S. W. 798; Ry. Co. v. De Walt, 96 Tex. 121, 70 S. W. 537, 97 Am. St. Rep. 877.

[8, 9] There is no assignment that upon the admitted and proven facts appellant was entitled to a judgment and that the court committed error in instructing a verdict for the appellee. If the court was in error in so instructing a verdict, it is fundamental. This proposition appellant has not seen proper to suggest or to brief. We believe that appellee's admission in the answer dispensed with the proof of the attachment and the return thereon. The issuance of the attachment, levy on the land, and the amendment of the return was alleged by appellant in the fourth and sixth paragraphs of the original petition, charging that the sheriff, appellee, so levied it.

In the seventh paragraph of the answer it is alleged that:

"Defendants further say that defendant Miller received the writ of attachment, and that upon the 6th day of July, 1912, levied upon the land described in plaintiff's petition."

This certainly, was all the attachment and return could have shown. It is otherwise shown that the sheriff did not file in the county court a copy of the attachment and the return for recordation as the statute requires in attachment liens. The appellant offered in evidence a judgment of the county court of Dallam county, No. 331, B. F. Neville v. G. M. Sharr, dated February 6, 1913, for the sum of \$369.60; the entry simply reciting that the plaintiff therein caused to be issued on June 29, 1912, the writ of attachment to Hartley county, and which was executed by levying it July 6, 1912, upon the land in question, describing the land. The lien was not foreclosed or any decree directing the sale of the land to satisfy the judgment. It was shown that a copy of the attachment and return thereon, or the original issue out of the above cause, No. 331, was not recorded in the attachment lien records of Hartley county, where the land was situated. It was admitted by the parties to the suit that G. M. Sharr conveyed the land levied on as the property of Sharr, to C. S. Davis, on the 27th day of May, 1912, and that the deed was filed for record in the county clerk's office of Hartley county, July 25, 1912, and recorded July 31, 1912. Davis testified to purchasing the land from Sharr, and that at the time of filing his deed he had no notice of the levy. This is substantially all the testimony introduced or offered.

[10, 11] We do not think if the attachment and return had been admitted that plaintiff was entitled to a verdict or judgment under the evidence. In the first place, it is not shown that appellant lost anything by the failure of the sheriff to cause the attachment lien to be recorded. It is not shown that appellant has not been paid, or that his debt could not be collected. There is no evidence as to the value of the land in

question. *Hurlock v. Reinhardt*, 41 Tex. 580; *Bernhelm v. Shannon*, 1 Tex. Civ. App. 395, 21 S. W. 386; *Crews v. Taylor*, 56 Tex. 461. If the appellant, at the time he caused the levy to be made, had actual notice of the conveyance of the land by Sharr to Davis, then, as to the sheriff, he could not recover damages for the failure to perpetuate the lien by having it recorded in the lien record. It is not shown whether appellant had actual notice. As between appellant and the sheriff, we think the burden was on the appellant to show he had no such notice in order to show that he in fact had lost a valuable right. In making this holding we do not wish to be understood as holding that as between appellant and Davis the burden would be on appellant to show he had no such notice, neither do we wish to be understood as holding as to creditors the same rule will apply as to the recordation of attachment lien, under article 6858, R. C. S., as has been applied by the Supreme Court, under article 6824, R. C. S. *Barnett v. Squyres*, 93 Tex. 193, 54 S. W. 241, 77 Am. St. Rep. 854; *Turner v. Cochran*, 94 Tex. 480, 61 S. W. 923. On the question last suggested we make no holding at this time, as it is not involved in the proper disposition of this cause. If, however, the appellant had proved every allegation in the petition, he yet would have had no right of recovery, in our opinion. This being a suit for damages against a sheriff in failing to record the attachment lien, it became necessary to show that appellant lost his lien thereby and had the proper record been made he would thereby have secured a superior right over Davis, the vendee of Sharr.

[12] It is the levy of the attachment on the property that gives the lien from the date of its levy. Article 267, R. C. S. The failure to record the attachment does not destroy the lien, but "the attachment lien shall not be valid against subsequent purchasers for value without notice and subsequent lien holders in good faith." The failure to record the writ of attachment and return in the county where the land is situated will not affect the lien by virtue of the levy. *Woldert v. Nedderhut, etc.*, 18 Tex. Civ. App. 602, 46 S. W. 378; *Davis v. Farwell & Co.*, 49 S. W. 656. Davis in this case was not a subsequent purchaser, and the levy of the attachment between his purchase and the recordation of his deed would preclude him, if under the law the appellant could hold under the rule that his right attached before the recordation and if he can be treated as a lienholder in good faith or for value. In other words, the mere recordation of the deed by Davis would not defeat the right of appellant if he had already attached the land at that time. The recordation or the failure to record the deed subsequent to the levy would not affect the respective rights of the parties. Davis had not been caused

to lose anything by virtue of the sheriff's failure to require the attachment and the return recorded; he had prior thereto paid and parted with the consideration for the land to Sharr.

We find no reversible error, and the case will be affirmed.

Affirmed.

**WICHITA FALLS & W. RY. CO. OF TEXAS**  
et al. v. ASHER. (No. 532.)

(Court of Civil Appeals of Texas. Amarillo.  
Oct. 28, 1914. On Motion for  
Rehearing, Jan. 2, 1915.)

**1. COMMERCE (§ 33\*)—"INTERSTATE COMMERCE."**

A shipment of goods which traverses another state, though the points of origin and destination are in the same state, is interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.\*]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

**2. CARRIERS (§ 91\*)—CARRIAGE OF GOODS—RATES—ERRONEOUS QUOTATION.**

A wrong quotation by a railway agent as to the freight rate to be charged on an interstate shipment gives no right of action to the shipper for injuries on account of the misquoted rate, though the tariff is not posted at the carrier's local station.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338-355; Dec. Dig. § 91.\*]

**3. TRIAL (§ 105\*)—RECEPTION OF EVIDENCE—ADMISSION WITHOUT OBJECTION.**

The uncontradicted testimony of a railway freight agent, admitted without objection, that certain rates were in effect on the day of a shipment, though subject to objection as a conclusion, is sufficient proof of that fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.\*]

**4. CARRIERS (§ 104\*)—CARRIAGE OF GOODS—ACTION FOR DETENTION—ADMISSIBILITY OF EVIDENCE.**

In an action against carriers for the detention of goods until the owner paid the lawful rate thereon, which was more than the rate quoted by the agent at the time of the shipment, testimony by plaintiff that he did not have enough money to pay the additional charges, and knew no one from whom he could borrow it, was immaterial, since the law requires a carrier to collect and a shipper to pay the legal rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 439-447, 459-461; Dec. Dig. § 104.\*]

**5. APPEAL AND ERROR (§ 1050\*)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.**

The admission of such testimony was prejudicial under Court of Civil Appeals rule 62a (149 S. W. 2d), forbidding reversals unless the error probably caused an improper judgment, where the jury awarded plaintiff \$300 damages for the detention of the goods for 100 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**6. CARRIERS (§ 177\*)—CARRIAGE OF GOODS—LIABILITY—CONNECTING CARRIERS.**

Where goods are shipped over the lines of connecting carriers, the common-law liability of each is limited to damages accruing on its own

line, but any one of them may, by special contract, make itself liable for the entire carriage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.\*]

**7. CARRIERS (§ 187\*)—CARRIAGE OF GOODS—LIABILITY—QUESTION FOR JURY.**

Where a shipper claimed a contract by an initial carrier, rendering it liable for the entire carriage, it was a question for the jury whether the oral negotiations between the shipper and the carrier's agent amounted to such a contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 851, 852; Dec. Dig. § 187.\*]

**8. CARRIERS (§ 177\*)—CARRIAGE OF GOODS—LIABILITY—CARMACK AMENDMENT.**

The Carmack amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]) to Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, requiring every common carrier receiving property for transportation from a point in one state to a point in another state to give a bill of lading therefor, and making it liable for all damages to the goods caused by it or any connecting carrier, when strictly construed as a penal law, does not apply to a shipment through another state to a point in the same state as the point of origin, though the evil is the same in such a case as in the cases covered by the express terms of the amendment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.\*]

**9. CARRIERS (§ 139\*)—LIABILITY AS WAREHOUSEMAN—REFUSAL TO PAY CHARGES.**

Where the agent of an initial carrier quoted an incorrect rate to a shipper, and the latter refused to pay the legal rate, the liability of the carrier for the safe-keeping of the goods thereafter would be as warehouseman and not as common carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 617-619; Dec. Dig. § 139.\*]

**On Motion for Rehearing.**

**10. CARRIERS (§ 189\*)—CARRIAGE OF GOODS—RATES—PUBLISHED TARIFF.**

The filed and published freight rates for an interstate shipment, whatever they may be, are conclusive as to the rate to be charged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.\*]

**11. CARRIERS (§ 193\*)—CARRIAGE OF GOODS—RATES—PUBLISHED TARIFF.**

Where published tariffs, establishing the rates for shipments between certain places, excepted therefrom the lines of a certain carrier which had not subscribed to the tariffs, in determining the rate on an interstate shipment originating on the lines of that carrier the tariff might be used to determine the rate on the other lines, which, in combination with the local rate of the initial carrier, would make the through rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 348, 868-869; Dec. Dig. § 193.\*]

Appeal from District Court, Collingsworth County; J. A. Nabers, Judge.

Action by J. C. Asher against the Wichita Falls & Wellington Railway Company of Texas and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, and motion for rehearing overruled.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Charles C. Huff, of Dallas, and R. H. Templeton, of Wellington, for appellants. J. L. Lackey, of Wellington; and Presler & Thorne, of Memphis, for appellee.

HENDRICKS, J. The appellee, plaintiff in the court below, sued the Wichita Falls & Wellington Railway Company of Texas and the Wichita Valley Railway Company for alleged damages to an "emigrant" shipment from Spur, Tex., to Wellington, Tex., claiming that he consummated an oral contract with the agent of the Wichita Valley Railway Company at Spur, Tex., for the shipment of said "emigrant" car at the agreed freight rate of \$50 for the through transportation, and that when said shipment reached Wellington, the destination, the Wichita Falls & Wellington Railway Company of Texas refused to surrender the same to him unless \$46 additional freight was paid. This shipment was required to go through a portion of the state of Oklahoma and return into the state of Texas in order to reach Wellington, the destination, and the appellants pleaded specially that the transportation was interstate on this account, and further that the correct and legal rate on the shipment was \$96 instead of \$50, and that the defendant the Wichita Falls & Wellington Railway Company of Texas was justified in refusing to deliver the shipment to the appellee until the correct freight was paid, and that there could be no recovery of damages for the detention of said shipment. The appellee also claimed damages on account of alleged rough handling and alleged negligent storing of said shipment, and the jury returned a verdict in his favor for \$200 for such alleged damages and for \$300 on account of the detention of the shipment.

The appellants assign error that the verdict of the jury, assessing the \$300 as damages for detention of the shipment, is erroneous in that the evidence is uncontradicted that the rate of \$96, which the carrier demanded at destination, was the legal rate on file with the Interstate Commerce Commission, and was the only rate that could be assessed and collected by the appellants as charges for the transportation; and that until the rate was tendered or paid the appellee was unable to recover upon this issue. The appellants' special plea that the shipment was interstate is proven in the record; the shipment originating at Spur, Tex., on a branch of the Wichita Valley and moving thence to Stamford, thence over the main line of the Wichita Valley to Wichita Falls over the line of the Wichita Falls & Northwestern Railway Company of Texas to Red river, thence through Oklahoma over the same system, returning into Texas, and thence over the Wichita Falls & Wellington Railway Company of Texas from the state line to said Wellington, the place of destination.

The appellants contend that by Supplement

24 of Texas Lines Basing Tariff No. 2, issued by the Interstate Commerce Commission, on its face purporting to be effective November 25, 1911, and claimed to have been in effect at the time this shipment was made, the rates between Wellington, Tex., and all Texas points included in this territory, as applied to the Wichita Falls & Northwestern Railway Company, were the same on all classes and commodities, including this character of shipment (excepting lumber and other products not necessary to mention), as then applied between Shamrock, Tex., on the Chicago, Rock Island & Gulf Railway Company, and such Texas points as shown in said tariff, further asserting, however, that the origin of the shipment being upon the Wichita Valley, and that this basis of rates in this territory, by an exception, not applying in connection with the Wichita Valley Railway Company, and certain other roads not necessary to mention, hence a through joint rate, on account of the Wichita Valley having been excepted therefrom, could not be applied by that road, in routing this character of shipment from Spur to Wellington, by using Shamrock as a basing point; hence some other rate necessarily would have to control this shipment, and we add if legally in existence.

Although this through joint rate was not applicable on account of the Wichita Valley, upon which Spur is located, having been excepted from the same, the further reasoning is that the rate from Wichita Falls to Wellington on this character of shipment, as shown by the supplement indicated above, was the same as the rate, whatever it may be, would have been from Shamrock to Wichita Falls, and that, if the rate from Wichita Falls to Wellington is the same as the rate from Shamrock to Wichita Falls—the record again shows that the entire line of the Chicago, Rock Island & Gulf Railway Company, on which Shamrock is located, is situated in what is known as differential territory—that the maximum rate from Shamrock to Wichita Falls is 23 cents per hundredweight, as applicable to this character of shipment, and the record further shows that as to a shipment for the distance between Shamrock and Wichita Falls, by applying a differential basis, there should be added a differential of two cents per hundredweight, making an aggregate rate of 25 cents per hundredweight as the rate from Wichita Falls to Shamrock, and that likewise this would be the same rate from Wellington to Wichita Falls, and from Wichita Falls to Wellington, if the shipment had been made exclusively between those points upon the system of Wichita Falls & Northwestern.

As to the rate applicable to this character of shipment between Spur, Tex., and Wichita Falls, Tex., on the Wichita Valley System, it is shown by Texas Basing Tariff No. 2, issued

by the Interstate Commerce Commission, that (quoting from the circular):

"On shipments between points on Wichita Valley Railway line north of Stamford and points on the Wichita Valley and points on Ft. Worth & Denver City Railway, and all other lines, rate to apply, two-line rate."

Spur, Tex., is located north of Stamford, on the line of the Wichita Valley Railway, and including the branch from Spur to Stamford and from Stamford to Wichita Falls, over the main line of the Wichita Valley, make the two-line rate, also shown by the tariff and issued by the Commission; and as it is shown that the shipment comes under the heading of class D, as evidenced by "Texas Line Classification No. 2, Interstate Commerce Commission Tariff No. 11, and that rates for 196 miles and over 192 miles, class D, will be 23 cents per hundredweight," this constitutes the two-line rate applicable to this class of shipment from Spur to Wichita Falls.

[1] It is settled law that transportation, where traversing another state, or a portion of same, though the points of origin and destination are in the same state constitutes interstate commerce. *Hanley v. Railway Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

[2] It is also settled that a wrong quotation, by a railway agent as to the freight rate applicable to an interstate shipment, of a lower rate than that fixed by the published tariff, gives no right of action to a shipper who claims to have sustained injury on account of the misquoted rate. *Gulf, Colorado & Santa Fé Railway Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; *Railway Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. And this is the rule though the tariff is not posted in the carrier's local station. *Ill. Cent. Ry. v. Henderson Elevator Co.*, 228 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 270; *Kansas City Southern Railway Co. v. Albers Com. Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556.

The case of *Railway Co. v. Albers Commission Co.*, supra, was one where grain merchants, Forrester Bros., contracted with the railway company to transport a large quantity of grain from Omaha, Neb., to Texarkana, Tex., through Kansas City, Mo., at a stipulated rate; the Commission Company as their judgment creditor garnishing the railway company on the theory that the railway company owed the judgment debtor overcharges in freight above the agreed rate. The Supreme Court of Kansas (79 Kan. 70, 99 Pac. 824), originally deciding the case, said:

"The contract as alleged by the plaintiff having been clearly established, the burden was upon the defendant to show, by way of defense that such contract was for some reason unlawful. If the invalidity resulted from the existence of legally established rates with which the rate relied upon by the plaintiff was in conflict, it was incumbent upon the defendant to allege and prove such fact."

The court had previously said:

"The contention that each of the roads making the Forrester rate had a legally established local rate is not sustained by the evidence. No such proof was offered. There was some talk by the witnesses of a local rate, and what it was on each road, but no proof that such rate had been established under the law was presented."

The Supreme Court of the United States thought that either one of two rates was established different from the agreed rate, though better testimony might have been preferable, and as to the controlling rate said:

"As it was conceded that there was no established joint through rate, it likewise is a necessary conclusion that the shipments, even if moving on through bills of lading, should have taken these local rates unless the latter was superseded or displaced by the special agreement."

And, quoting from Justice Hook of the Eighth Circuit Court of Appeals, the Supreme Court of the United States further said:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads, for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and, if no action to that end is taken, they in effect adhere to the rates established, published, and filed by them as applying, not only to local, but to through, traffic."

The Circuit Court of Appeals, in the case of *Chicago, B. & Q. Ry. Co. v. U. S.*, 157 Fed. 833, 85 C. C. A. 197 (from which the Supreme Court's quotation was made), in extending the reasoning as applicable to this question, further used the following language:

"The initial carrier which receives traffic and issues a bill of lading to ultimate destination should be held to have done so in view of the only rates which its connections are authorized by law to charge. This principle was recognized by the Commission as early as March 23, 1889 (2 Interst. Com. Com'n R. 656), when it said: 'When no other tariff is filed, the rates on traffic carried over or upon more than one line will be the sum of the local rates of the individual roads, or of local and joint rates, as the case may be.'"

Again the court said:

"By routing and billing the traffic over the connecting lines, the initial carrier adopts and is bound by their lawful rates."

The appellants also offered in evidence rule 5, issued and promulgated by the Interstate Commerce Commission, as follows:

"Rates on Through Shipments When No Joint Rates Apply.—(a) The practice on the part of carriers of accepting and transporting through shipments, as to which no joint rate applies, upon rates made up by combination of rates of the several carriers participating in the movement, and of collecting, as delivering carriers, the aggregate charges of the several carriers for their portions of such charges, is practically universal. That custom has the same binding effect as a joint rate, both as between carriers themselves and as between carriers and shippers. Therefore carriers may construct rates for through shipments to and from points to and from which there is no applicable published joint rate, by using lawfully published and filed basis, locals or proportionals, in connection with other lawfully published and filed tariffs."

[3] The witness Fontaine, who was the general freight agent of the delivering line, testified, without contradiction, that these rates were in effect on the 3d day of January, 1912, when the shipment was made. Believing that it is the law that a carrier shall place in the hands and custody of its agent, at every station, warehouse, or office at which passengers or freight are received for transportation, schedules of all rates and fares applying from the station, as held by the Supreme Court of North Carolina in the case of *Virginia-Carolina Peanut Co. v. Atlantic Coast Line Railway Co.*, 82 S. E. 1, and that compliance with the Interstate Commerce Act in that respect is made a condition precedent to the effectiveness of the schedules and the lawfulness of the rate charged thereunder (same case, *supra*), however, is the conclusion of the witness in this case that these rates were in effect at the time the shipment moved sufficient proof of that fact? We presume, if this testimony had been objected to as a conclusion of the witness, such objection would have been sustained, and as the Supreme Court of the United States said in the *Albers Commission Co. Case*, *supra*, in passing upon a similar question:

"This testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded."

Under rule 5, introduced by appellants, permitting carriers, where there is no applicable published joint rate, to construct rates "by using lawfully published and filed basis, locals or proportionals, in connection with other lawfully published and filed tariffs," we think the two-line rate from Spur to Wichita Falls could have been used "in connection with other lawfully published and filed tariffs," or "basis," which was the rate from Wichita Falls to Wellington, based upon the rate from Shamrock to Wichita Falls, for the purpose of ascertaining the through rate made up by the combination, and that this case comes within the spirit of the *Albers Commission Co. Case* and the case of *Chicago, B. & Q. Railway Co. v. United States*, and

that an "initial carrier, which receives traffic and issues a bill of lading to ultimate destination, should be held to have done so in view of the only rates which its connections are authorized by law to charge," which in this instance, in connection with the two-line rate, the only rate which the Wichita Falls & Wellington Railway Company of Texas could charge from Wichita Falls to Wellington, is the rate from Shamrock to Wichita Falls. We sustain the main assignment of appellants complaining of the \$300 verdict as damages for detention of the freight; however, it may still remain a jury question whether the rate is a legal rate, and existent as such, at the time the shipment was made.

[4] Appellants' third assignment of error complains of the testimony of the appellee, Asher, to the effect that, when the railway company refused to deliver his car of goods until he paid \$46 more freight, he did not have the money necessary to pay the amount demanded by the agent as additional freight, and that he did not know of any one in the town of Wellington from whom to borrow the money, and that he was a stranger in that community; appellants objecting that said testimony was "immaterial, prejudicial, and was flaunting the poverty of the plaintiff before the jury," etc. Under the law, the shipper, as well as the carrier, is arbitrarily bound by the established legal rate, the carrier, for the purpose of preventing discrimination, is required to demand such rate, and the shipper is required to pay the same in order to obtain the goods; otherwise the lien of the carrier as security for the freight, as provided by the Interstate Commerce Act, is in existence. The carrier retained the goods for 101 days when the appellee sequestered the property at the time of the institution of this suit. As stated, the jury awarded \$300 damages for detention and \$200 damages to the goods.

[5] The answer of appellee to this assignment is in effect that the testimony related to an immaterial matter, and that the court should apply rule 62a (149 S. W. x). We are unable to find a case similar in nature, but believe that the application of the principle in a different character of cases, arguing the inadmissibility of this character of testimony, is proper. For example: In the case of *M., K. & T. Railway Co. v. Hannig*, 91 Tex. 349, 43 S. W. 509, the appellee, suing for damages on account of personal injuries, was permitted to testify that he was a married man, and that his wife had no means of support, except her own labor. The Supreme Court said:

"The evidence in question in this case threw no light upon any issue properly involved in it, and was calculated solely to awaken the sympathy of the jury, and thereby to swell the damages to be awarded by the verdict. Counsel for the plaintiff evidently thought it would have some effect in plaintiff's favor, else he would

not have insisted upon its admission over the objection urged on part of the defendant."

In the case of Gulf, Colorado & Santa Fe Railway Co. v. Johnson, 99 Tex. 337, 90 S. W. 164, the mother of an injured minor was suing to recover for the diminution to her in value of her son's services, and for such expenses as may have been rendered necessary by the injury. In this case the appellee is also suing for the difference in value of his property. The Supreme Court said in the case cited, "The mother's 'poverty did not tend to show' the damages, reversing the case on account of the prejudicial testimony. Of course the difficulty of rule 62a is in its application. We are inclined to think, however, that where practically \$100 a month for detention of the household goods in question was awarded by the jury and \$200 damages to the goods is also given, as applied to this particular case, it is sufficient to say that the testimony is more consistent with affirmative injury than harmlessness.

The appellants in this case, by several assignments of error, are insisting on their written contract containing stipulations limiting the liability of the carrier on each line. The record shows that, upon inquiry by the appellee, the agent of the Wichita Valley Railway Company quoted the \$50 rate from Spur to Wellington. Appellee's son executed the contract of shipment, accompanying the same in the transportation, the contracts containing the usual stipulations limiting the liability of the carrier to damages upon the line of each; the appellee contending, however, that his son had no authority to vary the consummated oral contract previously made with him by the agent. The court submitted the common-law liability of the carrier, as we construe the charge, for damages on account of rough handling, a leaky car, and improper storage of the goods, as well as loss of some of the goods, irrespective of negligence.

In the sixth paragraph of its charge he submitted the issue of the detention of the goods, based upon an oral contract, thereafter informing the jury that, if the oral contract was superseded by a written agreement, the plaintiff could not recover damages for the detention of the goods, also informing them, if there was no valid oral contract prior to the execution of the written contract, to likewise find for the railway companies on said issue.

[6] The Supreme Court of the United States has said in *Michigan Cent. Ry. Co. v. Myrick*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, referable to an interstate shipment, that:

"The general doctrine \* \* \* as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the

whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

In this case the agent quoted a rate, it is true, over the whole route, which was an erroneous one.

[7] Of course it is a jury question, eliminating the written contract entirely, whether the oral negotiations in this case amounted to a contract—an engagement upon the part of the actual carrier to carry entirely through to destination. If so, the initial carrier is liable for all the damages. Otherwise, if the contract was not to assume the through transportation, each carrier, when it comes to an interstate shipment, is only liable for the damages upon its own line. In the *Myrick* Case, *supra*, the Supreme Court of the United States also said:

"What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment."

[8] The appellants complain considerably of the court's main charge to the jury, wherein he informed the jury that if the carriers roughly handled the goods, furnished a leaky car, or improperly stored the same, to find a verdict against both carriers. Of course we could assume from the jury's verdict that they found an oral contract, but whether the agent contracted for a through shipment, which has to be done, by special agreement, was a question not submitted to the jury. We do not mean to say that we would reverse the case on this proposition, but suggest it in view of another trial.

Appellees, though predicated their suit upon an oral contract, are insisting upon the application of the Carmack amendment as invalidating the stipulation for limited liability.

"The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in Interstate Commerce and 'receiving property for transportation from a point in one state to a point in another state,' as having contracted for through carriage to the point of destination, using the lines of the connecting carriers as its agents." *Atlantic Railway Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167.

The purpose and object and the subject-matter of the act being applicable to through shipments, we are unable to read into the act that where a shipment originates and the point of destination is within the same state, that because it passes through a point in a foreign state in order to return to the state of origin, such would be transportation from a point in one state to a point in another state. It may be that the same reason inducing the act is also applicable to an interstate shipment, where the origin and destination are in the same state, as where the origin and destination of the shipment are in different states; and it is true that the numerous de-

cisions of the Supreme Court of the United States consider the evil intended to be remedied by the act; however, that court, in the case of *Denn v. Reid*, 10 Pet. 527, 9 L. Ed. 520, as early as 1836, in considering the construction of statutes for the suppression of evils and the advancement of remedies, said:

"\* \* \* Cases may be found where courts have construed a statute most liberally to effectuate the remedy; but, where the language of the act is explicit, there is great danger, in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. \* \* \* It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

This act also is a penal one, if we interpret the law correctly. The Supreme Court of the United States, in the case of *Adams Express Co. v. Croninger*, 226 U. S. 504, 83 Sup. Ct. 151 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257), said that one of the dominating features of the amendment was that:

"It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one state to a point in another.'"

By another amendment (Act June 18, 1910, c. 309, § 10, 36 Stat. 549 [U. S. Comp. St. 1913, § 8574]), Congress has said:

"That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, \* \* \* or agent, or person acting for or employed by such corporation, \* \* \* shall willfully suffer \* \* \* omit or fail to do any act, matter, or thing in this act required to be done, \* \* \* shall be deemed guilty of a misdemeanor," etc.

We take it this act is penal as well as remedial, and while the Supreme Court of the United States, of course, has often pursued the rule that an act where a mischief is sought to be remedied, or an evil to be cured, in order to advance the remedy and suppress the mischief, the reason, purpose, and object of its enactment should be resorted to. That tribunal, however, in construction of penal statutes, has also said:

"But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress." *United States v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117 (a criminal statute under construction).

That court again argued, in the case of *U. S. v. Harris*, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780, that a penalizing statute would not be given an artificial construction based upon a consideration of the mischief sought to be remedied. The act of Congress of March 3, 1873 (17 Stat. 554, c. 252), for the prevention of cruelty to animals while in transit by railroad or other means of transportation, in imposing a punishment for its violation upon "any company," was held not to use the word "company" to include a "re-

ceiver" of a railroad. The penalty created by the act and recovered in civil actions in the name of the United States was held not to apply to receivers, because, "in order to hold the receivers, they must be regarded as included in the word 'company.'" We have familiar cases in our state where the receiver of a railroad company was attempted to be sued in a death case. The Supreme Court of this state invariably, where the question was raised in any manner, refused to consider the action because it was a case of omission not comprehended within the language of the act, though strong reasons might be advanced that the purpose and object of the law giving a remedy against those denominated in the statute were equally applicable to receivers of railway companies as well as the charterers, owners, or lessees of such railway companies. *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262. Also see the case of *Lipscomb v. Railway Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804. We are inclined to think that we would be making the law instead of interpreting it if we read into the act a shipment, where the origin and destination were in the same state, when the act reads "transportation from a point in one state to a point in another state"; and we take it that the construction would be uniform whether the actions were penal or civil.

[9] In view of another trial, if the written contract were made as the contract of the shipper, the stipulations limiting liability would control as the damages upon the line of each. Again, if the railway company properly proves the existence of the \$96 rate, and the shipper refuses to pay such rate, the liability of the carrier in holding the goods would be that of warehouseman, and not as common carrier.

For the errors indicated, the cause is reversed and remanded for a new trial.

#### On Motion for Rehearing.

The insistence of the appellee that this court was in error in applying the freight rate applicable to the controversy, as shown in our original opinion, actuates the following extension of reasons upon that subject: He says in the argument upon his motion:

"The evidence conclusively shows that the appellant the Wichita Falls & Wellington Railway Company of Texas, and its connecting carriers, had failed to file, print, and keep open to public inspection a separately established local rate applying between Wichita Falls and Wellington, and intermediate stations on said line, and in default of such established local rates direct between Wichita Falls and Wellington, Tex., appellants seek to subject this shipment to 23 cents per hundredweight, established for a haul of 317 miles, by way of Amarillo to Shamrock, and an additional two cents per hundredweight for being in Rock Island differential territory 72 miles (Amarillo to Shamrock), while the shipment proceeded directly from Wichita Falls to Wellington, a distance of about 130 miles, claiming, as authority for thus attempting to construct a local rate between Wichita Falls and

Wellington, Supplement No. 24 to Texas Lines Basing Tariff No. 2, Interstate Commerce Commission, effective December 25, 1911, which made the rates between Wellington and all other points \* \* \* the same as between Shamrock, Tex., \* \* \* and many other Texas points being named in said tariff."

If the evidence conclusively shows that, as to the appellants particularly, they had "failed to file \* \* \* separately established local rates applying between Wichita Falls and Wellington," then it necessarily follows as to an interstate shipment a properly filed and published rate issued by the Interstate Commerce Commission would be the only one applicable. The law (Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 [U. S. Comp. St. 1913, § 8569]) now provides:

"That every common carrier \* \* \* shall file with the Commission \* \* \* schedules showing all the rates, fares, and charges for transportation between different points on its own route," etc.

And further provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of \* \* \* property \* \* \* between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time. \* \* \*"

In the case of *Texas & Pacific Railway Co. v. American Tie & Timber Co.*, 234 U. S. 146, 34 Sup. Ct. 887, 58 L. Ed. 1255, involving a refusal of the railway company to receive and transport ties on the ground that it had no established filed rates for that purpose, the Supreme Court of the United States said:

"There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential."

[10] Hence, as the law now exists, the filed and published rate as to an interstate shipment, whatever the combination may be, is conclusive. See *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 623, 50 L. Ed. 1011.

[11] This would seem fundamental, and we really conceive that appellee's insistence is that, because the Wichita Valley Railway Company is excepted from the through tariff indicated, the tariff from Wichita Falls to Wellington as indicated in said supplement, could not be used to show a through rate from Spur to Wellington. Appellee says:

"Appellants claim that this exception prevented the through rate established by the tariff referred to applying between Spur and Wellington, and then seek to use the same tariff to establish a local rate of 25 cents for the haul between Wichita Falls and Wellington, rejecting the tariff rate for one purpose because of the Wichita Valley connection with this shipment, and seeking to use the tariff for another purpose in handling the same shipment. \* \* \*"

We attempted to thoroughly consider this reasoning on the original consideration of the case, though not answering it specifically in the opinion.

While the Wichita Valley would not con-

cur in this rate and was excepted from the scope of its operation by the Interstate Commerce Commission, and in consequence the basis between Shamrock, Tex., on the Chicago, Rock Island & Gulf Railway Company, to Texas points, as shown in the tariff, was not applicable to said Wichita Valley as a through rate for the shipment of goods, either from or to points on its line, however, the rate from Wichita Falls to Wellington is an established rate by this same supplement No. 2, promulgating this basis, which rate would have to be used by the road making up the combination for a through rate. It is not excepted from the rate between Wichita Falls and Wellington in making the combination for the through rate.

In our main opinion, though we considered all the assignments in appellant's brief, we desire to note the second assignment of error and the following proposition thereunder:

"In a suit against carriers for damages, where the carriers pleaded that the shipment had moved under a written contract duly executed by the appellee's agent, and the testimony of appellee's agent was to the effect that he signed the contract when it was presented to him, it was error for the court to permit the witness, over the objection of the appellants, to testify that he did not know what was written in the contract, although he signed it, and that he thought he had to sign it in order for the shipment to move forward, and that he did not know the written contract was different from an alleged verbal contract which it was claimed his father had made with the agent prior to the execution of the written contract, for the reason that said testimony had the effect of changing the terms of the written contract, was irrelevant, immaterial, and prejudicial."

Most of the testimony, on page 20 of appellants' brief, of the agent who signed the contract of shipment is so clearly admissible as against the objections made, though one of the statements may be questioned; the latter, however, is not separated so this court could consider it. The preliminary questions and answers of this witness, shown on pages 18 and 19 of the brief, in connection with his father's testimony, and of his own in other portions of the record, are relevant upon the question of the agent's authority to make a contract different from that which the father (the principal) claims was made and consummated between the latter and the agent prior to the shipment. We infer, though not wholly clear, that the son, the agent, testified that he signed the contract of shipment after the goods had been loaded upon the car. In the case of *Railway Co. v. Barnett*, 27 Tex. Civ. App. 501, 66 S. W. 476, the agent who signed the contract said, "I was authorized and directed by plaintiff to sign said contract;" and the appellate court said there was no evidence when the contract was signed with reference to loading, and also found that plaintiff "contemplated and expected written contracts to be entered into before the cattle left," which elements are not in the record.

We can see no error in the court excluding the witness Fontaine from the courtroom after the rule had been invoked; and as to appellee's insistence that we committed error in our construction of the Carmack amendment, as not being applicable to this character of shipment, we also have attempted to carefully investigate all federal acts material upon this matter, and we see no reason to change our original opinion on that subject.

The motion for rehearing is in all things overruled.

**GULF, T. & W. RY. CO. v. LUNN.**  
(No. 2374.)

(Supreme Court of Texas. Dec. 23, 1914.)

**COSTS (§ 4\*)—ATTORNEY'S FEES—STATUTES.**

Acts 31st Leg. c. 47, authorizing recovery of attorney's fees under certain circumstances in actions against railroad companies for overcharges and for loss or damage to freight, etc., is constitutional.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 2, 3, 109; Dec. Dig. § 4.\*]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Earl Lunn against the Gulf, Texas & Western Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (141 S. W. 538), and defendant brings error. Affirmed.

Ben B. Cain, of Dallas, and Sporer & McClure, of Jacksboro, for plaintiff in error. E. W. Nicholson, of Wichita Falls, for defendant in error.

BROWN, C. J. Lunn filed a suit in Jack county in a justice court against the plaintiff in error for \$3.50, alleging compliance with the act of the Legislature of March 13, 1909, now article 2178, Revised Statutes of 1911. The railway company paid the \$3.50. The justice gave judgment for the plaintiff for \$10 attorney's fees, and the judge of the district court of that county granted an injunction against said judgment, but subsequently dissolved the injunction and dismissed the case. The railroad company appealed to the Court of Civil Appeals, which affirmed the judgment of the district court, and this court granted a writ of error on the 2d day of February, 1912. From the entry made on our docket, the writer concludes that the writ was granted upon the assumption that the statute authorizing the recovery of attorney's fees was unconstitutional.

On November 12, 1912, this court filed an opinion in *Railway Co. v. Mahaffey*, 105 Tex. 394, 150 S. W. 881, in which the same statute was sustained, as being constitutional. That opinion was subsequently followed by the Supreme Court of the United States in *M., K. & T. Ry. Co. v. Cade*, 233 U. S. 647, 34 Sup. Ct. 678, 58 L. Ed. 1135.

We therefore affirm the judgment of the Court of Civil Appeals.

**MITCHELL et al v. SCHOFIELD et al.**  
(No. 2363.)

(Supreme Court of Texas. Jan. 6, 1915.)

**1. HUSBAND AND WIFE (§ 267\*)—COMMUNITY PROPERTY—TITLE IN HUSBAND—NOTICE TO PURCHASERS.**

When land belonging to the community of husband and wife is deeded to both, each has legal title to it, but, when a conveyance or judgment vests the title in one only, the other has an equitable interest only, and such conveyance or judgment is not notice to subsequent purchasers for value without notice of the community interest of the unnamed member.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 896, 929-938; Dec. Dig. § 267.\*]

**2. HUSBAND AND WIFE (§ 265\*)—COMMUNITY PROPERTY—TRUSTS.**

Where land which is community property is conveyed to one member only, that one holds the interest of the other as trustee.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 896, 917-924; Dec. Dig. § 265.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Suit by Louisa L. Mitchell and others against J. D. Schofield and others. A judgment in favor of defendants was affirmed by the Court of Appeals (140 S. W. 254), and plaintiffs bring error. Affirmed.

J. J. Eckford, of Dallas, for plaintiffs in error. Chas. A. Rasbury, of Dallas, F. A. Williams, of Galveston, and N. A. Stedman, of Austin, for defendants in error.

BROWN, C. J. George Lytle, Sr., and his wife Sallie, acquired title to the land in controversy, which was established in the district court of Dallas county on October 19, 1895, by judgment in favor of said Lytle against the Gulf, Colorado & Santa Fe Railway in a suit instituted by the railway against Lytle. Sallie Lytle died in 1895, leaving plaintiffs and others, her children, surviving her. It does not appear that the name of Sallie Lytle was in the judgment, or appeared in any manner in connection with the title to the land.

After the death of the first wife, George Lytle married Annie Lytle, who was living with her husband when he sold the land to defendant in error, Schofield, who had no notice of the former marriage, but asked Lytle if he previously had another wife, to which Lytle answered that he did not. There is nothing in the record from which it can be inferred that Schofield knew anything of the former marriage. There is no dispute about the facts, and but one question of law; that is, Do the facts establish the right of the defendant in error to the protection accorded to a purchaser for value without notice?

The burden was on the plaintiffs to establish a right to recover of the defendant Schofield. The evidence shows that the land was community property of Lytle and his

first wife, mother of plaintiffs, which would sustain a recovery if the purchaser had notice of the first wife's right.

[1] It is thoroughly settled by the decisions of this court that, when land belonging to the community of husband and wife is deeded to both, each has legal title to it, but, when the conveyance is made to one only, the legal title is vested in that one, and the other has an equitable title. Such deed does not constitute notice to subsequent purchasers for value without notice of the community interest of the unnamed member.

[2] That one in whose name the title is conveyed holds as trustee for the other. *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Hill v. Moore*, 62 Tex. 610.

The authorities cited above are so conclusive upon the issue under discussion that argument would be superfluous. Beyond cavil, Schofield acquired the legal and equitable title to the land by his purchase from Lytle, who had the legal title, and Schofield had no notice of the equity of the former wife or her children. The fact that Lytle acquired his title by judgment of a court can make no difference. It was no less the legal title than it would have been if acquired by deed.

The judgments of the Court of Civil Appeals and of the district court are affirmed.

#### TYLER BUILDING & LOAN ASS'N v. BIARD & SCALES. (No. 2730.)†

(Supreme Court of Texas. Dec. 23, 1914.)

##### 1. PLEADING (§ 214\*)—DEMURRER—ADMISSIONS.

A demurrer admits the truth of the allegations of the pleading demurred to.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

##### 2. PRINCIPAL AND AGENT (§ 76\*)—WRONGFUL ACT OF AGENT—ESTOPPEL—LIABILITY.

Where an agent, in possession of a deed executed by his principal in exchange for a stock of merchandise of the grantee, delivered the deed to the grantee in direct violation of the instructions of the principal, and in pursuance of a scheme to defraud the principal and deprive him of the value of his land, the agent was estopped to deny that title passed on his delivery of the deed to the grantee, and was liable to the principal for proximate resulting damages.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 158-161; Dec. Dig. § 76.\*]

##### 3. ESCROWS (§ 4\*)—DELIVERY IN ESCROW—ACTS CONSTITUTING.

A deed delivered by the grantor to his agent for delivery to the grantee, in accordance with specific instructions, is not in escrow while in the hands of the agent.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 7; Dec. Dig. § 4.\*]

##### 4. APPEAL AND ERROR (§ 360\*)—PETITION FOR ERROR—ANSWER—RIGHT TO HEARING.

Where defendant in error filed answer to an application for writ of error, as authorized by Supreme Court rule 5 (142 S. W. viii), based

on *Vernon's Sayles' Ann. Civ. St. 1914, arts. 1542a-1542c*, without reserving the right to be further heard in open court, the court will proceed at once with the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1941, 1949, 1953; Dec. Dig. § 360.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by the Tyler Building & Loan Association against Biard & Scales. There was a judgment of the Court of Civil Appeals (163 S. W. 542) affirming a judgment for defendant, and plaintiff brings error. Reversed and remanded.

See, also, 147 S. W. 1168.

Lively, Nelms & Adams, of Dallas, and Laster & McIlwaine, of Tyler, for plaintiff in error. Lawther & Pope, of Dallas, for defendant in error.

HAWKINS, J. Petitioner in error, as plaintiff in the trial court, sued defendant in error, defendants there, for damages alleged to have resulted from the unauthorized, wrongful, and fraudulent delivery by defendants, as plaintiff's agents, of certain deeds to some 4,294 acres of land in Eastern Texas in exchange for a stock of dry goods in Kansas City, Mo. Said petition alleges, in substance, among other things: That defendants are now, and during the year 1909 were, engaged in business in Dallas, Tex., as real estate agents and dealers. That in March, 1909, defendants represented to plaintiff, a corporation, that they were in position to make for their clients large profits on property turned over to them for trade or exchange. That at said time, and subsequent thereto, plaintiff owned and had possession of 2,888 acres of land in Angelina county, Tex., same being a portion of the Vincenti Michelli grant, describing it, worth \$6.50 per acre, or \$18,772, and also owned and held possession of 1,406 acres of land in Cherokee county, Tex., same being a portion of the M. del C. Leigo league grant, describing it, worth \$6.50 per acre, or \$9,931; a portion of the last-named tract being at the time of the negotiations mentioned in said petition in the name of the estate of Mrs. Susan W. Thorn, deceased, but in truth and in fact belonging to plaintiff. That plaintiff listed said lands with defendants on or about April 1, 1909, for disposition by sale or trade. That defendants thereafter submitted various propositions of trade for said lands, none of which were acceptable to plaintiff. That on or about September 7, 1909, defendants represented to plaintiff that they could trade said lands to Kansas City parties at \$15 per acre for a stock of general dry goods, consisting of clothing, shoes, boots, hats, dresses, etc., a stock which was first-class in every respect, and which could be easily handled for cash, whereupon plaintiff advised defendants that it would be willing to trade

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on motion for rehearing, see 171 S. W. 1200. by Google

for same, provided the stock was all right and the goods not damaged; said goods to be traded for to be submitted to inspection by plaintiff and checking up of the inventory thereof. That about September 18, 1909, and in reliance upon the representation of defendants, made through said Biard, to the effect that he had 20 years' experience in the dry goods business, and had examined and handled over 200 stocks of dry goods, and was thoroughly acquainted with the character and quality of dry goods and the value thereof, and was competent to pass upon stocks of dry goods as to kind and quality and price thereof, plaintiff authorized said Biard to go to Kansas City to negotiate a deal of said lands for such a stock of general dry goods, but did not authorize him to enter negotiations to trade said lands for any other kind or character of dry goods. That shortly thereafter said Biard went to Kansas City, and from there represented to plaintiff that they had been offered for said two tracts of land \$60,000 in merchandise, whereupon plaintiff believed and relied upon the representations of defendants, acting by and through said Biard, that said offered stock of merchandise was such as defendants had so represented to plaintiff it would trade said lands for, and such as that for which the plaintiff had authorized defendants to so enter into negotiations by way of exchange. That, immediately after attempting to enter into a contract on behalf of plaintiff with the Mitchell Dry Goods Company for the exchange of said \$60,000 stock of merchandise for said land, Biard returned to Texas, and thereafter studiously concealed the true character and quality of said stock of merchandise, but represented to plaintiff that he had traded for such a stock of general dry goods as he had represented to plaintiff he would trade for, and inventorying at cost prices the sum of \$60,000, and that such sale was subject to inspection of said goods and checking said inventory by plaintiff, and very strenuously and urgently recommended to plaintiff that he accept said trade and close same immediately. That believing said statements so made by defendants to be true, and relying on their representations, plaintiff authorized defendants to proceed with closing said deal for the exchange of said goods for said lands; "said trade to be made subject to examination of the goods and checking of the inventory of the same by plaintiff."

Said petition further avers: "That in pursuance of said trade, as represented to it by defendants, plaintiff prepared, executed, and acknowledged, and caused to be prepared, executed, and acknowledged, deeds for the land in question, conveying same by warranty title to one B. W. Pope, the party designated by said defendants, and turned said deeds over to defendants for safe-keeping, to be delivered when plaintiff had inspected and examined said stock of goods and checked the inventory therefor," and turned said

deeds over to defendants on or about October 23, 1909, down to which time, and ever since the return of said Biard from Kansas City, defendants had studiously and diligently represented to plaintiff that said stock of goods so traded for was a first-class stock of general dry goods, consisting of clothing, dresses, boots, shoes, etc., and had strenuously and diligently concealed from plaintiff the true character of said stock of goods, and up to said time had failed and refused to furnish to plaintiff a copy of the contract which they had entered into on behalf of plaintiff with said Mitchell Dry Goods Company, and had also failed and refused to furnish to plaintiff an inventory of said stock of goods, and plaintiff, when it left said deeds with defendants, believed and relied upon their said representations that it was to get the kind and character of goods mentioned above. That on October 23, 1909, relying on defendant's representations that they had traded for said stock of general dry goods, subject to plaintiff's inspection of same and the checking of the inventory thereof, plaintiff employed an expert and experienced dry goods man to go from Texas to Kansas City and inspect said dry goods and check the inventory thereof, and he arrived there on October 25, 1909. That on October 23, 1909, plaintiff turned over its said deeds to defendants, and that on that same day defendants took the fast train out of Dallas for Kansas City, and as soon as they could reach the office of the Mitchell Dry Goods Company after arriving in Kansas City, and on the very day on which plaintiff's said expert had arrived in Kansas City, defendants, knowing that plaintiff had employed and sent said expert dry goods man to examine said stock, and knowing that he had not examined same, nor had an opportunity to do so, and in "utter and willful disregard of plaintiff's rights, and in violation of their authority and against plaintiff's directions and instructions, turned over and delivered said deeds to the Mitchell Dry Goods Company, without plaintiff's knowledge, consent, or authority," and, without plaintiff's authority to do so, employed one Earnest Lovan to act for it in accepting said stock of merchandise, he being the party who, throughout said negotiations, had represented and was at that time representing said Mitchell Dry Goods Company as its agent, which fact defendants well knew, and that immediately upon receiving said deeds said Mitchell Dry Goods Company caused said land to be conveyed to an innocent purchaser for value, without any notice. That the stock of goods which defendants received for plaintiff's land "was not a stock of general dry goods consisting of boots, shoes, dresses, hats, clothing," etc., such as was represented to it to be, but that the majority of said stock consisted of cheap and worthless jewelry, notions, etc. That in said stock inventorying \$60,000 there was about

\$30,000 worth of cheap and worthless jewelry, consisting of neck chains, breast pins, collar buttons, and trinkets of like kind and character, all of which were practically worthless, and \$93.95 worth of ladies' waists. That in said stock there was millinery goods consisting of hats, braids, belting, etc., amounting to over \$6,000, while the shoes in said stock amounted to \$371. That in said stock of goods were cheap and worthless buttons inventorying over \$2,500, and piece goods inventorying only \$165. That there was \$6,295.11 of ladies' neck chains and \$53.17 of hosiery and underwear. That said stock did not contain the boots, shoes, clothing, hats, dresses, etc., as defendants had represented to plaintiff it did contain, but same was made up of neck chains stick pins, broaches, breast pins, braids, and trinkets of like kind and character, all of which, at the time plaintiff traded for same, or attempted to trade for same, were practically worthless, and "that plaintiff never did at any time authorize its land to be traded for any such stock of goods, has never agreed to accept the same for its said lands, nor did it authorize or ratify defendants attempted acceptance for it." That "the defendants knew, or by the exercise of ordinary care and diligence could have known, that plaintiff did not trade for any such stock of goods as was tendered to it, but, notwithstanding this fact, defendant negligently, carelessly, and fraudulently delivered plaintiff's deeds to the said Mitchell Dry Goods Company, without seeing or attempting to see that plaintiff received the goods for which said defendant agreed to exchange said land," and that the defendants, "by reason of their fraudulent acts and conduct, intended to and did cheat and defraud plaintiff out of its land without paying value therefor, and, in furtherance of such attempt to so defraud plaintiff, said defendants delivered plaintiff's deeds to said Mitchell Dry Goods Company, without plaintiff's knowledge, consent, or authority," and that "by reason of said fraudulent acts on the part of defendants in turning over and delivering its deeds, as aforesaid, without its authority, and by reason of their negligence and carelessness in not seeing that plaintiff received the stock of goods it was to receive in exchange for said lands, they have deprived plaintiff of its land, without having compensated it therefor, which land plaintiff alleged to be worth \$27,811, for which amount it asks judgment, and that plaintiff has demanded of defendants and of the said Mitchell Dry Goods Company a return of the deeds to its said land, which demand has been and is still refused."

Said petition further alleges that by reason of said willful violation by defendants of their duty in so delivering plaintiff's deeds, so depriving it of its said lands, it has been compelled to incur and has incurred considerable expense in an effort to regain its said lands, or value therefor, in the way of trav-

eling expenses, attorneys' fees, telegrams, and telephone calls, etc., to the amount of \$2,500, and has been compelled to employ attorneys at an expense of \$1,500 and pay their expenses in attending to said litigation in the sum of \$500, and has paid out in other expenses, telegrams, telephone calls, hotel bills, etc., the sum of \$500, aggregating the sum of \$2,500, and which items of expense were brought about and made necessary by defendants' utter disregard of plaintiff's rights and willful violation of their authority; that, but for defendants' acts in the premises, plaintiff would not have had to expend said amounts, and same became necessary by reason of and as a direct result of said acts of defendants.

Said petition prays for judgment against said defendants, jointly and severally, for the value of said lands in the sum of \$27,911, and for its damages in the way of expenses in the sum of \$2,500, aggregating \$30,411, together with interest thereon from October 25, 1909, and for all costs of suit, and for general and special relief. It does not allege fraud upon the part of the Mitchell Dry Goods Company.

Defendants' answer included a general demurrer and also what they denominated their "Sixth Special Exception," but which is, in effect, a general demurrer, as follows:

"Further answering, the said defendants, by their attorneys, come and say that the said plaintiff's first amended original petition is insufficient in law because it appears from the allegations therein contained that the deeds to the land which the plaintiff caused to be prepared, executed, and acknowledged, conveying said land by warranty deed to one B. W. Pope, were delivered to these defendants for safe-keeping, to be delivered to the grantee when and not until the plaintiff had inspected and examined said stock of goods and checked the inventory therefor; that afterwards these defendants, without the consent, knowledge, or authority of said plaintiff, and in violation of plaintiff's authority, and against their express directions and instructions, and with fraudulent intent, and in pursuance of a conspiracy, entered into by and between these defendants and the Mitchell Dry Goods Company to rob, cheat, and defraud the plaintiff out of its lands, delivered said plaintiff's deeds to the said Mitchell Dry Goods Company."

The district court sustained said demurrers, and from that judgment defendants appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District, which affirmed said judgment. 165 S. W. 542. The case is before us upon the application of the association for a writ of error.

[1] We are of the opinion that said petition states a cause of action, and that each of said demurrers should have been overruled. Their effect is to admit the truth of the allegations of said petition.

[2] Plaintiff's petition alleges, among other things, in substance, that defendants were plaintiff's agents; that defendants delivered said deeds to the dry goods company, in exchange for inferior goods, of less than stipulated value, and without plaintiff's knowl-

edge, consent, or authority, and in direct violation of its instructions, and in pursuance of a systematic design and scheme of defendants to rob, cheat, and defraud plaintiff and deprive it of the value of its said lands, and practically confirms said trade while seeking to hold defendants personally liable for damages alleged to have resulted from such unauthorized and fraudulent surrender of its said deeds.

Under these allegations, by which, alone, the merits of said demurrers can be determined, defendants are estopped to deny that titles to said lands passed upon their surrender or delivery of said deeds to the dry goods company, and therefore are liable to plaintiff for proximate resulting damages.

Consequently issues as to whether the minds of the contracting parties met upon the terms and conditions of the trade, whether the trade was consummated, whether said deeds to the dry goods company, while in the hands of defendants, were in escrow, whether those deeds were "delivered" in contemplation of law and in such manner and under such circumstances as to make them effective to pass titles to the dry goods company, and whether title to said lands passed by subsequent deed of the dry goods company to said innocent purchaser for value, are alike irrelevant and immaterial in this cause.

[3] However, we deem it proper to say that we do not concur in the conclusion of the Court of Civil Appeals to the effect that said deeds to the Mitchell Dry Goods Company were in escrow while in the hands of defendants as plaintiff's agents.

[4] Because of the errors indicated, said application for a writ of error is granted.

No. 5 of our "Rules for the Supreme Court" (142 S. W. viii), which is based on R. S. 1911, arts. 1542a, 1542b, and 1542c (Gen. Laws 1911, 1st. Sp. Sess. c. 20, p. 108 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 1542a-1542c]), provides:

"The defendant in error shall have ten days from the date of the filing of the application in the Supreme Court to file an answer thereto, which must be confined to a reply to the grounds of error presented by the plaintiff in error and to such matter as may be pertinent to show to the court that the plaintiff in error is not entitled to the writ, and in support of the correctness of the judgment of the court below. If the defendant in error shall file such answer, and the Supreme Court shall conclude that the writ of error should be granted, it may in its discretion proceed to finally dispose of the case: Provided, the defendant in error may in his answer expressly reserve the right to be heard in open court, in which event the case will stand for submission in regular course. If such right be not expressly reserved by the defendant in error in his answer, and the court shall deem it proper to finally dispose of the case upon hearing the application, it shall write such opinion as it may think proper and shall in open court pronounce the judgment of the case and enter the same of record as in other cases."

Availing themselves of a privilege thus conferred, defendants in error have filed an

answer to the application for a writ of error, without expressly reserving therein the right to be further heard in open court, so we proceed at once to a disposition of this appeal.

Said judgments of the Court of Civil Appeals and of the district court are reversed, and this cause is remanded to said trial court.

PHILLIPS, J., being disqualified, did not participate in the decision.

HUNT et al. v. JOHNSON et al. (No. 2380.)

(Supreme Court of Texas. Dec. 23, 1914.)

1. ACTION (§ 50\*)—JOINDER.

Persons having no common or joint interest in property damaged by a nuisance may not unite in a suit for damages therefor.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.\*]

2. APPEAL AND ERROR (§ 61\*)—JURISDICTION—AMOUNT IN CONTROVERSY.

The improper uniting of two separate causes does not give the Supreme Court jurisdiction on writ of error, where it has no jurisdiction of either case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 276-292; Dec. Dig. § 61.\*]

3. COURTS (§ 24\*)—JURISDICTION—WANT OF JURISDICTION—WAIVER.

Want of jurisdiction of the subject-matter cannot be waived by the parties nor disregarded by the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by S. R. Johnson and another against Hugh Hunt and another. There was a judgment of the Court of Civil Appeals (141 S. W. 1060), affirming a judgment for plaintiffs, and defendants bring error. Dismissed for want of jurisdiction.

Stephens & Miller, of Ft. Worth, and W. Poindexter and S. C. Padelford, both of Cleburne, for plaintiffs in error. Phillips & Bledsoe and F. E. Johnson, all of Cleburne, for defendants in error.

BROWN, C. J. Hugh Hunt and Winfield Scott erected a gin in the city of Cleburne, near to the residences of S. B. Johnson and B. J. Copeland, who resided on separate lots; neither being interested in the property of the other. It was claimed in the petition that Hunt and Scott so located their gin house, and so operated the gin as to cause the property of Johnson and Copeland each to deteriorate in value the sum of \$750 each. It is not claimed that the plaintiffs are joint owners of the property injured, nor that either was interested in the damages sought to be recovered for injury done to the property of the other. The plaintiffs in error made their objection to the joinder of the actions

in the district court, but they make no objection here.

[1] Parties cannot join in an action to recover separate and distinct parcels of land or damages thereto in which they have no common or joint interest, and the objection of the defendants should have been sustained by the district court. *Curry v. York*, 3 Tex. 359; *Allen v. Read*, 66 Tex. 21, 17 S. W. 117. In the case last cited the court said:

"In view of the disposition that will be made of the case, it is unnecessary to consider the sufficiency of the evidence to support the claims of Mrs. Thompson, Mrs. Jeffus, and R. N. Read, under the statutes of limitation. As each of the plaintiffs claim separate parts of the league of land in controversy, the action by them all is irregular, and had objections been made, at proper time, and in proper manner, to the maintenance of this joint action, they should have been sustained; but this was not done, and as this relates to the procedure, and not to the rights, of the several parties, the objection cannot be made in this court."

[2] If each plaintiff had instituted a separate suit in the county court or in the district court, this court would have no jurisdiction of either case. The uniting of two separate cases does not constitute one case, and, as this court has no jurisdiction of either case, it cannot have jurisdiction of two, when improperly joined. Upon the face of the proceeding, the question of jurisdiction of the subject-matter arises without objection by either party.

[3] Such want of jurisdiction of the subject-matter cannot be waived by the parties nor disregarded by this court.

It follows that this cause must be dismissed for want of jurisdiction.

#### NESBITT v. STATE. (No. 3351.)

(Court of Criminal Appeals of Texas. Dec. 16, 1914.)

#### 1. CRIMINAL LAW (§ 479\*)—EVIDENCE—ADMISSIBILITY.

Where medical experts examined the wounds of the prosecuting witness, they are entitled to testify that, from their experience and observation as physicians, the weapon used was calculated to produce death or serious bodily injury, though they did not see the weapon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.\*]

#### 2. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.

In a prosecution for assault with intent to murder, where accused claimed that he acted in self-defense, believing he was in imminent danger, but there was no evidence of any threats before the altercation which led to the assault, a charge that, if the words or acts of the prosecuting witness created in the mind of accused reasonable apprehension of imminent danger, then he had the right to defend himself in such a manner as seemed reasonably necessary, and that he was not bound to retreat to avoid the necessity of assaulting his assailant, is a sufficient presentation of the right of self-defense as raised by the evidence, which only showed that the prosecuting witness got down from his

wagon and reached towards his pocket, where accused believed he had a knife.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from District Court, Knox County; Joe A. P. Dickson, Judge.

Frank Nesbitt was convicted of aggravated assault, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted under an indictment charging him with assault to murder, and, when tried, was convicted of aggravated assault.

The evidence would show that trouble arose between appellant and the prosecuting witness, Bud Sessions, over some harness. Sessions had gone to the barn of appellant and took the harness during appellant's absence, and they had some words about the matter over the telephone. On the day of the difficulty Sessions was at work on the same farm on which appellant rented land, and when he got through his work he drove across appellant's wheat land in going to the home of Mr. Ludwick, for whom Sessions was at work, and on the way he went by the lot of appellant. The state's contention is that, when Sessions got even with the lot, appellant approached his wagon and told Sessions he did not want him to come across his land, when Sessions replied he would be compelled to do so; that appellant then commenced cursing Sessions, and told him if he would get out of the wagon he could and would whip him. As Sessions started to get out of the wagon, with his back to appellant, appellant struck him on the head with a stick or scantling, knocking him senseless.

Appellant's version is as follows:

That when Sessions came by his lot he said to him: "There is a road plumb around this place," I says. "I have forbid you twice before to come on this premises," and I was walking as I talked. I says, "There is a road plumb around this place, and I forbid you to come on these premises twice before." I says, "I want you to get out in this road, and stay out." By that time I was even with him. I turned my back to walk in this gate, and he stopped his team and commenced getting out of the wagon. He got over the front wheel of the wagon. When he stopped his team, he wound his lines up on the front stub of the wagon, and commenced to get out of the wagon. It was turned in a north-west direction. I was going in this lot to feed my hog. He says, "I will get off of this place when I get ready, and I will come back when I get ready, just to show you I am not afraid." When he did that I turned around—went back towards him. When he come off of the wagon, he run his left hand in his pocket first; then his right hand. Then I seen this stick, and grabbed it, and got to him as quick as I could. If I had not seen the stick, I would have run. I was sure he had a knife, because he had been heading maize. I hit him on the head with the stick."

Dr. W. M. Taylor testified:

"Mr. Sessions, Dr. Heard, and Mrs. Sessions went with me out to him. When we got there

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

we took him out of the wagon, and Mr. Sessions stayed on the back seat of the car and held him until we got to Goree. When I found him he was in an unconscious condition, vomiting some. I did not make a thorough examination of him then. We carried him home just as soon as we could. Afterwards I made an examination of him, and Dr. Heard assisted me; we made the examination as soon as we got him home and got him in bed and cleaned up as much as we could. We found two cut places on his head. We clipped his hair from around those places, washed them, sewed them up, took two stitches in one and one in the other. We found those wounds here (indicating) on the left side between the frontal bone and the parietal, on the left side of the head across this way (indicating); it was a little jag there. We found one here on top across that way (indicating); this was cut through the scalp; upper margin of the wound extended out to a scratch lower part. We took one stitch in the upper part of this wound (indicating). This side of the head (indicating) was bruised. We did not do any more than we had to that night, and awaited developments. The next morning, on this side of the head, the part of the scalp over the right parietal bone come down to the occipital septa, just a little over the center of what we call the parietal septa junction, between the two parietal bones. This swelling extended around this line. You can see where I shaved his head there around this way (indicating), something like. Then there was a fluctuating mass here, in around on the frontal bone, to the right of the center; one corresponding on the opposite side—a long fluctuating mass. These bruises I have testified about, they were separate and distinct from each other. I clipped his hair Sunday, so I could tell more about these places. I kept his head wrapped in hot cloths until Monday, to see if I could reduce some of the swelling; but the swelling increased, instead of going down. I wanted to make out as near as I could the nature of the mass, so I used an asperating needle on this mass here. I run the needle inside, drew it out, and it was pure blood. I took about two ounces out of that wound; that was just a fluctuating mass. I did not open this over here (indicating) until the following day. He complained a good deal of his eyes, could not bear the light, so I opened these two in front, and that relieved the eye-strain. I took about an ounce each out of the two wounds in front. I opened those up every day. I opened them one day, and they would fill up by the next. In my opinion, there was at least three distinct wounds upon his head that gave the trouble; there was two cut places on his head, one here and one here (indicating). This mass here (indicating), that contained the fluid beneath, come up to a line of this wound here. I tried to drain it through this, and could not, so I had to cut an opening here (indicating). I drained the one on top through this wound (indicating), but I run my knife under there, and run it about two inches towards the mass here; drained some from there, rather than to cut longer places. The wound and bruise I have described there on the back of his head, on the right, in my opinion, I do not think a man could stand in front of him and have inflicted that wound with a stick; he would have had to have been to the side of him or to the back. From the examination of the wounds upon the head of the person, and from my experience and observation as a physician and surgeon, I would say that the weapon used in the inflicting of the wounds, from the mode and manner of its use, was a weapon calculated and likely to produce death or serious bodily injury, in my opinion. I considered the wounds upon Bud Sessions' head serious wounds."

It is shown that Sessions remained unconscious for several days.

[1] Dr. Heard's testimony was, in substance, the same as Dr. Taylor's. Two bills of exception were reserved to a portion of Dr. Heard's and Dr. Taylor's testimony; that portion wherein they were permitted to testify that from an examination of the wounds upon the head and from their experience and observation as physicians and surgeons the weapon used in inflicting the wounds, from the mode and manner of its use, was a weapon calculated to and likely to produce death or serious bodily injury. While the evidence does not disclose they ever saw the weapon used, yet they did see and examine the wounds inflicted, and, under the circumstances shown by this record, we do not think there was any error in permitting them to so testify. *Waite v. State*, 13 Tex. App. 180; *Banks v. State*, 13 Tex. App. 182; *Powell v. State*, 13 Tex. App. 244; *Henry v. State*, 49 S. W. 97; *Sebastian v. State*, 41 Tex. Cr. R. 250, 53 S. W. 876.

[2] On the issue of self-defense, as made by the testimony offered in behalf of appellant, the court instructed the jury:

"Upon the law of self-defense you are instructed that if, from the acts of the said Bud Sessions, or from his words, coupled with his acts, there was created in the mind of the defendant a reasonable apprehension that he, the defendant, was in danger of losing his life or of suffering serious bodily injury at the hands of the said Bud Sessions, then the defendant had the right to defend himself from such danger or apparent danger as it reasonably appeared to him at the time, viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat to avoid the necessity of assaulting his assailant. If you believe that the defendant committed the assault as a means of defense, believing at the time he did so, if he did so, that he was in danger of losing his life or of serious bodily injury at the hands of said Bud Sessions, then you will acquit the defendant."

In this record there is nothing to suggest prior threats or conduct on the part of Sessions that would cause appellant to believe he was in danger of death or serious bodily injury; his right to act in self-defense must be based on the acts and conduct of Sessions at that time. He admits he ordered Sessions to get off his land and stay off. He says Sessions replied he would not do so, and got out of his wagon and started towards him, running his hand in his pocket, and he believed he was going after a knife. He does not claim that Sessions drew a knife, but, as he (Sessions) had been cutting maize heads that evening, he knew he had a knife, and he believed when he ran his hand in his pocket that it was his purpose to draw a knife and use it on him, when he struck with a stick, knocking Sessions senseless. The sole question is: Did the above paragraph of the charge sufficiently present this defense? We are inclined to think it does do so, and there was no reversible error in refusing the special charge requested on that issue.

The judgment is affirmed.

**RANOLS v. STATE. (No. 3356.)**

(Court of Criminal Appeals of Texas. Dec. 16, 1914.)

**1. INDICTMENT AND INFORMATION (§ 173\*)—NAME OF ACCUSED—VARIANCE.**

In view of Code Cr. Proc. 1911, § 560, that if a person is indicted by the wrong name he can suggest that fact to the court, when his real name will be substituted, that one commonly known as "Ranols," and indicted as such, was really named "Randall," presented no variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 539; Dec. Dig. § 173.\*]

**2. CRIMINAL LAW (§ 815\*)—TRIAL—SUBMISSION OF DEFENSIVE ISSUE.**

In a prosecution for unlawfully carrying a pistol, where defendant denied any admission that he had fired a pistol, and testified that he stood in the door of his boarding car and fired a pistol after another shooting had taken place, the evidence presented a defensive issue, the refusal to submit which to the jury was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

Appeal from Sabine County Court; J. B. Lewis, Judge.

Deary Ranols was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

W. R. Cousins, of Hemphill, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of unlawfully carrying a pistol, and prosecutes this appeal.

[1] One complaint made is that appellant's real name is "Randall," and not "Ranols." Our Code (section 560) provides that, if a person is indicted by the wrong name, he can suggest that fact to the court, when his real name will be substituted. Appellant was commonly known as "Ranols," and the fact that his real name was "Randall" presents no variance.

[2] There are a number of bills of exception in the record, but only one of them presents error, and we do not deem it necessary to discuss the others. The state's evidence would show that the officers heard and saw a pistol being fired; that four men were in the crowd, and they ran to the railway camp; that appellant afterwards admitted to the officers that he was the man who fired the pistol.

On the trial of the case defendant testified in his own behalf and denied making the confession or admission testified to by the officers. He says he was not one of the four men who fired the pistol and whom the officers saw running; that he was in his camp, and when he heard the shooting he ran to his door, and did not go out of his door, but says he stood in his door and fired his pistol after the other shooting had taken place. With the evidence in this condition, he requested the court to instruct the jury:

"In this case the defendant has testified that he did have a pistol, and that he shot the same on the steps of the boarding car where he was living, and that he did not have a pistol at any other place. You are charged that if you believe he did have a pistol, but that he did not carry it away from the boarding cars, then he would not be guilty of the offense charged, and the burden of proof is on the state to prove beyond a reasonable doubt that defendant's explanation is false, and, unless it does so prove, you will acquit the defendant."

This presented his defensive theory, and the court should have submitted that issue to the jury. The defendant excepted to the failure of the court to give this charge, and the failure to present his defensive issue in the charge as given. Under our law, where the evidence offered in behalf of a defendant presents a defensive issue, he is entitled to have it submitted to the jury.

The judgment is reversed and the cause remanded.

**JOHNSON v. STATE. (No. 3357.)**

(Court of Criminal Appeals of Texas. Dec. 16, 1914. Dissenting Opinion Jan. 9, 1915.)

**CRIMINAL LAW (§ 1055\*)—APPEAL—REVIEW—MISCONDUCT OF COUNSEL—QUESTIONS NOT RAISED AT TRIAL.**

Accused cannot object on appeal to allege misconduct of the district attorney in argument where no exception was reserved thereto at the time, or application made to the court to correct the error either by instruction or by granting accused a venire de novo, and this though the misconduct was such that it could not be cured by instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.\*]

Davidson, J., dissenting.

Appeal from District Court, Wichita County; E. W. Nicholson, Special Judge.

Alvin Johnson was convicted of robbery, and he appeals. Affirmed.

T. R. Boone, of Wichita Falls, for appellant.  
O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of robbery, and his punishment assessed at five years' confinement in the state penitentiary.

In this case the evidence would show that one Travis Keys robbed Frank Morgan of \$75, and the state relied on circumstantial evidence to connect appellant with the transaction as a principal. The court, among other things, instructed the jury:

"Before you can convict the defendant, Alvin Johnson, in this case you must believe beyond a reasonable doubt that Travis Keys actually committed the offense of robbery as defined above, and as charged in the fourth paragraph of this charge, and you must further believe beyond a reasonable doubt that the defendant, Alvin Johnson, was present at the time of the commission of said offense, and, knowing the unlawful intent, aided said Travis Keys by acts, or encouraged him by words or gestures, in the commission of said offense, or that said Alvin

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Johnson, prior to the commission of said offense, had advised and agreed with the said Travis Keys to the commission thereof, and had done some act pursuant to said agreement, and that he was actually present at the time said offense was committed."

The court also in his charge properly instructed the jury as to who are principals in the commission of an offense, and instructed the jury the law governing a case depending on circumstantial evidence in a way not complained of by appellant, and in language frequently approved by this court. Branch's Crim. Law, § 204, and authorities there cited. In this case we cannot hold, as a matter of law, that the facts and circumstances shown by the evidence were insufficient to authorize the jury to find that appellant was acting with Keys in the commission of the offense, if an offense was committed by Keys, and this the jury found to be a fact. While this is a companion case to that of Travis Keys v. State, 60 Tex. Cr. R. 279, 131 S. W. 1068, on this trial there was no evidence offered tending to show that the money was won from the prosecuting witness in a gambling game, as was done in that case, and yet the court held in that case that the evidence was sufficient to support a conviction for robbery, and in this case (without the evidence as to gambling) we could hardly be expected to hold that the evidence was insufficient to sustain a conviction for robbery.

The only other question presented in the record that it is necessary to discuss is presented in three bills of exception reserved after verdict and after the motion for new trial had been overruled, all relating to the same matter. In these bills it is claimed the prosecuting attorney used the following language:

"It is in the power of the defendant to show what manner of man he is; the state cannot show it: the law does not permit it. It is within the mouth of the defendant to tell what kind of a man he is, and I would like to know what kind of a man I am prosecuting, and you would like to know what kind of a man you are setting in judgment on."

In the bills of exception it is shown by the allegations of appellant that when the language was used, if used, no exception was reserved to the argument, but it is admitted that the first time it was complained of was in the amended motion for new trial, filed the 8th day of August, eight days after the verdict had been rendered and judgment entered thereon. Appellant contends that this was a direct allusion to defendant's failure to testify, and, although it was not excepted to during the trial of the case, it was a plain violation of article 790 of the Code of Criminal Procedure, which provides that a defendant may be permitted to testify in his own behalf, but his failure to testify shall not be considered as a circumstance against him, nor shall the same be commented on or alluded to by counsel in their argument; and he also contends that the error may be assigned for the first time after ver-

dict in the motion for new trial. This contention we think contrary not only to the trend of decisions of this court, but contrary to the provisions of the Code of Criminal Procedure. It has always been the rule in this court that evidence admitted on the trial, no matter how hurtful or harmful, if unobjected to during the trial of the case, and complained of for the first time after verdict in the motion for new trial, comes too late and presents no ground for reversal of the case, although, if objected to at the time it was offered during the trial, it would have presented ground for reversal. Wright v. State, 35 Tex. Cr. R. 368, 33 S. W. 973, Gonzalez v. State, 30 Tex. App. 203, 16 S. W. 978, Simon v. State, 31 Tex. Cr. R. 204, 20 S. W. 399, 716, 37 Am. St. Rep. 802, and cases cited under subdivision 1, § 1123, White's Ann. Code of Criminal Procedure, where the rule is stated to be:

"A party cannot be heard to complain of illegal and incompetent evidence to which he did not object \* \* \* at the time of its introduction."

The law in these instances says certain testimony is inadmissible, yet, if not objected to when offered, it is too late to complain of the matter after the trial is completed and verdict rendered.

It was formerly the rule in this state that objections to the charge of the court and errors pointed out therein for the first time in the motion for a new trial could be considered by this court, but the Legislature deemed this rule inadvisable, and changed it by specific legislative enactment. In chapter 138 of the Acts of the Regular Session of the Thirty-Third Legislature (page 278, Session Acts) it is provided that, if the charge is erroneous, the judgment shall not be reversed, unless the error was pointed out before the charge was read to the jury. And, so urgent did they deem this matter, the law declares:

"The fact that there are many reversals in criminal cases caused by errors in the charge of the court due to the fact that such errors were not pointed out to the trial judge before the charge was given \* \* \* creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act be in effect from and after its passage and it is so enacted."

Thus it is made plain that, if we follow the plain spirit, intent, and language of our Code of Criminal Procedure, if error be committed in the trial of the case, such error must be excepted to at the time of and during the trial, or we must not consider such matters on appeal. It was the evident intent and purpose of the Legislature to provide that any error committed during the trial of a case must be excepted to at that time to give the trial court a chance to correct its error, or the matter will be considered as waived, and this court shall not reverse a case on account of any error that appellant did not consider of sufficient importance to complain

of during the trial. As to the wisdom of this rule, or its fairness and justness, we do not feel called upon to express an opinion. If it is deemed hurtful and harmful, inequitable and unjust, an appeal should be made to the lawmaking body—the Legislature—to change it, and the appeal should not be made to us to annul its provisions. However, appellant contends that the use of such language by the prosecuting attorney was such an error that, if the court's attention had been called to it by reserving an exception at the time, it was such an error that the court could not have remedied; therefore it was not necessary to except to it at the time, but it could be complained of for the first time after verdict in the motion for a new trial. It has been held in this state, and in Illinois, Indiana, and Mississippi, that if counsel for the state refers to the defendant's failure to testify, the withdrawal of the obnoxious remarks and the instructions of the court to disregard them will not cure the error. To this rule, if an open question, the writer would not give his assent, for the great weight of authority is against such rule. In the *Encyclopedia of Pleading and Practice*, vol. 2, p. 724, it is said:

"The weight of authority fairly sustains the proposition that the court may repair the injury by excluding the comments and properly admonishing the jury"—citing *State v. Chianell*, 36 W. Va. 659, 15 S. E. 412; *Com. v. Harlow*, 110 Mass. 411; *State v. Graham*, 62 Iowa, 108, 17 N. W. 192; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; *People v. Hess*, 85 Mich. 128, 48 N. W. 181; *People v. Rose*, 52 Hun, 33, 4 N. Y. Supp. 737; *Ruloff v. People*, 45 N. Y. 213, which is referred to as a leading case.

In the *American and English Encyclopedia of Law and Practice*, vol. 5, p. 340, it is said that:

"In some jurisdictions it is held that, where unwarranted and prejudicial comment is made upon the prisoner's neglect to testify, the proceedings thereby become so fatally infected that a withdrawal of the obnoxious remarks and instructions of the court to the jury to disregard them cannot be held to neutralize their pernicious effect. But the weight of authority fairly sustains the proposition that the court may repair the injury by excluding the comments and properly admonishing the jury"—citing *Dimmick v. United States*, 121 Fed. 638, 57 C. C. A. 664; *Wright v. United States*, 108 Fed. 805, 48 C. C. A. 37; *Lee v. State*, 73 Ark. 148, 83 S. W. 916; *State v. Buxton*, 79 Conn. 477, 65 Atl. 957; *Robinson v. State*, 82 Ga. 535, 9 S. E. 528; *United States v. Kuntze*, 2 Idaho (Hasb.) 480, 21 Pac. 407; *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772; *People v. Hess*, 85 Mich. 128, 48 N. W. 181; *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976; *Williams v. State*, 30 Ohio Cir. Ct. R. 342; *State v. Harrison*, 145 N. C. 408, 59 S. E. 867; *State v. Howard*, 35 S. C. 197, 14 S. E. 481; *State v. Young*, 74 Vt. 478, 52 Atl. 1047; *Dunn v. State*, 118 Wis. 32, 94 N. W. 646; *Price v. Com.*, 77 Va. 393.

Many other cases could be cited sustaining the rule that, if the court properly reprimands counsel and instructs the jury that they must not consider such comment, it will not be ground for reversal of the case, but as

this court has adhered to the rule that such instructions will not cure the error, we would not be willing to overrule this unbroken line of decisions where the remarks were objected to and excepted to at the time they were uttered and while the trial was still in progress. Appellant cites us cases rendered by this court sustaining that rule, but in each and every case cited by appellant the remarks were objected to and exception reserved at the time they were uttered and while the case was still on trial. In none of them was the exception reserved and objection made for the first time after verdict in the motion for new trial.

But what is the reason for the rule that the objection must be made and exception reserved at the time the argument is made, and during the progress of the trial? Appellant's able counsel insist and urge that there is no sound reason for such rule; that, as this court has held that the court cannot cure the error by withdrawal of the remarks and the court instructing the jury not to consider them, there is no reason why the objection cannot be made after verdict in the motion for new trial as well as during the trial and at the time the argument is made. At first blush, the reasoning of appellant's counsel would appear sound, but in Texas and those states which hold that a reference to defendant's failure to testify is an incurable error it is also held that, in case of such improper remarks, the proper practice is to except to the remarks, and request the court to discharge the jury from a further consideration of the case. In the case of *Coffman v. State*, 165 S. W. 945, this court held, where the witness Miss Lizzie Barnes had testified that she had "testified on the former trial, when the defendant got the death sentence," that, as the trial court at the time when the exception was reserved offered appellant the privilege of withdrawing the case from the jury, and to discharge the jury from a further consideration of the case, which offer appellant's counsel refused to accept, that the bill did not present reversible error. Our Code provides that the result of the former trial shall not be referred to, as it also provides that the failure of the defendant to testify shall not be alluded to. And when either of these events happen, it is proper for the court to allow the defendant to have the case withdrawn from the jury, the jury discharged, and a new jury impaneled to try the case. But if appellant and his counsel, knowing that such error has been committed, proceed with the trial without objection, take chances on a verdict of acquittal, and, in case it results adversely to them, then seek to raise such objection, it comes too late. The courts cannot be trifled with, and their time occupied, and the necessary expense incurred to no good purpose. If one on trial thinks irreparable injury has been done him, and he cannot by reason thereof secure fair con-

sideration at the hands of the jury, he should promptly object and ask that the jury be discharged, and, if such request is not complied with, it will be our duty and our pleasure, if the remarks are such that may have been harmful to him, to see that he gets another trial before a jury uninfluenced by such improper conduct. But we cannot sanction the practice of appellant and his counsel, sitting idly by, without calling the attention of the trial court to what to them seems hurtful and damaging argument, speculating on the result and taking chances on acquittal, with the intention, if the trial results adversely to them, to seek to have the verdict set aside on account of a matter of which they were aware, but did not complain of when it occurred. This, to our minds, is not dealing fairly with the trial court, and is not in accordance with that well-known rule of law that he who seeks relief in the courts of his country must do so with clean hands. We do not wish to be understood as censuring counsel for appellant for raising this question. The attorney who now represents appellant, and who presented the bill of exceptions for approval, was not of counsel for appellant on the trial of the case, but was called into the case after verdict, and he is not to be censured nor blamed, but commended, for raising every question which he thought might prove advantageous to his client, but he in the bill admits, and in his argument before this court admits, that at the time the remarks of state's counsel were made no objection was made to such argument, and no exceptions attempted to be reserved until after the verdict was rendered, and it is our opinion that it was then too late to complain.

We have written at length on the bills as if they were properly verified and certified to by the trial judge. In the writer's opinion, however, the bills are not verified in a way which would authorize us to conclude from them alone that the district attorney used the remarks complained of. The bills are approved with the qualification that, if the language imputed to him was used by the district attorney, the court did not hear it; that, if such remarks were used, they were not excepted to, and his attention was not called to it until such language was assigned as error in the motion for new trial. Counsel for appellant admits that no exception was reserved, and the first time the language was complained of was in the motion for new trial. The allegation in the motion for new trial does not verify the fact that the language was used, and the court, in our opinion, does not do so in acting on the bill; for he says, if such language was used, he did not hear it. However, we have treated the matter as though it was properly verified, and hold that it was too late after verdict to reserve an exception to the remarks used on the trial of the case, and that, when no such exception is

reserved at that time, the matter will be considered as waived.

The judgment is affirmed.

DAVIDSON, J., dissents.

DAVIDSON, J. Briefly I desire to state some of the reasons why I cannot agree to the affirmance of this judgment. The language of the prosecuting attorney, which is sufficiently set out in the majority opinion without restating it, was clearly an allusion, to, and comment on, the failure of the defendant to testify. This is conceded by the majority opinion, but it is stated that, because appellant did not object at the time to the argument and ask an instruction to the jury not to consider it, and further did not ask the court then to withdraw the case from the jury and continue it, he waived his rights, and the error was not available. This proposition, to say the least of it, is more than novel. The decisions in this state, in an unbroken array, hold it error for the prosecution to allude to the fact that defendant did not testify, and always reversible error, although the court may charge the jury to disregard such argument and admonish the attorney against such conduct. If there is an authority which holds the other way in Texas, it has escaped my attention. These cases, without being here enumerated, may be found collated in section 849 of Mr. Branch's Crim. Law. If a charge to the jury withdrawing the remarks could not cure the error, I do not understand how an exception would be of any service. It is more than a novel proposition that a defendant, in order to take advantage of such error, must not only except at the time, but must also move the court to withdraw the case from the jury and continue it or organize another jury to try the accused. This proposition is evidently not the conclusion of serious reflection. If this is to be the law and practice, it would follow that, when reversible error is committed, it would be obligatory upon the defendant to ask a withdrawal of the case from the jury and put him on trial before another jury; otherwise he waives a legal trial. My Brethren place this on the statement that it is unfair to the court to do otherwise. Fair trial is due the accused, not the court or district attorney. They are not on trial. It has always been thought the law heretofore that, when an error is committed against the accused, he can avail himself of it in any legitimate manner. The state cannot take advantage of its own wrong conduct. Under this novel ruling an appellant would never be entitled to a reversal, however erroneous the ruling, unless he should not only except, but ask the court to withdraw the case from the jury at the time of the commission of the alleged error. This ought not to be asserted or entertained seriously. He is not required to ask a continuance for this reason, nor move for a new trial until after

the verdict has been rendered adversely to him.

My Brethren announce another proposition still more novel. In addition to what was said by them in regard to the other questions, they say:

"But we cannot sanction the practice of appellant and his counsel, sitting idly by, without calling the attention of the trial court to what to them seems hurtful and damaging argument, speculating on the result and taking chances on acquittal, with the intention, if the trial results adversely to them, to seek to have the verdict set aside on account of a matter of which they were aware, but did not complain of when it occurred. This, to our minds, is not dealing fairly with the trial court, and is not in accordance with that well-known rule of law that he who seeks relief in the courts of his country must do so with clean hands."

It is for the first time, so far as I am aware, announced as a "well-known rule of law" that a party accused of crime must come into court "with clean hands" in order to have a fair trial, to be permitted to take advantage of erroneous rulings. It may be asked how a party charged with, and convicted of, robbery, the judgment affirmed, could come into court "with clean hands." The machinery of the criminal law was set in operation by the state. The felonious charge is that he was without "clean hands"; that he was a violator of the law; had robbed his fellow man of property by the use of force, violence, or deadly weapon; and yet, in order to urge an exception to what is an illegal proceeding, he must come into court "with clean hands." I have been taught from the time I studied equity jurisprudence that there is a rule of equity, not criminal law, the substance of which is that he who seeks equity must come into court with clean hands or do equity. In that instance the plaintiff or complaining party is seeking equity in a civil matter. It cannot be a criminal prosecution. The rules of equity are resorted to in civil matters when the law has failed of remedies. It is fundamental that a criminal prosecution is not an equity case. The accused is brought in court by the strong arm of criminal process and required to answer a charge of robbery, and it is evident from the fight before the jury for his life and liberty and his appeal to this court that he was entering his most solemn protest against the whole proceeding. The affirmance was over his most serious objection. He not only did not come into court, but protested most seriously against being brought. When he declined to exercise his privilege of testifying, and that fact was commented upon before the jury by adverse counsel, it was incurable error, but we are told that he must not only engage in the fruitless task of asking a withdrawal of the remarks and the case from the jury, but he must come into court "with clean hands," before he could even do those things, and, not having done so, he must go to the peniten-

tiary under the rules of equity, upon the theory he had invoked the chancery powers of the court. He not only remained silent, but protested against interference with that silence. The Constitution guaranteed him this right. The statute which permits him to testify reserves to him this right. He exercised that right and did remain silent, and, because he did remain silent and failed to ask the court to withdraw the case, he did not come into court "with clean hands." For this reason he has been adjudged to have lost the guaranteed protection of the Constitution and the strict reservation of his rights in the statute to remain silent or testify at his opinion, and waived himself into the penitentiary. Like the sheep before his shearers, he was dumb, he opened not his mouth, and because of this silence he has forfeited his right to have his case considered under the Constitution and laws of the state, as he was entitled. He is compelled to sit "idly" or otherwise and listen at his trial. He must take the chances of acquittal, has no option, and cannot avoid it. If he is convicted heretofore, he could urge legal errors. He has not heretofore been required to move a continuance every time an error is made, nor required to move for a new trial until after he has been found guilty.

There are other startling propositions in the opinion, but I do not care to follow the subject further.

I most respectfully enter my dissent.

#### BYARS v. STATE. (No. 3345.)

(Court of Criminal Appeals of Texas. Dec. 9, 1914. Rehearing Denied Jan. 6, 1915.)

##### 1. CRIMINAL LAW (§ 603\*)—CONTINUANCE—APPLICATION—INFORMATION AND BELIEF.

An application for continuance for absent witness, based on information and belief, and not stating and verifying the source of information, is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.\*]

##### 2. CRIMINAL LAW (§ 603\*)—CONTINUANCE—ABSENT WITNESS—DILIGENCE.

A motion for a continuance for absent witness, showing that a subpoena was issued on September 23d, returnable the 28th, which was returned not found, the time of return not being stated, and there being no showing in the return as to diligence, is insufficient to show diligence, though the trial was on the 29th.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.\*]

Appeal from District Court, Colorado County; M. Kennon, Judge.

Andrew Byars was convicted of assault to murder, and he appeals. Affirmed.

P. P. Putney, of Victoria, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of assault to murder; his punishment being

assessed at two years' confinement in the penitentiary.

The court refused appellant's first application for a continuance, based on the absence of the witness Ned Morris. The application states that appellant expected to prove by the witness:

"As follows, to wit: That the said witness was an eyewitness to the shooting; that the said witness will testify, so defendant has been informed, that the assaulted party, Ben Kennon, was the aggressor in the difficulty. That he made threatening remarks to the defendant, and was in a position and making gestures as if he meant to execute said threats, to do the defendant Andrew Byars serious bodily injury, before the defendant, Andrew Byars, shot him. That the said witness will testify further, so the defendant has been informed, that Ben Kennon was advancing upon and towards the defendant in an angry manner, with his right hand in his pocket, and his left hand raised as if to ward off any blow which might be given him by the defendant; and will testify further that defendant made no further attempt to shoot after Ben Kennon retreated."

The bill of exceptions is approved with the statement:

"That the application for continuance does not show due diligence, and, in view of the motion for new trial to be heard, the undisputed evidence shows that the proposed testimony of the absent witness is contradicted by the physical fact of the bullet."

[1, 2] It will be noticed that the facts expected to be proved are not stated, except upon information. Appellant nowhere in the application, nor attached to it, shows or attempts to show from whom he received such information. If appellant had been informed that the absent witness would testify as indicated, his source of information should have been stated and verified. As to diligence, the application alleges that the absent witness resided in Colorado county, and that appellant thought his attorney of record appeared before the clerk of the court and made application for subpoena for the said witness Ned Morris, as the law requires to be done, on the 23d day of September, 1914, which application is here referred to and made a part of this application commanding the said witness Ned Morris to appear before the court on the 28th day of September, 1914, at 10 o'clock a. m., to testify in behalf of the defendant; that this subpoena was turned over to the sheriff of Colorado county, and was by him "returned into this court with the following return marked thereon, 'Cannot be found.'" The indictment was returned into court on 19th of the month. Under this allegation the process was issued on 23d of September, returnable on 28th. The case was tried on 29th of September. At what time the sheriff made the return is not stated; in fact, the above is the showing made on the face of the motion. We are of opinion this was not sufficient diligence. If the process had been returned on 24th, and the case set for the 28th, further steps would be necessary, and an attempt at dili-

gence would have demanded that other process be issued at once. The sheriff's return does not show what diligence was exercised on his part to secure the witness, but he simply returns the process, stating witness cannot be found. Appellant could have ascertained from the sheriff any fact that he knew about the witness, if he knew anything, or had heard anything of his whereabouts, or could have had the return amended so as to indicate where the witness could be found if the sheriff knew anything of it. But none of this was done. The bill was accepted by appellant as qualified by the court. If the physical facts were such that Kennon was not approaching appellant or was not doing what appellant said he was informed that Morris would testify, then his testimony would not be material. However, from any viewpoint, we are of opinion the diligence is not sufficient; nor is the statement with reference to the testimony expected to be shown so stated as to be positive in its character that Morris would swear to such facts; nor does he state the means of information upon which he predicates his statement.

The only other question presented in the motion is want of sufficient evidence to justify the verdict. The state's evidence is amply sufficient to justify the verdict. It is unnecessary to repeat or discuss it.

The judgment is affirmed.

#### SERRATO v. STATE. (No. 2990.)

(Court of Criminal Appeals of Texas. May 6, 1914. Rehearing Denied June 3, 1914.)

#### 1. INDICTMENT AND INFORMATION (§ 139\*)—RETURN—RECORD—AMENDMENT—CHANGE OF VENUE.

Code Cr. Proc. 1911, art. 232, provides that an indictment is considered as presented when it has been duly acted on by the grand jury and received by the court. Supreme Court Rule 110 (142 S. W. xxv) declares that the record must show that the indictment was presented in open court by a quorum of the grand jury, and Code Cr. Proc. 1911, art. 630, declares that before a change of venue is ordered in any case all motions to set aside the indictment and all special pleas and exceptions which have been filed shall be disposed of by the court of original jurisdiction. *Held*, that where the record of the return of an indictment only showed that, on a specified date, the grand jury appeared in open court and presented the following true bill of indictment, etc., a motion to quash because it did not appear that the indictment was presented by a "quorum of the grand jury" should have been made in the court of original jurisdiction and, being a mere matter of procedure, could not be made in the court to which the venue was changed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139.\*]

#### 2. INDICTMENT AND INFORMATION (§ 11\*)—PRESENTATION—CLERK'S MINUTES.

Where an indictment is found and presented by a quorum of the grand jury, its legality is not affected by the fact that the clerk may have neglected to enter the fact on his minutes; the court being authorized, on his attention be-

ing called to the omission, to order the minutes corrected.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 62-75; Dec. Dig. § 11.\*]

### 3. CRIMINAL LAW (§ 422\*)—EVIDENCE—UNLAWFUL ACT—SUBSEQUENT STATEMENTS AND ACTS.

Where decedent was killed by a company of men illegally organized in Texas to invade Mexico, merely as an incident of the purpose of the organization, in order to prevent decedent from informing concerning them, and the conspiracy did not end until the company were arrested and incarcerated, evidence as to what was said and done by the conspirators, or any of them, after decedent's death and prior to their arrest was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

### 4. CRIMINAL LAW (§ 423\*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.

The rule that evidence of acts and declarations of a conspirator in furtherance of the common design is admissible against another conspirator pending the conspiracy and until its final termination includes anything that is within the contemplation of the conspiracy, such as dividing the spoils, or any matter that may be subsequent to, but included in, the scope of the agreement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.\*]

### 5. CRIMINAL LAW (§ 422\*)—EVIDENCE—ACTS AND STATEMENTS OF CONSPIRATORS.

Acts and statements of conspirators pending the conspiracy and in furtherance of the common design are admissible against a conspirator on trial, though said and done in his absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

### 6. CRIMINAL LAW (§ 427\*)—EVIDENCE—DECLARATIONS OF CONSPIRATORS—PRELIMINARY PROOF.

Proof of a plot or combination must precede proof of declarations made by either of the conspirators, though the acts and declarations of separate parties in planning or executing the scheme may be shown in evidence of the common design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017; Dec. Dig. § 427.\*]

### 7. CRIMINAL LAW (§ 59\*)—INCIDENTAL CRIME—CONSPIRATORS' LIABILITY.

Where a crime committed is not in any way connected with a conspiracy, but is the independent act of one of the conspirators, though done while he was engaged in the common purpose, the others are not legally responsible therefor, but if the crime is in furtherance of the common purpose, and is such an offense as might have been and should have been contemplated would result from the execution of the conspiracy, and it was so executed, then all engaged in the unlawful purpose are equally guilty, though at the time they may have been engaged in some other part of the common purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.\*]

### 8. HOMICIDE (§ 169\*)—EVIDENCE—RELEVANCY.

Where a company was illegally organized and equipped in Texas under an agreement to invade Mexico, such organization constituted a felony in Texas as violating Pen. Code 1911, arts. 1433-1441, and decedent having been killed by members of the organization to prevent his informing against it, a flag with the words:

"The Liberal Party Mexico. Land and Liberty"—emblazoned thereon and a bugle found at the conspirators' camp, were admissible, in a prosecution against them for the homicide, to show they were engaged in an illegal design.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.\*]

### 9. HOMICIDE (§ 111\*)—EXCUSE—JUSTIFICATION.

Where a sheriff and certain of his deputies attempted to investigate a company illegally organized in Texas to invade Mexico, and as the sheriff and his officers approached the camp two of them were captured by the conspirators and the sheriff and one deputy fled, the fact that the officers had no legal authority to make the investigation was not justification nor excuse for the killing of one of the captured officers by the conspirators some three hours later.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.\*]

### 10. HOMICIDE (§ 111\*)—AUTHORITY—INVESTIGATION OF OFFENSES.

Where a company of conspirators organized in Texas to invade Mexico, the sheriff of the county in which the camp was located was justified in investigating the organization, though no complaints had been filed nor warrants of arrest issued.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.\*]

### 11. HOMICIDE (§ 111\*)—DUTIES.

Where a deputy sheriff was surprised and captured and later killed by a body of men armed and organized in Texas to invade Mexico, it was the duty of the sheriff, on ascertaining such crime, to use all necessary force to pursue and capture the criminals without a warrant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.\*]

### 12. CRIMINAL LAW (§ 519\*)—STATEMENTS BY ACCUSED—ARREST.

Where accused escaped from a sheriff's posse when his co-conspirators were arrested, and the succeeding day was detected by a ranchman, and there was nothing in the latter's appearance or conduct to lead accused to believe or suspicion that the ranchman contemplated taking him in charge and delivering him to the officers, the conversation that ensued between them at the time was not objectionable on the ground that accused was then under arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.\*]

### 13. WITNESSES (§ 277\*)—ACCUSED—CROSS-EXAMINATION.

Where accused became a witness voluntarily in his own behalf, he was subject to cross-examination as any other witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

### 14. HOMICIDE (§ 250\*)—CONSPIRACY—EVIDENCE.

In a prosecution for homicide, evidence held to sustain a conviction of murder pursuant to a conspiracy to organize a company in Texas to invade Mexico and to prevent decedent from giving information concerning the conspirators' unlawful purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

### 15. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

Where, in a prosecution for homicide alleged to have been committed in pursuance of a conspiracy to organize in Texas an armed force to invade Mexico, accused voluntarily became a witness in his own behalf, evidence obtained

from him in developing the homicide case was not objectionable because it also showed a conspiracy to violate the neutrality laws of the United States.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

**16. CRIMINAL LAW (§§ 365, 371\*)—EVIDENCE—OTHER OFFENSES.**

When extraneous crimes are *res gestæ* of an offense on trial, or tend to show the intent with which accused acted, and such intent is an issue, or tend to connect him with the offense charged, they are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 807, 830-832; Dec. Dig. §§ 365, 371.\*]

**17. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ISSUES.**

Where, in a prosecution for homicide, the state did not rely on a conspiracy to specifically kill decedent, but claimed that decedent was killed, as an act incidental to the furtherance of a conspiracy to illegally organize in Texas a company to invade Mexico, the court properly refused to charge on conspiracy to kill decedent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

**18. HOMICIDE (§ 169\*)—EVIDENCE.**

In a prosecution for killing decedent pursuant to a conspiracy to organize in Texas a company to invade Mexico, evidence concerning the carrying of arms and ammunition from Texas into Mexico was admissible as showing the formation of an unlawful conspiracy.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.\*]

**19. CRIMINAL LAW (§ 800\*)—INSTRUCTIONS—ISSUES.**

Where accused was not being prosecuted for conspiracy, but for murder alleged to have been committed as incidental to a conspiracy to organize in Texas a company to invade Mexico, the court did not err in omitting to define conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.\*]

**20. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—DEFENSE.**

Where the court gave the customary charge on presumption of innocence and reasonable doubt, and in a separate paragraph affirmatively presented accused's defense, the charge was not objectionable because the part submitting the issue to the jury for a finding did not charge the converse of the proposition that if the jury did not believe that the elements of the offense had been proven as required, they should acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**21. INDICTMENT AND INFORMATION (§ 174\*)—PRINCIPALS AND ACCOMPLICES.**

One charged in an indictment as a principal cannot be convicted as an accomplice to the crime; they being separate and distinct offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 540-543; Dec. Dig. § 174.\*]

**22. HOMICIDE (§ 30\*)—PRINCIPALS—"ACCOMPLICE."**

Where decedent was killed by a company of armed men, illegally organized to invade Mexico, and accused was with the company from the time of decedent's capture until long after he was killed in order that he might not inform against the party accused was a principal and not an accomplice, though he was some distance away when the killing occurred and did

not participate in it, under the statute defining an "accomplice" as one who is not present at the commission of the offense, but who, before the act is done, advises, commands, or encourages another to commit the offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.\*]

**23. CRIMINAL LAW (§ 59\*)—"PRINCIPAL"—"ACCOMPLICE."**

The dividing line between principals and accomplices is that to constitute one a "principal" he must do something in furtherance of the common design at the time the offense is committed, whether present or not, while an "accomplice" is one who, though having advised or agreed to its commission, is not present when the offense is committed, or who is not doing anything at the time in furtherance of the common design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, First and Second Series, Accomplice; Principal.]

**24. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—ACCOMPLICE—PREJUDICE.**

Where, in a prosecution for homicide committed as incidental to a conspiracy to commit another offense, there was no suggestion that, if accused was guilty of any offense, he might be guilty as an accessory or an accomplice, but all the evidence showed that if he was guilty at all it was as a principal in the transaction, and that at the time of the crime he was engaged with others in the unlawful conspiracy of which the killing was the offspring, he was not prejudiced by an instruction defining principals, containing a proviso that the offense was committed during the existence and in the execution of the common design and intent of all, whether in fact all were actually present on the ground when the offense was committed or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

Davidson, J., dissenting.

Appeal from District Court, Frio County; J. F. Mullally, Judge.

J. A. Serrato was convicted of murder, and he appeals. Affirmed.

R. W. Hudson and J. L. Pranglin, both of Pearsall, Magus Smith, of Jourdan, and W. F. Ramsey and C. L. Black, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** The indictment in this case alleges that:

"The grand jurors, for the county of Dimmit, state aforesaid, duly organized as such at the September term, A. D. 1913, of the district court for said county, upon their oaths in said court present that J. M. Rangel, Leonardo L. Vasquez, Abran Cisneros, Domingo R. Rosas, Bernardino Mendoza, Augennio Alzalde, Luis Mendoza, Lino Gonzales, Miguel P. Martinez, L. R. Ortiz, Jesus Gonzales, J. A. Serrato, Pedro Perales, Delipe Sanchez, Charles Cline, and Dan Daniels, alias Dynamiter Dan, acting together on or about the 11th day of September, A. D. 1913, and anterior to the presentment of this indictment, in the county of Dimmit and state of Texas, did then and there unlawfully, with malice aforethought, kill Candelario Ortiz, by shooting him with a gun."

The venue was changed to Frio county, and a trial had there. The facts would disclose that the sheriff of Dimmit county was informed that guns, ammunition, etc., were being shipped into his county and unloaded at a small station some six miles from the county seat; that strangers were gathering in his county, and he gathered together Deputy Sheriffs Buck and Ortiz and City Marshal White, and the four began an investigation of the matter. Circumstances led them to follow a trail leading to the Capones ranch, and when they arrived near the Capones windmill and a little creek, which had a growth of underbrush on its banks, they waited until daylight, and then the sheriff and city marshal took one trail leading down to the branch, and the two deputy sheriffs took another trail leading in the same direction. Upon turning a bend in the branch Messrs. Buck and Ortiz faced some 18 men with rifles drawn, who captured them and carried them to their camp, where they had guns, pistols, ammunition, cartridges, dynamite, bayonets, and other implements of war. About the time these men arrived at the camp with the two deputies as prisoners, shots were heard in the direction that Sheriff Gardner and Marshal White had gone, and some of those who had captured the two deputies rushed over in that direction, while others held the two deputy sheriffs. Shortly they were called over to where the others were, and there lay a dead Mexican on whose person was afterwards found a red flag with the words: "Partido Liberal Mexicano. Tierra y Libertad"—emblazoned thereon, meaning, "The Liberal Party Mexico. Land and Liberty." There was also found in the creek at the camp later a bugle. The entire party capturing the deputy sheriffs were Mexicans, except one, an American named Cline. They had a captain elected named Rangel. When the party got over to where the dead Mexican was, the sheriff and marshal were seen at some distance, and Cline called to the sheriff and marshal to come there. As they started to do so Deputy Sheriff Buck called to them not to do so, and when he did so a general fusillade was opened on the sheriff and city marshal, who fled. Mr. Buck testifies that appellant was one of the men with rifles who captured Ortiz and himself, and that he also was one of the men who fired on the sheriff and marshal. Appellant admits his presence, but denies that he was one of the party who captured the two deputies, and denies that he fired on the sheriff. Seeing that their rendezvous was discovered, Capt. Rangel and all of his men made arrangements to at once depart in the direction of the Mexico line. They each took a rifle and pistol and a lot of ammunition and supplies, and, tying Buck's and Ortiz's hands behind them, loaded them with supplies, making pack horses of them. They traveled through the brush some three or four miles. When they came to a bank,

a hard climb, Ortiz attempted to climb, but failed to do so, Buck succeeding in doing so. Buck says at the time they were captured three or four of the captors told Capt. Rangel that Deputy Sheriff Ortiz was one of the men who had been informing on them, when the captain remarked he would inform no more; that they would kill him. After his ineffectual attempt to climb the hill, Ortiz remarked that he could not climb, loaded as he was, with his hands tied behind him, and if they were going to kill him, they had just as well do it then. The captain ordered all except four men to proceed with Mr. Buck, and after they had traveled some 40 steps Mr. Buck and those with him heard a volley of shots, and Capt. Rangel and those remaining with him shortly thereafter joined the others. Ortiz was found at this point that night with five bullet wounds in his body any one of three of them being fatal. The party proceeded then on their way, forcing Buck along.

The sheriff, when he escaped, proceeded to organize a posse, and that evening about 4 o'clock Capt. Rangel and his band, after a parley, agreed to deliver Mr. Buck to the posse, if the posse would agree not to pursue the captain and his men no further, and would give them a statement that they were to be allowed a passport. This was agreed to, and Mr. Buck was delivered to the posse. At this time the posse was informed that Ortiz was tied to a tree near the point where Buck had last seen him. The posse departed and sent men to relieve Ortiz. When they got to the point designated they found him dead, as hereinbefore stated. Another posse was organized by the sheriff, and Capt. Rangel and his company again pursued, this time Lieut. Allen of the United States Army, and some of his soldiers, joining in the pursuit. The next day they were overtaken near the line of Mexico. As the posse approached two volleys were fired at the posse; these shots were returned, when Capt. Rangel and his men raised a flag of truce and surrendered. There were 2 dead and 13 of the men named in the indictment captured. Appellant was seen to flee while the shooting was going on, and the next day he was found near this place by Mr. Carrigan, who took charge of him, and he was incarcerated in jail with the others. Cline said that their "orders were to shoot anything except American soldiers; to kill any sheriff's posse, or any citizens that might come—to fight to a finish." It is conclusively shown that this band had organized to invade our sister republic, Mexico, for exactly what purpose is not disclosed by the record, except that it was an armed force.

[1] As the transcript of the proceedings from the district court of Dimmit county to the district court in Frio county only showed that "on this the 15th day of September, 1913, the honorable grand jury appeared in open court and presented the following true

bill of indictment: No. 553, State of Texas v. J. M. Rangel et al."—a motion was made in the district court of Frio county, after change of venue, to abate or quash the indictment, on the ground that the entry made in the minutes of the district court of Dimmit county as disclosed by the transcript did not show that "a quorum of the grand jury" was present when the indictment was presented. The language used in the minutes would, taken literally, embrace the entire grand jury, for it says "the honorable grand jury appeared in open court and presented the indictment," and article 282 of the Code of Crim. Proc. says:

"An indictment is to be considered as 'presented' when it has been duly acted upon by the grand jury and received by the court."

The entry made would be in literal compliance with this law, but appellant insists that rule 110, adopted by the Supreme Court (142 S. W. xxv), provides: "The record should show, and it should appear in the transcripts of the record for the Court of Criminal Appeals: First. That the indictment was presented in open court, a quorum of the grand jury being present," and that as this entry in the minutes does not specifically state that a quorum of the grand jury was present, the indictment should be abated. If this motion had been made in the court where the indictment was returned, it would have been proper to have the entry made in the minutes amended so as to conform to the requirements of the rule, but the question here presented is, Can this motion be made in the district court of Frio county, after the venue had been changed, which court would have no control over, nor power to order or permit amendments to, the minutes of the district court of Dimmit county? Appellant earnestly insists that the motion can be made in the district court of Frio county, and that court would have no option but to abate the indictment. He presents the question at length in a very able and exhaustive brief, and contends that the case of *Caldwell v. State*, 41 Tex. 86, was rendered when the statute was different from what it now appears to be; that the articles of the Code were amended relating to change of venue in the revision of 1876, and while the rule announced in the *Caldwell* Case had seemingly been followed in all the decisions since then, yet appellant contends that the rule therein announced is not a proper construction of our present statute, and the *Caldwell* Case has been followed because the court's attention had not been called to the change in the statute. The principles of law announced in the *Caldwell* Case by Judge Roberts are not dependent entirely upon statutory enactments, but are in accordance with the recognized rules of law governing all such matters—that motions which do not go to the merits of the case or substance of the indictment, but which go only to some matter of procedure, such as the entry of an order, and which could have been amended, corrected,

or entered by order of the court, must be made before announcement of ready for trial, and in the court where the proceedings were had or indictment returned.

Article 630 of the Code of Criminal Procedure, which provides that before a change of venue is ordered in any case, all motions to set aside the indictment, and all special pleas and exceptions which are to be determined by the judge, *and which have been filed*, shall be disposed of by the court, and, if overruled, the plea of not guilty entered was not intended to deprive a defendant of any substantial right, but was passed as much in his interest as in the interest of the state—to compel the judge before changing the venue to pass on all pleas on file and enter judgment thereon, and if he erred, such error might be reviewed on appeal. But we think if no pleas of any character, other than that of not guilty, as in this case, are made, only such pleas as go to the merits or matters of substance in the indictment can be presented after the case has passed from the control of the court in which the indictment was returned. This was the holding of Judge Roberts in the *Caldwell* Case, and we think the correct holding. If appellant had filed a sworn plea alleging as a fact that a quorum of the grand jury was not present when the indictment was returned, the court should have heard evidence on it, or any other plea which went to the merits or substance of the indictment, because our Constitution provides that no man shall be tried except upon indictment duly returned by a grand jury, and if a plea raises a question that an indictment has not been so found and returned into court, it presents a question of fact upon which the court should hear evidence and act thereon, for this question can be raised at any time, and in any trial court where the case may be pending.

[2] But when there is no plea alleging that a quorum of the grand jury was not present when the indictment was found and presented in court, but only an allegation that the minutes of the court do not show this fact, this presents a matter as to mere matter of form, which, if called attention to in the court where the indictment was returned, could be corrected and amended, and does not go to the merits, for the indictment would be a *legal one* if found and presented by a quorum of the grand jury, if the clerk had in fact made no entry in his minutes—the neglect of the clerk would not nullify the legal act of the grand jury, and the court when the question was raised could order the entry then made in the minutes. Not only has this been the rule in all the cases cited by appellant (to wit, *Goode v. State*, 57 Tex. Cr. R. 220, 123 S. W. 597; *Vance v. State*, 34 Tex. Cr. R. 395, 30 S. W. 792; *Loggins v. State*, 8 Tex. App. 434; *Ex parte Cox*, 12 Tex. App. 665; *Barr v. State*, 16 Tex. App. 333; *English v. State*, 18 S. W. 678), but in all cases decided

by this court. We want to commend counsel for fairly stating the holding of the court heretofore and citing the authorities, but we cannot agree with him as to the distinction he tries to draw. He thinks that they proceed upon incorrect interpretation of the statute, or that the amended statute had been overlooked, and that the holding was that article 630 of the Code of Criminal Procedure governed the matter, and the court based its holding on this article of the Code, while we think article 576 shows that the matters complained of in appellant's plea are matters of form, and as said by Judge White in *Barr v. State*, 16 Tex. App. 335:

"Irregularities in the *record entry of the presentment of an indictment* do not constitute cause for setting aside the indictment, or in arrest of judgment. Such matters should be mooted by suggestion in limine to the court wherein the indictment was presented, and are not available in a different forum to which the venue has been changed."

In the case of *Hamilton v. State*, 145 S. W. 350, are collated a number of authorities in this state holding that where the matter complained of does not relate to a matter of substance but of form only, such complaint must be timely made, and at a time when the trial court could have the matter corrected if the facts justified it in so doing. The court did not err in refusing to quash the indictment.

Appellant also moved to quash the special venire drawn. While this matter is not presented in the brief filed in this court, yet we have carefully scrutinized the papers relating thereto, and the venire was drawn, served, and returned in accordance with the provisions of the law.

[3] In a number of bills of exception appellant complains of the introduction of any testimony as to what was said or done by Capt. Rangel or any of his company after the death of Ortiz until their arrest, his contention being that if the state relied on a conspiracy to kill Ortiz to hold appellant as a principal, then after the accomplishment of that act, the acts, conduct, and words of his co-conspirators would not be admissible after the accomplishment and end of the conspiracy. If appellant's premise was correct that the state relied on a specific agreement and conspiracy to kill Ortiz and nothing else to prove its case, then undoubtedly his proposition would be correct, and the authorities cited by him so hold. But did the state allege or attempt to prove any agreement or specific agreement to kill Ortiz? Herein is where appellant is wrong in his premise. The state endeavored to prove, and the evidence tended to show, only that Capt. Rangel had organized a company to invade Mexico; that they selected a point in Dimmit county to gather and rendezvous; that appellant joined this company, knowing its object, intent, and purpose, and its accomplishment, agreement, or conspiracy, whichever you may call it, was not at an

end when the parties were arrested, but they and all of them were at that time engaged in furtherance of that agreement or conspiracy, and the evidence amply supports this conclusion that the killing of Ortiz was an incident to the conspiracy and an accomplishment of the agreement; and whether or not appellant could be held as a principal in the killing of Ortiz, he firing none of the shots, is a fact to be gathered from all the facts and circumstances attendant upon the agreement or conspiracy and the efforts to accomplish it and in furtherance of it. That this company was gathered together, organized, and equipped for an illegal purpose is amply shown by all the testimony, and is admitted by appellant in his testimony. But he most emphatically denies that there was any agreement to kill Ortiz or any one else in Dimmit county so far as he knew; that he entered into no such agreement or conspiracy. The conspiracy or agreement shown by the record and admitted by appellant was not at an end until the time of their arrest and incarceration in jail. The question as to whether or not the facts and circumstances connect appellant with the killing of Ortiz sufficiently to bind him as a principal is another question, but the court certainly did not err in admitting the testimony, as it all had a bearing on that issue.

[4] It has always been the rule in this state that the acts and declarations of one conspirator in furtherance of the common design are admissible against another conspirator pending the conspiracy and until its final termination. This proposition includes anything that was within the contemplation of the conspiracy, such as dividing the spoils, or any of those matters that may be subsequent to, but included in the scope of the conspiracy. *O'Neal v. State*, 14 Tex. App. 582; *Rix v. State*, 33 Tex. Cr. R. 353. 26 S. W. 505; *Franks v. State*, 30 Tex. Cr. R. 149, 35 S. W. 977; *Small v. State*, 40 S. W. 790; *Long v. State*, 55 Tex. Cr. R. 57, 114 S. W. 632; *Gracy v. State*, 57 Tex. Cr. R. 68, 121 S. W. 706; *Milo v. State*, 59 Tex. Cr. R. 196, 127 S. W. 1028; *Kipper v. State*, 45 Tex. Cr. R. 384, 77 S. W. 611; *Holt v. State*, 39 Tex. Cr. R. 299, 45 S. W. 1016, 46 S. W. 829; *Eggleston v. State*, 59 Tex. Cr. R. 542, 128 S. W. 1111.

[5] And what is said and done by any of the conspirators, pending the conspiracy and in furtherance of the common design, is admissible against the one on trial, though said and done in his absence. *Wallace v. State*, 46 Tex. Cr. R. 349, 81 S. W. 966; *Barber v. State*, 69 S. W. 515; *Trevino v. State*, 38 Tex. Cr. R. 64, 41 S. W. 609; *Dobbs v. State*, 51 Tex. Cr. R. 115, 100 S. W. 946; *Roma v. State*, 55 Tex. Cr. R. 345, 116 S. W. 598; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Smith v. State*, 21 Tex. App. 96, 17 S. W. 560; *Armstead v. State*, 22 Tex. App. 59, 2 S. W. 627; *Slade v. State*, 29 Tex. App. 391, 16 S. W. 253; *Richards v. State*, 53

Tex. Cr. R. 409, 110 S. W. 432; Bowen v. State, 47 Tex. Cr. R. 144, 82 S. W. 520; Williams v. State, 45 Tex. Cr. R. 240, 75 S. W. 509; Chapman v. State, 45 Tex. Cr. R. 484, 76 S. W. 477; Hannon v. State, 5 Tex. App. 551; Taylor v. State, 3 Tex. App. 200; Moore v. State, 15 Tex. App. 1; Eggleston v. State, 59 Tex. Cr. R. 542, 128 S. W. 1111.

[6] And as to the general rule governing these matters Mr. Phillips in his work on Evidence says:

"It is an established rule that when several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan with reference to the common object is, in contemplation of law, the act of the whole party. *Pb. on Ev. (5th Ed.)* 168. And proof of the plot or combination must precede proof of declarations made by either of the conspirators, though the acts and declarations of separate parties in the planning or execution of the scheme may be shown in evidence of the common design. *State v. Simmons*, 4 Strob. (S. C.) 266; *Regina v. Mear*, 1 Eng. Law & Eq. 581; *State v. Ripley*, 31 Me. 386; *Glory v. State*, 13 Ark. 236; *Hardin v. State*, 4 Tex. App. 366.

"The correct rule is also stated by Mr. Greenleaf. He says: 'The same principles apply to the acts and declarations of one of a party of conspirators in regard to the common design as affecting his fellows. Here a foundation must first be laid by proof sufficient, in the opinion of the judge, to establish prima facie the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed in law a party to every act which may afterwards be done by any of the others, in furtherance of such common design.'"

Doubtless appellant will accede to all these rules of law, and admit that the testimony would be admissible against him if he was being prosecuted for engaging in this conspiracy, but he may contend that, as he was being prosecuted for a matter that grew out of and was incident to this conspiracy, it should not be admitted against him, unless it be shown that he was in some way connected with the offense which was committed by another during the time of the conspiracy and while the object and purpose of the conspiracy was being furthered and actively engaged in by all of the conspirators, including appellant. As to whether the killing of Ortiz was in furtherance of the common purpose of all, and if so was legally within the contemplation and agreement of them all, is a question that arises in the case, and necessarily all the acts and conduct of each of the parties during the existence and while actively engaged in the furtherance of the common purpose and design would be admissible on that issue. In the case of *Mitchell v. State*, 36 Tex. Cr. R. 310,

36 S. W. 459, this court, speaking through Judge Hurt, says:

"If several conspire to invade a man's household, and go to it, armed with deadly weapons, to attack and beat him, whereupon one gets into difficulty with him and kills him, the rest are guilty also of murder, though they did not mean it.' 1 Bishop's New Crim. Law, § 633, subd. 5, citing *Williams v. State*, 81 Ala. 1, 1 South. 179 [60 Am. Rep. 183]. 'Where two combine to fight a third with fists, if death accidentally results from a blow inflicted by one, the other also is answerable for the homicide. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable.' 1 Bishop's New Crim. Law, § 637, subd. 5. Mr. Bishop deduces the following rules on the subject: 'The rules to determine responsibility are in reason, and fairly well deducible from the modern authorities, substantially as follows: One is responsible for what of wrong flows directly from his corrupt intentions, but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. If he did not intend it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into active and indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. But if the wrong done was a fresh and independent product of the mind of the doer, the other is not criminal therein merely because, when it was done, he meant to be a partaker with the doer in a different wrong.' *Id.* § 641. It follows, then, if the authorities cited enunciated the correct doctrine on this subject, that if the defendant and Kane Neal combined together to whip or beat the deceased, and to do so at all hazards, and, if necessary to that end, to take his life, in case he resisted it or fled from it, one would be responsible for the act of the other. If, in such case, they came upon him, and he resisted being beaten, and, in order to accomplish their common purpose, they either killed him with a picket or a pistol, it would be murder. If he fled from them to avoid being whipped, and they killed him with a picket or a pistol in his flight, it would be murder, that is, if the picket was in its nature, as used, a dangerous and deadly weapon, and what was done with it or with the pistol was directly and immediately dangerous to the life of the deceased, and so, if he submitted, and they beat him with a picket or a pistol, in a manner directly and immediately dangerous to his life, and death resulted, both would have been guilty of murder; that is, if the parties in their joint agreement contemplated the result, the defendant would be answerable, though it was produced in a manner he did not contemplate. If he did not intend it in kind, yet if it was the ordinary effect of the cause, he is responsible."

[7] It is thus seen that if the crime committed is not in any way connected with the common purpose and design, but is an independent act of one of the parties, although he did it while engaged in the design, the others would not be legally responsible for such independent act, but if the crime was in furtherance of the common purpose and design, and the facts show that it was such an offense as might have been and should have been contemplated by the parties would be the result of the execution of the common design, and it was so executed, then all engaged

in the unlawful purpose are equally guilty of the offense, although they, at the time, may have been engaged in some other part of the common purpose and design. And as all the evidence adduced was pertinent to show whether or not the killing of human beings was in contemplation of the parties if necessary to accomplish their unlawful design, the court did not err in admitting in evidence all the testimony from the time Ortiz and Buck were captured until the conspiracy was put an end to by the capture of the conspirators and the breaking up of the conspiracy.

[8] It is also contended that the court erred in admitting in evidence the flag with the words: "The Liberal Party Mexico. Land and Liberty"—emblazoned thereon, and the bugle found at the camp. It was necessary for the state to show that the parties had gathered there and were engaged in an unlawful design, and this was cogent evidence of that fact, together with the other facts and circumstances. But it is insisted that this only tended to show that parties were formed in a company to violate the neutrality laws, and, therefore, a violation of the United States Penal Code and not the laws of Texas. While the evidence conclusively shows that they had gathered there for the purpose of violating that law, yet it does not preclude the fact that by their acts and conduct they were also violating the law of this state. Chapter 1 of title 18 of the Penal Code provides that a conspiracy is an agreement entered into between two or more persons to commit any of the offenses named in that chapter, and embraces an agreement to commit any felony, and also provides that a conspiracy entered into in this state for the purpose of committing a felony in any foreign country shall be punished in the same manner as if the offense was to have been committed in this country. Under the laws of all nations the inciting of rebellion and organization of armed forces against the acting government is a felony of very grave grade, and that this company had organized, elected officers, secured arms, and all the munitions of war, is amply shown by the record, under an agreement to enter Mexico for an unlawful purpose and for the purpose of resisting the legally constituted authorities. So they had violated, and were engaged in violating, not only the laws of the United States, but the laws of this state as well, and could be prosecuted for conspiracy in this state.

[9] It is insisted that the sheriff and his deputy were in the wrong in proceeding to or near this camp for the purpose of making an investigation; that no complaints had been filed, and they had no warrants of arrest. This is foreign to any issue in the case, for if the sheriff and his deputies had been in the wrong in making an investigation, it would furnish no excuse or justification for the killing of Ortiz some three hours later, after

the sheriff had fled and Ortiz was in their power.

[10] But we do not think the sheriff or his deputies are subject to any censure for their acts, but they are rather to be praised. The sheriff had information furnished that arms and ammunition were being shipped into his county and being unloaded at a small wayside station; that strangers were also gathering in his county, and getting these dangerous implements and carrying them no man knew whither. We think it commendable in him for the protection of his people that he deemed it his duty to make suitable investigation of the object and purpose of these men in gathering there and having shipped to them guns, ammunition, dynamite, etc. It may be said that as they were of the Mexican race, and there was internal war in progress in Mexico, it might be surmised that they were bound thither and no danger threatened the citizens of Dimmit county. If one had so surmised, the facts indicate he would have been correct, yet no one knew that to be the purpose and object when the sheriff began his investigation, and if he had so known, it would have been the duty of the sheriff to have made the investigation, learned their names, filed complaints against them, and arrested them. As said before, no censure or blame is attachable to the sheriff or his deputies for seeking to ascertain the true facts; they had endeavored to make no arrests at the time Buck and Ortiz were seized, and when these two deputies were seized illegally in the presence and sight of the sheriff, it was his duty to organize a posse, pursue and capture the men who had thus kidnapped two officers of the law who were simply performing their duty under their oath.

[11] And when it was ascertained that Deputy Sheriff Ortiz had been slain by them, it was his duty to use all necessary force to pursue and capture them. It was not possible to file complaint, for he did not know who they were, and if he had taken time to ascertain their names and then file complaints, the appellant and his coconspirators would have been beyond his jurisdiction and in the Republic of Mexico ready to further pursue their unlawful enterprise.

[12] As shown by the testimony, appellant escaped when the majority of his companions were captured; the next day he was detected in the brush by Mr. Carrigan, who was not an officer of the law. When he and Mr. Carrigan met, a conversation ensued, and appellant objected to this conversation being introduced in evidence, on the ground that he was then under arrest. Mr. Carrigan was a ranchman, and there was nothing in his appearance or conduct to lead appellant to believe or even suspect that he contemplated taking him in charge and delivering him to the officers. Under such circumstances there was no error in admitting appel-

lant's statements, made at that time, in evidence. *Williams v. State*, 53 Tex. Cr. R. 3, 108 S. W. 371; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Grant v. State*, 56 Tex. Cr. R. 414, 120 S. W. 481; *Craig v. State*, 30 Tex. App. 620, 18 S. W. 297; *Martin v. State*, 57 Tex. Cr. R. 266, 122 S. W. 558; *Frye v. State*, 146 S. W. 199.

[13] Appellant took the witness stand in his own behalf, admitting that he was at the rendezvous and was with the parties at the time Buck and Ortiz were captured by Capt. Rangel and his company, but said he did not participate in their capture, as he was sitting down by a tree; he admitted the shooting at the sheriff and the city marshal, but says he did not participate therein; he admitted that Buck and Ortiz were tied and made pack horses of, but says he took no part in tying them or loading them down; he admits that he was with the company when they compelled Buck and Ortiz to go with them, but denies participation in such conduct; he admits that he was present when they came to the slippery hill that Ortiz could not or would not climb loaded as he was, and that Capt. Rangel told him and the others to go on, and they did so, taking Buck with them, and after they had gone 40 or 50 yards he heard the shots, but says he did not know they intended to kill Ortiz, or had done so, until some time thereafter, when he expressed his disapproval of such an act. Thus it is seen that he made himself a witness and testified to very material facts in his defense, and if believed by the jury, they might have acquitted him of being a party to the killing of Ortiz. And having taken the witness stand voluntarily, he became subject to cross-examination the same as any other witness, and the court did not err in so holding. *Morales v. State*, 36 Tex. Cr. R. 234, 36 S. W. 435, 846; *Brown v. State*, 38 Tex. Cr. R. 597, 44 S. W. 176; *Oliver v. State*, 33 Tex. Cr. R. 541, 28 S. W. 202; *Jackson v. State*, 33 Tex. Cr. R. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30. While defendant testified as above stated, Deputy Sheriff Buck testified that defendant was one of the men who had their guns leveled on him and Ortiz when they were captured; that defendant informed Capt. Rangel that Ortiz was a spy who had been reporting on them to the officers, when the captain replied that he, Ortiz, would report no more, for they would kill him, Ortiz, and defendant did not protest, but by silence acquiesced in this statement of the captain; that defendant was one of the men who rushed over and attempted to capture the sheriff and marshal also, and fired on them while they were fleeing; that defendant was present actively participating in all the preparations of departure when he and Ortiz were tied and loaded down; that defendant was one of the men who had him in charge, and marched near him; that defendant was present when Ortiz declined to

climb the hill, and said they had as well kill him then as any other time; that defendant was one of the men who had charge of him, Buck, and marched him on when the captain told them to go ahead, and that defendant and others marched him off 40 or 50 steps and then waited until Capt. Rangel and those who actually shot Ortiz came up; that defendant was one of the guards who drove him, Buck, on with epithets and threats, and punched him with his rifle; that defendant was present when the posse approached to secure his release, and when he was informed that if the posse fired he, Buck, would be the first one killed; and that defendant was one of those who arranged themselves in a V shape to capture the posse, being armed all the time with a rifle and pistol. So if Buck is to be credited, appellant was an active participant in all the proceedings up to the time Buck was released, except in the actual firing of the shots that killed Ortiz, and at this time he was in charge of Buck, not over 40 or 50 yards away, and waited until those who did fire the shots caught up. And the evidence further shows that after Buck's release appellant remained with Capt. Rangel's company until they were overtaken the next day, and was present when the two volleys were fired at the posse; he then escaped, but was captured the next day still armed with his rifle; and Cline says the agreement was to kill any citizen or posse who interfered with their unlawful design and purpose. The court charged the jury:

"In order to warrant a conviction of a crime on circumstantial evidence, each fact, necessary to the conclusion sought to be established, must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the offense was committed by the accused or by other persons (as charged in the indictment) with whom he was acting together as a principal in the execution of a common design to commit the offense charged (if he was so acting), and that such offense was not committed by any other person.

"But in such cases it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis, except the defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the defendant not guilty."

[14] And under this charge we think the evidence amply sufficient to support the verdict, for the facts and circumstances in this case authorized the jury to find that the killing of Ortiz was in pursuance of the common purpose and design, and especially is this true of appellant, whom Buck says told Capt. Rangel that Ortiz was one of the spies watching their movements, and silently acquiesced when Rangel replied, "He will report no more, for we will kill him," and when Ortiz refused to go on, they did kill

him, if for no other reason than to keep him from reporting on them and frustrating the execution of their purpose and design.

[15] But appellant says in compelling him to testify in regard to their organization and purposes, the state was compelling appellant to disclose he had committed another and different crime, conspiring to violate the neutrality laws of the United States. The state did not place appellant on the stand and could not do so, and when he voluntarily took the stand and testified, then he could be cross-examined, and if in developing the case for which he was being tried the evidence necessarily disclosed he had committed other and different crimes in connection with this one, evidence of such other crimes would be admissible if it shed light on the offense for which he was being tried. As said in *Craig v. State*, 23 S. W. 1108, and *Stovall v. State*, 97 S. W. 93, any competent evidence which tends to defeat the defense urged is admissible, though it tends to show appellant is also guilty of another offense, and this even though he has been acquitted of such other offense.

[16] And it has always been the rule that when extraneous crimes are *res gestæ* of the offense on trial, or tends to show the intent with which the person on trial acted when such intent is an issue in the case, or which tends to connect the defendant with the offense for which he is on trial, it is admissible. *Gilbraith v. State*, 41 Tex. 567; *Long v. State*, 11 Tex. App. 387; *Davison v. State*, 12 Tex. App. 215; *McCall v. State*, 14 Tex. App. 362; *Holmes v. State*, 20 Tex. App. 518; *Harwell v. State*, 22 Tex. App. 253, 2 S. W. 606; *Kelley v. State*, 31 Tex. Cr. R. 211, 20 S. W. 365; *Sisk v. State*, 42 S. W. 986; *Fielder v. State*, 40 Tex. Cr. R. 184, 49 S. W. 376; *Stanfield v. State*, 43 Tex. Cr. R. 12, 62 S. W. 917. And when defendant takes the stand as a witness he is subject to the same rules as any other witness. He may be impeached, attacked, sustained, bolstered up, made to give evidence against himself, cross-examined as to new matter and treated in every respect as any other witness testifying in behalf of defendant; *Hare v. State*, 56 Tex. Cr. R. 6, 118 S. W. 544, 133 Am. St. Rep. 950; *Mirando v. State*, 50 S. W. 714; *Jackson v. State*, 33 Tex. Cr. R. 287, 26 S. W. 194, 622, 47 Am. St. Rep. 30; *Hutchins v. State*, 33 Tex. Cr. R. 299, 26 S. W. 399; *Huffman v. State*, 28 Tex. App. 177, 12 S. W. 588; *Brown v. State*, 38 Tex. Cr. R. 598, 44 S. W. 176; *Pyland v. State*, 33 Tex. Cr. R. 382, 26 S. W. 621; *Thomas v. State*, 33 Tex. Cr. R. 615, 28 S. W. 534; *Hargrove v. State*, 33 Tex. Cr. R. 456, 26 S. W. 993; *May v. State*, 33 Tex. Cr. R. 74, 24 S. W. 910; *Monticue v. State*, 40 Tex. Cr. R. 531, 51 S. W. 236; *Hamblin v. State*, 41 Tex. Cr. R. 142, 50 S. W. 1019, 51 S. W. 1111; *Alexander v. State*, 40 Tex. Cr. R. 404, 49 S. W. 229, 50 S. W. 716; *Brown v. State*, 57 Tex. Cr. R.

269, 122 S. W. 566; *McFadden v. State*, 28 Tex. App. 245, 14 S. W. 128; *Mendez v. State*, 29 Tex. App. 608, 16 S. W. 766.

In this case the conspiracy to violate the neutrality laws and the killing of Ortiz were certainly *res gestæ* of each other—parts of the same transaction according to the testimony offered by the state.

[17] There was no effort made to prove, and the state did not rely on, a conspiracy formed to specifically kill Ortiz; therefore the court did not err in refusing the special charges presenting that issue. It is always proper to refuse charges presenting an issue not even suggested by the testimony. The conspiracy relied on by the state was the agreement, conclusively shown, for all the parties named in the indictment to gather at a point near Carrizo Springs in Dimmit county, to which place the arms, ammunition, dynamite, etc., were carried, and when the company was completed to go into Mexico on an unlawful mission, and the facts and circumstances would authorize a jury to find that embraced in the conspiracy was an agreement to resist all efforts to prevent the execution of their agreed purpose, even unto death, and in the furtherance of said design and as contemplated incident to it Ortiz was killed, and that being the issue, and not whether there was a specific conspiracy to kill Ortiz, the court correctly refused the charges requested.

[18] Neither did the court err in refusing the special charge requesting the court to instruct the jury not to consider any testimony in the case concerning carrying arms and ammunition into a foreign country, as such acts are not penal by the laws of the state of Texas. This testimony was admissible as tending to show the formation of an unlawful conspiracy, and if the unlawful conspiracy was to commit a felony in a foreign country, it was a violation of the laws of this state.

The court did not err in refusing the special charges requesting him to instruct the jury not to consider any of the testimony concerning the acts and declarations of others than the defendant after the killing of Ortiz. This testimony was admissible as tending to show the purpose of the conspiracy formed, and as facts and circumstances to shed light on the killing of Ortiz and as tending to show whether or not appellant was a principal in the killing of Ortiz. The court, in addition to the charge on circumstantial evidence hereinbefore copied, instructed the jury:

"All persons are principals who are guilty of acting together in the commission of an offense. When an offense has been actually committed by one or more persons, the true criterion for determining who are principals is, Did the parties act together in the commission of the offense; was the act done in pursuance of a common intent and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actual—

ly committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually, bodily present on the ground when the offense was actually committed or not.

"If there was no such common design and intent of all, including the defendant, to commit the offense, or if the offense, if any, was committed by one or more, acting independently of the defendant in so doing and without participation by him in the design and intent to commit it, then the defendant is not guilty; and if you have a reasonable doubt as to this issue, you must give the defendant the benefit of the doubt and acquit him."

"Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant J. A. Serrato, acting together with J. M. Rangel, Leonardo L. Vazquez, Abran Cisneros, Domingo R. Rosas, Bernardino Mendoza, Eugenio Alzalde, Luis Mendoza, Lino Gonzales, Miguel P. Martinez, L. R. Ortiz, Jesus Gonzales, Pedro Perales, Felipe Sanchez, and Charles Cline, as a principal as hereinbefore defined, in the county of Dimmit and state of Texas, on or about the time alleged in the indictment, with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, and not in defense of himself against an unlawful attack, real or apparent, reasonably producing a rational fear or expectation of death or serious bodily injury, with intent to kill, did unlawfully and with malice aforethought shoot and thereby kill said Candelario Ortiz, as charged in the indictment, you will find him guilty of murder, as charged, and assess his punishment at death or by confinement in the penitentiary for life, or for any term of years not less than five."

In addition to these charges, at the request of appellant, the court also instructed the jury:

"Gentlemen of the jury, you are instructed by the court that the mere presence of a party at or near the scene of the commission of an offense does not make him a principal, and mere knowledge that an offense is about to be committed will not make the party a principal; nor will his knowledge that an offense is being committed, or has been committed, nor will his failure to give alarm, his silence or inaction, make him a principal. Now, therefore, unless you believe from the evidence beyond a reasonable doubt that Jose A. Serrato was present at the time Candelario Ortiz was killed, and that he knew both of the act of the killing and of the intent of the person who killed him, or unless you believe from the evidence beyond a reasonable doubt that the defendant Jose A. Serrato was not present at the scene of the killing, but was engaged in carrying out his part of a previously conceived design theretofore entered into with others to take the life of said Candelario Ortiz, and unless you believe from the evidence beyond a reasonable doubt that the defendant did some overt act in connection with the person or persons who did kill Candelario Ortiz, whoever they may be, and that he had a guilty knowledge, and had conspired and confederated with the person or persons who did kill said Candelario Ortiz, before the act was done, then his mere presence at or near the scene of the killing, or his mere knowledge that such killing was about to be committed or had been committed, or his failure to give an alarm, or his silence or inaction, would not make him a principal, and you will acquit the defendant."

These charges, we think, fully presented the issues made by the testimony.

[19] The first complaint to the court's charge is that the court nowhere in the

charge defines "conspiracy." Defendant was not being prosecuted for the crime or offense of conspiracy, but was being prosecuted for the crime of murder, and evidence of a conspiracy was introduced as tending to show that appellant was guilty as a principal in the crime of killing Ortiz, when he did not himself fire the fatal shot, therefore it was not necessary to define the crime of conspiracy, and in so far as that evidence and issue were concerned, it was sufficiently presented in the charge on circumstantial evidence, wherein the jury was specifically instructed in regard to the matter.

[20] The next complaint of the charge is that, in submitting the issue to the jury for a finding, in that paragraph he did not charge the "converse of the proposition," and if they did not so believe, they would acquit the defendant. The court gave the usual and customary charge on presumption of innocence and reasonable doubt, and in another and separate paragraph instructed the jury that if there was no common design and intent to commit the offense, they would acquit defendant, or if Ortiz was killed by one or more persons acting independently of any design in which defendant participated, they would acquit the defendant, and if they had a reasonable doubt of such facts, they would acquit defendant. This paragraph presented his defense affirmatively, and it was unnecessary to include it in any other paragraph of the charge.

The next criticism is that the charge did not submit to the jury the right of Sheriff Gardner and those acting with him to arrest without warrant. Whether or not they had the right to arrest was not an issue in the case in so far as the killing of Ortiz was concerned. They had captured Ortiz, carried him off some three miles, and there killed him, and were not arrested until the day after the killing had taken place.

The next criticism is that the court in his main charge did not instruct the jury "that the mere presence of a party at the commission of an offense does not constitute him a principal, and the mere knowledge that an offense is about to be committed will not make a party a principal; that to make a party a principal there must be a combination of both acts and intent." If this criticism should in any manner be said to be just, then the special charge given at the request of appellant covered every phase of this matter. And the act of the last Legislature was passed requiring that appellant file his objections in writing that the court's attention might be called to any omission, and when the court was informed by appellant that he did not think the charge sufficiently covered these matters, the court gave the charge requested by appellant, and it certainly instructs the jury as appellant contends should have been done in these respects. In this court it is urged there is a

conflict in the main charge and the special charge, and such conflict rendered unintelligible the instructions, appellant contending:

"First, the two charges were directly conflicting, and the jury in this state of the record was left with no safe or certain rule to guide them; and, in view of the manifest error in the court's charge which undertook to instruct the jury, and did instruct the jury, as to what under the law would constitute a principal, such error was not cured by the giving of a correct charge on the subject at the request of defendant. Second. This is particularly true since the court refused to give the special charge on the subject of accomplice asked by us."

We will consider the second objection first, and see whether or not the court ought to have instructed the jury on the law as to the offense of accomplice, and if they found that he was an accomplice to acquit.

[21] It is a correct proposition of law that one charged in an indictment as a principal cannot be convicted as an accomplice to the crime—they are separate and distinct offenses. *McKeen v. State*, 7 Tex. App. 631; *Rix v. State*, 33 Tex. Cr. R. 353, 26 S. W. 505; *McAllister v. State*, 45 Tex. Cr. R. 258, 76 S. W. 760, 108 Am. St. Rep. 958; *Jones v. State*, 57 Tex. Cr. R. 148, 122 S. W. 31.

[22] Our statute defines an accomplice to be: First, one who is not present at the commission of an offense, but who before the act is done advises, commands, or encourages another to commit the offense. The acts of appellant proven in this case do not bring him within the provisions of this definition, for he was with the parties from the time of the capture of Buck and Ortiz until long after the killing of Ortiz. Neither is it contended by the state that appellant advised, encouraged, or commanded the persons who fired the shots to do so. Neither does the evidence suggest that appellant promised aid to those who committed the offense, and failed to do so. Whatever of aid the facts and circumstances would suggest that appellant promised in the enterprise engaged upon, he was there on the ground actually extending it. Nor does the record suggest that appellant offered any of his coconspirators any reward of any character, nor does the evidence suggest that he made any dire threats as to what he would do if Ortiz was not killed. The evidence does not show that appellant furnished the arms to kill Ortiz. The weapons appellant says were at the rendezvous when he arrived there, after having been induced to join them in their unlawful enterprise. As hereinbefore stated, the state did not rely upon any specific agreement or understanding to kill Ortiz, either to make appellant a principal or accomplice, but what the state sought to prove and relied on was proof of all the parties being engaged in an unlawful undertaking, and the killing of human beings was one of the probable and contemplated results, if they were in any way interfered with in the accomplishment of their purpose, and, the killing of Ortiz being deemed necessary by some of the conspirators in

the furtherance of their joint project, appellant became a principal in the commission of the offense; it being the natural and not unexpected consequence of the conspiracy that the taking of human life might become necessary, the agreement entered into between the parties also embracing such steps if deemed necessary. Therefore the court did not err in refusing the special charge instructing the jury to acquit if they found appellant was an accomplice to the crime—the evidence did not raise such an issue.

[23] The evidence suggests only that appellant was a principal offender, and if not guilty of that, he would have no criminal connection with the killing of Ortiz. Our decisions hold that the dividing line between principals and accomplices is that to constitute one a principal he must be doing something in furtherance of the common design, at the time the offense is committed, whether present or not, while an accomplice is one who, though having advised and agreed to its commission, is not present when the offense is committed, and who is not doing anything at the time in furtherance of the common design, and the law governing this character of case is so well stated in *Bass v. State*, 59 Tex. Cr. R. 186, 127 S. W. 1020, we refer to that case and the authorities there cited for a further discussion of this question.

[24] As to the contention that the court's charge as given and the special charge given at the request of appellant were conflicting, we think a perusal of them refutes this contention. But in the brief it seems that the main contention is that the court erred in defining principals in instructing them:

"Provided the offense was committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually, bodily present on the ground when the offense was actually committed or not."

While no objection was filed to the charge on this specific ground at the time of the trial, yet it is upon this ground that it is now contended that this part of the paragraph defining principals conflicts with the special charge given. Appellant cites us to the cases of *Davis v. State*, 55 Tex. Cr. R. 495, 117 S. W. 159; *Yates v. State*, 42 S. W. 296; *McDonald v. State*, 46 Tex. Cr. R. 4, 79 S. W. 542; *Criener v. State*, 41 Tex. Cr. R. 290, 53 S. W. 873; *Silvas v. State*, 159 S. W. 223; *La Fell v. State*, 153 S. W. 884, and *Drysdale v. State*, 156 S. W. 685. In these cases under the facts adduced in evidence, a charge thus defining principals was held erroneous, but it may be as well said here that in the cases of *Wright v. State*, 40 Tex. Cr. R. 45, 48 S. W. 191, *Henry v. State*, 54 S. W. 592, *Ballew v. State*, 48 Tex. Cr. R. 46, 85 S. W. 1063, *Glasgow v. State*, 50 Tex. Cr. R. 635, 100 S. W. 933, and other cases, a definition of principals, containing the clause objected to by appellant in this case, was held to present no reversible error under the facts in those cases. So at last,

whether or not this charge is erroneous depends on the evidence on the trial of the case, and it is not always erroneous, and we think it presents no reversible error in this case.

In the Davis Case, cited by appellant, it is said there was no direct testimony of the presence of appellant at the time the animal was taken or killed, but his connection with the original taking was sought to be established by acts and conduct soon thereafter, and other facts are cited, and it is held by the court:

"As a necessary deduction and corollary of what we have said above, it is evident that the court should have submitted to the jury the issue and question as to whether, under the facts, appellant was an accessory, accomplice or receiver of stolen property."

In this case the evidence raises no such questions—he was either guilty as a principal, or guilty of no offense. In the case of Jones v. State, 57 Tex. Cr. R. 144, 122 S. W. 31, the court holds that the evidence raises the issue that Jones might be an accomplice or a receiver of stolen property, and for this reason the charge was held to be erroneous, the court in that case, in the main, discussing the true dividing line between accomplices, accessories, and principals, and under the rules there laid down, under the evidence in this case the issue of whether or not appellant was an accomplice would not be raised.

In the Yates Case, supra, the court states that the evidence only showed "subsequent acts and conduct of the defendant, and agreed as well, indeed more strongly, with the theory that he was not present at the time of the taking, but, if guilty at all, was guilty as a receiver of stolen property."

In the McDonald Case, supra, the defendant's defense was an alibi—that he was not present and was at another and different place, and had no guilty connection with any part of the transaction.

In the Criner Case, supra, it is said that "the acts of the accomplice are all done prior to the commission of the offense; and these acts, in order to constitute him an accomplice, would terminate his connection with the transaction." This is a correct rule of law, and clearly demonstrates that the issue of whether or not appellant was an accomplice is not even suggested by the testimony in this case. It is further held in that case that the facts raised the issue of whether or not he was a receiver of stolen property, and for this reason the charge that authorized appellant's conviction as a principal, whether present or not, was held erroneous, yet it is also held in that case this charge would not be reversible error if the facts were conclusive that appellant was actually present and participated in the offense.

In the La Fell Case, supra, it is said: "It will be seen, and the record manifests beyond question, that appellant was not shown to have been present at the time and place that the animals were taken." He claimed to have

bought the animals at Toyah, 80 miles away, and this is the first time his connection with the animals is shown by positive testimony; that his defense was an alibi—that he was at another and different place, and had no guilty connection with the transaction when the offense was committed.

In the Drysdale Case, supra, we held that the evidence did not raise the issue of accomplice, but showed that he was a principal, and affirmed the case. The question raised by appellant in this assignment is not mentioned nor discussed.

In the Silvas Case, supra, it is stated his defense was an alibi, and that he purchased the beef he was found in possession of, and there was no positive evidence that he was present, and the state relied on circumstances to prove that fact.

To the rules of law announced in those cases—that where the evidence raises the issue that a person on trial may be an accomplice, an accessory, or a receiver of stolen property, instead of a principal, and there is no positive evidence of his presence at the scene of the crime—the writer gives his assent and does not question the correctness of the rule that holds such a charge erroneous under such circumstances, but our Presiding Judge does not agree to that enunciation of the law, and holds that the charge even in those instances would not be erroneous, and his views are expressed in the dissent in the Silvas Case, supra. However, as the evidence in this case does not suggest that if appellant is guilty of any offense he might be guilty as an accessory or accomplice, but the evidence and all the evidence shows that if appellant is guilty of any offense, he is a principal in the transaction those cases do not sustain appellant's contention. In this case there is no evidence that he was at a different place, having no connection with the transaction, but the evidence and all the evidence, including his own, shows that he was then at that specific time along, engaged with others in the unlawful conspiracy of which this killing was the offspring; he walked off about 40 steps, and was guarding the other prisoner, thus doing acts in furtherance of the common design at the very time.

The above cases are all that are cited by appellant in support of this contention, but we might add there are others holding as those do.

In the case of Bollen v. State, 48 Tex. Cr. R. 73, 86 S. W. 1025, it was held that such a charge, while erroneous, was not hurtful because his testimony, as well as that of the state, shows he was present.

In the case of Henry v. State, 54 S. W. 593, it was held, as the evidence showed the presence of the appellant at the place where the offense was committed, while inapplicable, such a charge presented no error for which the case should be reversed. In Glasgow v.

State, 50 Tex. Cr. R. 635, 100 S. W. 933, Wright v. State, 40 Tex. Cr. R. 45, 48 S. W. 191, and other cases, the same rule is announced.

In this case it is unquestionably shown that appellant was a party to the unlawful conspiracy to enter Mexico; that he was present when Buck and Ortiz were captured; that he was present when Sheriff Gardner was fired on; that he was present going with the crowd when Ortiz and Buck were tied and made to carry munitions of war; that he was present when Ortiz said he could not climb the hill and go any further, Buck stating that the following occurred:

"Ortiz made an attempt and slipped back, and he told him, 'If you people are going to kill me, kill me now. I cannot climb the banks, and I cannot do what you want me to do like I am packed.' He said, 'If you are going to kill me, kill me now.' They got around him and said, 'You son of a bitch, if you won't go, we will kill you.' All of these men were around him there—the defendant was there, too, all of these men together. They argued there with him for about a second, and the captain told them to go on and take me. So they taken me; all but the captain and three men stayed. This man [the defendant] was with me, guarding me with the others. After I walked 40 steps I heard a volley of shots, about six or seven shots. So we walked on about 10 steps further and came to a fence, and they stopped, waiting for those people to come up, the captain and three men to come up, they all stopped."

With such testimony in the record, appellant had entered into the agreement with the others to enter Mexico and, appellant admitting that he was present on each and all of these occasions in his testimony, this part of the charge of the court could not have been hurtful to defendant if erroneous, but we do not think it erroneous in any case unless the evidence raises the issue that the defendant's connection with the offense may have been that of an accomplice, accessory, or receiver of stolen property, or his defense is an alibi, and the evidence in this case suggests none of these issues, and none of the cases cited by appellant announce any contrary rule of law in our opinion.

The judgment is affirmed.

DAVIDSON, J., dissenting.

#### GONZALES v. STATE. (No. 2991.)

(Court of Criminal Appeals of Texas. May 13, 1914. Rehearing Denied June 10, 1914.)

#### 1. HOMICIDE (§ 30\*)—PRINCIPAL AND ACCESSORY.

Where, in a prosecution for homicide committed as an incident to a conspiracy to organize an armed force to invade Mexico, accused at the time of the killing was a member of the company and was then engaged in the furtherance of the conspiracy, he was a principal and not an accessory, though he was not engaged in the killing nor present when it was committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.\*]

#### 2. CRIMINAL LAW (§ 59\*)—"ACCESSORY"—"ACCOMPLICE."

To constitute one an "accessory," his participation in the crime and acts must all have occurred subsequent to the commission of the offense, while to constitute one an "accomplice," his acts must have occurred prior to the commission, and he at the time of the offense must have done nothing in furtherance of the common purpose and design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, First and Second Series, Accessory; Accomplice.]

#### 3. HOMICIDE (§ 30\*)—PRINCIPALS—PRESENCE AT CRIME.

Where decedent was killed as an incident to a conspiracy to commit another crime, and accused, one of the conspirators, was but a few yards away at the time of the killing, engaged in the furtherance of the common purpose, the fact that he was not bodily present at the exact spot where decedent was killed did not prevent his being a principal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.\*]

#### 4. HOMICIDE (§ 30\*)—CONSPIRACY—OTHER OFFENSE.

Where a company illegally organized in Texas to invade Mexico, arming and equipping themselves to engage in war and agreeing to resist all interference, the killing of a deputy sheriff, captured while attempting to investigate the camp, was within the accomplishment of the common purpose, and this being a felony, all engaged therein were guilty of murder as principals.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.\*]

#### 5. HOMICIDE (§ 169\*)—CONSPIRACY—EVIDENCE.

In a prosecution for homicide in the furtherance of a conspiracy to illegally organize in Texas an armed company to invade Mexico, evidence that accused, a member of the company, secured arms when he went to the camp, carried them all the time while he was in the company, and was armed when arrested, was admissible as showing that, while in the United States, the company was prepared to resist all those who might interfere with their purpose, together with the nature of the resistance that would be offered.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.\*]

Davidson, J., dissenting.

Appeal from District Court, Frio County; J. F. Mullally, Judge.

Lino Gonzales was convicted of homicide, and he appeals. Affirmed.

R. W. Hudson, J. L. Pranglin, and Magus Smith, all of Pearsall, and W. F. Ramsey and C. L. Black, both of Austin, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. This is a companion case to that of J. A. Serrato, 171 S. W. 1133, decided at the last sitting of this court, and as the questions raised as to the introduction of testimony and the charge of the court are, in the main, the same as in that case, it is not necessary to enter into an as extended discussion of them as was done in that case.

In this case, as in that case, it is not contended by the state that appellant was one of those who fired the fatal shots which killed Ortiz, but that he became a principal by reason of the agreement he entered into with the others named and his acts and conduct in furtherance of that agreement.

In this case appellant testified and admits that when he joined Rangel's company he knew they were going to Mexico to fight; that Rangel wanted appellant to help him and his party, and they were going to Mexico to take up arms in the interest of the party to which Rangel belonged, and that he (appellant) was going with Rangel to fight in the interest of the party. He also admits he was present when Ortiz and Buck were captured and tied by Rangel and his company; that he was present when Gardner and White were fired on; that he was with them during all the time they had Buck and Ortiz in their possession, and knew when Ortiz was killed; he says he was a short distance behind when Ortiz was killed, while Buck says he was with those guarding him, and that appellant was one of the men who captured him and Ortiz, and was one of the men who tied Ortiz and guarded them as they traveled through brush on their way to Mexico.

[1] The evidence for the state nor the defendant does not raise the question that appellant may have been an accomplice or accessory, for the evidence tends to show, and shows only, if it shows anything, that he was a principal in the commission of the offense, for he at the time of the killing of Ortiz was then engaged in the furtherance of the agreement which he admits he entered into, and the only question is whether or not the agreement and the acts and conduct of the appellant in furtherance thereof are such as to render him a principal offender.

[2] To constitute one an accessory in this state his participation in the crime and acts must all have occurred subsequent to the commission of the offense. *Welsh v. State*, 3 Tex. App. 419. And to constitute one an accomplice, his acts must have occurred prior to the commission, and he at the time doing nothing in furtherance of the common purpose and design. In *Bass v. State*, 127 S. W. 1025, this court said:

"If the party charged, though not actually present, is engaged in or is doing something in the chain of causation which leads up to the offense and is a necessary part of its accomplishment, he is a principal, though he may not be at the immediate time actually present."

This we understand to be the clear holding of the court in the case of *Dawson v. State*, 38 Tex. Cr. R. 9, 40 S. W. 731; *Id.*, 38 Tex. Cr. R. 50, 41 S. W. 599, and it is undoubtedly the conclusion reached by Judge White in the case of *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552, where it is said that an accomplice is one whose acts are all performed before the commission of an offense, while a principal may not only perform some

antecedent act, but when the offense for which he is on trial is actually committed is doing his part of the work in the furtherance of the common purpose, citing *Berry v. State*, 4 Tex. App. 492; *Heard v. State*, 9 Tex. App. 1; *Wright v. State*, 18 Tex. App. 358. Under the evidence in this case the issue of appellant being an accomplice or accessory does not arise, for by his testimony alone he was along with his co-conspirators, engaged in an unlawful enterprise, and at the time by his acts and conduct performing his part in furtherance of the common purpose and design.

[3] The charge of the court on principals, which is an exact copy of that given in the *Serrato Case*, is again severely criticized because of the use of the words "whether personally present or not." As the undisputed facts, even his own testimony, shows conclusively that appellant was along with those who actually fired the shots, and not but a few yards away, engaged at the time in the furtherance of the common purpose and design, he would be a principal, although not bodily present at the exact spot when the shots were fired, if the homicide was committed in pursuance of and in furtherance of the accomplishment of the design, and committed while all the parties were actually engaged in the pursuance of the common purpose. The court recognized the fact that there was no positive testimony going to show that the killing of Ortiz specifically was within the compass of the original agreement as made between the parties, and no positive testimony showing that this identical homicide was in contemplation by any of the parties at the time the agreement was formed, and as appellant is not shown to be one of the persons who fired the fatal shot, his connection with the killing must be proven, if proven, by circumstantial testimony, and the court so instructed the jury.

[4] It was shown by positive testimony that appellant entered into an agreement to organize and invade Mexico on a hostile mission; that they were all armed and equipped to engage in war; it is further testified too that there was embraced in the original agreement a purpose to resist all interference, and testimony to show an intention to kill all those who interfered with the accomplishment of the main purpose and design, and circumstances in the case would tend to show that Ortiz was captured and held to prevent him with others from interfering in the accomplishment of the common purpose, and when he refused to go along with them he was killed to keep him from reporting their purpose and design, and thus with others frustrate it. Under such circumstances it is said in the *Noftsinger Case*, 7 Tex. App. 301:

"In a case like the present, depending wholly upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived." *Cooper v. State*, 19 Tex. 449; *Barnes v. State*,

41 Tex. 351; Hamby v. State, 36 Tex. 523; Black v. State, 1 Tex. App. 868. And in such cases the nature of the case, in many instances, demands a greater latitude in the presentation of the evidences of the circumstances than where a conviction is sought upon direct and positive testimony. *Ballew v. State*, 36 Tex. 98."

In *Burrell's Case*, 18 Tex. 732, it was held the agreement may be shown directly or by circumstances, such as his companionship with the principal actor, his knowledge of his purpose, and his own conduct before, at, and after the commission of the offense. *Blain v. State*, 33 Tex. Cr. R. 236, 26 S. W. 63; *Harris v. State*, 31 Tex. Cr. R. 414, 20 S. W. 916; and in *McFaddin's Case*, 28 Tex. App. 241, 14 S. W. 128, it is held parties are principals, or acting together, so long as any portion or object of the common design remains incomplete; in other words, until the full purpose and object of the conspiracy is consummated. In the case of *Kirby v. State*, 23 Tex. App. 23, 5 S. W. 171, wherein the parties entered into an agreement to escape jail, and one of them killed the jailer, while the others were locked in their cells and rendered no aid at the time of the killing, it was held:

"Under such circumstances, and without direct proof of encouragement, the question is, Could appellant be held and considered in law a principal in the crime committed by Cannon? It is declared that 'all are principals who are guilty of acting together in the commission of an offense.' Penal Code, art. 74, and 'all persons who shall engage in procuring aid, arms or means of any kind to assist in the commission of an offense whilst others are executing an unlawful act,' are principals. Penal Code, art. 76. And again, any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act. Penal Code, art. 78.

"Thus it will be seen that, to render a party equally guilty and responsible with the real perpetrator, all that is required is that he be present, consenting, and that the act was the result of a common design. It is true his bare presence is not sufficient, nor is his failure to give alarm; neither is his inactive and supposed concealment of the offense. *Burrell v. State*, 18 Tex. 713; *Truitt v. State*, 8 Tex. App. 148; *Tullis v. State*, 41 Tex. 598; *Ring v. State*, 42 Tex. 282. But such significant facts as his presence in connection with his companionship, his conduct at, before, and after the commission of the act, are potent circumstances from which participancy may be inferred. *Id.* The true test is, Did the parties act together, and was the act done in pursuance of a common design and purpose in which their minds had agreed? *Welsh v. State*, 3 Tex. App. 413; *Wells v. State*, 4 Tex. App. 20; *Scales v. State*, 7 Tex. App. 361; *Corn v. State*, 41 Tex. 301; *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552.

"There can be no question as to the common design and conspiracy to effect an escape from jail, and the fact is also incontestable that the murder was committed by Cannon in pursuance of this common purpose. But while this is so, it is insisted that the conspiracy only extended to a purpose to confine Glazner in order that the escape might be accomplished, that the evidence fails to show that appellant and Brown ever contemplated, much less agreed to, his murder or the infliction of any bodily harm upon him, and that the fatal blows dealt him

by Cannon, causing death, were the result of an independent act upon the part of Cannon without their knowledge or concurrence, and without the ability on their part even to prevent it.

"The joint responsibility of parties for each other's misconduct rests on the principle that when an act is committed by a body of men engaged in a common purpose, such act is treated as if specifically committed by each individual. It should be observed, however, that while parties are responsible for collateral acts growing out of the general design, they are not responsible for independent acts growing out of the particular malice of individuals. Thus, if one party of his own head turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt.' *Whart. on Hom. §§ 201, 202; Mercersmith v. State*, 8 Tex. App. 211; *Stevenson v. State*, 17 Tex. App. 619. But it is equally as well settled that: 'All combining to commit an offense to which homicide is incident are principals in homicide. As where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder be in the furtherance of the common design.

\* \* \* Malice in such a killing may be inferred as a presumption of fact from the nature of the design and the character of the preparation; whether the deceased fell by the hand of the accused or otherwise is immaterial.

\* \* \* It is only where the causes leading to the homicide have no connection with the common object that the responsibility for such homicide attaches alone to its actual perpetrator.' *Whart. on Hom. § 338.* \* \* \*

"If, as is clearly proven, part of the common design was to imprison Glazner within the jail, and detain him therein without his consent until the parties had effected their escape, then such detention would be unlawful and constitute what in our Code is denominated 'false imprisonment.' Penal Code, art. 513, for which they would be liable to punishment by a fine not exceeding \$500 and confinement in the county jail not exceeding one year. *Id.*, art. 518. Mr. Bishop says: 'A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific or general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding, according to the common plan, terminates in a criminal result, though not the particular result meant, are all liable.' 1 *Bish. Crim. L. (7th Ed.) § 636.*

"In *Mercersmith's Case*, 8 Tex. App. 211, supra, it was said where two persons go out for the common purpose of robbing a third person, and one of them in pursuit of such common purpose kill such third person under such circumstances as to make it murder in him who does the act, then it is murder in the other. \* \* \* Nor is it necessary that a common guilty purpose of resisting to the death any person who should endeavor to apprehend them must have been formed when the parties went out with the common design of committing the unlawful act, to render all principals in a murder by one of them whilst making such resistance."

As stated in the *Serrato Case*, the court did not err in refusing to quash the indictment. The question was so thoroughly discussed in that case we will not do so here, and the other preliminary questions likewise present no error.

[5] The fact that appellant secured arms

when he went into the camp, carried them all the time he was with Capt. Rangel's company, and was armed when arrested was clearly admissible. It was a strong circumstance to show that while still in the United States, they were prepared to resist all those who might interfere with their purpose, and the nature of the resistance that would be offered.

Appellant's attorneys in this case are the same as those in the Serrato Case, and in this case no question is briefed other than those acted on in the Serrato Case, and, if there is any other question in this case, our attention has not been called to it, and after a study of it we find none that would present any error; and the judgment is affirmed.

DAVIDSON, J. This is a companion case to Serrato v. State, recently decided. I entered dissent in that case, and may write later. I dissent also in this case.

#### GONZALES v. STATE. (No. 3127.)

(Court of Criminal Appeals of Texas. June 3, 1914. On Motion for Rehearing, June 24, 1914.)

#### 1. WITNESSES (§ 395\*)—IMPEACHMENT—SUPPORT.

Where, in a prosecution for homicide alleged to have grown out of a conspiracy, defendant sought to impeach the state's principal witness on three distinct points, and the evidence tended to impeach him, the state was entitled to support the witness' testimony by showing that shortly after the transaction, and prior to the trial, the witness made statements to others in accordance with his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1260; Dec. Dig. § 395.\*]

#### 2. CRIMINAL LAW (§ 1122\*)—TRIAL—INSTRUCTIONS—OBJECTIONS.

Where a criminal prosecution was tried after the taking effect of Act April 5, 1913 (Acts 33d Leg. c. 138), requiring that objections to the charge be made before argument, objections not shown by the record to have been so made cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.\*]

#### 3. CRIMINAL LAW (§ 1173\*) — APPEAL — REFUSAL OF INSTRUCTIONS — REQUESTED CHARGE—PREJUDICE.

In a criminal prosecution, accused was not prejudiced by the court's refusal to charge that the burden of proof was on the state throughout the trial and never shifted to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

#### 4. CRIMINAL LAW (§ 432\*)—EVIDENCE—CONSPIRACY—NEWSPAPER.

Where decedent was killed as an incident to a conspiracy to illegally organize an armed force in Texas to invade Mexico, in accordance with a certain political party, and accused testified that he was a subscriber to a newspaper, and that one of the principal things which induced him to join the company was articles in the paper, and that the principles announced in the paper were those of the party to which he belonged and joined the company to carry out, a translated copy of the paper was admissible

as showing the purpose for which the conspiracy was organized and for which the defendant joined it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1021; Dec. Dig. § 432.\*]

Davidson, J., dissenting.

#### On Motion for Rehearing.

#### 5. CRIMINAL LAW (§ 722\*) — TRIAL — ARGUMENT OF ATTORNEY.

Where, in a prosecution for homicide alleged to have been committed in furtherance of a conspiracy to organize in Texas an armed band to invade Mexico, defendants' attorneys devoted their argument almost exclusively to historical sketches of conditions of the Mexican people and other revolutions, referring to the condition of the Mexican people and their struggle for liberty, comparing defendants to other revolutionists for liberty, and defended the Mexicans in their present struggle against their President, whom he dubbed a tyrant, argument of the district attorney in reply that defendant was a member of the faction in Mexico, the principles of which were murder, rapine, and plunder, etc., was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. § 722.\*]

Appeal from District Court, La Salle County; J. F. Mullally, Judge.

Jesus Gonzales was convicted of murder, and he appeals. Affirmed.

W. F. Ramsey and C. L. Black, both of Austin, R. W. Hudson and Magus Smith, both of Pearsall, and F. B. Earnest, John W. Willson, and J. Albert Strawn, all of Cotulla, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder and his punishment assessed at life imprisonment.

This is a companion case to that of J. A. Serrato, decided by this court May 6, 1914, and also that of Lino Gonzales, decided May 13, 1914. In fact, appellant is one of the same persons indicted with said Serrato and Lino Gonzales and others in the same indictment. In said two cases decided, we gave a rather full statement of the facts. The main witnesses, especially for the state, in those two cases were the same witnesses who testified in this, and they gave substantially the same testimony in each case. Of course appellant did not testify in either of those cases. He did in this. Neither of those parties, of course, testified in this. Each of them did testify in their respective cases. Appellant in this case testified he was not one of the four persons whom Buck swore killed the deceased, Ortiz. In other words, by his testimony he substantially put himself in the same attitude that Serrato and Lino Gonzales put themselves. By Buck's testimony, however, the appellant in this case was shown to be one of the four persons who actually shot and killed deceased. In that respect, and practically in that only, does this case differ from the others. Treating this case from appellant's standpoint, what was said in the other cases equally applies to

him in this. However, from the state's standpoint in this case, he was, without doubt, one of the persons who actually shot and killed Ortiz. Substantially the same questions were raised and passed upon in the other cases that are raised in this, so far as the introduction of evidence is concerned, and the charges of the court given, and the complaints of the charges which were given and not given. No further discussion of any of those questions is necessary in this case. There are some questions raised in this case that were not in either of the other cases, which we will discuss and decide.

[1] Eugene Buck in this, as in the other two cases, was one of the state's most material, if not the most material, witness. In his direct testimony, when first introduced by the state, he positively identified appellant as one of the persons who captured and kidnapped him and deceased, Ortiz, and one of the persons who tied his and the hands of Ortiz behind them with ropes; and he identified him as one of the four persons who actually shot and killed deceased. He also identified Rangel, Cisneros, and Alzalde as the other three. His description of these four persons, in his direct testimony, was rather general. When appellant took him on cross-examination, his attorneys required him to testify in the minutest details the actual description of each of said four persons (unless it be Rangel)—their dress, their hats, their size, their age, color of their hair, their voices, and every other special minute detail that could be thought of—also particularly what appellant and each of the others said from first to last. They also had him to go into the minutest details of some of the other persons who captured him and Ortiz, and particularly of what may be designated "a little Jap-looking Mexican fellow." It is perfectly evident by this cross-examination, which is very lengthy, that they sought to show by him that he was mistaken in testifying that appellant was one of the four persons who shot and killed the deceased, and they were seeking to show that he mistook appellant for the little Jap-looking fellow, and that it was the little Jap-looking Mexican, and not appellant, who was one of the four who shot and killed deceased. They then cross-examined him as to his testimony on the point of identity of the appellant on one of the previous trials, and attempted to show, and the evidence tended to show, by this cross-examination, that his identity of appellant on the previous trial was somewhat different or conflicting from what it was on this trial. They also by this cross-examination sought to show that one of the persons who was killed when the crowd was captured, two days after the killing of Ortiz, by the United States soldiers and the sheriff and his posse, was the person he now identified and testified was appellant, and that on the former

trial he had identified that person, instead of appellant, as one of the four who shot and killed Ortiz. The appellant made so much headway on these points, tending to contradict Buck, that when he was turned back to the state for redirect examination the district attorney, without objection by appellant, had the sheriff to bring into open court the 11 other defendants charged in said same indictment with murdering deceased and had them to take seats around in the courtroom. The district attorney thereupon had the witness Buck to point out the three persons other than appellant whom he claimed were the three with appellant who shot and killed the deceased. The witness did this. After looking at all the men, he picked out and testified that Rangel was one, Alzalde was another, Martinez and appellant the others. Immediately after this, the witness was turned back to appellant and recross-examined, and they at once went into the examination of the witness again. They asked him if he had not made a mistake in pointing out the four men whom he claimed did the actual killing in identifying Martinez as one of them, instead of Cisneros. He again observed the men and said that in his designating Martinez as one of them he was mistaken; that Cisneros, instead of Martinez, was one, and that in designating Martinez he had made a mistake, and that it was in fact Cisneros. They then took him up and went into a long cross-examination as to what he had testified as to the identity of these two persons and appellant on the other trial. They had the stenographer to reproduce and read to him his testimony on the previous trial. This was gone into elaborately and to a great extent; the appellant seeking to show, and the evidence tending to show, that his testimony on the previous trial in identifying the parties was different and conflicting from that on this trial, the state seeking by it to show that there was no material difference.

Appellant also sought to show by another witness Thornton, and their cross-examination of him without question tends to show, that said Buck identified to him the little Jap-looking Mexican, who was killed when they were captured, as one of the four, instead of appellant, who shot and killed deceased.

Taking the record as a whole, or taking appellant's bills of exceptions by themselves alone, they unquestionably show that appellant sought to impeach the witness Buck in three particulars: First, that he had identified Martinez instead of Cisneros as one of the four who did the actual killing. There is no question but that said witness on this trial did at first identify Martinez as one of the four, and later claimed to be mistaken as to that, and then testified positively that Martinez was not one of the four, but that Cisneros was instead. Second, that, on

one of the former trials, by the description he gave he identified the little Jap-looking Mexican as one of the four instead of appellant. Third, by the witness Thornton it was shown, or his evidence tended to show, that Buck before this trial had identified the little Jap-looking Mexican, the one who was killed when they were all captured, as one of the four, instead of appellant, whereas he now testified that appellant, and not the little Jap-looking Mexican, was one of the four. There can be no question but what they sought to impeach, and the evidence tended to impeach, the witness Buck on these three points. The bills and the arguments about them clearly and distinctly show this. There is no principle or rule better established in this state than that, when this is the case, the state can bolster up its witness thus impeached by showing that shortly after the transaction he made statements to others, similar or to the same effect as that now testified to by him on the trial. Mr. Branch, in his Criminal Law, § 874, collates some of the authorities on this point. There are a great many, but we deem it unnecessary to collate and cite them.

So that the court in this case did not err in permitting the state to prove by the witnesses Knaggs, Gardener, White, and Campbell in substance and effect that very soon after the capture of appellant and all his associates the witness Buck did point out to each of them the said four persons he now testifies were the persons who shot and killed the deceased, and appellant's bills 58, 59, 62, and 49, raising these questions, show no error. What we hold on this question is not in conflict on this point with *Clark v. State*, 39 Tex. Cr. R. 152, 45 S. W. 696, *Reddick v. State*, 35 Tex. Cr. R. 463, 34 S. W. 274, 60 Am. St. Rep. 56, and other cases cited and relied upon by appellant. Appellant, in citing and relying upon *Murphy v. State*, 41 Tex. Cr. R. 120, 51 S. W. 940, and *Bowen v. State*, 47 Tex. Cr. R. 146, 82 S. W. 520, overlooks the fact that the holding of the opinions in those two cases were modified, if not overruled, by this court in *Weaver v. State*, 150 S. W. 786.

[2] This case was tried in October, 1913, long after the act of April 5, 1913 (Acts 33d Leg. c. 138), amending articles 735, 737, 743, and adding article 737a to our C. O. P., went into effect, whereby it is expressly required that objections to the charge of the court of either commission or omission shall be made before the argument begins. The record in this case does not show that any objections were thus made to the court's charge. The judge gave a full and correct charge on circumstantial evidence. He also affirmatively required the jury to believe, beyond a reasonable doubt, every essential fact to show appellant's guilt before they could find him guilty, and, if they did not so find, to acquit him. In addition he told the jury that defendant was presumed to be innocent until his guilt was established by legal evidence

beyond a reasonable doubt, and, in case they had a reasonable doubt as to his guilt, to acquit him; still in addition that in all criminal cases the burden of proof was on the state.

[3] There is in the record a special charge, asked by appellant but refused by the court, to the effect that the burden of proof rests upon the state throughout the trial and never shifts to defendant. There is nothing to show that this charge was requested before the court read his charge to the jury and the argument had been concluded. It seems, therefore, very doubtful whether the question is raised in such a way that it can be considered by this court. We think not. But if it was asked and refused in the proper time, clearly under the statute (article 743), as it now is, the refusal of the court to give appellant's said special charge presents no such error as would authorize or require this court to reverse this case. Most if not all the old cases cited by appellant which indicate that it was error to refuse to give such charge were rendered before the amendment of 1897 of article 743, and, we think, have no application now. We fail to see how it could possibly have injured appellant not to have given said charge.

[4] The appellant, in his direct testimony, among other things said that he was a subscriber to the newspaper "Regeneracion," and that he received and read that paper; that said Capt. J. N. Rangel must have gotten his name from the subscription list of that paper; and that Rangel wrote to him, and that he went and joined Rangel and his company, being induced by what was published in said paper. On cross-examination he stated that one of the principal things that induced him to join said company, etc., was the articles in said paper. One of the copies of the paper was then exhibited to him, and he identified it as one of them. A translation of this article was thereupon introduced in evidence. He further testified that the principles announced in that paper and of the Liberals party therein specified was the one to which he belonged and joined said Rangel's company to carry out. The article introduced is quite lengthy. We deem it unnecessary to copy all of it. A part of it is:

"We Liberals proclaim that everything shall be for everybody, and that each producing agent shall consume not in accordance with his ability but in accordance with his necessity. In order to attain these ends, we Liberals will fight to snatch, to grasp from the hands of the rich the land, the waters, the mountains, the mines, the factories, the shops, the railroads and all other means of transportation, through the medium of arms, leaving everything in the hands of the poor so that these can agree and will organize a protection free from all masters of every kind."

The court committed no error, as claimed by appellant in his bills 63 and 64, in permitting the state to have him testify, as shown above, and to introduce the translated copy of the paper to which he was a subscriber,

and which he read, and which he said announced the principles which he and Rangel and his company were intending "to do" and fight for in Mexico. There is nothing else in this record that requires any discussion.

There being no error, the judgment will be affirmed.

DAVIDSON, J., dissents.

#### On Motion for Rehearing.

PRENDERGAST, P. J. In his motion for rehearing appellant presents but some of the same questions originally raised and others not mentioned specially in the opinion heretofore. We will discuss in this opinion such of these as we deem necessary.

In discussing his bills 49, 58, 59, and 62, we stated he made no objection when the court had the 11 other defendants brought into court for the purpose of identification of the 4 who did the actual killing of Ortiz, as claimed by the state's witness Buck. He now calls our attention to the fact that he did object to their being brought in, as shown by his bill No. 45. We find that he did object to said parties being brought into the courtroom, and this court was mistaken in the original opinion in saying he did not object. His objections, shown by bill 45, are:

"We do not care to bring these parties in here and have him identify them in the trial of this defendant. We do not see that it is material. It would just go to detract the minds of the jury from this trial, and we do not think it advisable."

The point has been expressly decided against appellant in *McIver v. State*, 37 S. W. 745; *Benson v. State*, 69 S. W. 166. So that this court's incorrectly stating that he made no objection did not and could not affect nor change the decision of the question. Besides, the bringing in the parties resulted to his advantage decidedly, because Buck made a mistake at first in the identification of one of the parties, as shown in the original opinion.

He also specially calls our attention to his bill of exceptions No. 13, wherein it is shown that he objected to the charge of the court because it "failed and omitted to instruct the jury distinctly for what purpose they should consider the evidence of Gardner, White, Allen, Knaggs, Wilcox, Barnard, Boynton, Decker, Dickens, and Campbell," claiming the evidence of these witnesses "did not establish the corpus delicti and was not offered for such purpose, nor to prove defendant committed the offense, and that the law required that such evidence be limited in the charge, and that the court's charge should state for what purpose such evidence had

been admitted and for what purposes the jury may consider it." The testimony of several of these witnesses was very material to establish many circumstances and facts which tended to make the case against appellant. The testimony of others was for bolstering the testimony of Buck as to the identity of appellant as one of the four who actually killed deceased. It would have been improper for the court to have given any such charge as this bill points out. Besides, to have called especial attention to the supporting testimony of Buck would have been on the weight of the evidence and against appellant. His objections were too general to specifically call the court's attention to any charge applicable to the testimony of these respective witnesses.

[5] He also calls our attention to his bill of exceptions No. 5, wherein he complains of this language of the district attorney, "That defendant, Jesus Gonzales, was a member of the Zapata Faction in Mexico, whose principles were murder, rapine, and plunder," used in argument. The court, in allowing the bill, thus qualified it:

"A red flag with white lettering on it was introduced in evidence by the state, and defendant, while on the stand, identified it as the flag of the Liberal party of Mexico, his political party in Mexico. The district attorney stated the following: 'Was he fighting for Huerta? No, because the flag of Huerta is the flag of the Mexican Republic. Was he fighting for Carranza? No, because the flag of Carranza is the tricolor of Mexico. He was fighting for Zapata, the leader of the Partido Liberal in Mexico, the flag of murder, rapine, and plunder.' This remark was made in answer to argument of the attorneys of the defendant as follows: Judge Earnest's speech was devoted exclusively to a historical sketch of the conditions of the Mexican people, from the time of Cortez, recounting their oppressed conditions from the time of the Spanish, and Judge Earnest did not discuss the evidence. Earnest also spoke about the French Revolution. The speech of Mr. Smith referred to the condition of the Mexican people and their struggle for liberty, comparing the defendant's to other revolutions for liberty, mentioned the Battle of San Jacinto, among other things. Mr. Strawn also spoke at length about the present condition in Mexico and defended—the Mexicans in the present struggle against Huerta, as a tyrant. And the district attorney stated that the red flag was the flag of Zapata in answer to the argument of Mr. Smith, who, in his speech, asked the question that when in history could it be shown that the red flag had ever been used for a bad purpose."

The bill as qualified shows no error.

In this connection we call attention to what the principles of the party, which appellant joined and was attempting to carry out, were, and the extract from the paper "Regeneration," a part of which is copied in the original opinion.

The motion is overruled.

**MARTINEZ v. STATE. (No. 3337.)**

(Court of Criminal Appeals of Texas. Nov. 18, 1914.)

**1. HOMICIDE (§ 235\*)—CONSPIRACY—PARTICIPATION.**

In a prosecution for homicide committed in furtherance of an illegal conspiracy to organize in Texas an armed band to invade Mexico, evidence held to warrant a finding that defendant was a member of the band and engaged in the furtherance of the conspiracy at the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 494; Dec. Dig. § 235.\*]

**2. HOMICIDE (§ 172\*)—CONSPIRACY—PURPOSE—EVIDENCE.**

In a prosecution for homicide committed as incidental to an illegal conspiracy to organize in Texas an armed band to invade Mexico, a manifesto in the Mexican language, purported to have been written by a Junta in California, intended to incite Mexicans to rebellion, found in the possession of one of the conspirators, who separated from the others a short time prior to their arrest, but who was first arrested, was admissible against accused to show the illegal character of the conspiracy.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 372, 373; Dec. Dig. § 172.\*]

**3. HOMICIDE (§ 29\*)—CONSPIRACY—PURPOSE.**

Where, in a prosecution for homicide, the state did not claim a specific conspiracy to kill deceased, but that he was killed as an incident to a conspiracy to organize in Texas an armed force to invade Mexico, the members of the company not immediately concerned in the killing could only be convicted of homicide on proof that the killing was incidental to a conspiracy to do an unlawful act and was within the scope thereof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 47; Dec. Dig. § 29.\*]

**4. HOMICIDE (§ 172\*)—CONSPIRACY—EVIDENCE.**

In a prosecution for homicide alleged to have been committed in the furtherance of a conspiracy to organize in Texas an armed force to invade Mexico, personal property found on one of the conspirators at the camp ground, including a manifesto, battle flag, bugle, guns, bayonets, dynamite, and other munitions of war, and testimony concerning where and what was found, was admissible to show the conspiracy and its purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 372, 373; Dec. Dig. § 172.\*]

**5. HOMICIDE (§ 172\*)—EVIDENCE—INCIDENTAL OFFENSE—SUBSEQUENT ACTION.**

Where decedent was killed as incidental to a conspiracy to organize in Texas an armed force to invade Mexico in order to prevent a discovery of the conspiracy, which did not terminate until the conspirators' arrest, evidence of all that took place and what each of the conspirators said from the time of their discovery at their rendezvous and until they were arrested was admissible, in a prosecution against each of them for the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 372, 373; Dec. Dig. § 172.\*]

**6. CRIMINAL LAW (§ 517\*)—EVIDENCE—CONFESSION.**

In a prosecution for homicide alleged to have been committed in pursuance to a conspiracy to organize in Texas an armed force to invade Mexico, evidence that, on the arrest of one of the conspirators by soldiers and posse, he told them where the others could be found, and that

they were found there, was not objectionable as a confession made to officers after arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1148-1156; Dec. Dig. § 517.\*]

**7. CRIMINAL LAW (§ 1169\*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.**

Where deceased was killed in furtherance of a conspiracy to form in Texas an armed force to invade Mexico in order to prevent discovery of the conspiracy, accused, on trial for the homicide, was not prejudiced by the introduction of a hat worn by deceased at the time of the killing, a rope with which his hands were tied behind him, and a belt with which a load was fastened on him after he had been captured by the conspirators and while he was forced to pack material for them until he was killed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

**8. CRIMINAL LAW (§ 1166½\*)—CONSPIRACY—TRIAL—CODEFENDANT BROUGHT INTO COURT MANACLED.**

Where accused, as member of a company illegally organized in Texas to invade Mexico, was on trial for the killing of a deputy sheriff as an incident to the conspiracy to prevent discovery, and the other conspirators were only captured after having fired at the sheriff and another deputy and also attempting to resist the posse and a company of United States soldiers, defendant was not prejudiced because certain of the alleged co-conspirators were brought into the court room during the trial of accused manacled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

**9. CRIMINAL LAW (§ 1038\*)—APPEAL—INSTRUCTIONS—OBJECTIONS.**

Objections to a charge made for the first time in the motion for a new trial cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

**10. HOMICIDE (§ 269\*)—CONSPIRACY—EVIDENCE.**

In a prosecution for homicide, evidence held sufficient to justify submission to the jury of the question of a specific conspiracy to take the life of decedent, though the preponderance of the evidence indicated that he was killed as an incident to a conspiracy to commit another offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 269.\*]

Davidson, J., dissenting.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Miguel P. Martinez was convicted of murder, and he appeals. Affirmed.

Chambers & Watson, of San Antonio, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of murder, and his punishment assessed at 12 years' confinement in the state penitentiary.

This is a companion case to those of J. A. Serrato (171 S. W. 1133), Lino Gonzales (171 S. W. 1146), and Jesus Gonzales (171 S. W. 1149), heretofore decided by this court, but not yet officially reported. In this case there is this difference between it and those heretofore decided: Appellant did not testify, and of course his connection with the con-

spiracy is not admitted, nor is the object and purpose of the men banding themselves together.

[1] To show that he was a member of the armed band found on Capones creek, the state proved that, when Officers Ortiz and Buck were captured by Capt. Rangel and his men, appellant was present and was one of the men who assisted in their capture, having a drawn gun in his hands; that he was present at the time when Sheriff Gardner and Marshal White were fired upon; that he was present when Buck and Ortiz were tied and loaded down as pack horses; that he was one of the guards who accompanied Buck and Ortiz to the place where Ortiz was killed; that he went with those who were guarding Buck some 40 yards away when Ortiz was killed; that he continued with Rangel and his men until Buck was rescued, and continued with them until finally they were captured, being one of those engaged in the battle with the posse and soldiers at the time of the capture. While no one can say specifically they saw him fire a shot, yet he was in company with those, some dozen or more of whom were shooting at the posse and soldiers. This authorized a finding that he was a member of the company, in the absence of any testimony to the contrary. In the other cases, as hereinbefore stated, the men on trial took the stand and testified they had banded together to go to Mexico and engage in armed rebellion.

[2] The defendant did not do so in this case; consequently the state had to make other proof showing the object and purpose of the band of men, and whether they were bound. Cline, clearly by all the testimony shown to be a member of the company, separated from the others a short time before their arrest, and he was the first one arrested. When arrested there was found on his person a manifesto, which, translated into English, reads as follows:

"Mexicans: The board of organization of the Mexican Liberal Party views with complacency your efforts to place in practice the high ideals of political, economical and social emancipation, whose supremacy throughout the world will put an end to that already sufficiently prolonged struggle between man and man, which has its origin in the inequality of riches, which emanates from the principle of private ownership of property.

"The abolishment of that principle signifies the annihilation of all institutions, political, economic, social, religious and morals which generates the gaseous atmosphere within which are asphyxiated free initiative and the free association of mankind, who see themselves forced, in order to survive, to engage in deadly competition, from which those who emerge triumphant are not the good, neither the most unselfish nor the best endowed, physically, morally and intellectually, but the most astute, the most egotistic, the least scrupulous, the most hard-hearted, those who place their personal welfare above every consideration whatsoever of human solidarity and of human justice.

"Without the principle of private ownership of property, there is no reason for the existence of a government, necessary only to keep within bounds the disinherited in their complaints or in

their rebellion against the deforcians of social riches; nor the church reason to exist whose exclusive object is to extrangulate in man the innate rebelliousness against oppression and exploitation, through preaching about patience, resignation and humility, stifling the cries of the most powerful instincts, and fruitful with the practice of immoral penances, cruel and hurtful to the health of persons, and so that the poor may not aspire to the joys of earth and constitute a danger to the privileged of the earth, promise to the humblest, to the most resigned, to the most patient, a heaven which swings in the infinite space beyond the visible stars.

"Capital, authority, clergy, here you have the somber trinity which makes of this beautiful world a paradise for those who have succeeded in grasping in their claws, by their astuteness, violence and crime, the product of hard labor by the sweat of the brow, by blood, by tears and sacrifices of thousands of generations of workmen and a hell for those who with their hands and their intelligence cultivate the soil, move machinery, construct houses, transport products, thus leaving humanity divided into two social classes, with interests diametrically opposed: The capitalist and the laborer. The class which possesses the land, the machinery of production and the means of transportation for the rich products, and the class which reckons only with his hands and his intelligence for his support.

"Between these two social classes there cannot exist any bond of friendship or fraternity, for the property holding class are always disposed to perpetuate the economic, political and social system, which guarantees to them peaceful enjoyment of their plunder, while the working class makes efforts to destroy that iniquitous system, in order to install a medium on the earth, by which the land, the houses, the machinery of production and the means of transportation may become of common use.

"Mexicans: The Mexican Liberal Party recognizes that every human being, from the sole fact of having been born, have the right to enjoy of all and of each and every advantage which modern civilization offers, for those advantages are the product of the efforts and sacrifices of the working class of all ages.

"The Mexican Liberal Party recognizes that work is necessary for the maintenance of the individual and of society, and consequently everybody, with the exception of the aged, the maimed, the weakminded and the children, must dedicate themselves to produce something useful, so that they will be enabled to give satisfaction to their needs.

"The Mexican Liberal Party recognizes that the so-called right of individual property is an iniquitous right, because it subjects the greatest number of human beings to work and to suffer for the satisfaction and ease of a small number of capitalists.

"The Mexican Liberal Party recognizes that the government and the clergy are the support of the iniquitous capital. Therefore the board of organization of the Mexican Liberal Party has solemnly declared war against authority, war against capital, war against the clergy.

"Against capital, authority and clergy, the Mexican Liberal Party has unfurled the red banner in the fields of action in Mexico, where our brothers are battling like lions, contending for victory against the hosts of the Patricians, or be it Maderistas, Reyistas, Vasquistas, Cientificos and many others, whose only purpose is to elevate a man to the first magistracy of the country, to do business under his shadow, without any consideration for the entire mass of the population of Mexico, and all of them recognizing as sacred the right of individual property.

"In these moments of confusion so propitious for the assault against oppression and exploitation, in these moments in which the government crushed, unbalanced, vacillating, attacked on all sides by the forces of all the unbridled passions.

by the tempest of all the appetites, whetted by the hopes of a proximate satiety, in these moments of anxiety, of anguish, of terror for all the privileged, compact masses of disinherited beings invade the lands, burn the titles to property, place the creating hands on the fertile soil and threatening with their closed fist all that which yesterday was authority, capital and church, they open the furrow, scatter the seed and await with emotion the first fruits of free labor.

"These are, Mexicans, the first practical results of the propaganda and the action of the soldiers of the people, of the generous supporters of our principles of equality, of our brothers who defy all imposition and exploitation with this cry, of death to all those above and of life and hope for those below; long live land and liberty.

"The tempest increases in fury from day to day. Maderistas, Vasquistas, Reyistas, Cientificos, Delabarristas cry out to you, Mexicans, to return to defend their tarnished banners, protectors of the privileges of the capitalist class. Do not listen to the sweet songs of those sirens, who desire to take advantage of your sacrifices to establish a government; that is, a new dog to protect the interests of the rich. Arise, everybody, but only to carry out to a finish the expropriation of the property which the rich retain.

"The expropriation must be carried out to a finish by blood and fire during this grandiose revolution, as our brethren have done and are doing; our brethren, the inhabitants of Morelos, South of Puebla, Michoacan, Guerrero, Veracruz, North of Tamaulipas, Durango, Sonora, Sinaloa, Yucatan, Quintana Roo and in parts of other states, as even the very patrician Public Press of Mexico has had to acknowledge that the people have taken possession of the land without waiting for a paternal government until it design to make them happy, conscious that there is nothing good to be expected from governments and that the emancipation of the laborers must be the work of the workingmen themselves.

"These first acts of expropriation have been crowned with the most flattering of successes, but the limit must not be placed at taking possession of the land and implements of agriculture only.

"There must be taken possession, resolutely, of all the industries by the workingmen employed therein, obtaining in this manner that the land, the mines, the manufacturers, the workshops, the smelters, the cars, the railroads, the ships and all the warehouses of every kind and the buildings remain in the possession of all and every one of the inhabitants of Mexico without distinction of sex.

"The inhabitants of each locality in which such an act of supreme justice has been carried out have nothing else to do but to come to an agreement between themselves that all the effects that are found in the stores, warehouses, granaries, etc., be carried to a place of easy access for everybody where men and women of good (will) repute, shall make out a minute inventory of everything that has been gathered together, in order to calculate the duration of the stock on hand, having in view the needs and the number of the inhabitants who have to make use of it, from the time of expropriation until in the fields are raised the first crops, and in the other industries are produced the first products.

"The inventory made, the workingmen of the different industries will understand each other fraternally in order to regulate production, so that during this movement no one shall lack for anything and only those will die of hunger who do not desire to work, with the exception of the aged, the maimed and the children, who shall have the right to the enjoyment of everything. Everything produced shall be sent to the general storehouse of the community, from which all shall have the right to take all that they may need according to their wants, without other req-

uisite than to exhibit a badge that he is working in this or that industry.

"As the aspiration of man is to have the greatest number of gratifications with the least effort possible, the most adequate means to obtain that result, is work the land and the other industries in common. If the land is divided and each family takes a portion, besides the grave danger which is run of once again dropping into the capitalist system, for there will not be a lack of astute men, or who have habits of saving, who will succeed in having more than others and be enabled in time to exploit their fellowmen—besides this grave danger, the fact stands out. If a family cultivates a piece of land, it will have to work as much or more than is done at present under the system of individual property to obtain the same meager result which is obtained at present, while, if the land is united and worked in common, the farmers will work less and produce more. Of course there must not be a lack of land, so that every person can have his house and a good lot to dedicate it to the uses most agreeable to him. The same as is said of the work in common of the land can be said of the work in common of the manufacturers, workshops, etc., but each one according to his temperament, according to his tastes, according to his inclinations, may choose the kind of work that best suits him, so that he produces enough to cover his needs and not be a charge upon the community. Working in the manner set forth (that is, following immediately after the expropriation, the organization of production, free of owners, and based on the needs of the inhabitants of each locality), no one will be in want of anything, notwithstanding the armed revolution, until this movement being ended with the disappearance of the last aristocrat and of the last authority, or its agent, the law, the support of the privileged class, broken in pieces and everything placed in the hands of those who work, we will embrace each other with a fraternal embrace, and will celebrate with pangs of joy the installation of a system which will guarantee to every human being food and liberty.

"Mexicans: For all this, the Mexican Liberal Party struggles, for this a band of heroes shed their generous blood, who battle neath the red flag, with the portentous cry of land and liberty.

"The Liberals have never unbuckled their weapons, notwithstanding the treaties of the traitor Madero with the tyrant Diaz, and notwithstanding also of the attempts of the aristocrats to fill their pockets with gold, and this has been so, because we, the Liberals, are men convinced that political liberty is not of advantage to the poor, but to the hunters of offices, and our object is not to obtain offices nor distinctions, but to take away all from the hands of the aristocrats, so that everything shall remain in the hands of the workingmen. The activities of the different political bands which at the present time dispute amongst themselves the supremacy in order that the one which triumphs to do exactly the same as the tyrant Porfirio Diaz did, because no man, however well disposed he may be, can do anything in favor of the poor class when he finds himself in power. That activity has produced chaos, which we, the disinherited, must take advantage of. The especial circumstances in which the country is found in order to put in practice without loss of time, on the spot, the sublime ideals of the Mexican Liberal Party, without waiting for peace to be declared to carry out the expropriation, for by that time the stock of goods in the stores, granaries, warehouses and in other depositories would have been exhausted, and at the same time, by reason of the state of war in which the country has been, production had been suspended, hunger would be the result of the struggle, while, carrying out the expropriation and the organization of the free work during the revolution, neither would there be a lack of the necessities of life in the midst of the movement nor afterwards.

"Mexicans: If you want to be free at once, do not fight for any other cause that is not of the Mexican Liberal Party. All offer you political liberty after triumph. We, the Liberals, invite you to take the land, the machinery, the means of transportation and the houses right now, without waiting that any one to give them to you, without waiting for the law to decree such a thing, because the laws are not made for the poor but for gentlemen with dress suits, who take good care not to make laws against their own caste. It is our duty, for us, the poor, to work and struggle to break the chains which make slaves of us. To leave the solution of our problems to the educated and rich classes is to place ourselves voluntarily in their claws.

"We, the plebeians, we, the ragamuffins, we, the hungry, we, who have not even a stone upon which to recline our head, we, who live tortured by the uncertainty of obtaining a piece of bread for the morrows for our wives, and our children, we, who, having reached old age, are ignominiously discharged, because we can no longer work, behooves us to make strenuous efforts, innumerable sacrifices, to destroy to the very foundation the structure of the old society, which has been up to the present an affectionate mother for the rich and the rascals and a coldhearted stepmother for those who work and are good. All the evils which affect the human race arise from the present system, which forces the majority of humanity to work and to sacrifice itself for a privileged minority, to satisfy all their needs and even all their caprices, living in idleness and in vice. And the evil would be less if all the poor had their work assured, as the production is not arranged to satisfy the needs of the laborers, but to leave profit to the patricians. These contrive to produce no more than they calculate can be expended by themselves, and from this result the periodical shutting down of industries or the reduction of the number of employes. This also arises from the fact of the perfection of machinery, which substitutes with advantage the hands of the employes.

"To put an end to all this, it is necessary that the laborers take in their hands the land and the machinery of production and be the ones to regulate the production of riches, tempered to their own needs.

"Robbery, prostitution, assassination, incendiarism, swindling, are the results of the system which places men and women under conditions so as not to perish or hunger, forced to take what they need where found, or to become criminal, for in the majority of cases, although there may exist the greatest desire for work, no work is to be found, or is so poorly paid that the salary does not cover the most pressing needs of the individual or family; besides, the long hours of work under the present system of the capitalists and the condition under which they are affected, in a short time, undermines the health of the laborer and even ends his life in the catastrophe which takes place in the work shops, which has no other origin in the disdain with which the governing class look upon those who sacrifice themselves for them.

"The poor, irritated by the injustice of which he is the object, angry at the ostentatious display of luxury paraded before his eyes by those who do nothing, beaten by the 'cop' (policeman) on the streets for the crime of being poor, forced to employ his hands in work not to his liking, poorly paid, despised by all those who know more than he does, or who, by reason of having money, believe themselves to be superior to those who have nothing, faced by an expectant sad old age, the death of an animal, driven out of the stable as useless, worried by the possibility of being without work from one day to another, forced to look upon even those of his own class as enemies, because he does not know which one of them may go to hire himself for less than he is earning, it is natural that under these circumstances there

develops in the human being anti-social instincts, and be it crime, prostitution, disloyalty, the natural fruits of the old and odious system which we want to destroy, even to its deepest roots, in order to create a new one, of love, of equality, of justice, of fraternity, of liberty.

"Arise all as one man, in the hands of all is tranquility, well-being, liberty, satisfaction of all same appetites, but let us not allow ourselves to be led by directors; that each one be his own master; that everything be arranged by the mutual consent of unhampered individuality. Death to slavery; death to hunger; long live land and liberty.

"Mexicans: With the hand placed over the heart and with a peaceful conscience, we make you a formal and solemn call that every one of you all, men and women, adopt the high ideals of the Mexican Liberal Party. As long as there are rich and poor, governments and governed, there will not be peace, nor is it to be desired that there should be, because that peace would be based on inequality, political, economic, and social of millions of human beings, who suffer hunger outrages, prison and death, while a meager minority enjoy all sorts of pleasures and liberties for doing nothing.

"To the struggle; to expropriate with the idea of benefit for all and not for a few, that this war is not a war of bandits, but of men and women who desire that all be brethren and enjoy as such the goods which nature cheerfully offers to us, and the hands and intelligence of man have created, with the single condition that each one shall dedicate himself to a work really useful. Liberty and well-being are within reach of our hands. The same efforts, the same sacrifice that it costs to elevate a governor (that is, a tyrant), costs the expropriation of the goods which the rich retain. To choose, therefore, a new governor, a new yoke, or the redeeming expropriation and the abolishment of all impositions, political, religious or from any other order whatsoever.

#### "Land and Liberty.

"Given in the city of Los Angeles, state of California, United States of America, this the 23d day of the month of September, 1911.

"Ricardo Flores Magon.

"Librado Rivera.

"Anselmo L. Figueroa.

"Antonio de P. Araujo.

"Enrique Flores Magon.

#### "To the Workmen in General.

"Every person who is in accord with the principles for which the Mexican Liberal Party struggles is cordially invited to help in the manner most agreeable to himself, in order to obtain the triumph of our principles. All remittances of money and all correspondence must be directed without fail to Manuel G. Garza, 914 Boston Street, Los Angeles, California, U. S. A.

"The success of the revolution which is being developed on Mexican soil depends in a great measure on the generous help with money loaned to the Mexican Liberal Party. No working man should hesitate to send his contribution for the encouragement of this grand struggle against graft and tyranny. If the poor do not furnish their share for the triumph of the interests of their class, they cannot expect that the rich will do anything for them. If the poor dazzled by the gold of the patricians and enroll themselves under some banner of the patrician, they will be food for the cannon during the war, and food for exploitation, for jail and barracks in time of peace. The poor should unite resolutely with the Mexican Liberal Party, and make the declaration sent out on the 23d of September their own. There is no other party which fights with the sincerity of the Mexican Liberal Party. Hurl far from you, disinterested ones, all those who speak to you to remedy your condition through

the law; they are your worst enemies, for knowing that the law in all times and in every place is always on the side of the rich, they hold it out to you as the shield of the weak, while in reality it is the yoke of which the high class make use of to keep down in submission the poor. Fix your minds attentively on this. All those who want you to elevate them, tell you to help them, and that they in turn will make your happiness after the victory.

"Porfirio Diaz spoke in that manner to the public when he was a revolutionist. Francisco L. Madero spoke to you in like manner. All the governors which we have had since our independence from Spain up to the present time promised the same thing, and not one of them could carry it out.

"No government will be able to carry out the promises of welfare and of liberty made to the poor, because from the simple fact of being a government it is obliged to safeguard the goods of the rich. Therefore we must not confine our own welfare to a government. Welfare will be acquired disavowing the right of individual property, and taking possession of the land for all men and women, and the means of production and consumption. This ought to be done before there is peace, before some government becomes strong, because then it will be necessary to commence a new revolution to obtain it.

"It is in these moments when the government is weak that the poor ought to take possession of the lands and everything which exists for the benefit of all. If it is not done to-day, afterwards it will be too late."

This authorized a jury to find it was an armed force going into Mexico to engage in rebellion against the then established government; in fact, all government. In the camp and on one of the other men was found a flag, as described in this manifesto, bearing the words "Pardido Liberal"—land and liberty—also guns, bayonets, swords, dynamite caps, fuses, dynamite, etc. This testimony, with all the other facts and circumstances in evidence, will support a finding that these men and all and each of them had organized under this manifesto, and were on their way to Mexico to engage in this armed rebellion, and this was their object and purpose. But appellant contends that much of this evidence was inadmissible, and especially the manifesto found upon Cline at the time of his arrest. If Cline was on trial, would any one question that this instrument found in his possession would be admissible in evidence against him as tending to show his object and purpose, and, if not, by what rule of law would it be inadmissible against a co-conspirator? The rules of law governing in conspiracy cases have been well established, and as said by a well-known writer:

"The conspiracy may, of course, be shown by direct evidence, and it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy from the very nature of the case, and the rule which admits this class of evidence applies equally in civil and criminal cases. In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to arrive at a satisfactory conclusion. And it is no objection that the evidence covers a great many transactions and extends over a long period of time, provided, however, that the facts shown have some bearing upon,

and tendency to prove, the ultimate facts at issue. But much discretion is left to the trial court, in a case depending on circumstantial evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact. If it be shown that several have combined together for the same illegal purpose, any act done by one of them in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of all, and therefore proof of such act will be evidence against any of the others who were engaged in the conspiracy, and any declaration made by one of the parties in the absence of the others during the pendency of the illegal enterprise is not only evidence against himself but against all the other conspirators who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves."

These rules have been approved in all the text-books and in the following cases in our own court: *Atkinson v. State*, 34 Tex. Cr. R. 424, 30 S. W. 1064; *McKenzie v. State*, 32 Tex. Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795; *McFadden v. State*, 28 Tex. App. 241, 14 S. W. 128; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Phillips v. State*, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Williams v. State*, 24 Tex. App. 17, 5 S. W. 655; *Kennedy v. State*, 19 Tex. App. 618; *Pierson v. State*, 18 Tex. App. 524; *Post v. State*, 10 Tex. App. 598; *Avery v. State*, 10 Tex. App. 199; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; and the authorities cited in the *Serrato Case*, 171 S. W. 1133, and *Gonzales Cases*, 171 S. W. 1146, 1149. Again it has been said:

"Where the guilt of a party depends upon the intent, purpose, or design with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or as induced by the same motives, and it is immaterial that they show the commission of other crimes. The evidence in a conspiracy is wider than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances. Although the fraudulent and corrupt combination, the common design, is the essential element, it is not necessary to prove that defendants came together and actually agreed in terms to have this common design and to pursue it by common means and so carry it into execution. Such proof can seldom be made, and therefore is not required. It is sufficient to justify the jury in finding a conspiracy if it is shown that the persons charged with conspiring pursued by their acts the same object, often by the same means, one performing one part of an act and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing." Cyc. vol. 8, p. 684; *Mason v. State*, 31 Tex. Cr. R. 306, 20 S. W. 564; *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552.

[3] It was incumbent upon the state to establish a conspiracy to do some unlawful act by those gathered at Capones ranch to hold each and every one of them liable for the act of those four who actually fired the fatal

shot into the body of Ortiz, unless the testimony would show a specific conspiracy participated in by appellant to kill Ortiz. And, if it did not show a specific conspiracy to kill Ortiz, then to show the killing of Ortiz was incident to and grew out of the conspiracy to do the unlawful act, and which would in law be considered as embraced in the contemplation of all of them. In this case such evidence was dependent upon circumstantial evidence, and as is said by this court in *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552:

"The ancient doctrine that a conspiracy must first be established ipso facto before proof of acts and declarations of the individual conspirators are admissible against each other is now exploded. The rule as it now exists is stated in the case of *Cox et al. v. State*, 8 Tex. App. 254 [34 Am. Rep. 746], as follows: 'Ordinarily, when the acts and declarations of one co-conspirator are offered in evidence against another co-conspirator, the conspiracy should itself be first established prima facie and to the satisfaction of the judge of the court trying the cause; but this cannot always be required. It cannot well be required when the proof depends upon a vast amount of circumstantial evidence—a vast number of isolated and independent facts. And in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that a conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations.'"

[4] And under this rule of law it is apparent that the court did not err in admitting those things found on Cline at the camp ground—the manifesto, the battle flag, the bugle, the guns, bayonets, dynamite, other munitions of war, etc., in evidence, and testimony in regard to where found and what was found. This was most cogent testimony to show the conspiracy and object and purpose of the conspiracy as originally formed and why the men had gathered together at this ranch; consequently bills of exception Nos. 5 and 6 present no error.

[5] And as the conspiracy entered into did not terminate until the arrest of the defendants, there was no error in admitting in evidence all that took place, and what each of the conspirators said from the time of their discovery on the ranch (and the kidnapping of Buck and Ortiz) until the arrest of the defendants, so bills of exception Nos. 3, 4, and 8 present no error. All this testimony was ruled properly admissible in the *Serrato* and *Gonzales Cases* and *Vasquez Case*, 171 S. W. 1160, and this record only demonstrates that the court did not err in so holding. The manifesto more clearly shows the object and purposes and the means to be used to accomplish those purposes than did the testimony in the other cases; the flag, bugle, weapons, and ammunition and other indicia authorize a finding that they were organized under this manifesto, and their acts and conduct justify a finding that they, at the time of their capture, were on their way to Mexico to engage in this armed re-

sistance. Another thing in this record manifests why Ortiz was killed when he refused to go further. Buck at one time stopped and refused to go on, when he says the following took place:

"They taken me on and cussed and abused me all the time trying to make me hurry; made me walk over places I couldn't walk and run their guns against me all day, until I was rescued. I packed the load and was going very well up to about 12 o'clock. They gave me water up to about 12 o'clock, and I didn't get any water any more, and it was one of the hottest days we had last September. I got overheated. I got sick and I admit I gave out one time. I didn't see that I could go any further. I told the captain and Cline that I couldn't. I was sick and that I couldn't go but that I had gone as far as I could; if they were going to kill me they would have to kill me; that I couldn't go. They stopped and looked at me just a few minutes, stood around, and the captain told them to go on, told the bunch to go on. They walked about 30 steps, I suppose. I could see them from where I was lying. They stopped. He kept two men with him, when they walked off; he told them to take the packs off of the 'son of a bitch.' They taken the packs off of me. I was lying down on the ground. I just made up my mind I wouldn't walk another step. I knew what was coming off, so when they got those packs off of me I told them, I says, 'I will make one more walk,' so I got up and made another walk. I walked about half a mile or three-quarters of a mile, and gave out again, had to stop again, and when I did they began to pull out some tobacco and all went to smoking; sat down and smoked. We had been there, I suppose, I don't know— Q. Wait a moment, I will take that up again. In connection with your stop at that time, state all that was said, if there was anything said, in regard to their purport. A. Oh! When he taken these packs off. They told me when they were taking those packs off, he said, 'Do you think we are going to leave you, you son of a bitch, to tell any yarns?' I told him, I said, 'I don't know what you are going to do.' Q. What did he say then? A. He said, 'If you don't go, we will kill you, you son of a bitch.'"

Mr. Buck testifies that appellant was present when this scene took place, and was also present when a like scene occurred and Ortiz, refusing to walk, was shot to his death. They were not going "to leave them behind to tell any yarns" or in any manner interfere with the accomplishment of their purpose.

[6] After Cline's arrest he told the soldiers and posse where the others could be found, and they were found at the place Cline stated. This was not a confession of any character such as its admission is prohibited by the statute, and there was no error in admitting this statement of Cline, even though he was under arrest at the time he made it. They followed the information received and found appellant and the others at that point.

[7] A hat, rope, and belt were introduced in evidence. The hat was shown to be the hat worn by Ortiz; the rope, the rope with which his hands were tied behind him; and the belt, the belt with which the load was fastened on him by the men at the time a pack horse was made of Ortiz—all of which were left on him when he was killed. Unless this was intended to aid in demonstrating the manner and mode of his death, and the posi-

tion he must have been in at that time, we do not understand the object and purpose of introducing these articles in evidence. However, the hat, nor the rope, nor the belt are shown to have any blood thereon, nor to have been other than an ordinary piece of rope and a belt; and if a witness should testify a man was tied, and tied with this rope and loaded down, and they buckled the load on him with this belt, we can see no objection to such testimony, unless there was something about the rope or belt which would be calculated to inflame the minds of the jury and cause them to assess more punishment than they otherwise would. Certainly such articles could have no bearing on whether or not a conspiracy had been formed, what the object and purpose of the conspiracy was, nor whether the killing of Ortiz or any other man, if he got in their way, was within the contemplation of the parties at the time the conspiracy was formed, nor prove injurious to appellant's defense as made.

[8] The only other bills of exception in the record relate to bringing into the courtroom the persons other than appellant jointly charged with killing Ortiz. In the bill it is not claimed that appellant was handcuffed, but it is alleged that his codefendants were handcuffed at the time they were brought into the courtroom, and their handcuffs removed in the courtroom in the presence of the jury. The objections stated are:

"I will state to the court that the defendant desires to take a bill of exception to the bringing of the other defendants in the courtroom during the trial of this case. The further fact that they were brought into this courtroom in the presence of the jury handcuffed; that the handcuffs were taken off of the prisoners in the presence of this defendant and the jury. We want the bill to further show that this defendant filed and was granted a motion of severance and was entitled to be tried in that manner without bringing in the other parties, as the same is calculated to prejudice the rights of this defendant to a fair and impartial trial, as guaranteed under the statutes of this state. We want the bill to further show the matter was called to the court's attention prior to the other defendants being brought into the courtroom, and that the attorneys for defendant objected to their being brought into the courtroom. The fact of their being brought into the courtroom can be for no other reason than to prejudice the jury against the defendant's rights and create in their minds the idea that he belongs to a gang of criminals."

We cannot see how the bringing of the codefendants into the courtroom could in the least tend to show whether or not appellant was a member of the company or joined them in a conspiracy, and whether or not he by his acts and conduct had rendered himself liable as a principal for the death of Ortiz. The mere presence of these other men would be no evidence of that fact, and if the testimony should show that each of the others, or some of them, were guilty of killing Ortiz, unless the evidence should also show that appellant was guilty, their presence would not show nor tend to show that fact. If the men were out on bond and they desired to

attend the trial of their codefendants, the court could hardly exclude them, nor would it be proper to do so, if they behaved themselves. And how does the fact that they were under arrest change the attitude of matters? It is the first time (where he is not to be used as a witness) we have heard it contended that the mere presence of a codefendant would work injury to the one on trial. The court gives as his reason for permitting them in the courtroom that they were needed for the purpose of identification. If the court had in mind the severe cross-examination of state's witnesses in the Jesus Gonzales and other cases, we can readily understand why he thought it proper to have the others charged with the offense in the courtroom for identification, for in the Gonzales Case they had to be brought in. Buck and Gardner had never known the defendants until the day Ortiz was killed. They still claim not to know the names of each separately, but know the men and can point them out on sight, and Buck details the participation of each. But appellant insists that, if they were permitted in the courtroom, they should not have been brought in handcuffed together, and cites us to a number of cases wherein the trial courts are criticized for permitting the person on trial to be brought into the courtroom with handcuffs on him. But it will be noticed in the bills in this case it is not contended that the appellant was brought into the courtroom with handcuffs on him, but only that his codefendants were brought in handcuffed, and released as soon as they got in the courtroom. In all the cases cited by appellant it was a case where the person on trial himself was the one so brought into the courtroom, and not a codefendant who was not on trial. But, while the practice is condemned, yet in each of the cases the rule seems to be, as said in *Powell v. State*, 50 Tex. Cr. R. 592, 99 S. W. 1007, that it is not permissible to bring the defendant into the courtroom manacled, except in extreme cases. As the bill does not show that appellant was manacled, the bill presents no error, but, if he should have been, we could not, from the record before us, say the court had abused the discretion confided to him by law. The evidence in this case shows that a company of men had banded themselves together to go into a foreign state to engage in rebellion, to use no stronger term; that they kidnapped two officers of the law, murdered one of them while his hands were tied behind him and he was helpless, cursed and mistreated the other, and engaged in a pitched battle to prevent arrest, and only surrendered when several of them had been killed. These were the character of men the record discloses the court was dealing with, and if, in going to and from the jail with such prisoners, the court deemed it advisable to permit them to be handcuffed, we cannot say that it was an abuse of his discretion. This

court never saw the men, or either of them, and knows nothing of their characteristics. We have but the record of a body of armed men, going about the country, in defiance of the law and the officers, and, when approached by two officers, with drawn weapons they compel their surrender and murder one of them, while he is helpless, without any just cause or provocation, so far as this record or the records in the companion cases disclose.

[9] At the time the charge was submitted to counsel for their inspection, but two objections were made thereto. The second one, that after the words "conspired and confederated" in the ninth paragraph the court failed to follow with the words "to commit the offense," was sustained by the court and the words inserted before the charge was read to the jury. The only other complaint is that the court erred in not instructing the jury the specific language of article 78 of the Code:

"Any person who advises or agrees to the commission of an offense, who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act."

The court's charge in paragraph 8 fully defines the law of principals as applicable to this offense, and this criticism presents no error.

Special charge No. 1 requested by appellant was embodied in the court's charge as given to the jury, as was also appellant's only other special charge. The complaints of the charge in the motion for new trial for the first time, and contained in the brief cannot be considered by us, as the law now is all objections to a charge shall be made at the time same is submitted to counsel for their inspection.

Appellant's propositions of law that, if a conspiracy is not shown, statements, acts, and conduct of third persons are not admissible, and further that, if a conspiracy is shown, then proof of acts or declarations of co-conspirators, made in the absence of a defendant after the completion of a conspiracy, are not admissible in evidence, are sound, and we heartily approve the law as laid down by the authorities cited by him on those two propositions. But having held that the evidence authorized a finding by the jury that a conspiracy was formed, and that it continued until the time of their arrest, the authorities have no application to this case. Neither can we sustain the contention that the evidence does not sustain a verdict under the law as given in charge by the court.

[10] The contention that the court erred in authorizing a conviction if there was a specific conspiracy to take the life of Ortiz, if it had been desired to be complained of, the charge should have been objected to on that ground at the time the charge was submitted to counsel for inspection. But the contention there is no evidence to form the basis for such a charge in this record is not well

founded. Appellant and the men jointly charged with him were gathered together in a pasture on a creek, where they had assembled arms and ammunition. Officers went there to make an investigation. Two of these officers were taken charge of by appellant and those with him; Buck saying:

A "bunch of men had their guns pointed at us; this man (appellant) being one of them. Some disarmed us and took us into camp; the others keeping their guns on us. Four or five said Ortiz was the man who put the officers onto them and had been helping the officers for several years and putting them onto the Mexican People, when Rangel walked around, called Ortiz a son of a bitch, and said: 'You will never help them again. You killed one of our comrades at Ashland, and you will never get to kill another one, nor never again get to help any officers.'"

It was not a great length of time until Ortiz was killed. It may be that the court thought this raised the issue of a specific agreement in which all present were participants to kill Ortiz for having killed one of their comrades at Ashland, and for having put the officers on to them, and if so, and this had been the finding of the jury, we would not disturb the verdict, but the impression made on our minds by the record is that the killing grew out of the general conspiracy, amply proven by all the testimony, and that it was incident to and so connected with said general conspiracy in a way that, if appellant was proven a party to the general conspiracy, it would be under such circumstances as to render him liable for the death of Ortiz equally with those who in fact fired the shots.

The judgment is affirmed.

DAVIDSON, J., dissents.

VÁSQUEZ v. STATE. (No. 3181.)  
(Court of Criminal Appeals of Texas. June 24, 1914.)

1. HOMICIDE (§ 30\*) — CONSPIRACY — PARTIES LIABLE.

All persons forming a conspiracy to march into a foreign country at all hazards and overcome all resistance, and arming themselves for that purpose, are equally principals in a murder committed by some of them in furtherance of the conspiracy.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.\*]

2. CRIMINAL LAW (§ 772\*)—INSTRUCTIONS—EVIDENCE—ISSUES AND THEORY.

Where accused, tried for murder on the theory that it was committed by his co-conspirators in pursuance of a common design, testified that the co-conspirators acted independently in killing decedent, and that the killing was not incidental to the common design, failure to submit accused's theory was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812-1814, 1816, 1817; Dec. Dig. § 772.\*]

3. CRIMINAL LAW (§ 800\*)—INSTRUCTIONS—DEFINITION OF WORDS—CONSPIRACY.

Where all the testimony showed a conspiracy between defendant and third persons com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mitting a murder, and that the murder was committed in pursuance of the common design, the court could refuse to define a "conspiracy"; but where the testimony did not show conclusively a conspiracy, the court must instruct on the subject, and clearly state what facts must be found to justify a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.\*]

**4. CRIMINAL LAW (§ 422\*)—CONSPIRACY—ACTS AND CONDUCT OF CONSPIRATORS—ADMISSIBILITY.**

Where a conspiracy is once shown, the acts of each of the conspirators are admissible against any one of them, provided the acts were done in pursuance of the conspiracy and in furtherance of the common design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Leonardo L. Vasquez was convicted of crime, and he appeals. Reversed and remanded.

R. W. Hudson and Magus Smith, both of Pearsall, John R. Storms, of Ft. Stockton, Edwin F. Vanderbilt, of San Antonio, and W. F. Ramsey and C. L. Black, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** This is a companion case to that of J. A. Serrato (171 S. W. 1133), Lino Gonzales (171 S. W. 1146), and Jesus Gonzales (171 S. W. 1149), recently decided by this court. In the other three cases the evidence clearly showed a conspiracy had been entered into by and between all the parties to gather near Carrizo Springs, in Dimmit county, and that they did gather there, and that at that point there had been accumulated arms, ammunition, bayonets, dynamite, bugles, and other munitions of war; that the flag under which they were to fight was in their possession; and that it was the purpose and intent of the parties to invade the republic of Mexico to engage in armed resistance to those in authority. By the facts and circumstances it was shown that the conspiracy embraced an agreement to overcome all resistance to their unlawful enterprise, and that Candelario Ortiz was killed because it became necessary or seemingly necessary to do so in order to accomplish the purpose for which they had banded themselves together. The state's evidence offered on the former trials fully supported all these contentions, but on this trial the state's case was not so well developed. A number of the witnesses used in the other cases were not placed on the stand, and of those who were introduced as witnesses much of their testimony was for some reason omitted, and in many respects the record in this case is much more incomplete than on the trials of the other defendants. This defendant was not one of the men who fired the shots that killed Ortiz. He admits he

entered into the agreement to invade Mexico, and was along with the company aiding and assisting in the furtherance of that common enterprise, but he denies emphatically that the killing of Ortiz was embraced in the original agreement or conspiracy, and denies emphatically that he knew Ortiz was going to be killed, or that he had been killed, until some time after the deed had been committed.

[1] We want to say that in this record, and in the other records, the state's testimony did not show that there was a conspiracy formed, or an agreement made, to take the life of any particular man, or to take the life of Ortiz, by the entire company. Their agreement or conspiracy, if it be so termed, was to march into Mexico at all hazards and overcome all resistance; armed themselves for that purpose; that Ortiz was killed by Capt. Rangel and three others, in the furtherance of this common design and purpose, and each and all members of the company thereby became liable therefor, it being the law that when persons combine to engage in a breach of the peace, with a general agreement to resist all opposition, and in the execution of the design a murder is committed by one or more of the parties, all of the company are equally principals in the murder. Motive of the individual on trial may be inferred *from the nature of the design and character* of the preparation. From the admitted purpose of the organization in this case, and the fact that they armed themselves with all character of implements calculated to inflict death, and taking the evidence as heretofore introduced, the jury would be authorized to find that the killing of Ortiz, or any other man who got in their way, was within the compass of the original agreement, and was an act directly incident to and grew out of the common design of all. And this is the theory that the cases of Serrato and the two Gonzales was tried on. However, from the record now before us it is not apparent that this case was tried upon this theory, but, rather, the state seems to have tried this case upon the theory that there was a specific agreement or conspiracy entered into to kill Ortiz, and, to prove that, relies on the fact that when Buck and Ortiz were kidnapped and Rangel informed that Ortiz was the man who informed on them, that Rangel then said that Ortiz would report on no other person; that they would kill him; and other similar remarks. However, appellant denies hearing any such statement or hearing any such remarks, and says that he did not know that Ortiz was to be killed; that he was not present when he was killed, and did not know of it until some time thereafter, and when he learned of it he told the person informing him that it should not have been done, and if the state relied on a specific agreement to kill Ortiz, then the con-

verse of this proposition should have been submitted to the jury; that is, if appellant did not enter into such an agreement, and did not know that Ortiz was to be killed, and did no act in furtherance of that design, he would not be guilty. However, under the evidence, we think the Serrato and Gonzales Cases were tried upon the correct theory; and that is, all the company, as shown by all the testimony, had entered into a common design to commit an unlawful act—conspired to arm themselves and go from Dimmit county into Mexico to there engage in armed resistance to lawful authority, and embraced in this design was an agreement to overcome all opposition to the accomplishment of this design, and out of this common design the killing of Ortiz was a direct incident and grew out of it, rendering each and all of the parties who were along with Capt. Rangel at the time and engaged in the common purpose equally guilty with those who, in fact, fired the fatal shots, because, according to the evidence offered in behalf of the state in the Serrato and Gonzales Cases, it was evident he was killed to keep him from interfering with their common purpose—that is, to go to Mexico and engage in unauthorized warfare.

[2] However, it is equally true that the testimony of this defendant, as did the testimony of the defendants in the other cases, tended to raise the issue that Ortiz may have been killed by Capt. Rangel and the three other men upon an independent motive, foreign to, and not incident to, the common design of all, and in the Serrato and Gonzales Cases the court submitted that issue to the jury, instructing them that, if Ortiz was killed by one or more of the parties acting independently of the common design, and not in furtherance thereof, and that the killing was not directly incident to, and grew out of, the common design, and without participation by him in the intent and design influencing those in committing the crime, he would not be guilty, and, if the jury had a reasonable doubt on that issue, they should give the defendant the benefit of such doubt and acquit him. In the charge in this case no such instructions were given; in fact, defendant's defensive theory, whether the state relied on a specific design formed in the minds of all to kill Ortiz, or relied on the theory that they had all entered into a common design to commit an unlawful act, and the killing of Ortiz grew out of it, was not submitted to the jury, and this will, of necessity, work a reversal of the case.

[3] The complaint that the court in his charge should have defined "conspiracy" we do not think is well taken under the evidence in this case; for the defendant by his testimony and all the testimony in the case, shows that a concerted purpose and design was entered into by and between all the parties named in the indictment. If the testi-

mony did not show conclusively there was such conspiracy, then the court should have instructed the jury that he would not be bound by the words, acts, and conduct of the other parties when he was not present, unless they believed the defendant had entered into a conspiracy or a combination in which two or more persons had agreed to commit a criminal or unlawful act, but, if they found beyond a reasonable doubt such combination had been formed and defendant was a party thereto, then the acts and conduct of each and all the parties up to the time of their arrest could be considered by the jury in passing on the guilt or innocence of defendant.

[4] The rule is that, when a conspiracy is once shown, then the acts and conduct of each and all the conspirators are admissible in evidence against any one of them on trial, said or done during the continuance of the conspiracy and until its final termination. In this case the end sought by the conspiracy was not accomplished, but frustrated by arrest, consequently the acts and conduct of the parties in furtherance of the common design are admissible up until the time of their arrest. Of course, as hereinbefore stated, if the conspiracy is not admitted fact, then "conspiracy" should be defined, and the issue submitted as to whether or not there was such conspiracy, and the jury properly instructed in regard thereto, and it might be best for the court in these cases to define "conspiracy," and instruct the jury that, before they would be authorized to find the defendant guilty as a principal they must believe beyond a reasonable doubt that defendant entered into a conspiracy with Captain Rangel and others to arm themselves to invade Mexico for an unlawful purpose, and that, in pursuance of such common purpose and design, Ortiz was killed, and that such killing was directly incidental to, and grew out of, the common design, and was committed in furtherance of the common purpose, even though at the time of the homicide some of them were at such distance as to be out of view; and then instruct them the converse of the proposition, that if the causes leading to the homicide had no connection with the common object, and was not committed in pursuance of the common purpose, then those not participating in the killing would not be guilty.

Our views are so fully expressed in the Serrato and two Gonzales Cases, recently decided, we do not deem it necessary to further discuss the questions herein raised, but refer the trial court to those cases and the law as herein stated for his guidance on an other trial of this case.

On account of the failure of the court to submit appellant's defensive theory in any manner, the judgment is reversed, and the cause remanded.

DAVIDSON, J. I agree to the conclusion, but not all the reasoning.

Ex parte HOPKINS. (No. 3352.)

(Court of Criminal Appeals of Texas. Dec. 16, 1914.)

**INTOXICATING LIQUORS (§ 138\*)—OFFENSES—STATUTES.**

Under Allison Act (Acts 33d Leg. 1st Called Sess. c. 31) §§ 2-10, providing that, except as otherwise provided therein, it shall be unlawful for any person or agent to carry or deliver any intoxicating liquors to any other person in the state, and making it unlawful for persons living outside the state to carry intoxicants to any one in local option territory to be used in violation of law, and making it unlawful to solicit orders in local option territory, and permitting the use of alcohol by manufacturers, druggists, etc., and permitting duly licensed persons to deliver to persons in territory where the sale is permitted by law, and permitting one to carry liquors for the use of himself and family and to carry liquors to any one licensed to sell the same, defendant's act as an agent in buying for another and carrying to him a bottle of whisky bought with such other's money for his individual use was not an offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

Prendergast, P. J., dissenting.

Original application by Lewis Hopkins for writ of habeas corpus. Relator ordered discharged.

Capps, Cantey, Hanger & Short, of Ft. Worth, and John T. Smith, of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Applicant was arrested for violating what is known as the Allison Act, found on page 62 of the Acts of the Called Session of the Thirty-Third Legislature. Applicant, as a friend and agent, bought for and carried a bottle of whisky to his friend, bought with the money of his friend, who wanted it for his individual use and not for any illegal purpose. This constitutes the agreed case. It is unnecessary to give further details. In what I shall have to say I will not discuss the general police power of the Legislature.

The Allison Act, as it is called, provides, in sections 2, 3, and 4, that "except as otherwise provided in this act it shall be unlawful for any person, firm or corporation, or any officer, agent or employé thereof in this state" to deliver, receive, transport, or carry any intoxicating liquors to any other person, firm, corporation, or any agent or employé thereof in this state.

It is provided in section 5 of the act that it shall be unlawful for any of these parties living without the state of Texas to convey to any one in Texas intoxicants into local option territory, when such intoxicating liquors are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of Texas.

Section 6 provides it shall be unlawful to solicit in local option territory or take or-

ders for intoxicating liquors in said territory. Then follows those acts which are said in the act to be not unlawful.

Section 7 provides that certain parties shall not be prohibited from receiving alcohol for use of his or their business. This applies to educational and eleemosynary institutions, and manufacturers and their employes, as well as druggists, provided its use shall be confined to the business and institutions mentioned.

Section 8 provides as follows:

"Nothing in this act shall make it unlawful for any person licensed or authorized under the laws of this state to sell spirituous, vinous or malt liquors, to ship, transport, carry or deliver such liquors to any person within the limits of the territory wherein the sale of intoxicating liquors is permitted under the laws of this state."

Section 8a permits the parties to make wine from their own grapes and to ship under circumstances mentioned in that section.

Section 9 provides it shall not be unlawful for any person for the use of himself or members of his family residing with him to personally carry such liquors.

Section 10 provides that it shall not be unlawful for any person, firm, or corporation, etc., to ship, transport, carry, or deliver intoxicating liquor to any person authorized or licensed under the laws of this state to sell spirituous, vinous, or malt liquors (including dealers licensed and authorized under the laws of this state to sell such liquor for medicinal purposes on prescription in local option territory; and section 11 authorizes priests and ministers to ship when used for sacramental purposes in quantities of one gallon or less). These are provisions of the act thought necessary to be noticed.

So it will be seen by sections 2, 3, and 4 that it is unlawful to ship, transport, or carry intoxicating liquors between points in Texas. This applies to the state generally, except as otherwise provided in the act. Sections 7, 8, 8a, 9, and 10 provide instances in which it is not unlawful to carry or transport intoxicants. So we have it that the Legislature has provided certain things shall be unlawful, and certain things shall not be unlawful. If the act had remained as sections 2, 3, and 4 provided, if they are legal and constitutional, intoxicating liquors could not be transported from one point to another point in Texas under any circumstances; but, when we go to the other sections, we find that it is lawful to ship intoxicating liquors under certain circumstances and for certain purposes. By the terms of section 8 it is not unlawful for any person licensed or authorized under the laws of this state to sell spirituous, vinous, or malt liquors, to ship or transport or carry or deliver such liquors to any person within the limits of the territory wherein the sale of intoxicating liquors is permitted under the laws of this state. As we understand the laws as they

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

apply to the sale of intoxicating liquors, there is no point in Texas where intoxicating liquors may not be sold under some circumstances. In local option territory it is permitted to be sold under certain circumstances. It may there be sold under a license system on prescription, which is recognized by section 10 of the Allison Act to be an existing law, and wine may there be sold for sacramental purposes. So whether it be local option or anti-local option territory, it is *permissible* to sell under circumstances mentioned in the different statutes at any point in the state. It will be noticed that section 8 does not say the parties must have taken out the license either in wet or dry territory, but, if the sale is *permitted* under the laws of the state, the shipment under the Allison Act can occur. The permission to do a thing is one thing; doing the thing permitted is another thing. It would seem from the terms of this section that a party may ship from one point in Texas to another point in Texas, if in that territory the sale of intoxicating liquors is *permitted*. This law authorizes the shipment of intoxicating liquors from any point in Texas to any other point in Texas, and the mere fact that the parties have not taken out license to sell does not abrogate the law granting permission to do so. The writer has always concurred fully in decisions which hold that, when the local option law is put into effect, it supplants all other means of regulating the sale of intoxicating liquors in local option territory. This has been the law in Texas, until recently, since the rendition of the Robertson Case in 5 Tex. App. 155. Therefore, following this line of jurisprudence, the writer dissented in the Snearly Case, and has dissented whenever there had been a departure from that rule.

There is a line of decisions in which I have not concurred, to the effect that the Legislature may prevent the storing of whisky in local option territory, and authorize its seizure if stored for the purpose of illegal sale. This seems to find its support in the general proposition that this can be done in aid of the local option laws. It has never been held, as I understand, in any of the cases, that the Legislature was empowered to go further, even in local option territory, than to prevent the use of intoxicating liquors for any purpose, except that connected with illegal selling, either as selling in fact or preparatory thereto. It has never been held that it was a violation of the law to store intoxicants in local option territory for the purpose of selling on prescription, or of selling wine for sacramental purposes, or for one's individual use; and no decision has been called to the writer's attention, and he believes none exists, that prevents parties in local option territory from giving whisky to others than minors.

The question has come before the court as

to whether or not the local option law took the place of the law prohibiting gift to minors, and it was held that it did not. In that connection it has been held that a charge could not be sustained of selling to minors under that statute, but the prosecution for such sale must be had under the local option laws, whether the sale was to a minor or to an adult. The Allison Act recognizes these conditions expressly by its terms. If the intoxicants can be shipped into local option territory because the sale is permitted under the circumstances indicated, then it would not be unlawful to so ship under the provisions of the Allison Act. If it is not shipped for unlawful selling, then section 8 of the Allison bill authorizes such shipment. If the intoxicants are shipped into such territory, when *permitted* to be there sold, the Legislature cannot require the purchaser to go after the intoxicants. He may ship it. He may sell on prescription, and may ship it for this reason and for the several reasons set out in the act, or he may ship it for himself. If the act intends to prevent shipments when not intended for illegal purposes, it is clearly void. The citizen has the right to ship, not only intoxicants for lawful purposes, but anything that is not prohibited. It may be shipped by any means of transportation, whether public or private. The law does not concern itself, and ought not to concern itself, as to how the party should have intoxicants conveyed to him when he has a right to have the intoxicants. Such laws would be absolutely vexatious and tyrannical, and even beyond the reach of the police power. This act recognizes the fact that the citizen is entitled to have intoxicants for his own and the use of members of his family, but undertakes to curtail these rights by saying that he must himself carry the intoxicants, and that he will not be permitted to ship it to himself. The law could not prohibit him from having the whisky for his own use, and, even under the decisions prohibiting the storing of intoxicants for illegal sales, he would not be prohibited from shipping intoxicating liquors for his own use by public conveyance or common carriers or by private agents. The Legislature cannot prohibit a citizen of Texas from using the common carriers' systems of the state, or of employing agents to do legitimate things, even to the carrying of intoxicants when the use of those intoxicants is not illegal. The party may do by an agent what he may do by himself. There is nothing to indicate that the agent is criminal, and in fact it would be a difficult proposition to sustain under such circumstances. If the agent was criminal in carrying the intoxicants, the principal would also be criminal. The agent obtains his authority to act from the principal, and it would seem rather clear to the ordinary mind that an agent could not usually be guilty for doing a thing of which the prin-

principal would be innocent. It is well recognized that there may be agency in criminal matters as well as in civil. In one it is innocent, and in the other criminal. Among the most familiar illustrations of the guilty agency is that of the accomplice to the crime committed by the principal; but before there can be an accomplice there must be a principal, and there must be a crime committed by the principal. In other words, the principal must commit the crime before there can be an accomplice.

I therefore conclude, without further discussion, that the citizen of Texas has a right to transport to himself or have transported to himself intoxicating liquors by any one of the means that is open to the public or to his private will or contract. If this law is to be construed otherwise, then it is void and in derogation, not only of common right, but is violative of the constitutional privileges of the citizen. I have not discussed other constitutional phases, but I believe the act unconstitutional for several reasons.

Taking this view of the matter, relator is ordered discharged.

**PRENDERGAST, P. J.** I respectfully dissent. For my views I refer to my dissenting opinions in the Longmire Case, *infra*, this day decided in an opinion by Judge Harper, and the Peede Case, 170 S. W. 749.

**HARPER, J.** In concurring in the discharge of the prisoner, I do not agree that the Allison law or any of its provisions are unconstitutional, but think, properly construed, it is valid, and prohibits the transportation, shipment, carriage, and delivery of intoxicating liquors in prohibition territory for illegal sale or any other illegal purpose. For full expression of my views, see Longmire v. State, *infra*, this day decided, and, if deemed advisable, I may later amplify those views in my opinion in this case.

#### LONGMIRE v. STATE. (No. 8353.)

(Court of Criminal Appeals of Texas. Dec. 16, 1914. Supplemental Opinion Jan. 2, 1915.)

#### 1. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge substantially covered by a charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 2. INTOXICATING LIQUORS (§ 89\*)—ADOPTION OF PROHIBITION—CRIMINAL PROSECUTIONS—QUESTIONS REVIEWABLE.

Where an election adopting prohibition in a county was not contested within the statutory time, the court must conclusively presume, on a trial for violating the prohibition law, that all the steps taken to enact prohibition in the county were legal.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 33; Dec. Dig. § 89.\*]

#### 3. INTOXICATING LIQUORS (§ 40\*)—VIOLATION OF PROHIBITION LAW—STATUTES—APPLICABILITY.

The Allison Law (Acts 33d Leg. 1st Called Sess. c. 31) applies to a county which, prior to its enactment, had adopted prohibition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.\*]

#### 4. INTOXICATING LIQUORS (§ 210\*)—OFFENSES—INTRASTATE COMMERCE—INDICTMENT.

An indictment alleging that accused, a private person, unlawfully transported and delivered intoxicating liquor to a person named in a county which had adopted prohibition, need not allege whether the transportation was interstate or intrastate, since Allison Act (Acts 33d Leg. 1st Called Sess. c. 31, §§ 2-4) relates to intrastate transactions, and section 12 thereof declares that it shall not be necessary to negative exceptions, but the same shall be available as purely defensive matter.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 250; Dec. Dig. § 210.\*]

#### 5. INTOXICATING LIQUORS (§ 6\*)—REGULATION—POLICE POWER.

As with the shipment and delivery of intoxicating liquor wholly within the state, the Legislature alone has authority to deal, and, in so far as it may be necessary to protect the public health, morals, and welfare, its will, as expressed in statutes, is final.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.\*]

#### 6. INTOXICATING LIQUORS (§ 6\*)—REGULATION—CONSTITUTIONAL PROVISIONS.

Const. art. 16, § 20, authorizing the prohibition of the sale of intoxicating liquor, is not an implied limitation on legislative power, and the Legislature has not only the authority but must pass all laws necessary and appropriate to prevent illegal sales.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.\*]

#### 7. CONSTITUTIONAL LAW (§ 81\*)—"POLICE POWER."

The police power of the state includes the right to regulate, control, and prohibit occupations endangering the health, morals, and safety of the general public.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

#### 8. INTOXICATING LIQUORS (§ 138\*)—SALES IN PROHIBITION TERRITORY—OFFENSES—ACTS CONSTITUTING.

The transportation of intoxicating liquors from "wet" territory in the state into prohibition territory by a citizen of the latter territory, for his own use or as agent for another for his own use, is not a violation of Allison Act (Acts 33d Leg. 1st Called Sess. c. 31).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

Prendergast, P. J., and Davidson, J., dissenting in part.

Appeal from District Court, Hamilton County; J. H. Arnold, Judge.

Charley Longmire was convicted of violating the prohibitory law, and he appeals. Reversed and remanded.

Eldson & Eldson, of Hamilton, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted under an indictment charging that:

"On or about the 13th day of August, 1914, he (a private person) did then and there unlawfully transport, carry, and deliver intoxicating liquor to one Roy Blansit in Hamilton county, Tex."

Other necessary allegations are made showing that local option was in force in Hamilton county, etc., but, as the whole case hangs around the above allegation, we only copy that much of it in substance. When tried, he was convicted, and his punishment assessed at one year's confinement in the state penitentiary.

The evidence in behalf of the state would show that appellant stated he was going to Waco. Roy Blansit delivered to him \$1, with an understanding that appellant would bring him (Blansit) a quart of whisky; that appellant did bring the whisky, and placed it where Blansit could and did get it. They were working together at the time, but were not members of the same family.

[1] Appellant's contention is that he having business in Waco, desiring to go there to see his uncle, he remarked that if he had money enough he would go, when Blansit let him have a dollar; that at the time he received the dollar he told Blansit he could not bring him any whisky, and that he did not bring Blansit any whisky; that he bought some whisky for himself, and brought it back home with him, and if Blansit got a quart of it he did not know it. This defense was submitted by the court to the jury; he giving, at appellant's request, the following charge:

"If you believe from the evidence that defendant purchased liquor in Waco for his personal use, and personally carried said liquor to Hamilton county, but that, after he reached Hamilton county with it, the prosecuting witness, Roy Blansit, without the knowledge of the defendant, got a part of said whisky, or in case you have a reasonable doubt hereof, you will acquit the defendant."

Having given this special charge, there was no error in refusing to give the other special charge relating to the same matter.

[2] There was no error in refusing to give the special charge in regard to whether or not local option was in force in Hamilton county. Our law now provides for a contest to be instituted in a given period of time, and, if no contest is instituted within this time, the question as to the validity of the law cannot be later raised on the trial of a case where one is charged with a violation of the law. In the case of Doyle v. State, 59 Tex. Cr. R. 61, 127 S. W. 816, this court held:

"Whatever we might conclude in respect to these several matters, in the absence of the statute passed by the Thirtieth Legislature (Acts 30th Leg. c. 8), requiring contests to be made of local option elections theretofore or to be thereafter held, it is sufficient to say that, in the absence of a contest, we must and shall assume that the judgment and decree putting local option in force and the proclamation of the county judge had the effect to institute the law in that county, and that this presumption and

conclusion are conclusive on us and on appellant."

See, also, Alexander v. State, 53 Tex. Cr. R. 505, 111 S. W. 145; Evans v. State, 53 Tex. Cr. R. 450, 117 S. W. 167; Jerue v. State, 57 Tex. Cr. R. 215, 123 S. W. 414. The record shows that the order of the county judge prohibiting the sale of intoxicating liquors in Hamilton county was published in the Rustler, a weekly newspaper, November 30 and December 7, 14, and 21, 1911, and prohibition was and is in force in said county, and, no contest having been instituted, we conclusively presume that all steps taken were legal.

[3] Appellant moved to quash the indictment on various grounds, none of which, we think, are tenable. He contends that, as the local option law was adopted in Hamilton county prior to the enactment of the Allison law by the Legislature, its provisions do not apply to Hamilton county. This was decided adversely to him in the case of Fitch v. State, 58 Tex. Cr. R. 366, 127 S. W. 1040.

[4] Appellant also contends that the indictment should have alleged whether the transportation was an interstate or intrastate transaction. This court held in the Peede Case, 170 S. W. 749, that sections 2, 3, and 4 related to intrastate transactions and section 5 to interstate. As the indictment in this case is drawn under the sections relating to intrastate transactions, the allegations in the indictment are sufficient to charge an offense under these sections of the bill. The act itself specifically provides in section 12 that:

"It shall not be necessary \* \* \* to negative the exceptions herein made, but the same shall be available \* \* \* as purely defensive matters."

Many other objections are urged to the indictment, all of which go to the constitutionality of the act. In the brief herein filed, and in the able oral argument presenting this case, the validity of the law is assailed from almost every conceivable viewpoint. This is an intrastate transportation of whisky, and it is urged that, as we held in the Peede Case that it was not a violation of law to ship, transport, and deliver whisky to one in prohibition territory for personal use from a point without the state, to hold that the law prohibits the transportation and delivery of whisky from a point within the state for such use would render the law void, for by such construction it would contravene section 1 of article 14 of the amendments to the federal Constitution, which guarantees to each individual the equal protection of the law. In the Peede Case we were passing on that provision of the law (section 5) which by its terms dealt with interstate shipments, etc., and it by its language provided that such shipments were prohibited only when "intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of this state." This being an intrastate transportation, a

transportation from Waco, where the sale is licensed, to Hamilton county, where the sale is prohibited, a different question is presented. In dealing with intrastate shipments, the Legislature has provided:

"Sec. 2. Except as otherwise provided in this act it shall be unlawful for any person, firm or corporation, or any officer, agent or employé thereof in this state to deliver to any other person, firm or corporation, or any agent, officer or employé thereof, any intoxicating liquor for shipment, transportation, carriage or delivery within this state.

"Sec. 3. Except as otherwise provided in this act, it shall be unlawful for any person, firm or corporation, or any agent, officer or employé thereof in this state to receive from any other person, firm, or corporation, or any agent, officer or employé thereof, any intoxicating liquor for shipment, transportation, carriage or delivery within this state.

"Sec. 4. Except as otherwise provided in this act, it shall be unlawful for any person, firm or corporation, or any agent, officer or employé thereof to ship, transport, carry or deliver any intoxicating liquor to any other person, firm or corporation, or any agent, officer or employé thereof in this state."

"Sec. 9. Nothing in this act shall make it unlawful for any person for the use of himself or the members of his family residing with him, to personally carry such liquor to any point within this state."

[5] In dealing with commerce between the states we must remember this is under the control of Congress by virtue of the interstate commerce clause of the federal Constitution, and our state can go and only has gone as far as Congress has seen proper to authorize. But just as commerce between the states is under the dominion and control of the federal government, commerce wholly within the state is under the control of the state government; and if a state in legislating, recognizing this to be true, should, as many states have done, prohibit the traffic in intoxicating liquors within the state, yet a citizen might and often has sent to another state and purchased such liquors, such legislation is not violative of any provision of the federal Constitution, and does not deprive any citizen of the equal protection of the law, for all citizens of the state have the same right and privilege to send and get it without the state, although not to buy it within the state.

We have quoted above the provisions of the law, so that it may be seen that, in dealing with the shipment and transportation of liquors wholly within the state, the Legislature did not use the qualifying words "is intended to be received, possessed, sold or in any manner used in violation of the law," in sections 2, 3, and 4, as they did in the section (5) dealing with interstate shipments, etc. In this case we have wholly a different question presented, for now we are dealing with transportation and shipment wholly within the state—a question which our state legislative body alone has authority to deal—and, in so far as it may be necessary to protect the public health, public morals, and

public welfare, their will as expressed into law is final and supreme.

[6] We are aware that in the case of *Holley v. State*, 14 Tex. App. 505, Judge White held that section 20 of article 16, in authorizing the sale of whisky to be prohibited, was an implied limitation on the power and authority of the Legislature, and the Legislature of this state could do no more than to say, "Thou shalt not sell," and affix a penalty for making an illegal sale. Judge Willson, however, at that time dissented from the view that this provision of the Constitution was a limitation on the authority of the Legislature, which Judge White admits it would possess in the absence of this provision, to by general law pass such legislation as it deemed advisable. It is to be regretted that this court has never been in entire harmony on this question since the adoption of this provision of the Constitution, but the writer is of the opinion that the great weight of authority holds that where, by the organic law of the state, the people are given the right to prohibit the sale of intoxicating liquors, the Legislature has not only the authority, but it is under obligation, to pass all such laws as may be necessary to render that right effective—to pass all needful laws to prevent illegal sales—and this is the view of our Supreme Court, and they are unanimously of that opinion. In the case of *Dupree v. State*, 102 Tex. 460, 119 S. W. 302, that court says:

"The proposition that only sales may be prohibited has sometimes been thought to imply the further one that the prohibition can only be enforced by denouncing and punishing as an offense the completed sale. This restricts the power granted within too narrow limits, as we had occasion to hold in *Ex parte Dupree* [101 Tex. 150] 105 S. W. 493. The purpose of the prohibition is to prevent the thing prohibited, and this provision of the Constitution prescribes no scheme of legislation by which that is to be done, but leaves the choice of the methods to the lawmaking power. There is nothing whatever in the provision which, in our opinion, should be construed as denying the power to prevent the sales which are prohibited by any legitimate remedies appropriate to that end. Prevention of crime is one of the objects to which the most anxious thoughts and the most constant efforts of thoughtful legislators are directed, and the dealing with the steps preparatory to commission is a favorite method."

Again, in *Ex parte Dupree*, 101 Tex. 155, 105 S. W. 495, Chief Justice Brown, speaking for the court, says:

"The Constitution does not require the Legislature to submit to the vote of the people the law which is necessary to enforce prohibition, and it has not done so; this is a proper subject for legislative action."

Thus it is seen that our Supreme Court holds that the Legislature has authority to say more than "thou shalt not sell"; that it has authority and power to enact all necessary legislation to render effective the prohibition law, wherever adopted, and as Judge Williams said in *Dupree v. State*, supra:

"Prevention of crime is one of the objects to which the most anxious thoughts and the most

constant efforts of thoughtful legislators are directed, and the *dealing with the steps preparatory to commission is a favorite method.*"

We are of the opinion the Legislature not only has authority to punish a person for selling in violation of the law, but it has the authority to pass on all necessary legislation to prevent illegal sales being made.

Instead of section 20 of article 16 being an implied limitation on the power of the Legislature to pass all necessary laws to render effective the prohibition law wherever adopted, we think, if the Legislature had not already possessed the authority by virtue of being the representative of sovereignty, the authority to pass all necessary laws to render effective the prohibition law, wherever adopted, would be necessarily implied by virtue of section 20 of article 16. Mr. Cooley in his work on Constitutional Limitations has well said:

"The distinguishing characteristic difference between the federal and state Constitutions is that the Constitution of the United States is but a grant of legislative power, and the Congress can, in framing laws, only exercise such authority as is granted, whilst, on the other hand, state Constitutions are only limitations upon the complete power with which, otherwise, the legislative department of the state was vested in its creation. 'Congress can pass no laws but such as the Constitution authorizes, either expressly or by implication, while the state Legislature has jurisdiction of all subjects on which its legislation is not prohibited. The law-making power of the state, it is said in one case, recognizes no restraints, and is bound by none, except such as are imposed by the Constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute.'"

While Congress can pass no law except in those instances where the authority to do so was delegated to it by the Constitution, yet it has always been held by the Supreme Court of the United States that, where the power to pass a given law was expressly delegated, Congress necessarily also impliedly had all necessary authority to enact all laws to render effective the law passed in obedience to the express authority granted. That court has held: The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and at the same time to mark, by sufficiently definite lines, the sphere of its operation. To this end it was needful only to make express grants of general powers, coupled with the further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive, and it has been found, in the practical administration of the government, that a very large part of the functions have been performed by the exercise of powers thus implied. *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97;

*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. And as Chief Justice Marshall says:

"The government which has the right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

So if we looked alone to section 20 of article 16 of the Constitution for authority in the Legislature to pass all necessary laws to enforce prohibition and prevent illegal sales of intoxicating liquor, under all the canons of construction, instead of that section of the Constitution being a limitation on the power of the Legislature to pass needful legislation to enforce prohibition wherever adopted, the authority and power would necessarily be implied to be in the Legislature by virtue of that section of the Constitution to pass all such laws that they deemed necessary to render effective that provision of the organic law, and the choice of remedies must be left to their wisdom, so long as they do not run counter to any other provision of the Constitution.

And the rule announced in the *Holley Case*, supra, that section 20 of article 16 was an implied limitation on the powers that the Legislature would otherwise have possessed to pass laws under the police power in aid of the enforcement of the prohibition law, has never obtained in our Supreme Court, and has not obtained in this court for a great length of time.

In the case of *Sneary v. State*, (the opinion of Judge Brooks being reported in 40 Tex. Cr. R. 507, 52 S. W. 547, and the opinion of Judge Henderson in 53 S. W. 696) the right of the Legislature to pass regulatory laws in aid of the proper enforcement of prohibition was upheld.

In the case of *Snead v. State*, 55 Tex. Cr. R. 584, 117 S. W. 963, Judge Ramsey reviewed the authorities and sustains the authority of the Legislature to enact such laws.

In *Joliff v. State*, 53 Tex. Cr. R. 61, 100 S. W. 176, this court held:

"It is urged by the state that the contention of appellant seems to ignore the fact that local option and nonlocal option territory alike have laws regulating the licensing and sale of intoxicating liquors, and that in consequence he overlooks the necessity for a general law, such as the one in question. If, however, the state contends this court should assimilate the act in question to a law by its terms limited to local option territory, then they insist that such act dealing, as it does, with the sale of intoxicating liquors, and being germane to the main subject, and considered by the Legislature as a necessary auxiliary to the enforcement of the will of the people, as expressed by the adoption of local option, the same should be held by every test as a valid law. We are inclined to believe that both of these contentions of the state are correct. Certainly, if we are to have respect for the decisions of the Supreme Court, as declared in the case of *Ex parte Dupree* [101 Tex. 150] 105 S. W. 493, this is no longer in this state an open question. In that case, in discussing the search and seizure law, which by its terms was limited to local option territory, and in view of the question there raised that said act was un-

constitutional, because in excess of the power of the Legislature, as limited by article 16, § 20, of the Constitution, in a luminous opinion upholding the validity of the law, the court say: "The Constitution does not require the Legislature to submit to the vote of the people the law which is necessary to enforce prohibition, and it has not done so. That is a proper subject for legislative action. It has been held in this state that the Legislature cannot go beyond the limits of the Constitution and prohibit the giving away of liquors within the prescribed territory, but that does not in the least interfere with nor limit the power of the Legislature to enact all suitable and necessary laws for the enforcement of the will of the people on that subject. The law in question is not subject to the objection urged." So, both on reason and authority, the contention here considered must be held adversely to appellant. This view is supported by the holding of the Court of Civil Appeals of the Second District, in the case of *Clopton v. State*, 105 S. W. 994."

In *Stephens v. State*, 47 Tex. Cr. R. 604, 85 S. W. 797, it was held that the Legislature had authority to prohibit gifts of liquor to a minor in local option territory under the police power of the state.

In *Williams v. State*, 81 S. W. 1209, and *Weatherford v. State*, 51 Tex. Cr. R. 447, 102 S. W. 1146, the law was upheld punishing a physician for giving a prescription for intoxicants in local option territory without making a personal examination of the applicant and ascertaining that he was in fact sick.

The act of 1905 (Acts 29th Leg. c. 64), prohibiting those following the occupation of storing intoxicating liquors in local option territory from permitting any one to drink liquor on the premises, was sustained in *Ex parte Massey*, 49 Tex. Cr. R. 60, 92 S. W. 1083, 122 Am. St. Rep. 784, Judge Henderson saying:

"We do not understand that the police power of the state is abrogated or suspended in local option territory, or that state laws which are applicable to such territory are inoperative."

In the case of *Fitch v. State*, 127 S. W. 1040, the authorities are exhaustively reviewed, and in an opinion written by Judge McCord he held:

"All legislative power is vested in the Legislature, and cannot be exercised by any other body, except as provided by the Constitution. We therefore hold that the power to legislate for the efficient enforcement of the local option laws is not taken away from the Legislature after the adoption of local option, \* \* \* and that, if new offenses grow out of the violation of this law that cannot be covered by the laws already in existence, the duty and obligation rests upon the Legislature to see that efficient laws are passed to meet each new emergency."

In the concurring opinion Judge Ramsey says:

"That it is within the power of the Legislature to provide ample remedies for evils and abuses growing out of the sale of intoxicating liquors in local option precincts, beyond and aside from the punishment assessed for such sales is no longer an open question in this court."

In *Ezell v. State*, 29 Tex. App. 523, 16 S. W. 783, in discussing a similar question, this court held:

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"The reason assigned why said conviction could not occur is stated to be that section 20, art. 16, of the Constitution does not delegate to the Legislature power to continue the penalty in force after the law has been repealed by vote of the people. The position assumed is not a sound one. The Legislature is not only empowered to pass such laws, but it is obligatory upon said body to pass same and make them effective. It is not a question of delegated power, but is a command to that body to enact laws for the purpose and object stated in said provision of the Constitution. The authority to create the law carries with it the power to provide adequate penalties to punish violations thereof when the laws have been put into operation."

This was the status of the law on this question when the writer was honored with a position on this high court, it being, as said by Judge Ramsey, *no longer an open question that the Legislature possessed the authority and power to provide ample remedies for evils and abuses growing out of violations of the local option law*, and as said by Judge Williams in the Dupre Case, *supra*:

"The prevention of crime is one of the objects to which the most anxious thoughts and the constant efforts of thoughtful legislators are directed, and the dealing with the steps preparatory to commission is a favorite method."

It having been shown that this was the law of this state both by this court and the Supreme Court, and the reasoning therein in our opinion being sound, we have taken the rules therein announced as our guide. The question first came before us on motion for rehearing in the case of *Ex parte Roper*, 61 Tex. Cr. R. 68, 134 S. W. 334; Judge Ramsey having written the original opinion before his retirement from this court. In that case we upheld the right of the Legislature to enact a law authorizing the issuance of an injunction to prevent certain premises being used as a place in which to make sales in violation of the local option law. The right of the Legislature to enact laws to secure the enforcement of the prohibition law wherever adopted again came before us in the case of *Edmanson v. State*, 64 Tex. Cr. R. 413, 142 S. W. 887, wherein we upheld the law prohibiting the taking and soliciting of orders for the sale of intoxicating liquors, among other things saying:

"The police power is not abrogated by the local option law, \* \* \* but it is the duty of the Legislature to pass all such remedial statutes as may be necessary to enforce the will of the people"—reviewing the authorities.

In *Ex parte Flake*, 149 S. W. 146, we upheld the right of the Legislature to regulate and control the business of storing intoxicating liquors for others in prohibition territory, and in *Ex parte Townsend*, 64 Tex. Cr. R. 350, 144 S. W. 628, Ann. Cas. 1914C, 814, we upheld the right of the Legislature to regulate and control the sale of nonintoxicating malt liquors in prohibition territory, saying:

"The police power includes the right to regulate, control, and prohibit occupations which endanger the health, morals, or safety of the general public. The police power is inherent in governments and may be exercised by every sov-

foreign state through its lawmaking agency, independently of any specific or general grant of constitutional express authority."

To these rules of law we adhere, and, if necessary, would reannounce them in full, and the cases holding to the contrary are overruled expressly, as they have often been impliedly, if not expressly, heretofore, and, if the Legislature deems it necessary to regulate and control the shipment and transportation of intoxicating liquors into prohibition territory in order to more effectively prevent illegal sales and secure the enforcement of the prohibition law wherever adopted, it may do so.

Another contention made, that the provisions of the Allison Law apply to license territory as well as prohibition territory, and for this reason is void, we do not think can be sustained, and do not deem it necessary to discuss it at length. The caption of the bill and its provisions as a whole render it clear and certain that it should and does apply only to such territory as may have already or may hereafter adopt the local option or prohibition law, and this is fully shown by section 8 of the bill. As we have stated in previous opinions, when discussing the questions here involved, it is manifest that the people of the state, in adopting the present Constitution, authorizing the licensing of the sale of intoxicating liquors in all territory where prohibition has not been adopted, and authorizing the adoption of prohibition in any county or subdivision thereof where the people might elect to so declare, recognized fully that it would be necessary to have different laws in the license and prohibition territory—in the license territory to regulate and control the business of selling intoxicating liquors, and protecting those who took out a license under the law; in prohibition territory, laws to prevent altogether the sale of intoxicating liquors—and the fact that this law applies only to prohibition territory does not render it unconstitutional. But the laws passed must be in aid of the enforcement of the prohibition law, which apply alone to local option territory; therefore, if a statute purporting to be passed in aid of the prevention of illegal sales in prohibition territory has no real or substantial relation to that object, it would be the duty of the courts to so declare, just as it would be to uphold and enforce a law that really is in aid of the accomplishment of that object. And, so far as the provisions of the Allison bill prohibits the shipment, transportation, carriage, and delivery of intoxicating liquors for sale or illegal use, it would be and is in aid of the proper enforcement of the prohibition law, and should and will be sustained. However, section 9 of the bill provides that it shall not be unlawful for any person, for the use of himself and members of his family residing with him, to personally carry liquor into prohibition territory. So that one having in his possession intoxicating liquor for

his own use is declared by law not to be hurtful to the public welfare, and it is declared not hurtful for him to personally carry such liquor into prohibition territory for his own use. Thus by law it is declared not to be prohibited, and that the law does not intend to prevent one from carrying liquor or having it in his possession in prohibition territory. The question then arises: May the Legislature under the police power, when it licenses the sale of liquor in certain territory, by law make it legal and lawful for every citizen to purchase it, and by law authorize him to carry it in the prohibition territory and keep it there for his own use, regulate the manner in which he shall carry it, and prohibit him from having it conveyed by another, when the liquor is intended to be used in the same way and for the same purpose for which he is personally authorized to carry it into such territory?

[7] The police power inherent in the state has been likened unto the law of self-defense that is said to be born in each individual. As the individual has the right to protect his life or body from serious bodily injury, and his property which he has lawfully acquired from destruction, so the state has the inherent right, under the police power, to protect the public welfare from those things which would produce death or seriously affect the health of the public or its general moral welfare. This power has always been and is difficult of exact definition. It has been well said that:

"It is easier to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise."

The decisions of the courts show this power is of wide extension and diversity; it has been termed "the law of overruling necessity." Citizens' rights or property, as they are estimated by the public, are continually invaded by the government in its necessary guardianship of public interests, public welfare, and for the general public good. The power of the legislative branch of the government seems to be almost unlimited, except in so far as the Constitution of the state has inhibited it. There are certain rights, however, guaranteed to each and every individual by the Bill of Rights and other provisions of the Constitution, and it is provided in the Bill of Rights:

"To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto \* \* \* shall be void." Section 29.

The right to sell intoxicating liquors, nor the right to purchase or own intoxicants, may be said not to be a portion of the rights reserved, no more than the right to purchase and use opium, cocaine, or other hurtful and harmful drug; but the right to purchase property which is recognized by the state as a legitimate article of commerce, and the

sale of which the state legalizes by licensing, is a right each and every citizen possesses in common. The Legislature could not pass a law which, while recognizing the right of the citizens in "wet territory" to purchase intoxicants, would deprive the citizen of "dry territory" of the right to purchase it when he goes to a place where the state has and does by law legalize and authorize its sale. And when he thus buys it and it becomes his property, what right has the state to say by what means he conveys it to his home? If the shipment thereof by a common carrier, or the carriage of it by another, could be said to be more inimical to the public welfare than his personally carrying it, then under the police power the state could and should perhaps regulate its carriage. In the celebrated case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, the law is thus declared:

"But by whom or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund Cases*, 99 U. S. 718, 25 L. Ed. 501), the courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose.' It was said in *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 167, 2 L. Ed. 60, 70, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Mr. Black, in his work on *Intoxicating Liquors*, says:

"The keeping of intoxicating liquors in his possession, by a person, unless he does so for the illegal sale of it, or some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore a statute prohibiting such keeping in one's own possession is not a legitimate exercise of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void. \* \* \* Though there is a prohibition not to sell them, yet that cannot prevent a man from having a property in them for his own use, without any intention to sell them, and they may be transported through the state, where there is no intention to violate the law."

If the Legislature of this state had deemed it necessary to prohibit altogether the transportation and carriage of intoxicating liquors into prohibition territory (except for medicinal, sacramental, and scientific purposes), in order to render effective the law prohibiting illegal sales thereof, there might be and probably would be justification for such law, although, in our opinion, the validity of such a law would be one of extreme doubt, so long as the laws of the state license and authorize the sale of intoxicating liquors, and authorize its sale to all persons, except minors and habitual drunkards. When a state legalizes the traffic by law, it is a legitimate article of commerce, under decisions of all the courts; and, when the law authorizes one to acquire, own, and use it, we doubt the state having authority to do more than to prevent the owner from so using it that it may be hurtful to the public health and public safety. But our Legislature specifically authorized each and every citizen of the state to purchase, own, and acquire intoxicating liquors and to transport into prohibition territory liquors for his own use and the use of his family; and since they have not thought it proper, in order to prevent illegal sales, to attempt to prohibit the citizen from transporting it into prohibition territory, but specifically authorize him so to do by section 9 of the bill, can they, under the police power, regulate the mode of transportation he may adopt in conveying or having it conveyed for his own use to his home in prohibition territory? In what way can the mode and manner one may adopt in transporting or having transported intoxicating liquor purchased for his own use injure or affect the health, morals, safety, or general welfare of the public? If the shipment, transportation, and carriage of intoxicating liquors for one's own use cannot by any possibility be hurtful to the public health, public morals, or public safety, then it is a matter that cannot legitimately come within the police power of the state. And the right to have it shipped would necessarily carry the right with it for the carrier to make a delivery to the owner of the liquor, and we have ample statutory laws to prohibit and punish its delivery to any other person than the owner.

We cannot give our consent to a law

sought to be enacted under the police power, which would make a man a criminal for an act that can in no way be hurtful or harmful to the health, morals, or safety of any other citizen of the state or his property. Under the construction contended for, it would be admitted that under the law, and necessarily so, a citizen of San Marcos (in prohibition territory) can come to Austin and purchase intoxicating liquors, place it in his suit case, and carry it on the train with him to his home in San Marcos for his own use and the use of members of his family. The law specifically authorizes him so to do in section 9; yet it is contended, if, when he gets to the depot, he hands the suit case to the baggage-master or express agent to be transported on the same train on which he travels, only in another coach, that, the minute he hands the suit case to the express messenger or baggagemaster to be conveyed in the baggage car to San Marcos on the same train, he becomes a felon; the baggagemaster or express agent becomes a felon; the railroad company, which could lawfully carry it in the passenger coach, by permitting it to be carried in the baggage coach becomes a criminal and subject to severe penalty; and the agent at San Marcos, who delivers to him his suit case with his property therein lawfully acquired under the law, becomes a felon; and all may be confined in the penitentiary. In what way is it or can it be more hurtful to the public for the man to have the suit case carried in the express car or baggage coach than for him to carry it in the passenger coach? This is a matter we have never been and are now unable to perceive.

Texas, as hereinbefore stated, has dual laws in regard to intoxicating liquors. It has never declared it to be the policy of the state to prohibit one from manufacturing liquors for his own use; on the other hand, the right to do so is specifically recognized in section 8a of the bill. It has never been declared to be the policy of this state to prohibit any one from obtaining intoxicating liquors for his own use and keeping it at his home; on the other hand, his right to do so is recognized specifically in section 9 of the bill, as such rights have always been recognized by every law passed in this state either in regard to regulating the traffic therein or in prohibiting its sale. We are not in the position of those states whose laws have made it illegal to manufacture intoxicating liquors even for one's own use, and undertake to prohibit one having such liquors in his possession. Our laws, nor this law, do not go to that extent, but, on the other hand, recognize and reiterate his right to manufacture it for his own use, to purchase it, and to transport it, at least personally, into prohibition territory for his own use. In the territory where its sale has been prohibited, the Legislature recognizes it as its duty to pass

all laws needful to prevent its illegal sale; and, if other laws become necessary to accomplish that end, we have that faith in the Legislature to believe they will pass them as they should do. On the other hand, we have territory in Texas where the sale of intoxicating liquors is legalized by licensing dealers therein, and under this license they are authorized and permitted to make sales thereof to the general public under such regulations as are now or may hereafter be prescribed by law. So long as the laws of Texas recognize, legalize, and legitimize the sale of intoxicating liquors and license dealers therein, just so long the Legislature of Texas will be powerless to pass a law which will prevent the citizens of the state from going into this licensed place and purchase such liquors in quantities and under the terms which the licensed dealer has been authorized to sell; and, when the citizen purchases it at such licensed place, it becomes his property, is not subject to confiscation, nor can he be prevented from carrying it to his home for his own use, nor can he be prevented from making use of the common carriers of the country in having it conveyed to his home for his own use, unless the Legislature should arrive at the conclusion that it was proper to prohibit one living in prohibition territory from owning, keeping it in his possession, and using intoxicating liquors altogether, in order to prevent illegal sales thereof. This this bill does not seek to do, and the citizen, by its terms, is authorized to transport and import it into prohibition territory for his own use. Intoxicating liquor is not an article of commerce (where commerce therein is legalized by law) that its mere carriage by an express company, or baggage company, or other common carrier is dangerous to the public welfare, in any sense of the word. And, when the law legalizes its sale and purchase by the citizen, to undertake to say how the citizen shall carry it, or that he cannot have it carried by another, is not a regulation of the intoxicating liquor, but becomes a regulation of the citizen in the management of his property acquired under the law, and seeks to control him in a matter in which the public can have no interest, and can in no sense be hurtful to the safety of the public, nor its health, nor morals, nor the general welfare of the public.

But in holding that the Legislature is without authority and power to regulate the citizen as to the means to be adopted in the transportation or carriage of intoxicants purchased for his own use, at places where the state authorizes its acquisition, to his home, we do not wish to be understood as holding that if the liquor is purchased or intended for resale in the prohibition territory, or intended to be used in prohibition territory for any unlawful purpose, the Legislature is without authority to prohibit its shipment, transportation, carriage, and delivery to any

person (even the owner) for such illegal purposes. We think the Legislature has authority and power to do so, and it is its duty to do so, and that it has done so by the provisions of the Allison Law, and that a proper construction of this law shows that this is all the Legislature intended to do. It is a well-known rule of construction that if a bill, by all of its terms, is subject to two constructions, and by one construction it would be rendered void, yet by another construction, of which it is equally susceptible, its terms would be within the authority of the Legislature to enact under the police power, and violative of no provision of the Constitution, it is the duty of the court to give to the act that construction which would render it valid. What was the evil the Legislature had in mind? Not to prevent one from obtaining liquor for his own use, for the act authorizes him to get it and keep it for his use; but recognizing that liquor was being shipped into, transported into, carried into, and delivered to others in prohibition territory for illegal purposes (that is, to make illegal sales thereof in prohibition territory), it was at this evil the terms of the act were directed, and which it intended to prevent in future, and which should be and by the terms of this act is prohibited.

Sutherland on Statutory Construction states:

The "universal principle applied in considering constitutional questions is that an act will be so construed, if possible, as to avoid conflict with the Constitution, although such construction may not be the most obvious or natural one. The courts may resort to an implication to sustain a statute, but not to destroy it."

Black on Interpretation of Laws says:

"The presumption is always in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against it; and the courts will not adjudge it invalid, unless its violation of the Constitution is clear, complete, and unmistakable. Hence it follows that the courts will not so construe the law as to make it conflict with the Constitution, but will rather put such interpretation upon it as will avoid conflict with the Constitution and give it full force and effect, if this can be done without extravagance. If the enactment is fairly susceptible of two or more constructions, that interpretation will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary for this purpose to disregard the more usual or apparent import of the language employed."

In the case of *W. U. Tel. Co. v. State* (Civ. App. 121 S. W. 194, Chief Justice Key of the Court of Civil Appeals cites a number of authorities, and reaffirms the rule:

"That if a statute is capable of two constructions, one of which will render it valid and the other render it invalid, the former will be adopted."

In the case of *Bassett v. Mills*, 89 Tex. 168, 34 S. W. 95, our Supreme Court, speaking through Chief Justice Gaines, said:

"Where a statute is capable of two constructions, one of which would comply with a positive requirement of the Constitution, and the other leaves the duty unperformed, the former should prevail."

And in the case of *Galveston Ry. Co. v. Gross*, 47 Tex. 435, that court held:

When a law is susceptible of two constructions, that which is constitutional will be adopted.

In our court it was held in *Ex parte Mabry*, 5 Tex. App. 98:

"When a legislative act can be so construed \* \* \* as to avoid a conflict with the Constitution, and give it the force and effect of law, such construction will be adopted by the courts."

Again in *Ex parte Murphy*, 27 Tex. App. 494, 11 S. W. 487, it was held:

In construing a legislative act, courts must so interpret it as to harmonize its provisions with the Constitution, if possible.

This rule of construction has always prevailed in the courts of this state, and we think properly so, and the rule is upheld by all text-book writers of any note. Courts should never hold an act of the Legislature void, unless compelled by the clear and specific language of the act to hold that its terms are in contravention of the inhibition of the state Constitution; and if the language used in the act as a whole is reasonably subject to a construction that will render it valid, and reach the evil intended to be suppressed, such construction should be adopted by the court and its validity upheld.

We have felt impelled to discuss these questions at length and cite these authorities by reason of the differences in opinion existing between members of this court. Our senior justice, Judge DAVIDSON, is of the opinion that the language of the act is subject to the construction that it prohibits the shipment, transportation, and delivery of one's own liquor to him in prohibition territory, and, if so, that the act would, in that event, be clearly violative of the provisions of the Constitution and void, and further that section 20 of article 16 of the Constitution should be construed as a limitation on the power of the Legislature to pass any law under the police power to affect in any wise intoxicating liquors in prohibition territory other than merely to punish for an illegal sale, as evidenced by his dissenting opinions in the *Sneary*, *Snead*, and other cases hereinbefore cited. On the other hand, Presiding Judge PRENDERGAST is of the opinion that the proper construction to give the law is that it prohibits the transportation, shipment, carriage, and delivery of intoxicating liquors in prohibition territory, except for medicinal, scientific, and sacramental purposes, and that the Legislature has the authority and power to regulate and prohibit the transportation, shipment, and delivery of liquors for one's own use in prohibition territory, and that this law does do so, even though the law in section 9 authorizes one to purchase it for his own use and carry it to his home in prohibition territory, as evidenced by his dissenting opinion in *Ex parte Peede*. To neither of these, to my mind extreme, views have I been able to give my

assent, for I do not believe such to be the law, which fact has been known to my Associates on the bench since the rendition of the opinion in *Ex parte Muse*, 168 S. W. 520. In the writer's opinion, the police power is one of the greatest and most essential powers possessed by the government, and that it is necessarily inherent in sovereignty—the power to protect the health of the citizenship of a state, the morals of the citizenship, and to insure the safety of the citizenship—and, when exercised within these bounds, the judiciary nor any other authority has the right to annul laws passed in regard to such matters when necessary for the public welfare; but when the Legislature goes beyond the proper bounds and seeks to control the individual citizen in the mode of transportation or carriage of his property to his home (whether in prohibition territory, and whether it be whisky or other property) that he has legally acquired at points where the state has licensed and authorized its sale, when the property is not of the nature that the mere mode and method of its shipment, transportation, and carriage can be injurious to the public health, public morals, public safety, nor the general public good, it has gone beyond the limits heretofore recognized as inherent in the state under the police powers. Entertaining these views, as I do, and knowing that the views I entertain in this case are not concurred in by either of my Brethren, I have written perhaps at more length than was necessary, and yet I deemed it necessary and proper to do so to show why I think the Allison Law violative of no provision of the Constitution, and yet that it did not prohibit a citizen of the state from carrying or having conveyed to his home, by the usual and customary methods of conveying property, his own property that the law by express terms authorized him to acquire and to carry to his home and there use it himself, or administer to his family, when he deemed it advisable or necessary.

To the rule of law hereinbefore stated that, when an act is subject to two constructions, the courts should give it that construction which would render it a valid law, another equally well-recognized rule of construction may also be added: That we should take into consideration the evil intended to be remedied. From contemporaneous history we are made aware that, wherever local option has been adopted, it had, to some extent at least, become customary to ship intoxicating liquors into such territory, establishing depots therefor, denominated as "cold storages" and under other nomenclatures, which said liquors were not intended for the personal use of the person receiving same, but were intended, when shipped into such territory, to be surreptitiously sold and otherwise used in violation of the laws of this state, and by such means render ineffectual the prohibition law. It was such evils as this that the Legislature

intended to remedy, and yet it was careful in the same act to reserve to the individual citizen his right to procure and use intoxicating liquors if he elected so to do, as evidenced by section 9. And while many of us may differ as to the advisability of a citizen using intoxicating liquors, and doubtless do differ, yet with the general public policy of a state the courts can have no concern. This the Legislature has the right to determine and must declare, and it has, in every law that it has ever passed since the right to adopt local option by a vote was adopted as a part of the organic law, declared that it was not the policy of this state to interfere with the right of the individual citizen to use intoxicating liquor if he so desired, provided he did not drink it in certain public places, and did not become drunk in public places. As said by an eminent law writer, an act cannot be declared void because, in the opinion of the court, it violates the best public policy, nor can its terms be so construed as to make effective a public policy the court deems most advisable and for the best interests of a state, which would be in antagonism to the settled policy of the state, as expressed in this and former legislative acts. The wisdom of the policy adopted by the state, as expressed in its laws, and the desirability of another and different policy are matters addressed to the legislative branch of the government, and must rest upon the intelligence, patriotism, and wisdom of that body, and not upon the judgment of the court. When the Legislature has declared the policy of the state, and given to the citizens, and each citizen thereof, the right to acquire intoxicating liquors and convey it to his home, the courts have no authority to seek to nullify that right by erecting and placing insuperable barriers to the exercise of the right. If it is deemed desirable to prohibit the individual citizen from obtaining and having in his possession for his own use intoxicating liquors, the remedy is with the people, and not with the courts, and should not be sought to be exercised by them. Mr. Sutherland in his work on Statutory Construction says:

"In general the same rules of construction apply to Constitutions as to statutes. A statute should be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd and unjust consequences, and, if possible, so as to make it valid and effective. 'It is familiar rule that, if the words employed are susceptible of two meanings, that will be adopted which comports with the general public policy of the state, as manifested by its legislation, rather than that which runs counter to such policy.' When a general intention is expressed in a statute, and also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception, and both are to have effect in their respective spheres."

As sustaining this text, he cites the following authorities: *Martin v. Election Commissioners*, 126 Cal. 404, 58 Pac. 932; *Davis*

v. Dougherty County, 116 Ga. 491, 42 S. E. 764; Dahnke v. People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; People v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770; Dodge v. Chicago, 201 Ill. 68, 66 N. E. 367; Boyd v. Brazil Block Coal Co., 25 Ind. App. 157, 57 N. E. 732; Arnold v. Council Bluffs, 85 Iowa, 441, 52 N. W. 347; Poor v. Watson, 92 Mo. App. 89; State v. District Court, 14 Mont. 452, 37 Pac. 9; Rome B. & L. Ass'n v. Nolan, 21 Mont. 205, 53 Pac. 738; Cate v. Martin, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613; McGinn v. State, 46 Neb. 427, 65 N. W. 46, 30 L. R. A. 450, 50 Am. St. Rep. 617; State v. Cornell, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am. St. Rep. 629; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524; Portland v. Gaston, 38 Or. 533, 63 Pac. 1051; McAskie's Appeal, 154 Pa. 24, 26 Atl. 60; Kolb v. Reformed Episcopal Church, 18 Pa. Super. Ct. 477; Hayes v. Arrington, 108 Tenn. 494, 68 S. W. 44; Howard Oil Co. v. Davis, 76 Tex. 630, 13 S. W. 665; People v. Utah Commissioners, 7 Utah, 279, 26 Pac. 577; Jackson v. Kittle, 34 W. Va. 207, 12 S. E. 484; American Net & Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821. See *Ex parte Ah Hoy*, 23 Or. 89, 31 Pac. 220.

The particular attention is expressed in the statute under consideration that the citizenship of this state, and each individual citizen, living in prohibition territory, shall have the right to procure for himself, in territory where the sale thereof is licensed, for the use of himself and members of his family, intoxicating liquors if he so desired, and we cannot be made the instrument to nullify or place impediments in the way or exercise of that right so expressly given and reserved to him in this statute. Entertaining these views, we hold that the proper construction of this act shows that it was the intention of the Legislature to prohibit, and by its terms they do specifically prohibit, the shipment, transportation, carriage (personal or otherwise), and delivery of intoxicating liquors into prohibition territory for any purpose other than for medicinal, scientific, and sacramental purposes, and the personal use (and members of his family) of the person receiving same; that a law with such intent and purpose has a place in the system of laws intended to prevent illegal sales of intoxicating liquors in prohibition territory; and that the law, as thus construed, is valid, and violative of no provision of the Constitution.

[8] That it does not prohibit the shipment, transportation, carriage, and delivery of intoxicating liquors from a point in this state, where same is authorized by law to be sold, and may be legally purchased, into prohibition territory, when intended for medicinal, scientific, or sacramental purposes, or the personal use of the person receiving same. Having this view of the law, and the

facts of this case showing, it may be said conclusively that appellant, A. D. Blansit, Dee Blansit, Roy Blansit, and others were employed by the commissioners of Hamilton county, in working or grading the roads of Hamilton county. The tent or camp was in A. D. Blansit's yard. During a rainy spell, in which no work could be done, appellant decided to go to Waco on a trip, as he says, to see an uncle on some business, who lived there. Roy Blansit, knowing this, gave him a dollar and requested him to purchase a quart of whisky, and bring it back with him. Appellant took the dollar, purchased the quart of whisky, and on his return brought it and placed it where he knew Roy would get it, and Roy did get it. There is nothing to suggest that it was the intention of appellant or Blansit to sell the whisky in prohibition territory, but the evidence and all the evidence shows that Roy Blansit desired it for his own personal use, and did so use it. Neither is there any evidence to even suggest, much less show, that appellant received any profit in the transaction, but the act was done merely as an accommodation to his friend, Roy Blansit. Had the prosecution been based on the transaction with Dee Blansit shown by the testimony, a different question would be presented, for, in so far as that transaction is concerned, the evidence would show that appellant perhaps made a profit out of that transaction, but not so in the instance on which this prosecution was based. Having the view of the law as hereinbefore expressed, we do not think the facts show a violation of the law in the instance charged in the indictment, and therefore the case should be reversed and remanded.

But under this construction it may be contended that the act would authorize two convictions for the same offense, which is prohibited by the Constitution—that, if one carries whisky into prohibition territory for sale and sells it, under the law he could be prosecuted both for carrying or transporting the whisky into prohibition territory for sale, and also be prosecuted for making a sale of it, if he sells it. We think the law authorizes a prosecution for each of said acts, and that they constitute two separate and distinct offenses, and the Legislature intended to so enact and to make the penalty so severe as to deter men from carrying or transporting whisky into prohibition territory for sale, and selling it in prohibition territory, and a conviction would and should be sustained under such circumstances for both offenses: First, for carrying or transporting it into the prohibition territory for an illegal and unlawful purpose; and, second, for making an illegal sale thereof after getting it into such territory. This is no anomaly in the law. A man breaks and enters a house for the purpose of committing

enforcement of the law. A contrary conclusion, logically pressed, would save the nominal power while preventing its effective exercise."

Further saying:

"With the wisdom of the exercise of that judgment (of the Legislature), the court has no concern. \* \* \* To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature—a notion foreign to our constitutional system."

That court cites many other cases in that opinion, all to the same effect. And to the same effect is *Patson, etc., v. Penn., etc.*, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539, reported in the issue of February 15, 1914. In my dissenting opinion in the *Peede Case* I cite and quote some of them. They are applicable here.

Carried to its necessary logical sequence. Judge HARPER'S opinion herein makes void and invalid all those provisions of the Allison Act which makes it an offense for any druggist, owner, etc., of any educational, etc., institution, hospital, owner, etc. (sections 7 and 13), to make the affidavit therein required, and also that provision in said sections which make it an offense for any of such persons to fail or refuse to file such affidavit with the clerk, because, as the Legislature has made it lawful for said persons to get liquor for their lawful uses, it is without authority to hamper them with making or filing such affidavit. So, also, would those provisions of our statute making it an offense to label shipments of liquor to prohibition territory (article 606, Pen. Code), and making it an offense to deliver such shipment of liquor to any other than the consignee in person, and other of our laws, because, as every person has the right to get liquor for his own use in any and every way and in all quantities, the law must not hamper him by any such restrictions as will make it the least inconvenient to him to get liquor, even though the Legislature is trying its best, by such regulations, to thus prevent the unlawful sale of such liquor.

But, is I see it, it is entirely useless for me to further discuss the question. The fiat has gone forth that the Allison Act must be held invalid and void, at least so far as it makes prohibition prohibit, and it is so held in Judge HARPER'S opinion in this case and in the companion case of *Ex parte Lewis Hopkins*, 171 S. W. 1163, in an opinion written by Judge DAVIDSON, this day delivered.

I most respectfully but earnestly dissent.

#### Supplemental Opinion.

HARPER, J. Having read Presiding Judge PRENDERGAST'S dissent, I wish to add I do not think there is anything said herein that can be construed as rendering invalid those provisions of the law requiring affidavits to be made by druggists and others, for we think a provision to require the owner, when he secures it from the express office, to make affidavit that he intended it for his own use would be valid, and there is nothing in the opinion that holds or is intended to hold that the law requiring such affidavits to be filed is invalid. Neither is there anything said or held herein that renders invalid the law requiring intoxicating liquors to be labeled when shipped, or to render invalid the law making it an offense to deliver such liquors to any person other than the consignee—the owner. In fact, such law is referred to in the opinion and approved. These are reasonable regulations to prevent illegal sales. We have deemed it necessary to add this much so that it may not be gathered that we lend our sanction to this part of Presiding Judge PRENDERGAST'S dissent. But we do not deem it necessary to comment further thereon, for in our opinion he does not therein discuss any of the questions involved in a proper discussion of this case, but his dissent was apparently written in moments when he was not cool and collected, for it mainly deals in extravagant conclusions and assertions, and not with the issues herein involved.

## WAGNER v. BRADY et al.

(Supreme Court of Tennessee. Dec. 12, 1914.)

## 1. PLEADING (§ 34\*)—CONSTRUCTION—"ETC."

The character "etc.," as used in a bill by a company's doctor to recover money taken out of the wages of employes, alleging that the money was collected on representations that the funds collected would go to the company's doctor and for his benefit in the way of purchasing medicines, providing hospital equipment, etc., imports every agency, device, construction, and measure tending to preserve the health of employes or to alleviate or cure their suffering in case of accidental injury or illness.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, First and Second Series, Et Cetera.]

## 2. PLEADING (§ 34\*)—AMENDMENT—CONSTRUCTION AGAINST REPUGNANCY.

An amendment to a pleading will not be held repugnant to the original averment, where a construction can be given which will avoid it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

## 3. PHYSICIANS AND SURGEONS (§ 24\*)—COMPENSATION—BENEFIT FUND—RIGHT TO RECOVER—EVIDENCE.

In an action by a company's doctor to recover amounts held out of the wages of employes for his alleged benefit under Acts 1889, c. 259, making it unlawful to withhold a portion of wages for the avowed purpose of paying the salary of the company's doctor without consent of the employe, and that the whole amount of such wages so withheld shall be paid to the company's doctor, evidence held insufficient to show that any fund was withheld for the avowed purpose of paying the company's doctor rather than maintaining hospitals, nurses, etc., or that any money was left of the fund.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 53-62; Dec. Dig. § 24.\*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by M. M. Wagner against Anthony N. Brady and others. From a decree for complainant, defendants appeal. Reversed, and bill dismissed.

Williams & Lancaster, of Chattanooga, for appellants. Joe V. Williams, of Chattanooga, for appellee.

BUCHANAN, J. By his original bill, Dr. M. M. Wagner sought a decree against Brady, as a nonresident individual, for certain sums of money collected by Brady through his agents from laborers and employes engaged in the construction of a lock and dam at Guild, in Marion county, Tenn., during the period of time from December 28, 1908, to the latter part of April, 1911, which sums the bill avers were collected out of the wages of said laborers and employes upon "representations made to them that the funds thus collected would go to the company doctor and for their benefit in the way of purchasing medicines, providing hospital equipment, etc."

[1] The character "etc.," above quoted, is said by the lexicographer, Mr. Webster, to be equivalent to the phrase "others of the same

kind, and the rest, and so on." It is equivalent to "et cetera" and the character "&c." "Etc." has been held to import other purposes of a like character to those which have been named. In re Schouler, 134 Mass. 426; High Court I. O. F. v. Schweitzer, 70 Ill. App. 139; and our own case, Garvin v. State, 13 Lea (81 Tenn.) 169, and in this case our court rejected the argument that the character "etc." was a mere abbreviation and meant nothing, but said:

"It is thoroughly incorporated into our language, is defined by our lexicographers, and is a perfect English word in almost common use."

In the case last cited, the character or word "etc." was the last word in the caption or title of an act and was held to embrace five other kinds of games not mentioned in the caption but mentioned in the body of the act.

So we think the word "etc.," as used at the end of the quotation from the bill last above set out, must be held to import every agency, device, construction, and measure tending to preserve and promote the health of the laborers and employes or to alleviate or cure their suffering in case of accidental injury or illness.

The bill also sought a decree against "Jacobs & Davies, Incorporated," averred to be a foreign corporation, "for all sums so collected by them from the time said Jacobs & Davies, Incorporated, took charge of said work, until the latter part of April, 1911, when complainant severed his connection with defendants, less the said sums which it may be shown were actually and necessarily expended as aforesaid." In another part of the bill it avers that Jacobs & Davies took charge of the work for Brady on July 1, 1910. So it is that the bill sets up a several demand against Brady for the period of time from December 28, 1908, to the time when he ceased to be "company doctor" in the latter part of April, 1911, and a joint and several demand against Brady and his agents, Jacobs & Davies, Incorporated, from July 1, 1910, to the latter part of April, 1911.

To the foregoing bill, the defendants interposed a joint and several demurrer, the grounds of which, under the view we have of the case, need not be noted, except the fourth ground, which the chancellor sustained, and which was in substance that the bill did not allege whether the sums collected and retained were collected and retained with or without the full consent of said employes and laborers. The action of the chancellor was met by an application to amend, which was allowed, and the bill was accordingly amended to meet the fourth ground of demurrer. The chancellor also allowed the bill to be amended so as to aver that said employes were induced to and did pay same over to defendants for the express purpose of compensating complainant as defendants' said company doctor.

[2] The amendment above quoted will not be allowed to have the effect of striking from the original bill the averments hereinbefore quoted as to the representation made to the employes and laborers under which the funds were collected, because the complainant did not ask leave to strike out that portion of the original bill, and such leave was not granted. The original bill was sworn to, and its averments must stand as binding upon the complainant. The amendment is susceptible of a construction which will save it from being held repugnant to the original averment, and that construction will be given it.

The complainant asked and was granted leave to amend his bill by an averment that:

"Defendants, in thus retaining and appropriating said funds for their own use and benefit, and in refusing to pay the same over to complainant, are violating chapter 259 of the Acts of 1889."

This amendment was not improper, but wholly unnecessary, inasmuch as the complainant had already averred, in substance, in his original bill that the retention by the defendants of the sums of money collected was in violation of the statute laws of the state.

Upon the coming in of the foregoing amendments, the defendants demurred to the amended bill, raising divers questions in respect of the constitutionality of chapter 259 of the Acts of 1889. In our view of the case, it is not necessary to go into the questions raised in this demurrer. The chancellor overruled the demurrer, and the next step in the cause was the suggestion of the death of the defendant Anthony N. Brady, which being admitted, the cause was revived against the executors of his estate, these being the Central Trust Company of New York, along with N. F. Brady and J. C. Brady. Whereupon the original defendants, Jacobs & Davies, Incorporated, and the executors above named for their testator's estate, filed their joint and separate answer, taking issue upon all the material averments of the bill, whereupon proof was taken in the cause.

Along with their answer, defendants filed statements taken from their books covering the period of time for which complainant claims, to wit, the years 1909, 1910, and 3½ months in 1911. Said statements show that defendant Brady collected from his laborers and employes, during the time aforesaid, the sum of \$24,987.30. The statements also show that there was expended by Brady through his agents during said period of time for camp sanitation, hospital and doctors expense, the sum of \$30,699.53. The expenditures are thus shown to have exceeded the receipts by the sum of \$5,712.23, and the answer of defendants avers, in substance, that, if to the above deficit there should be added what was expended for water supply and sewerage account, the sum would amount to more than \$25,000.

There is a stipulation of counsel to the ef-

fect that the statements filed with the answer of the defendants correctly show the amounts collected and expended for the purposes shown in said statements. We have examined the statements, and we think the purposes for which they show funds expended fall within the purposes for which the funds were reserved under the averments of the complainant's bill, as we construe that bill, and under the averments of the answer, and under the preponderance of the proof in this cause.

[3] It is clear from the proof, and the complainant expressly admits in his evidence, that he never contracted with the defendant Brady for any part of the sum so collected from employes and laborers. The proof does not disclose that the sums, or any part thereof, were collected under any written or verbal contract between Brady and the employes or laborers. Each laborer or employé, when employed upon the work, was advised of the scale of wages per week or per month which would be paid for such services, and upon this statement the work of each of them was done, and from the wages due each laborer and employé a deduction was made at the rate of \$1 per month for those paid by the month or 25 cents per week for those paid by the week or biweekly, and the sum was withheld by the paymaster; and these several amounts, so acquired by deduction from the wages due each laborer, accumulated and finally amounted to the sum already stated for the period of time during which the complainant was employed at the camp. When any employé or laborer, on pay day, would make complaint that he had not received full pay, the explanation would generally be made by those charged with the duty of paying that the amount retained was for "doctor" or "company doctor" or "hospital fund," or the like. There is no accurate evidence from which we can draw any conclusion as to how many of the laborers or employes ever so objected, nor how many of them were ever so answered. We think it quite probable, from the number of employes and the large scale on which the hospital was conducted and the health of the employes conserved, that they generally understood that the amount accumulated by deduction from their wages was used for the purposes averred in the bill; and therefore it is probable that, comparatively speaking, the objections and inquiries from laborers on pay day were few in number. But, looking at the whole proof, it is utterly impossible to say what proportion of the fund so accumulated was withheld with any avowal whatsoever made by Brady in respect of the use to which the amount retained from each employé would be put. Witnesses appear on behalf of complainant who undertake to show a general understanding that the fund was for the company doctor. But an equal number of witnesses on behalf of defendants testify in substance that the know-

edge among the employes and laborers was general that the fund so accumulated was to be applied "for the health of the men and their benefit, and for the salaries of the doctors, the nurses and assistants, and the operation of the hospital, to provide medicine for the sick and injured, and to maintain the health and sanitary condition of the camp."

Speaking to this subject, one of the witnesses of defendant answered as follows:

"Well, I expect there was different understandings about that. Some narrow-minded men thought it was being held for the doctor, and maybe other men who could see further would say it was to pay off the doctor bills, hospital bills, and the general upkeep of the camp."

Another witness was asked:

"What was the purpose for which this fund was held out of your wages?"

He answered:

"Well, the purpose was for hospital expenses; otherwise, I suppose you might call it sanitary expenses for the benefit of the health of the employes down there. I would call it hospital expenses, or rather hospital fund."

And there was much other evidence to the same effect on behalf of the defendants, not only as to the understanding of the men as to what the deduction from their particular wages was to be used for, but also as to the general understanding among the men.

A stipulation of counsel appears wherein counsel for complainant agrees that any number of witnesses might be procured on behalf of defendants from among their former employes who would testify, in substance, the same way as the witnesses to whom we have referred above. This agreement, construed literally, would, of course, cover all of defendants' employes.

After all the proof was in, the chancellor decreed in favor of the complainant and ordered an account to be taken and stated, the effect of which would be to deprive defendants in large measure of their proper credits under the law, and under the preponderance of the evidence, as we see it in this cause. From this decree, defendants appealed to this court.

The complainant relies on no contract right to any interest in this fund, but relies wholly upon the provisions of chapter 259 of the Acts of 1889, and must make his case out by a preponderance of all the proof under the terms of that act. In order to fall within its terms, he must show that a specific fund is in the hands of the defendants, withheld from the wages of employes and laborers, for the avowed purpose of paying his salary as "company doctor"; and proof of a general understanding among the employes and laborers as to the avowed purpose for which the fund was withheld is not sufficient under the statute. In the only cases where recoveries under this statute have been approved by this court, there was proof, not only as to the amount of the fund, but of the fact that it was withheld for the avowed purpose expressed in the statute. In *Shepherd v. La*

*Follette Coal & Iron Co.*, decided by this court on December 7, 1907, and in *Wright v. Same Company*, September term, 1912, the specific date when the company commenced to collect from its single employes 50 cents and from its married employes \$1 each per month was fixed, and the fund there involved was collected under written contracts with the employes, providing, among other things, that each employe "hereby agrees that his account at the beginning of each month shall be charged with the sum of \$——, the same to be credited to the account of the regularly employed and designated company physician and surgeon, whose services are to be rendered to him and his family, when reasonably called, within the period of the month for which said charge is made." And upon this state of facts, this court held:

"These fees having been paid to the company for the express purpose of being turned over to the company doctor, and the company having received them under such written directions, it must be held to hold said fees in trust for the complainant."

In the *Shepherd Case*, *supra*, this court said:

"The whole purpose and scope of the act of 1889 was to prevent corporations from retaining money from their employes for the ostensible purpose of paying the salary of the company doctor without the full consent of the employes of the company. This act impliedly authorizes the retention of such wages when full consent has been given by the employe, as the court of chancery appeals finds was the case in the present instance."

It is also significant that in the *Shepherd Case* the company doctor was not allowed to recover the full amount which was collected under the aforesaid written contracts between the employes and the company. There the full amount collected, as found by the court, was \$35,603.67, out of which the company had disbursed salaries due its physicians, nurse hire, the expense of maintaining the hospital, and for all medicines and medical instruments purchased by it for the benefit of its employes; and, after paying all these disbursements, the sum of \$15,612.70 remained, and that amount alone was held to be subject to claim by the company doctor.

The only avowed purpose established by the proof in this cause, as that accompanying the withholding of the fund, is that purpose which is avowed in the averments of the bill of complaint. As we have construed the averments of that bill, and accepting that as the avowed purpose for which the fund in this cause was collected, no balance in the hands of these defendants exists; all of the fund and much more was expended. The complainant admits that he received from the company full pay for all that he ever contracted with the company to receive from it.

Upon the whole case, it is our conclusion that, according to the preponderance of the proof in the record, complainant has failed

to show the existence of a fund in which he has or ever had any interest under the act of 1889. The proof does not show, within the meaning of that act, that the fund which did exist was withheld under an avowed purpose which would bring it within the terms of that act as a fund held in trust for complainant. We have no warrant of law to expand the terms of that act; we can only apply the act when a case is within its terms. But, even if it could be held that the fund was within the terms of that act, the evidence very greatly preponderates against the insistence of the complainant that any balance of the fund remains in the hands of the defendants.

It results that the decree appealed from must be reversed, and the bill dismissed.

### TAYLOR v. ST. LOUIS, I. M. & S. RY. CO. (No. 74.)

(Supreme Court of Arkansas. Dec. 21, 1914.)

#### 1. RAILROADS (§ 428\*)—DOGS—NEGLIGENT KILLING—"PERSONAL PROPERTY."

Dogs are "personal property" for the negligent killing of which railroads are liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1399; Dec. Dig. § 428.\*]

For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

#### 2. RAILROADS (§ 443\*)—CROSSING ACCIDENT—KILLING DOG—NEGLIGENCE.

Proof that plaintiff's dog was killed by defendant's railroad train at a crossing establishes a prima facie case of negligence on the part of the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

#### 3. RAILROADS (§ 443\*)—CROSSING ACCIDENT—KILLING DOG—NEGLIGENCE—PRIMA FACIE CASE—LOOKOUT STATUTE.

Where plaintiff's dog was killed at a railroad crossing by contact with defendant's train, the prima facie case of negligence thus made out was not affected by the lookout statute (Acts 1911, p. 275).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

#### 4. RAILROADS (§ 415\*)—CROSSING ACCIDENT—LOOKOUT STATUTES.

Acts 1911, p. 275, requiring operators of railroad engines to keep a lookout, only requires that an efficient lookout be kept, and does not require that every employé on the train should be constantly on the lookout; it being sufficient that the lookout is kept by one person, unless by reason of curving track or other obstruction an efficient lookout cannot be kept by him alone.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1476-1482; Dec. Dig. § 415.\*]

#### 5. RAILROADS (§ 443\*)—CROSSING ACCIDENT—KILLING DOG—LOOKOUT—EVIDENCE.

In an action for killing plaintiff's dog at a railroad crossing, evidence held to warrant a finding of actionable negligence on the part of the train operatives in failing to keep an efficient lookout.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

Appeal from Circuit Court, St. Francis County; J. M. Jackson, Judge.

Action by George P. Taylor against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

S. H. Mann and J. W. Morrow, both of Forrest City, for appellant. E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and P. R. Andrews, of Helena, for appellee.

HART, J. Geo. P. Taylor sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the alleged negligent killing of his dog by one of defendant's passenger trains. The facts were as follows: On July 31, 1913, one of defendant's north-bound passenger trains struck the dog of the plaintiff and killed it while the dog was on the railroad crossing in the town of Forrest City. The train did not slow down before or after striking the dog. The crossing was 90 steps north of the depot. The track curved there, and the dog came on the track at the crossing about 15 or 20 feet ahead of the engine. According to the testimony of the witnesses for the plaintiff, there was no obstruction along the right of way at that point, and, in their judgment, the employes of the railroad company who were in the cab of the engine could have seen the dog approaching the track. Neither the engineer nor the fireman of the train which struck the dog testified. Another engineer, who had run on that particular piece of road for many years, testified that the engineer sat on the right-hand side of the cab, and that at that particular crossing where the dog was killed he could not have seen the dog go on the track 15 feet ahead of the engine. He also testified that it was the custom for the fireman to commence coaling the engine after the train left the station. The value of the dog was proved. The court directed the jury to return a verdict for the defendant, and the plaintiff has appealed.

[1, 2] Dogs are "personal property," for the negligent killing of which railroads are liable. Proof that a dog was killed by the running of a train makes a prima facie case of negligence on the part of the railroad company. *St. L., I. M. & S. Ry. Co. v. Rhoden*, 93 Ark. 29, 123 S. W. 798, 137 Am. St. Rep. 73, 20 Ann. Cas. 915; *El Dorado & Bastrop Ry. Co. v. Knox*, 90 Ark. 1, 117 S. W. 779, 134 Am. St. Rep. 17; *St. Louis Southwestern Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; *St. L., I. M. & S. Ry. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901.

[3] Here the dog was killed by the operation of the train by actually coming into contact with it, and the prima facie case of negligence thus made is not changed by the lookout statute of 1911 (Laws 1911, p. 275).

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

St. L., I. M. & S. Ry. Co. v. Gibson, 107 Ark. 431, 155 S. W. 510.

[4] The engineer and the fireman of the train which struck the dog did not testify at the trial. It is true another engineer testified that the engineer could not have seen the dog come upon the track 15 feet ahead of the engine, and that it was the custom of the fireman to begin to coal the engine immediately after the train left the depot; but this testimony was not sufficient to overcome the prima facie case of negligence made against the defendant by killing the dog. The statute requires that an efficient lookout be kept. It is not required that every employé upon the train should be constantly upon the lookout. It is sufficient that the lookout be kept by one person, unless by reason of curving track or other obstructions an efficient lookout cannot be kept by one person alone. St. L. S. W. Ry. Co. v. Russell, 64 Ark. 236, 41 S. W. 807. The injury occurred at a public crossing in a populous town, and the jury might have found from all the evidence that the engineer alone could not have kept an efficient lookout.

[5] The dog was killed at a public crossing in the town of Forrest City about 90 steps north of the depot. It is true that there was a curve in the track there, that the dog approached from the left-hand side, and that the engineer usually sat on the right-hand side of the cab. But the witnesses for the plaintiff testified that there was no obstruction on the right of way there, and that, in their judgment, the engineer could have seen the dog approaching the track. From the testimony the jury might have found that the engineer was not keeping a lookout, or that, if he was keeping one, if he had blown the whistle the dog might have been frightened away from the track. Thus, from the testimony of the plaintiff's witnesses who saw the train hit the dog, the jury might have found that the defendant was guilty of negligence. St. L., I. M. & S. Ry. Co. v. Fuller, 165 S. W. 949.

It follows that the judgment must be reversed, and the cause remanded for a new trial.

#### SMITH v. JOYCE. (No. 79.)

(Supreme Court of Arkansas. Dec. 21, 1914.)

VENDOR AND PURCHASER (§ 208\*)—"CONVEYANCE" BY VENDOR TO THIRD PERSONS—"SELL AND CONVEY."

Under Kirby's Dig. § 1694, providing that if any person shall sell any land and make any instrument assuring the title of such land to the purchaser, and shall afterwards "sell and convey" such land to any subsequent purchaser, he shall be guilty of a misdemeanor, and section 1695, providing a penalty for so doing, a vendor who after executing a bond for title in which he agreed to convey land upon the making of deferred payments, and who thereafter executed a mortgage on such land to secure a debt, was not liable to the holder of the title bond for the statutory damages, where he was not insolvent

and there had been no offer of performance by the holder of the title bond to which he could not respond, since a mortgage is not such a "conveyance" as is contemplated by the statute, as, though a mortgage conveys the legal title, it is always subject to be defeated by the payment of the debt. (Quoting Words and Phrases "Sell and Convey." See, also, Words and Phrases, First and Second Series, Conveyance.)

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 424; Dec. Dig. § 208.\*]

Appeal from Circuit Court, Greene County; J. F. Gautney, Judge.

Suit by C. H. Joyce against E. J. Smith. From a judgment for plaintiff on demurrer to the complaint, defendant appeals. Reversed and remanded, with directions.

The complaint in this cause alleged that on March 1, 1913, appellant executed to appellee a bond for title, a copy of which was attached to the complaint and made an exhibit thereto, in which he agreed to convey to appellee certain lots in the city of Paragould, Ark., on condition that appellee should pay him \$25 cash and 25 notes, of \$15 each, the first to be due on April 1, 1913, and the balance to be due on the 1st of each subsequent month, and one note for \$6.25 due May 1, 1915. The total sum to be paid amounted to \$406.25. Appellee paid \$25 in cash, according to the terms of this contract, and, according to the allegations of the complaint, made other payments amounting, in all, at the time the suit was brought, to \$43.18. There was no allegation that appellee had complied with his contract at the time the suit was filed, further than to make the payments above stated. The complaint further alleged that on the 26th of May, 1913, appellant and his wife made, executed, and delivered to one C. A. Mack a mortgage conveying said lots as security for a loan of \$1,000 made appellant by said Mack, who, at the time, had no knowledge of plaintiff's equity, and that this mortgage had been duly recorded in Greene county, and had been executed without the knowledge or consent of appellee. It was not alleged that appellee had lost anything by reason of the mortgage that appellant had executed to Mack, nor was there any allegation of appellant's insolvency. Appellee prayed judgment for \$86.36, which was twice the amount of the payments made by him under his bond for title. Appellant filed a demurrer to this complaint, which was overruled by the court, and, appellant having refused to plead further, final judgment was rendered against him, and he duly saved his exceptions and prayed an appeal, which was granted.

M. P. Huddleston and Robt. E. Fuhr, both of Paragould, for appellant. R. P. Taylor, of Paragould, for appellee.

SMITH, J. (after stating the facts as above). This action was instituted under sections 1694 and 1695 of Kirby's Digest,

which, so far as they are relevant here, read as follows:

"Sec. 1894. If any person shall bona fide sell any tract or parcel of land, and shall make any written deed, conveyance, bond or other instrument in writing, assuring the title of such land to the purchaser thereof, and shall afterward sell and convey such tract of land to any subsequent purchaser, whether the subsequent purchaser have knowledge of the previous sale or not, such person shall be deemed guilty of a misdemeanor," and fined not less than twice the value of the land so sold.

"Sec. 1895. Any person who shall violate \* \* \* the \* \* \* preceding sections shall, in addition to the fine, \* \* \* pay to every person so by him injured or defrauded, by any of the means therein mentioned, double the damages sustained by him, to be recovered by proper action."

The briefs contain an interesting discussion of the question whether the above statute is penal or merely remedial.

Appellee concedes that he could not recover if this statute was construed to be penal, and not remedial; but he insists that it is remedial in its nature and should receive a liberal construction to accomplish the purposes intended by the Legislature in its enactment. But we think there can be no recovery in either event. There is no allegation here that appellant is insolvent, nor is there any allegation of any offer of performance on appellee's part to which appellant cannot respond; and, consequently, there is no allegation that appellee has been injured or defrauded, unless the mere execution of the mortgage, under the circumstances above stated, constitutes an injury, or a fraud, within the meaning of the statute.

Appellee insists that a mortgage is such a conveyance of land as is comprehended within the phrase "and shall afterward sell and convey such tract of land to any subsequent purchaser." But we do not agree with this contention. A mortgagee is not a purchaser in the strict legal sense of that term. It is true that this court said, in the case of Perry County Bank v. Rankin, 73 Ark. 589, 592, 84 S. W. 725, that:

"It is the rule in this state that a mortgage deed conveys to and vests in the mortgagee the legal title to the property described, subject to be defeated by payment of the debt."

But in whatever form it may have been executed, if it is in fact a mortgage, it is always subject to be defeated by the payment of the debt which it secures. In fact, this is a distinguishing and essential characteristic of a mortgage.

The words "sell and convey" are defined

in Words and Phrases, and it was there said:

"The 'power to sell and convey' does not confer the power to mortgage." And, further, "A trust with power to sell out and out will not authorize a mortgage, and a trust for sale, with nothing to negative the settlor's intention to convert the estate absolutely, will not authorize the trustee to execute a mortgage."

A number of cases are there cited in support of that text.

In the case of St. Louis Land & Building Ass'n v. Fueller, 182 Mo. 93, 81 S. W. 414, the Supreme Court of Missouri had occasion to define the phrase "sell and convey," and it was there said:

"They (counsel) urge that the terms of the grant of power, 'to sell and convey,' should have been followed by the terms 'in fee.' This suggestion is answered by the fact that the terms 'sell and convey,' when applied to real estate, mean, in the absence of appropriate expressions in the instrument itself limiting and restricting such general acceptance of the meaning of such terms, a conveyance in fee. Hence it follows that the addition of the words 'in fee' would give no additional force to the words used in the deed before us. The intention to authorize the conveyance of the entire estate, by the use of the terms in the grant of power, 'to sell and convey,' is made clear when considered in connection with the statute, which expressly declares the nature and character of title vested by a conveyance of real estate. The learned counsel for respondents very aptly applied the statute. It is stated thus: 'The Goff deed is dated February 4, 1874.' The statute then provided \* \* \* that 'every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear, or be necessarily implied in the terms of the grant.' That statute is in full force and effect to-day. 1 Rev. St. 1899, p. 1090, § 4590."

The above section of the Missouri statutes which is quoted in part is so similar to section 733 of Kirby's Digest, which section relates to the construction of conveyances, as to suggest that, if our statute was not copied from the Missouri statute, it was, at least, drawn to conform with it.

We conclude therefore that a mortgage is not such a conveyance, by one who has executed a previous agreement to convey, as subjects the mortgagor to the penalty of the statute. As has been said, there is no allegation of any tender of performance on appellee's part, nor of any refusal or failure to respond on appellant's part, nor that appellee has been injured or defrauded, except by the fact of the execution of the mortgage.

The judgment of the court below is therefore reversed, and the cause will be remanded, with directions to sustain the demurrer.

**ST. LOUIS, I. M. & S. R. CO. v. CRAFT.**  
(No. 38.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

**1. APPEAL AND ERROR (§ 586\*)—RECORD—SUFFICIENCY OF ABSTRACT.**

Where, on an appeal by defendant in an action for the damages to his father from the death of a railroad brakeman and for damages for his conscious suffering prior to his death, defendant's counsel conceded defendant's negligence, and made no complaint as to the verdict for contributions to the father, but only sought reversal as to the recovery for pain and suffering, and therefore abstracted the testimony on this point only, the appeal would not be dismissed for noncompliance with rule 9.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595-2597, 2600-2605; Dec. Dig. § 586.\*]

**2. DEATH (§ 82\*)—DAMAGES RECOVERABLE—STATUTORY PROVISIONS.**

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. 1913, §§ 8657-8665), where an employé is killed through his employer's negligence, there may be a recovery both for the pecuniary loss to the next of kin and for the pain and suffering endured by deceased prior to his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 106; Dec. Dig. § 82.\*]

**3. APPEAL AND ERROR (§ 839\*)—QUESTIONS REVIEWABLE.**

Where, in an action for damages for the death of an employé, and damages for his conscious pain and suffering prior to his death, defendant appealed only from that part of the judgment permitting a recovery for pain and suffering, it was in no position to complain that under the statute there could be no recovery both for the death and for the pain and suffering.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3278, 3279, 3280, 3286-3288, 3290-3293, 3297-3300, 3377; Dec. Dig. § 839.\*]

**4. DEATH (§ 77\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.**

In an action for the death of a railway brakeman, who lived for something over 30 minutes after he was run over by a coal car, and for his pain and suffering, evidence held sufficient to support a jury finding that he suffered conscious pain.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 96; Dec. Dig. § 77.\*]

**5. DEATH (§ 99\*)—DAMAGES—EXCESSIVENESS.**

A railway brakeman was struck by a coal car, which did not entirely pass over his body, but pinned him between the rails, face downward, making it necessary to push the car forward several feet before he could be removed. This required about 15 minutes, and 15 minutes more elapsed before an ambulance arrived by which he was taken to a hospital. He was still alive when the ambulance started for the hospital. His body was badly mangled and his intestines were lacerated and very much swollen. Held, that a verdict for \$11,000 for his conscious pain and suffering was excessive, but \$5,000 would not be too large an amount to be awarded, and the recovery would be reduced only to that amount.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

Appeal from Circuit Court, Jackson County; R. E. Jeffery, Judge.

Action by J. T. Craft, as administrator of Tom Craft, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and Campbell & Suits, of Newport, for appellant. Jones & Campbell, of Newport, for appellee.

HART, J. J. T. Craft, as administrator of the estate of Tom Craft, deceased, sued the St. Louis, Iron Mountain & Southern Railway Company under the federal Employers' Liability Act for damages for personal injuries sustained by the decedent which resulted in his death.

On the 16th day of February, 1913, plaintiff's decedent, while a brakeman in the employment of the defendant railway company, was negligently run over in the nighttime by a coal car. He lived for something over 30 minutes and suffered great agony. At the time he was injured he was 23 years of age, and made material contributions to the support of his father, J. T. Craft. The jury found for the plaintiff in the sum of \$11,000 as damages for decedent's pain and suffering, and \$1,000 as damages for contributions to his father. Judgment was entered upon the verdict, and defendant has appealed from so much of the judgment of the circuit court as awarded to the plaintiff the sum of \$11,000 for pain and suffering.

[1] A motion has been made by counsel for plaintiff to dismiss the appeal because the defendant has failed to file an abstract in compliance with the rules of this court. Counsel for the defendant concede defendant's negligence, and for that reason state that they did not file an abstract on that point. They make no complaint as to the verdict for contributions to the father of decedent, and only ask that the judgment be reversed in so far as plaintiff recovered for decedent's pain and suffering. They have abstracted the testimony on this point, and, the correctness of the verdict and judgment in this respect being the only issue raised by the appeal, we are of the opinion that plaintiff's motion to dismiss for noncompliance with rule 9 of this court should be denied.

[2, 3] It is contended by counsel for the defendant that, under the federal Employers' Liability Act, as amended on April 5, 1910, the plaintiff is not permitted to recover both for pecuniary loss to the next of kin and for pain and suffering endured by the decedent. It may be said in the first place that we have decided adversely to defendant's contention in the case of *St. L. & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93, and in the case of *K. C. Sou. Ry. Co. v. Leslie*, 167 S. W. 83. We adhere to the decisions there given for the reasons stated in those opinions, and it

would be useless to enter again into a discussion of the subject. Moreover, the defendant has only appealed from that part of the judgment which permitted a recovery for decedent's pain and suffering, and is in no attitude to complain of an issue not raised by the appeal. No doubt, any dissatisfaction that the defendant felt on account of the action in behalf of the next of kin was assuaged by the verdict of the jury, and, not having taken an appeal from that part of the judgment, it is now in no attitude to complain of it.

[4] It is, however, earnestly insisted by counsel for the defendant that there is no evidence which would warrant a verdict against it for pain and suffering. We do not agree with them in that contention. The deceased was run over, in the nighttime, by a coal car of the defendant, and was found lying face downward between the rails. The car at the time it struck decedent was only going at a moderate rate of speed, and did not entirely pass over his body. Other employes of the defendant heard him holler when the car struck him and immediately went to where he was. The car had pinned his body down between the rails, and it was first necessary to raise it off his body. Decedent could not even then be removed from under the car until it had been pushed forward several feet. All this required about 15 minutes' time, and 15 minutes more elapsed before the ambulance arrived, and decedent was then sent to the hospital. At what time he died is not certain, but it is certain that he was alive when they started to the hospital and that this was a period of 30 minutes after he had been struck by the car. His body was badly mangled and his intestines lacerated and very much swollen. All of the witnesses say that he was groaning during all the time they were trying to remove his body from under the car and until he was carried away in the ambulance. One of the witnesses stated that when he took hold of the decedent and tried to remove him from under the car the decedent would move his arms and also tried to move his body. His companions spoke to him, but he did not answer them.

Under the circumstances, we are of the opinion that the jury were warranted in finding that the decedent suffered conscious pain. It is true he never spoke to his companions, but it must be remembered that while he was under the car, and during the time they were trying to speak to him, he was lying face downward, one wheel of the car resting on his body. One of his companions tried to raise him up and he moved his arm and tried to move his body. We think the jury were warranted in inferring from these facts that he was conscious, and was doing all in his

power to assist his companions in getting him out from under the car.

[5] It is next contended by counsel for the defendant that a verdict for \$11,000 was excessive, and in this respect we think their contention is correct. In the case of *Aluminum Co. of North America v. Ramsey*, 89 Ark. 522, 117 S. W. 568, we said:

"It has been frequently said that it is difficult to find a measure of damages for pain, for the obvious reason that none would be an acceptable inducement to suffer it; but when it has occurred the compensation, as such, must be considered upon a reasonable basis of estimate. Under our system of jurisprudence, the amount of damages must be left largely to the reasonable discretion of the jury. Again, we may say, it has been repeatedly held that they may not give any amount they please."

Though there should be some similarity in the award of damages for like injuries, still there is no exact rule for the measurement of damages, and the facts of each case must be the basis on which the amount is predicated. If decedent suffered conscious pain (and we have already said that the jury were warranted in finding that he did), it is almost impossible to describe the terrible injuries which he sustained and the untold agony and suffering which he endured. We have never intended to fix by rule specific sums for different degrees and variations of anguish and suffering. Each case must be decided on its own merits with a due regard to the observance of reasonable uniformity, taking into consideration the peculiar facts in the case.

In the case before us, after the decedent was struck by the car, he was compelled to lie face downward for the space of 15 minutes, and for part of that time a wheel of the car rested upon his body. His suffering was doubtless greatly increased because he could not know how long it would be before he could be removed from under the car and how long it would be before surgical relief could be provided for him. Each additional minute of delay under the circumstances added to the horrors of his situation, and he must have suffered almost indescribable agony of mind and body. His body was mangled and his intestines were lacerated and swollen. It is evident that he suffered indescribable anguish, and we are of the opinion that the jury were warranted in finding that he continued to suffer such anguish at least until he had been conveyed a part of the way to the hospital. Thus it will be seen that his suffering continued for more than 30 minutes, and, while we think that the sum of \$11,000 was too large an amount to be awarded, we are of the opinion that plaintiff was entitled to recover the sum of \$5,000 on that account.

Therefore the judgment will be reduced to \$5,000, and for that amount will be affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. MORGAN.  
(No. 84.)

(Supreme Court of Arkansas. Dec. 7, 1914.)

## 1. MASTER AND SERVANT (§§ 265, 278\*)—ACTIONS FOR INJURIES—PRESUMPTIONS AND BURDEN OF PROOF.

Evidence that a railway employé overtaken by a train while he was riding on a speeder was struck by the train while attempting to remove the speeder from the track made a prima facie case and raised a presumption of negligence which stood until the company proved contributory negligence; but, if the injured employé was guilty of contributory negligence, the burden rested on him to show that his perilous situation was discovered in time to avoid injuring him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 954-958, 960-969, 971, 972, 977; Dec. Dig. §§ 265, 278.\*]

## 2. MASTER AND SERVANT (§ 246\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

It was the duty of a railway employé overtaken by a train while riding on a speeder to remove the speeder from the track if he could do so consistently with the exercise of ordinary care for his own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.\*]

## 3. MASTER AND SERVANT (§ 137\*)—LIABILITY FOR INJURIES—DISCOVERED PERIL.

An engineer and fireman of a train had a right, after seeing a section foreman riding a speeder, to presume that he would get off the track and out of danger, and if, after it became apparent he was not going to get off the track, they used reasonable care and diligence to stop the train or avoid the injury, and could not reasonably do so, the company was not liable for his injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

## 4. MASTER AND SERVANT (§ 293\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries to a railway section foreman overtaken by a train while riding on a speeder, where the jury might have inferred from the testimony that plaintiff's situation was one not necessarily appearing to be perilous, and from the other instructions they might have understood that, if the engineer saw plaintiff attempting to remove the speeder in time to have stopped the train or slow up, the company was liable, whether the engineer had reason to suppose that plaintiff would remove himself from the place of danger or not, an instruction that the engineer and fireman had a right, after seeing plaintiff upon the track, to presume that he would get off the track and out of danger, and that if, from the time it became apparent that he was not going to get off the track, they used reasonable care and diligence to stop the train or avoid the injury, and could not reasonably do so, to find for defendant, should have been given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

## 5. RELEASE (§ 58\*)—FRAUD—QUESTIONS FOR JURY.

Evidence that a railway claim agent, at the time an employé's release of a claim for personal injuries was executed, promised him permanent employment, that the division engineer

or roadmaster made a similar promise, and that he was subsequently discharged for what his superiors contended was good cause, did not tend to show that the promises were fraudulently made, and this question should not have been submitted to the jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.\*]

## 6. RELEASE (§ 17\*)—FRAUD—REPRESENTATIONS AVOIDING RELEASE.

A false representation by a railway claim agent to an illiterate employé who could do no more than sign his name that a release of a claim for personal injuries contained a contract for permanent employment avoided the release, where the employé did not read it, but relied upon such assurance.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.\*]

## 7. RELEASE (§ 16\*)—MISTAKE—CLAIMS FOR PERSONAL INJURIES.

A representation by a physician or surgeon who treated an injured employé at the hospital to which he was taken that he was not permanently injured, whereby he was induced to release a claim for his injuries in consideration of a small payment, avoided the release, where the representation was not true; since, if it was not fraudulent, it was made under a mistake of fact which absolved the parties from the binding force of the contract.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 31; Dec. Dig. § 16.\*]

Wood and Hart, JJ., dissenting.

Appeal from Circuit Court, Jackson County; R. E. Jeffery, Judge.

Action by W. C. Morgan against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and Campbell & Suits, of Newport, for appellant. Jones & Campbell, of Newport, for appellee.

McCULLOCH, C. J. This is an action based upon alleged liability for personal injuries done to plaintiff while working as section foreman in the employment of the defendant railway company, and the case has been here on a former appeal. 107 Ark. 202, 154 S. W. 518. After being remanded, there was another trial, which resulted in a verdict and judgment in favor of the plaintiff, from which another appeal has been prosecuted. The testimony was, on the second trial, substantially the same as on the first, with one or two exceptions which will be mentioned later. The facts are set out in detail in the former opinion and need not be repeated.

The substance of the case is that the plaintiff was a section foreman, and was riding a speeder along the part of the track composing his section, and was accompanied by another man behind him on the speeder. They were overtaken by a passenger train, and, on discovering its approach, they stopped the speeder and got off, and then attempted to remove the speeder from the

track. They got it partially off of the track, but one of the wheels hung under the rail, and while they were still attempting to remove it the plaintiff was struck by the train, and serious injury was inflicted. Plaintiff was carried to a hospital, and after he was discharged he made a settlement and executed a release in consideration of the payment of \$45. He contends that the release was procured by fraud, deception, and misrepresentation, and on that account he is not bound by it. The former opinion became the law of the case, and this court, as well as the trial court, is bound by it so far as it applies to the questions raised on this appeal. The testimony adduced by the plaintiff at the last trial, so far as it relates to the circumstances attending the injury, is the same as before; but at the former trial the defendant introduced the fireman and engineer as witnesses, and in this case adduced no testimony at all. The testimony of the plaintiff as to the circumstances under which the release was executed is slightly different from that given at the former trial.

It will be seen from a consideration of the facts as set out in the former opinion that, according to the undisputed evidence, the plaintiff and his companion saw the train as it approached, and got down from the speeder, but the plaintiff was injured while they were attempting to remove the speeder from the track. It is also undisputed that the men on board the train must have seen the plaintiff engaged in attempting to remove the speeder, and we said in the former opinion that the only question in the case was "whether the enginemen discovered appellee to be in a position of peril from which he could not extricate himself in time to have prevented the injury to him and failed to use proper care to avoid the injury after such discovery." In other words, the turning point of the case was then, and is now, whether or not the trainmen were guilty of negligence after they discovered the plaintiff's peril.

[1, 2] It is contended in the first place that the court erred in giving an instruction to the effect that, if the plaintiff was injured by the running of the train in this state, "then the presumption is that it was due to the negligence of said company." It is insisted that the instruction is in conflict with the decisions of this court on the subject of burden of proof in cases of this kind, and also in conflict with the following statement in the former opinion:

"The burden of proof was upon appellee to show, in order to recover damages, that the employes in charge of the train discovered his perilous position in time to have avoided injuring him and negligently failed to use proper means to do so after discovering his peril."

While this language is found in the opinion, it was not meant to lay the rule down broadly that, under every phase of this case, the burden of proof is upon the appellee, nor

that the proof at any stage did not make out a prima facie case of negligence. That view of it would put the opinion in direct conflict with other decisions of this court. We held in *St. L., I. M. & S. Ry. Co. v. Standifer*, 81 Ark. 275, 99 S. W. 81, that, where an employe of a railroad company is struck by a train and injured while riding a hand car, a prima facie case of negligence is made against the company, and that case has been followed in later ones. It is true that proof of contributory negligence on the part of an employe or of a traveler at a crossing overcomes the presumption of negligence and places the burden on the injured party to show that there was negligence on the part of the servants of the company after discovery of the peril. But the burden is always upon the company to prove contributory negligence, and, until it does so, the prima facie case arising from proof of the injury stands. A fair interpretation of the language quoted from the former opinion, when considered in the light of the remainder of the discussion therein, is that, if the plaintiff was guilty of contributory negligence in remaining on the track, the burden rested on him to show that the trainmen discovered his perilous situation in time to avoid injuring him, and thereafter negligently failed to use ordinary care. We did not hold then, and do not hold now, as a matter of law, that he was guilty of contributory negligence, as that was a question for the jury. It was the duty of the plaintiff, after getting off of the speeder, to remove it from the track, if he could do so consistently with the exercise of ordinary care for his own safety, but it was a question for the jury to say, under the circumstances, whether he was guilty of negligence in thus exposing himself to the danger from the approaching train.

[3, 4] The court's refusal to give defendant's requested instruction No. 24 was error which, we think, calls for a reversal of the case. The instruction reads as follows:

"(24) The engineer and fireman had a right, after seeing that plaintiff was upon the track, to rely upon the presumption that plaintiff would get off the track and clear the danger from the train; and if it afterward became apparent that plaintiff was not going to get off the track, and from the time it became so apparent the engineer and fireman used reasonable care and diligence to stop the train or to avoid the injury, and could not reasonably do so, by reason of the nearness of the engine to plaintiff, then your verdict should be for the defendant."

This instruction presents the turning point of the case, for we said in the former opinion that the engineer "had the right to rely upon the presumption that appellee would clear the track of the obstruction and remove himself to a place of safety, until he discovered that he would not do so; for it was only then that he would have known him to have been in a perilous position." The instruction quoted above stated the case in concrete form, and it should have been given. It is not embodied in any other instruction.

The undisputed evidence is, as before stated, that the plaintiff had gotten off the speeder in safety, but remained to remove it from the track, and that the engineer saw him in that position. It is not, however, undisputed that the situation of the plaintiff was one of peril known to the engineer in time to have avoided the injury by the exercise of proper care. The jury might have drawn the inference from the testimony that the situation of the plaintiff was one not necessarily appearing to be perilous, and in this state of the proof the defendant had the right to an instruction telling the jury that the engineer could indulge the presumption that the plaintiff would get off the track and rescue himself from the danger, until there was something to indicate to him that the plaintiff would not do so. In the absence of this instruction, or one of similar import, the jury might have understood from the other instructions that, if the engineer saw the plaintiff attempting to remove the speeder in time for the train to have been stopped or slowed up, it rendered the defendant responsible for the injury, whether the engineer had reason to suppose that the plaintiff would remove himself from the place of danger or not. We have held in many cases that, where trainmen see a person on the track, they have a right to assume that he will get off in time to avoid a collision, unless it appears that such person is oblivious of his danger or is unable to extricate himself from the place of peril; and that principle, as embodied in the refused instruction indicated above, was applicable to this case. We are of the opinion, therefore, that the court erred in refusing to give this instruction, and that the case must be reversed on that account.

[5] The court gave the following instruction at the request of the plaintiff and over the defendant's objections:

"(5) Before you can find for the plaintiff, you must find, from the preponderance of the evidence, that the duly authorized agents of the defendants fraudulently procured plaintiff to execute the release by falsely representing to him that his injury was not permanent, or that he would be given a permanent employment in the capacity of section foreman, and you must further find that the false and fraudulent representations were relied upon by plaintiff, and he was, by such representations, induced to execute the release."

We do not think that the proof in this case justified a submission to the jury of fraudulent procurement of the release by false representations to the plaintiff that he would be given permanent employment. The testimony is that he was promised employment, and that he was employed and worked for a time and then discharged. The testimony tends to show, too, that his discharge was without just cause, and that plaintiff was physically able to continue his labors. But this does not establish fraud in the promise said to have been made to him for permanent employment. The claim agent told him at the time the release was executed that they

would give him permanent employment, and that he also received a similar assurance from the division engineer or the roadmaster, but there is no testimony which warrants the inference that those representations were made for any fraudulent purpose. The fact that plaintiff was afterwards discharged for what his superiors contended was good cause does not tend to show that those who promised him employment at the time the release was executed did so fraudulently, for the purpose of inducing him to sign the release. That question should not have been submitted to the jury, and we think that its submission in the instruction quoted above constituted prejudicial error.

[6] The testimony of the plaintiff was sufficient, however, to warrant the submission of the question whether or not the claim agent represented to him at the time he signed the release that it contained a contract for permanent employment, and thus constituted a false representation which was sufficient to avoid the contract. The testimony tends to show that the plaintiff is illiterate and could not more than sign his name, and that he did not read over the contract, but relied upon the assurance of the claim agent that it contained the stipulation with reference to permanent employment. That question was properly submitted to the jury, and a finding in plaintiff's favor would not be disturbed.

[7] There is also testimony sufficient to warrant a finding that the physician or surgeon who treated the plaintiff at the hospital represented to him that he was not permanently injured and that the settlement was induced by that statement. Under the doctrine of the case of *Railway v. Hambright*, 87 Ark. 614, 113 S. W. 803, that constituted grounds for avoiding the release, whether the statements were made by the physicians falsely or under mistake of fact. It is contended by counsel for the defendant that such is not the effect of the *Hambright* Case, but a consideration of the opinion shows plainly that while, in the opinion of one of the judges, the case could and should have been decided entirely on the question that the representation was fraudulent, the majority of the court based their views upon the decision of the law that, even if the statement was not fraudulent, it constituted a mistake of fact which absolved the parties from the binding force of the contract. The syllabus in that case correctly reflects the substance of the decision, and is as follows:

"If the chief surgeon of a railroad company in good faith represents to an injured employé that his injuries are slight and temporary, when they are serious and permanent, and thereby misleads him into signing a release of the railroad company from damages, such release is not binding."

Other errors are assigned with respect to rulings of the court in giving and refusing instructions, but we find no other prejudicial error, and there is nothing further of sufficient importance to discuss. There are as-

signments of error with respect to improper argument of counsel, but, as the case is to be reversed on other grounds, it is unnecessary to discuss those assignments.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

WOOD and HART, JJ., dissent.

### BUTLER v. CABE. (No. 61.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

#### 1. HIGHWAYS (§ 169\*) — USE — VEHICLES — AUTOMOBILES.

All persons have an equal right to use the public streets and highways for travel by proper means, with due regard to the corresponding rights of others; a traveler using the highway for an automobile having no higher or greater rights than the driver of a mule attached to a buggy.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 458; Dec. Dig. § 169.\*]

#### 2. HIGHWAYS (§ 181\*)—USE—OPERATION—ANIMALS—AUTOMOBILES.

That the driver of a mule on the highway may have known that the animal was liable to become frightened and unmanageable on meeting an automobile did not render him negligent in driving the mule along the highway, where he had reason to believe he would be required to meet and pass automobiles.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 469; Dec. Dig. § 181.\*]

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Action by Thomas W. Butler against Chas. L. Cabe. Judgment for defendant, and plaintiff appeals. Reversed.

Thomas W. Butler brought this suit against the defendant, Cabe, for damages for personal injury to his buggy and harness alleged to have been caused by the negligence of the defendant in frightening his mule and causing it to run away by the operation of his automobile at a rapid and dangerous rate of speed upon the public road along which plaintiff was driving, and in failing to stop after plaintiff's signal and his discovery that the mule driven by plaintiff was becoming unmanageable from fright.

It appears from the testimony that appellant was driving towards his home on the public country road, and that when he came near a sharp curve around which he could not see that defendant approached in his automobile from beyond the curve at a high rate of speed, and made no effort to stop his car or slacken the speed of it after plaintiff's signal, and he discovered that the mule driven by plaintiff was greatly frightened and becoming unmanageable. The mule bolted, ran into the woods, struck the buggy against a tree, and threw the occupants out, breaking plaintiff's wrist and otherwise severely injuring him, and breaking up the harness and buggy to some extent. There was tes-

timony tending to show the speed of the automobile and that the mule driven by plaintiff was not gentle and was not safe to drive where automobiles were passing and was always greatly frightened by them, although the plaintiff said that the mule was gentle, and had never been regarded unsafe to drive nor greatly frightened at automobiles until after this occurrence. The court instructed the jury, giving, among others, over appellant's objection, instruction No. 4, as follows:

"If you find from the evidence that the mule driven by the plaintiff was afraid of an automobile, and would become frightened and probably unmanageable on meeting one upon the public highway, and this fact was known to plaintiff, and, notwithstanding this knowledge, plaintiff drove said mule on the public highway, where he would probably meet automobiles, and that his conduct in so doing was not that of a reasonable and prudent man under similar circumstances, then you should find for the defendant."

The jury returned a verdict for the defendant, and from the judgment thereon plaintiff prosecutes this appeal.

D. L. King, of Williford, for appellant. Searcy & Parks, of Lewisville, for appellee.

KIRBY, J. (after stating the facts as above). [1] Appellant contends that the court erred in giving said instruction No. 4 and we agree with this contention. All persons have equal right to use the public streets and highways for purposes of travel by proper means with due regard to the corresponding rights of others, and it is unquestioned that an automobile is a proper means of conveyance on the public highways; neither can it be disputed that driving a mule to a buggy is a like proper means of conveyance. Certainly a citizen is not to be deprived of his right to use any means of conveyance within his control because, forsooth, the animal he must drive is unaccustomed to the sight of automobiles and becomes frightened upon meeting or coming near them. Public highways are established for the benefit of all who find it necessary or desirable to travel thereon, adopting any means of conveyance not prohibited by law.

In *Millsaps v. Brogdon*, 97 Ark. 469, 154 S. W. 632, 32 L. R. A. (N. S.) 1177, the court said:

"The beggar on his crutches has the same right to the use of the streets of the city as has the rich man in his automobile. Each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof."

In *Minor v. Mapes*, 102 Ark. 354, 144 S. W. 219, 39 L. R. A. (N. S.) 214, the court said:

"Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them. Care must be exer-

commensurate with the danger reasonably to be anticipated."

All travelers upon the public highways are bound to the exercise of ordinary care in the use thereof, both for their own protection and the safety of others, and ordinary care, as indicated in the quotation from *Minor v. Mapes*, may require greater care exercised on the part of the automobilist and others driving vehicles of high power and great speed that make fearsome noises calculated to frighten unsophisticated country horses and mules not city broke and accustomed to seeing them than that required of other users of the highway. In some jurisdictions automobilists are prohibited the use of certain streets and highways, and our own statutes restrict their operation as to the rate of speed that may be maintained. Said instruction allowed the jury to find against the plaintiff, who was unquestionably seriously injured by the frightening of his mule and the overturning of his buggy, if the jury found that he knew the animal driven by him was afraid of an automobile, and might become frightened and unmanageable upon meeting one upon a public highway, if his conduct in driving the animal upon a public highway, where he would probably meet automobiles, was not that of a reasonable and prudent man under the circumstances, taking away from the jury altogether the right to find for the plaintiff notwithstanding any negligence on his part, if it can be held that the driving of an animal, upon a public highway where an automobile might be met, not accustomed to the sight thereof, was negligence, if the defendant, after discovering his perilous position, failed to exercise ordinary care to prevent the injury. Our courts have invariably held railway companies responsible for damages caused by the frightening of animals ridden or driven along public highways near their tracks and at crossings for failing to use the proper care to prevent injury by them after it becomes apparent that injury may result from the fright.

[2] This instruction, in effect, told the jury that the plaintiff was not entitled to recover for an injury caused by his team becoming frightened at the approach of an automobile and running away and injuring him, if he knew that the animal was liable to become frightened upon meeting an automobile, and a prudent person would not have driven an animal of that kind upon the public highway where automobiles might be met. This is not the law. Plaintiff had the right to drive his mule on the public highway, being bound, of course, to the exercise of ordinary care while doing so, and there was no reason to think that he could or would not have time upon the approach of an automobile to take such measures as would protect himself from danger on account of the fright of the animal by either leaving the road if opportu-

nity offered, or by getting out of the buggy and holding the animal until the danger was past.

The court erred in giving this instruction, and the judgment must be reversed, and the cause remanded for a new trial.

It is so ordered.

## KLINGENSMITH v. LOGAN COUNTY.

(No. 80.)

(Supreme Court of Arkansas. Dec. 21, 1914.)

### 1. COUNTIES (§ 114\*)—DIRECTION OF JAIL—EMPLOYMENT OF ARCHITECT—AGREEMENT OF COUNTY JUDGE.

Under Kirby's Dig. § 1011, authorizing the county court to build a jail whenever it shall think it expedient, an architect cannot recover for services in the construction of a jail, notwithstanding he was employed by, and did the work under the direction of, the county judge, where there was no county court order appointing him architect, but only one approving his plans, and there was no appropriation either by the county court or the quorum court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 175; Dec. Dig. § 114.\*]

### 2. APPEAL AND ERROR (§ 671\*)—REVIEW—AGREED STATEMENT OF FACTS.

Appellate courts on review of a finding on an agreed statement of facts cannot interpolate anything into the agreed statement of facts to aid a recital therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

Appeal from Circuit Court, Logan County; Jephtha H. Evans, Judge.

Action by A. Klingensmith against Logan County. From a finding for the county on an agreed statement of facts, plaintiff appeals. Affirmed.

This cause was tried upon the following agreed statement of facts:

"The county judge of Logan county determined to build a jail at Booneville and employed A. Klingensmith, an architect of Ft. Smith, to draw the plans and specifications and to superintend it. He was to receive 3 per cent. for drawing plans and specifications and 2 per cent. for superintending it. Mr. Klingensmith did the work of drawing plans and specifications and letting the contract. Based on a low bid, his agreed compensation for this was to be 3 per cent. of the low bid, which amounted to \$210. The county judge made an order for the building of the jail September 17, 1912, but at no time did either the county court or the quorum court of Logan county make any appropriation for the building of the jail, and the question to be raised by this appeal is the right of the architect to recover for his work when no appropriation whatever was made by the county court or quorum court, notwithstanding he did the work under the directions of the county judge, and there is no county court order appointing him as architect but there is one approving his plans."

Appellant requested the court to make a declaration of law predicated upon the above statement which was to the effect that appellant was entitled to a judgment for the amount sued for. The court refused to make this declaration of law, but, upon the con-

trary, made a finding in favor of the county, and this appeal has been duly prosecuted.

Vincent M. Miles, of Little Rock, for appellant. J. D. Benson, of Ozark, for appellee.

SMITH, J. (after stating the facts as above). It was decided in the case of Sadler v. Craven, 93 Ark. 11, 123 S. W. 365 (to quote from the syllabus in that case) that:

"Kirby's Digest, § 1011, authorizing the county court to build a courthouse or jail whenever it shall think it expedient to do so, was not repealed by the subsequent statute (Kirby's Digest, § 1502), providing that 'no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended.'"

[1, 2] Upon the authority of this case, the county court can order the construction of a jail even in the absence of any order to that effect by the quorum court, or of any appropriation by that court. And it may be true that the power of the county court to contract for the construction of a courthouse or a jail through proper orders of that court implies the power to make a preliminary contract with an architect for the preparation of plans for such buildings. But we are not required here to decide whether the county court has the right to make this preliminary contract with the architect where it has made no order determining the necessity for the construction of such building and its purpose to build it. We must assume that the terms employed in the agreed statement of facts are not used colloquially, but in their technical sense. This statement recites that the county judge did certain things and the county court did certain other things, and this distinction shows those terms were employed advisedly. The county judge, and not the county court, made an order for the building of the jail, and there was never any appropriation by either the county court or the quorum court for that purpose. It does not appear that the county court undertook to make any contract with appellant for the preparation of these plans, although such a contract was made by the county judge. The agreed statement of facts recites that appellant did the work under the directions of the county judge, but there was no county court order appointing him architect for that purpose. There is the recital, however, that the county court made an order approving his plans, and this is the only order of the court upon which appellant could predicate any cause of action against the county. But the majority of the court thinks this order approving the plans did not make a contract, because it did not order the construction of the jail, nor did it undertake to bind the county to make any use of these plans. We cannot interpolate anything into this agreed statement of facts which will add any validity to the recital

that there was an order of the court approving the plans.

That order does not undertake to bind the county to pay for these plans, and the judgment of the court below will therefore be affirmed.

STATE ex rel. MOOSE, Atty. Gen., v. ARKANSAS COTTON OIL CO. (No. 70.)

(Supreme Court of Arkansas. Dec. 21, 1914.)  
ABATEMENT AND REVIVAL (§ 39\*)—ACTIONS FOR PENALTIES—"DEBT"—VOLUNTARY DISSOLUTION OF CORPORATION.

Kirby's Dig. §§ 957, 958, authorizing any corporation to surrender its charter, and conferring on the chancery court jurisdiction to pay the debts and distribute the assets among the stockholders, give the unqualified right to a corporation to dissolve at any time, and a voluntary dissolution pending action by the state for penalties for violation of the anti-trust statutes abates the action, in the absence of any provision for the enforcement of the claim against a dissolved corporation; for an action for a penalty is not an action for a "debt."

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204; Dec. Dig. § 39.\*]

For other definitions, see Words and Phrases, First and Second Series, Debt.]

Kirby, J., dissenting.

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by the State, on the relation of Wm. L. Moose, Attorney General, against the Arkansas Cotton Oil Company. From a judgment sustaining a motion to abate the action, the State appeals. Affirmed.

Wm. L. Moose, Atty. Gen., Jno. P. Streepey, Asst. Atty. Gen., and Edw. B. Downie, of Little Rock, for the State. Moore, Smith & Moore and Cockrill & Armistead, all of Little Rock, for appellee.

MCCULLOCH, C. J. This is an action at law instituted by the Attorney General against the Arkansas Cotton Oil Company, a domestic corporation, to recover penalties for alleged violation of the anti-trust statutes. During the pendency of the action in the circuit court of Pulaski county, the defendant conveyed all of its assets to another corporation for a nominal consideration, and, by a resolution adopted by a majority of the stockholders, filed in the office of the Secretary of State, surrendered its charter. Thereupon a motion was filed in this case, by one who had been a stockholder of the dissolved corporation and the vice president and secretary thereof, to abate the action, on the ground that, since the corporation had dissolved, an action against it could no longer be maintained. The court sustained the motion, and the Attorney General appealed to this court.

There is a statute concerning the voluntary dissolution of corporations, which reads as follows:

"Sec. 957. Any corporation may surrender its

charter by resolution adopted by the majority in value of the holders of the stock thereof and a certified copy of such resolution filed in the office of the Secretary of State, and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized, shall have effect to extinguish such corporation.

"Sec. 958. When any corporation has surrendered its charter the chancery court shall have jurisdiction to pay its debts and to distribute its assets among the stockholders according to their several interests." Kirby's Digest, §§ 957, 958.

Other sections of the statute provide for dissolution by decree of a chancery court, at the instance of stockholders or creditors. The doctrine seems to be settled by many courts of the American states that the effect of a dissolution of a corporation is to abate actions pending against it at the time of its dissolution, "in the absence of a statute providing for the continuation of such actions." 10 Cyc. of Law, pp. 1316, 1317. The authorities on that subject are collated in the encyclopedia. It is said in most of the cases that the courts, in thus holding to the doctrine, are following the common law on the subject; but it is pointed out that there was no such doctrine at common law, for the reason that business corporations were unknown at that time, and there only existed those which were either municipal, ecclesiastical, or eleemosynary. How far we would feel constrained to go in following those decisions in a case involving a suit against a corporation to recover a debt, we need not now stop to consider, for, in the light of our statutes on the subject, a discussion of the effect of a dissolution during the pendency of such an action would seem to be academic. The statute, it will be observed, gives the unqualified right to dissolve, and makes provision for the payment of debts and distribution of assets. It means that by such dissolution the existence of the corporation is terminated, except for purposes specified therein either expressly or by necessary implication. 5 Thompson on Corp. § 6478. In the case of Freeo Valley R. Co. v. Hodges, 105 Ark. 314, 151 S. W. 281, we said, in discussing this statute, that:

Even "in the absence of a statute on the subject, the decided weight of authority is that strictly private corporations may surrender their charters and dissolve themselves, except so far as creditors have a right to object."

We have here no action for the payment of debts. This is one by the state to recover a penalty; the purpose being not to recover a debt, but to punish for alleged infractions of the law. The statute makes no provision for the continuance or survival of any such action against a dissolved corporation.

It is insisted that the suit cannot be abated as against the state, and for ground of that contention it is said that the state would be without a remedy. But we inquire: Why cannot the action be abated, if there is nothing in the statute which authorizes its continuance? The legislative will is supreme, and the unqualified right of dissolution is

declared in the statute. The statute does, as before stated, contain a provision for the payment of debts and distribution of assets, but this does not, for obvious reasons, apply to the recovery of a penalty. The distinction between a penalty and a debt is pointed out by the Supreme Court of the United States in the case of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. Speaking of penal statutes, the court said:

"Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws."

In 1 R. C. L. § 46, pp. 47, 48, it is said:

"As to what is a penal action the rule is that where an action is founded entirely upon a statute, and the only object of it is to recover a penalty or forfeiture, it is clearly a penal action. But where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial. In other words, where a liability is imposed by statute upon a person purely for a violation of its provisions, the statute is penal; but where it is a statute which is merely declaratory of a common-law right, coupled with a means or way enacted for its enforcement, giving a remedy for an injury against the person by whom it is committed to the person injured, and either limiting the recovery to the amount of loss sustained or to cumulative damages as compensation for the injury, it is a remedial statute."

Since there is no provision in the statute for the payment of this kind of a claim against a dissolved corporation, it is plain that there can be neither a continuation of the action nor a revival thereof. Whether there would be an abatement of an action which does, in effect, survive under the statute we need not stop to inquire, for the reason that that question is not raised here. We have before us the question of enforcement of a strictly penal statute, which does not survive under this or any other statute, no provision is made for the enforcement of such claim against a dissolved corporation, and it necessarily follows that the action does not survive even where the dissolution takes place after the commencement of the action.

The state, to sustain its contention, relies upon the case of *Shayne v. Evening Post Publishing Co.*, 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654, an opinion of the New York Court of Appeals rendered by Judge Parker. That was an action for libel against a domestic corporation, and, the charter of the corporation having expired by limitation during the pendency of the action, there was a motion to revive or continue the action in the name of the trustees; the motion being founded on a statute of that state which provided that, upon the dissolution of any corporation, the directors shall be the trustees of the creditors, stockholders, or members, with full power to settle the affairs of the corporation, collect and pay outstanding

ing debts, and distribute surplus proceeds. The court held that the action for libel came within the terms of the statute, and that the cause should be revived against the former directors of the defunct corporation as trustees. There is much in the opinion in that case which seems to be at variance with the current of American authority; but whether it should be followed in a case involving the right to revive an action against a corporation for liability other than a penalty we need not consider. It has much persuasive force, but it is not an authority on the question now before us. Whether that court was right or wrong in deciding that an action for libel fell within the terms of the statute, that question is not pertinent to the issue now before us. We must look for a solution of this question to the statutes of our own state, which provide for the payment of debts and distribution of assets of a dissolved corporation, but not for the payment of penalties.

A decision of one of the Texas Courts of Civil Appeals is precisely in point. *Mason v. Adoue*, 30 Tex. Civ. App. 276, 70 S. W. 347. That was an action, the same as this, to collect penalties for alleged violation of the anti-trust laws of that state; and during the pendency of the action the defendant corporation was dissolved by the judgment of another court, and it was held that this operated as an abatement of the action. The Supreme Court of that state denied a petition for a writ of error. We are of the opinion that that is the correct solution here, and that the circuit court was correct in entering an order abating the action.

Our attention is called to the third section of the anti-trust statute of 1905 (Laws 1905, p. 3), which provides, in addition to the penalty prescribed in section 2, that any corporation organized under the laws of this state found guilty of a violation of the terms of the statute shall forfeit its charter; such forfeiture to be declared by any court of competent jurisdiction. It is argued that this provision of the statute is inconsistent with the right of voluntary dissolution of a corporation during the pendency of the state's suit to enforce penalties. The act of 1905 does not attempt, in express terms, to repeal any other statute, except the Act of 1899 (Laws 1899, p. 288) which relates to the same subject. It is not a general statute covering the laws on the subject of the organization, control, and dissolution of corporations, and therefore does not repeal any other statutes by implication, except such as are in irreconcilable repugnance to it. It does not deal at all with the question of voluntary dissolution of corporations, and it would be extending the force of the statute beyond its legitimate scope to hold that it took away or limited the right of voluntary dissolution expressly and unqualifiedly conferred by another statute. There are no limitations as to time or circum-

stances in the statute conferring the right of voluntary dissolution, and this provision in the act of 1905 cannot be reasonably construed as a limitation on that right.

It is urged that the effect of this holding is to thwart the efforts of the state to enforce the anti-trust laws, giving corporations the privilege of defeating the state's right of action by voluntary dissolution. But the answer to this is that the remedy lies with the Legislature. It is entirely within the power of the lawmakers to declare that a dissolution shall not abate an action to enforce the anti-trust laws, and that, notwithstanding such dissolution, the accrued penalties shall be enforceable against the assets of the corporation. Until that remedy is provided by the lawmakers themselves, none can be molded by the courts, in the face of the statutes now in existence which expressly and unqualifiedly give the right of dissolution without any provision, after such dissolution, for the enforcement of penalties.

Judgment affirmed.

KIRBY, J., dissents.

#### WILLIAMS v. McCABE. (No. 56.)

(Supreme Court of Arkansas. Dec. 14, 1914.)

##### 1. EXCEPTIONS, BILL OF (§ 39\*) — TIME FOR FILING.

A bill of exceptions must not only be signed in the time allowed, but should be filed with the clerk within that time.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 51, 52, 54-56, 60; Dec. Dig. § 39.\*]

##### 2. APPEAL AND ERROR (§ 511\*) — RECORD — TIME OF FILING BILL OF EXCEPTIONS — TRANSCRIPT.

Where the record on appeal does not show that the bill of exception was filed or signed, and the certificate of the clerk to the transcript was made after the 90 days allowed for the signing and filing of the bill and was the only record at the time of filing the bill, the record conclusively shows that the bill was not filed in the time allowed and cannot be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.\*]

Appeal from Circuit Court, Perry County; Robt. J. Lea, Judge.

Replevin by M. M. McCabe against E. R. Williams. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones & Owens, of Little Rock, for appellant. John L. Hill, of Perryville, and Sellers & Sellers, of Morrilton, for appellee.

HART, J. This is an action of replevin brought by M. M. McCabe against E. R. Williams for a mule. The plaintiff based his right to recover upon allegation and proof that the defendant had by false and fraudulent misrepresentation induced him to exchange his mule for a pair of ponies. There was a verdict and judgment for the plaintiff, and the defendant has appealed.

Counsel for the defendant asks that the judgment be reversed for two reasons: First, because there is not sufficient evidence to warrant the verdict; and, second, because the court erred in refusing to give certain instructions asked by him. On the other hand, counsel for the plaintiff ask that the judgment be affirmed because no bill of exceptions was signed by the presiding judge and filed with the clerk of the court within the time allowed by the court.

The judgment in the case was rendered on the 7th day of February, 1914. A motion for a new trial was filed and overruled on the same day, and the defendant was given 90 days within which to prepare and file his bill of exceptions. The record does not show that the bill of exceptions was signed by the judge, or filed with the clerk.

[1, 2] The bill of exceptions should not only have been signed within the time allowed, but should have been filed with the clerk within that time. *Pekin Stave Co. v. Watts*, 95 Ark. 331, 129 S. W. 796.

In the case of *Carnehan v. Parker*, 102 Ark. 439, 144 N. W. 907, the court said that it has long been held that a bill of exceptions can only be signed by the judge before whom the case was tried and the exceptions made, and that one not so signed is a nullity and cannot be noticed.

The clerk's certificate to the transcript was made on the 12th day of May, 1914. As we have already seen, 90 days was given the defendant within which to prepare and file his bill of exceptions. The record does not show that the bill of exceptions was ever signed by the judge or filed with the clerk. The certificate of the clerk certifying to the transcript in the case was more than 90 days after the 7th day of February, 1914. Therefore, if the clerk's certificate be considered sufficient to show that the bill of exceptions was filed on that day, the record shows conclusively that it was not filed within the time allowed, and the court cannot consider it. See *Madison County v. Maples*, 103 Ark. 44, 145 S. W. 887.

It follows that the judgment must be affirmed.

#### NANCE et al. v. POLK. (No. 68.)

(Supreme Court of Arkansas. Dec. 21, 1914.)

#### 1. MORTGAGES (§ 38\*) — CHARACTER OF INSTRUMENT—SUFFICIENCY OF EVIDENCE.

In an action to have an absolute deed to a person who executed an option to repurchase declared a mortgage, evidence held to support a finding that the transaction was not a mortgage, but a sale with a contract for a resale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 88.\*]

#### 2. VENDOR AND PURCHASER (§ 18\*)—OPTION—ASSIGNMENT—RIGHTS OF ASSIGNEE.

Where a party who had executed an option for the purchase of land had notice, when he made a payment to the original holder of the

option to extinguish his right to exercise the option, that the option had been assigned, the acceptance of such payment did not extinguish the rights of the assignee.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 23; Dec. Dig. § 18.\*]

Appeals from Clay Chancery Court; Chas. D. Frierson, Chancellor.

Suit by B. F. Nance and another against W. D. Polk. From a decree granting plaintiffs insufficient relief, they appeal, and defendant cross-appeals. Affirmed.

J. L. Taylor and F. G. Taylor, both of Corning, for appellants. C. L. Daniel and G. B. Oliver, both of Corning, for appellee.

MCCULLOCH, C. J. [1] This is an action instituted in the chancery court of Clay county by appellants, B. F. Nance and A. G. Nance, against appellee, W. D. Polk, to redeem a certain tract of land from a conveyance absolute in form but alleged to have been executed as a mortgage for the security of debt. The tract of land in controversy contained about 44 acres and is a farm in Clay county which was owned by B. F. Nance, one of the appellants. He mortgaged it, prior to the year 1905, to one Imboden, to secure a debt of \$800 and interest, evidenced by note, and on March 7, 1905, he conveyed the land to appellee, Polk, by deed in absolute form, reciting a cash consideration of \$500. On the same day, Polk executed and delivered to B. F. Nance an instrument of writing in the following form:

"Corning, Arkansas, March 7, 1905.

"This is to certify that I have bought the following lands from B. F. Nance, and on the return of the amount of money paid said Nance on the place, with 10 per cent. interest, will deed the land back to Nance. (Here follows description of the land in controversy.)

"[Signed] W. D. Polk."

B. F. Nance transferred the instrument of writing which is described above to his son, A. G. Nance, some time prior to the date of the institution of this suit, which was on December 29, 1911, and they allege in the complaint that the deed of B. F. Nance to Polk, while absolute in form, was intended as security of an indebtedness to Polk for the amount paid out by him for B. F. Nance in satisfaction of the mortgage debt to Imboden. It is undisputed that, subsequent to the original transaction between Polk and B. F. Nance, the former paid off the Imboden mortgage. Appellee in his answer denied that the instrument was intended as a mortgage, but alleges that he purchased the land outright from B. F. Nance for the consideration of \$1,600, which was represented by the amount which he (Polk) paid out in discharge of the Imboden mortgage debt; also, an unsecured debt of B. F. Nance to the Bank of Corning, of which Polk was president; and also a debt of B. F. Nance to Polk himself; and a balance of \$250 for which Polk executed to B. F. Nance his negotiable promissory note,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

payable six months after date with interest.

The chancellor found that the conveyance to Polk, and the instrument of writing whereby he undertook to reconvey the land to B. F. Nance, did not constitute a mortgage, but held that it constituted a contract for resale, and entered a decree permitting appellant A. G. Nance to exercise the option to purchase the land on payment of the sum of \$1,600, with interest at the rate specified in the contract, from the date of the original transaction. Appellee has cross-appealed from that part of the decree which permits appellant A. G. Nance to exercise at this time the option as to the purchase under the contract. Appellee went into possession of the land as soon as the conveyance was executed and delivered to him and has remained in possession continuously since that time, receiving the rents and profits, which have amounted to the gross sum of \$250 per annum. Appellants ask an accounting, and that appellee be charged with the rents and profits of the land, and that the same be credited on the amount to be paid in redemption from the mortgage. The chancery court held against them on that point and decided that as the transaction was merely an option to purchase, and not a mortgage, the appellee was not answerable for rents and profits, as it was not so specified in the contract.

Appellee executed to B. F. Nance, on the date of the conveyance aforesaid, his note for \$250, payable in six months after date; but this note was not actually turned over to B. F. Nance until some time in the year 1910. Appellee, in his testimony, explains that the note was left by Nance at the bank with other papers, and that it was considered as having been delivered to him. There is no very satisfactory evidence in the record why this note was not actually turned over to Nance, who left the state shortly after the execution of the instrument and remained away for several years; but it is undisputed that when B. F. Nance came back to the state in 1910 the note was delivered to him, and in January, 1911, by arrangement between him and appellee Polk, he went to the bank and received \$500 and surrendered the note. In his first deposition, B. F. Nance testified that this sum of money was not paid to him in satisfaction of the note, or with reference at all to the land transaction, but that it was an amount of money which Polk had collected for him on the note of another party. In a subsequent deposition, he corrected his former statement and admitted that the \$500 was paid to him with reference to the land transaction, but he states that he had prior to that time assigned to his son, A. G. Nance, all right to the land under the contract, and his son owed him a balance of \$500 on the transaction, and that the payment of the \$500 by appellee was to cover this remaining interest which he had in the land; that is to say, the balance which

his son owed him. This is not a very satisfactory explanation of the transaction, for it is difficult to understand why appellee, under those circumstances, should have paid that sum of money to B. F. Nance. Appellee testified that, after B. F. Nance took the note in possession in 1910, a conversation occurred between them in which he asked Nance whether or not he wanted to exercise his option and buy the land back or receive the money on the note, and that Nance told him that he did not want the land, but must have \$500. He testified that they agreed that Nance was to accept the \$500 as a final settlement of the matter, and that he authorized the cashier of the bank to pay it over to him and take up the note, which was done. The payment of the sum of \$500 exceeded, to the extent of about \$120, the amount of the note and accrued interest.

Our conclusion is that the chancellor was correct in holding that the transaction did not constitute a mortgage; at least, after giving due force to the finding of the chancellor upon the disputed questions of fact which relate to the transactions between the parties, we think that his finding is not contrary to the preponderance of the evidence. The language used in the written contract indicates an intention to treat the transaction as a purchase of the land by appellee from B. F. Nance, and an agreement to resell to the latter for the same consideration. But even if it be treated as ambiguous to the extent that extrinsic evidence is admissible to aid in interpretation of the instrument, we cannot say that the chancellor, in the light of the evidence which was adduced, was wrong in declaring that the contract was one for the resale of the property, and not that the conveyance was intended as a mortgage. There are many decisions of this court which settle the law with reference to the circumstances under which a conveyance in absolute form may be treated as a mortgage, and the degree of proof necessary in such cases. *Hays v. Emerson*, 75 Ark. 551, 87 S. W. 1027; *Rush-ton v. McIlvene*, 88 Ark. 299, 114 S. W. 709. See other cases cited on the briefs of counsel.

[2] Appellee, in support of his cross-appeal, insists that appellant, B. F. Nance, by acceptance of the \$500 paid to him, elected to waive his option to repurchase the land, and that the rights under the contract cannot now be exercised. He also contends, and so testified in the case, that, when this payment was made, he had no notice of the assignment of the instrument to A. G. Nance. We think that the contention is sound to the extent that the acceptance by B. F. Nance operated as an election to waive his option and that it extinguished his right to exercise the option. But the evidence tends to show that the contract had, previous to that time, been assigned to A. G. Nance, and that appellee had notice of that fact. There is a sharp conflict in the testimony on this point, and

there is much testimony in the record, it must be conceded, tending to discredit the claim of appellants that there was ever any assignment at all of the contract; but the chancellor has found in favor of appellants on that issue, and our conclusion is that the testimony is so evenly balanced that we are unable to say that the chancellor was wrong in reaching that conclusion upon the facts. Appellee testified positively that he had no information that the contract had been transferred until about the time this suit was commenced, but there is enough evidence to warrant a finding that he had sufficient information on the subject to put him upon notice that A. G. Nance claimed rights under the contract. Therefore we think the chancellor was correct in holding that, while B. F. Nance had waived his right to exercise the option if the contract was still held by him, his acceptance of the \$500 did not extinguish the rights of his son, to whom he had transferred the contract.

The decree of the chancellor is, upon the whole, correct, and the same is affirmed.

LEWIS et al. v. YOUNG et al. (No. 73.)  
(Supreme Court of Arkansas. Dec. 21, 1914.)  
SCHOOLS AND SCHOOL DISTRICTS (§ 37\*)—CREATION—BOUNDARIES—NOTICE.

Kirby's Dig. § 7540, provides that, when a change of boundaries of school districts is proposed, notice shall be given by putting up handbills in four or more conspicuous places in each district to be affected, such notices to be posted 30 days before the convening of the court to which the petition is to be presented. *Held*, that the posting of such notices is jurisdictional; and hence, where the boundaries of a new district were to include parts of two other districts, a failure to post notice in one of the districts was fatal, though all the electors residing in that district signed the petition for the change.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 60, 65, 67; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Columbia County; W. E. Patterson, Judge.

Proceeding by A. O. Young and others to create a new school district out of certain other districts, to which S. H. Lewis and others filed objections. An order of the county court fixing the boundaries of the new district having been affirmed on appeal to the circuit court, objectors appeal. Reversed and remanded.

Stevens & Stevens, of Magnolia, for appellants. C. W. McKay, of Magnolia, for appellees.

HART, J. Section 7544 of Kirby's Digest provides that the county court shall have the right to form new school districts or change the boundaries thereof upon a petition of the majority of all the electors residing upon the territory of the districts to be divided.

Section 7540 of Kirby's Digest reads as follows:

"When a change is proposed in any school district notice shall be given by the parties proposing the change, by putting up handbills in four or more conspicuous places in each district to be affected, one of said notices to be placed on the public school building in each affected district. All of said notices to be posted thirty days before the convening of the court to which they propose to present their petition; said notices shall give a geographical description of the proposed change."

Under these statutes appellees, who are electors of school district No. 3 in Columbia county, Ark., filed a petition with the county court and gave the notice providing that a new school district would be formed out of school district No. 3, and the boundaries of the new district were described in the petition and notices. After the notices were posted, and while appellees were circulating the petition, they discovered from the county court records that a part of the territory included in the description of the proposed new district was in district No. 64, instead of district No. 3. Both of these districts were common school districts. There were 14 electors living in district No. 64 who believed themselves to be living in district No. 3. For many years they had voted and paid their taxes on personal property in district No. 3. These 14 persons were white persons, and the remaining electors in district No. 64 were negroes. After the mistake was discovered the petition was presented to the electors in school district No. 64, and every one of them signed the petition.

Appellants filed a counter petition remonstrating against the formation of the new district. The county court made an order changing the boundaries of the districts so as to form the new district prayed for in the petition. Upon appeal to the circuit court the judgment of the county court was affirmed. The case is here on appeal.

It is conceded that a majority of the electors in school districts Nos. 3 and 64 signed the petition, and also that no notice as prescribed by the statute was posted in district No. 64. The giving of the notices prescribed by the statute was a prerequisite to the exercise of jurisdiction by the county court, and this is the effect of our decision in the case of *McCray v. Cox*, 105 Ark. 47, 150 S. W. 152.

A part of the territory in the new district was in district No. 64, and the action of the county court in dismembering districts No. 3 and No. 64, both common school districts, to form a new district out of a part of the territory of both of these districts was without validity, because the court acquired no jurisdiction to deal with any part of district No. 64; the notice required by the statute not having been given. This principle of law is recognized by counsel for appellees, but they contend that it is not applicable under the facts in the present case, because all of the electors residing in district No. 64 signed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the petition, and to have given the notice would, they say, have been a useless thing.

But it may be that property owners within district No. 64 did not reside within the district, and therefore did not sign the petition. They were interested in the question as to whether or not a school district in which their property was situated should be dismembered, and for that reason notice should have been given so that, in the event they saw fit to do so, they might have used whatever influence they might have had with their tenants and other electors residing within the district to cause them not to sign the petition.

Therefore it cannot be said that giving of the notices required by the statute would have served no useful purpose. The notice required by the statute not having been posted in district No. 64, the county court had no power to take a part of the territory embraced in that district and transfer it into another district, or to form a new district with it and a part of district No. 3.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

#### MILLSAPS v. URBAN. (No. 78.)

(Supreme Court of Arkansas. Dec. 21, 1914.)

##### 1. LOTTERIES (§ 3\*)—POPULARITY CONTEST.

A popularity contest in which voting coupons were issued by certain merchants to be cast for the contestants, the one receiving the highest number to be given an automobile, with no element of chance in it, is not illegal as a lottery.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. § 3.\*]

##### 2. CONTRACTS (§ 278\*)—BREACH—POPULARITY CONTEST.

Where plaintiff entered into a contract with defendant to work to secure votes in a popularity contest by making sales and collections for merchants with the understanding that, if she received the highest number of votes, she was to be given an automobile, and the defendant breached the contract by changing the conditions, so that another received more votes than plaintiff, plaintiff was entitled to recover the value of the automobile.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1207-1213; Dec. Dig. § 278.\*]

Appeal from Circuit Court, Garland County; Calvin T. Cotham, Judge.

Action by Mrs. Maude Urban against R. L. Millsaps. Judgment for the plaintiff, and defendant appeals. Affirmed.

Appellant advertised that he would give away an automobile under the conditions and in accordance with certain rules set forth in literature distributed by him. His plan was that he would furnish coupons to certain business houses in the city of Hot Springs, which had become members of the Business Men's Co-operative Club, a name given to the business houses which had arranged to pro-

cure these coupons from him, and which are hereinafter designated as club members, and these coupons were to be given by the members of this club to their customers at the rate of one coupon per each five cents worth of merchandise purchased from the club member, and the holders of these coupons were entitled to cast them as ballots in a popularity contest for some lady contestant for this automobile. It was advertised that the contest would close on the 30th of April, 1911, at 8 p. m., at which time there was to be a final count of the ballots and an award of the prize, but prior to this final count there was to be a count each Saturday night of the votes cast that week and an announcement of the standing of the candidates made at the end of each week.

Appellee entered the contest, and led all the other contestants until the final result was announced. She testified that appellant told her he had modified the rules of the contest to permit ballots to be cast, not only upon coupons issued for purchases made from members of the club, but that coupons might be issued upon collections made for such members by contestants upon the same terms as in cases of purchase of merchandise direct from such members. Appellee thereupon undertook the collection of various accounts given her for that purpose by club members and cast for herself the coupons thus earned.

Appellant testified that a Mrs. Coates was also a contestant, and that on the last Wednesday of the contest Mrs. Coates sold her chances to a man named Bert Walls, who ran a cigar stand in one of the hotels in Hot Springs.

The judges who had been appointed to conduct the contest testified that after this coupons representing 1,000 votes each were cast for Mrs. Coates in large numbers, and that all of them were issued by Mr. Walls. These judges reported this fact to appellant, and protested to him that these coupons were not being voted in accordance with the rules of the contest, as they understood them, but they were told by appellant that any member of the club could buy any number of votes and do with them whatever he pleased, and that the coupons did not have to represent actual sales of merchandise at all, and that, as judges, they were only expected to count and certify the coupons which had been voted as they found them. The coupons were so counted, and Mrs. Coates was found to have the majority, but, to make this majority, it was necessary to include the coupons issued by Mr. Walls.

The 30th of April proved to be Sunday, and a notice was published in a daily paper that the contest would be extended until Tuesday of the following week; and, while it is not certain that coupons were cast after Saturday for either of the contestants herein

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

named, it is altogether probable that they were cast for both of them after that date. But appellee says she was 104,000 votes ahead when the voting closed on Saturday.

Appellee says that appellant's representations to her as to how he would award the automobile induced her to enter the contest, and that his statement of its terms constituted a contract on appellant's part to award the automobile to her if she complied with the conditions imposed and received the largest number of votes. The case was tried in her behalf on the theory that appellant and Walls conspired together to defraud her out of the automobile, and she testified that she complained to appellant about his conduct of the contest, and that he told her he would not give her 25 cents for her chance, and that any one could enter the contest on the last day, and that he would sell any one all the chances he wanted. Appellant offered no proof whatever in his own behalf, but insists that appellee's proof is insufficient to establish the commission of any fraud or the breach of any contract. At her request the court gave the following instruction:

"If the jury find from the evidence that the plaintiff entered into an oral contract or agreement with the defendant to work to secure votes in the contest for an automobile with the understanding that, if she secured the highest number of legal votes, she was to receive said automobile, and further find that the plaintiff fully complied with all the conditions on her part to be performed, and secured the highest number of legal votes, but that defendant breached the contract between the plaintiff and defendant, and on account of said breach the plaintiff was not declared the winner of said contest and failed to secure said automobile, you will find for the plaintiff for the value of said automobile, as shown by the testimony."

Appellant requested the court to charge the jury as follows:

"The court instructs you that, before you can find for the plaintiff in this case, you must first find from the evidence, by a preponderance of the proof, that on the 30th day of April plaintiff was the leading contestant in the contest; second, that there was a conspiracy to defraud between the defendant and Bert Walls; third, that, in furtherance of such conspiracy to defraud, Bert Walls purchased the chance of a young lady, whose name was being run in the contest; and that the defendant and Bert Walls cast more than a hundred thousand illegal votes in such race; fourth, that such votes so cast were illegal, and were known by the defendant to be illegal, and were cast by him in furtherance of such conspiracy to defraud the plaintiff; fifth, that she demanded of the plaintiff and was refused the automobile referred to in the evidence."

This instruction was modified by the addition of the following clause:

"Unless you should find from the evidence that the defendant breached the contract between himself and plaintiff after the plaintiff had performed all of the conditions on her part to be performed."

And, over appellant's objection to this modification, the instruction was given as modified.

At the request of appellant the court gave five instructions on the subject of fraud and upon the quantum of proof required to establish it.

There was a verdict in appellee's favor for the value of the automobile, and this appeal has been duly prosecuted.

C. C. Sparks and Wm. G. Bouie, both of Hot Springs, for appellant.

SMITH, J. (after stating the facts as above). [1] No point is made as to the illegality of the transaction out of which this litigation arose. No contention is made that this was a lottery or that the element of chance entered into the award of the prize. Had such been the case, the entire transaction would have been illegal, and the courts would have refused any aid in enforcing any rights depending upon it. *McDaniel v. Orner*, 91 Ark. 171, 120 S. W. 829; *Watkins v. Curry*, 103 Ark. 414, 147 S. W. 43, 40 L. R. A. (N. S.) 967; *Carey v. Watkins*, 97 Ark. 153, 133 S. W. 1016; *Burks v. Harris*, 91 Ark. 205, 120 S. W. 979, 23 L. R. A. (N. S.) 626, 134 Am. St. Rep. 67, 18 Ann. Cas. 566; *Wood v. Stewart*, 81 Ark. 41, 98 S. W. 711.

[2] The jury was warranted, under the evidence, in finding that appellee became a contestant upon the condition that coupons would be issued by the members of the club only to purchasers of goods from them or to persons making collections for them. Appellant, of course, could have prescribed any terms he saw fit for the use of the coupons which he furnished the members of the club, but fairness required that the same terms be prescribed for all contestants, and that the contest be carried out upon the terms which induced persons to become contestants, and that no changes should thereafter be made to which the contestants themselves did not assent. The jury might have found from the evidence that appellant induced appellee to become a contestant by the representation made to her that votes would be permitted only where goods had been sold by club members or collections had been made for them, and that appellee would have earned the prize had that engagement been kept, but that appellant permitted votes to be cast in sufficient numbers to defeat appellee, which were not based upon either sales or collections.

The instruction given at appellee's request correctly submitted these issues to the jury, and the modification which the court made of appellant's instruction, set out above, was a proper one.

Finding no prejudicial error, the judgment of the court below is affirmed.

**ELSER v. PUTNAM LAND & DEVELOPMENT CO. (No. 8032.)**

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 12, 1914.)

On motion for rehearing. Motion overruled.

For former opinion, see 171 S. W. 1052.

CONNER, C. J. In overruling this motion we do not wish to be understood, by what we said in our original opinion, as holding that an appellant, who has not objected to charges submitting an issue to a jury, cannot on appeal question the sufficiency of the evidence to sustain the verdict against him on the issue. We held that in such case an appellant would be heard to say that the "uncontradicted" evidence was against it; i. e., that not only was there no evidence authorizing the submission of the issue to the jury, but the "uncontroverted" evidence was the other way. These were the questions we were called upon to decide by plaintiff in error's propositions, and the questions in mind while adverting to plaintiff in error's failure to object to the court's charge. See *T. & P. Ry. v. Raney*, 86 Tex. 363, 25 S. W. 11; *T. & P. Ry. v. Corn*, 110 S. W. 485.

Motion overruled.

**TYLER BUILDING & LOAN ASS'N v. BIARD & SCALES. (No. 2730.)**

(Supreme Court of Texas. Feb. 3, 1915.)

On motion for rehearing. Denied.

For former opinion, see 171 S. W. 1122.

BROWN, C. J. I concur in the action of this court in overruling the motion for rehearing in this case upon the following grounds:

The petition in this case shows that the defendants in error were employed as agents to sell the land of plaintiffs, and as such reported a sale or a prospect of a sale. The deed was executed and delivered to them to be delivered to the purchaser upon the completion of the transaction. There was no agreement between the proposed vendee and the vendors that a deed should be deposited with any person for future delivery. Therefore the deed was not in escrow; it had none of the elements or characteristics of such an instrument. There must be an agreement between the parties upon the depositary and the terms upon which delivery shall be made. It cannot be deposited with one of the parties, nor with his agent. 16 Cyc. pp.

571, 573; *Miller v. Sears*, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176.

In fact, it is immaterial whether the deed was an escrow, or whether it was a deed delivered to the agent without any concurrent agreement on the part of the vendee, and to be by the agent delivered at his own discretion upon the completion of the transaction between him and the proposed vendee. If it was a deed which the owner of the land executed and delivered to his agent, to be delivered to the vendee upon the performance of the agreement between them, and the agent delivered it fraudulently, as alleged in the petition, still, when the land had been sold to an innocent purchaser, as it was in this case, and, as alleged in the petition, the purchase was for valuable consideration without notice, title would pass notwithstanding the fraud. If the deed had been strictly in escrow, deposited with the parties by agreement, and the depositary had delivered it by a fraudulent agreement between himself and the vendees in the deed, the innocent purchaser for value and without notice of any such conditions would take the title free from the claim of the vendor. 16 Cyc. 582, note 34.

I have not thought it necessary to enter into a discussion of what constitutes an escrow, or the difference between that and a deed. The case as here presented, and the ground upon which the demurrer was sustained, is the real point to be decided; that is, the deed, whether escrow or not, being placed in the hands of the agents, and having been fraudulently delivered to the vendee, who sold the same to innocent parties, for valuable consideration, and without notice, the title passed, and the plaintiffs in error could not have recovered the land from the innocent parties, if the petition alleges the truth of the transaction.

If the agent to deliver a deed, or a depositary who has been intrusted with an escrow, in fraud of the right of the maker of the deed, delivers the same to the vendee, who conveys the land to an innocent purchaser, such agent or depositary is responsible to his principal for the damages thus occasioned. It would be monstrous to say that one intrusted with property may fraudulently dispose of it and acquit himself of liability by casting upon the principal the burden of recovering the property from the fraudulent vendee.

It follows, therefore, that I conclude that the allegations of the petition show a right of action against the defendants in error in this case.

The motion is overruled.

PHILLIPS, J., not sitting.

# INDEX-DIGEST



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It Supplements the Decennial Digest, the Key-Number Series and  
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### ABATEMENT.

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### ABATEMENT AND REVIVAL.

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§ 39 (Ark.) An action by the state against a corporation for violating the anti-trust statutes *held* abated by the voluntary dissolution, pending action, of the corporation, as authorized by Kirby's Dig. §§ 957, 958.—State v. Arkansas Cotton Oil Co., 171 S. W. 1192.

§ 39 (Tex.Civ.App.) Under Rev. St. 1911, arts. 3723, 3725, 5504, subd. 2, a sale of land under execution against a corporation after its dissolution by the sale of its franchise, etc., was void.—Allison v. Richardson, 171 S. W. 1021.

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##### (B) Continuance or Revival of Action.

§ 72 (Tenn.) Under Shannon's Code, § 4579, where, after judgment for defendant in an action for malpractice was affirmed by the Court of Civil Appeals, plaintiff died, *held*, that the suit should have been revived in the name of his personal representative, and his widow and next of kin could not have the cause revived, and prosecute certiorari to the Supreme Court.—Burnett v. Layman, 171 S. W. 76.

#### VI. WAIVER OF GROUNDS OF ABATEMENT AND TIME AND MANNER OF PLEADING IN GENERAL.

§ 81 (Tex.Civ.App.) Notwithstanding Rev. St. 1911, art. 1909, the court may hear exceptions before trying a plea in abatement, and a party who under such circumstances submits excep-

tions before submitting a plea in abatement does not waive his plea.—J. D. Fields & Co. v. Allison, 171 S. W. 274.

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#### II. PROSECUTION AND PUNISHMENT.

§ 9 (Mo.) Evidence that girl claimed to have been taken away for purpose of prostitution was received in accused's house of prostitution and sent to a room with a man from whom she received money and with whom she had sexual intercourse *held* admissible to show intent.—State v. Corrigan, 171 S. W. 51.

§ 11 (Mo.) On trial for taking girl under 18 away from her father for purpose of prostitution, accused *held* to have made such an attack on the girl's reputation for chastity as entitled the state to offer evidence of good reputation.—State v. Corrigan, 171 S. W. 51.

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### ACCORD AND SATISFACTION.

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§ 11 (Mo.App.) The acceptance by a creditor of an order for less than the amount claimed by him, reciting full payment, but which he could not read, *held* not to be an accord and satisfaction.—Elliott v. Thomas, 171 S. W. 939.

§ 17 (Mo.App.) The acceptance of an order reciting full payment does not bar an action on the original debt, where the creditor received only part of the amount called for by the order.—Elliott v. Thomas, 171 S. W. 939.

§ 26 (Ark.) Facts of an attempted settlement for injuries to plaintiff at a railroad crossing held insufficient to establish an accord and satisfaction.—*St. Louis Southwestern Ry. Co. v. Mitchell*, 171 S. W. 895.

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§ 27 (Ky.) That a corporation could have sued to set aside a wrongful sale of corporate property or sued to recover the property held not to preclude it from suing the purchaser for conversion.—*Paducah & Illinois Ferry Co. v. Robertson*, 171 S. W. 171.

§ 27 (Tex.Civ.App.) Wrongs arising from non-performance of implied contract obligations will sustain an action on the case, and where such wrong outside the contract is the gravamen of the action the action is an action ex delicto.—*Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.*, 171 S. W. 1103.

A cause of action arising from breach of promise is an action ex contractu, but a cause of action arising from a breach of duty growing out of the contract is in form an action ex delicto.—*Id.*

Petition alleging failure to perform a written contract to keep a subway free from inflammable material and to indemnify plaintiff for loss by fire therefrom held to state a cause of action for breach of contract.—*Id.*

§ 32 (Tex.Civ.App.) Under the Texas system of pleading, distinctions between actions do not exist, but the facts alleged control, and if a contract appears to be the gravamen of an action it will be so determined.—*Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.*, 171 S. W. 1103.

### III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 50 (Mo.) Under Rev. St. 1909, § 1795, a petition held demurrable because it united causes of action which did not affect all the parties to the action.—*Trefny v. Eichenseer*, 171 S. W. 930.

§ 50 (Tex.) Persons having no common or joint interest in property damaged by a nuisance may not unite in a suit for damages.—*Hunt v. Johnson*, 171 S. W. 1125.

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## ADVERSE POSSESSION.

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### I. NATURE AND REQUISITES.

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§ 1 (Tex.Civ.App.) The distinction between title by limitation and prescription is that the latter is based upon a presumed grant, while the former is not.—*Martin v. Burr*, 171 S. W. 1044.

(B) Actual Possession.

§ 19 (Tex.Civ.App.) Under Rev. St. 1911, art. 5678, as to what constitutes peaceable and adverse possession within article 5675, ten-year statute of limitation held to have no application to dispute regarding boundary of surveys included in tract of over 5,000 acres on which there were no improvements, except a fence around it.—*J. D. Fields & Co. v. Allison*, 171 S. W. 274.

(F) Hostile Character of Possession.

§ 58 (Tex.Civ.App.) Hostile possession must be manifested by such acts as would constitute grounds for action against an adverse claimant.—*Martin v. Burr*, 171 S. W. 1044.

§ 68 (Tex.Civ.App.) The three and five year statutes of limitation had no application to a boundary dispute, where plaintiff only claimed the land paid for by him and claimed up to a fence only because he thought his deeds embraced the land up to the fence.—*J. D. Fields & Co. v. Allison*, 171 S. W. 274.

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§ 20 (Tex.Civ.App.) An order denying a motion to set aside the judgment at a former term, the trial court being without jurisdiction to entertain it, was not appealable.—*Banks v. Blake*, 171 S. W. 514.

## III. DECISIONS REVIEWABLE.

### (C) Amount or Value in Controversy.

§ 51 (Tex.Civ.App.) A petition *held* sufficient to warrant a recovery of \$116 and confer jurisdiction on the Court of Civil Appeals, especially where defendant urged a counterclaim for \$154.—*Mahaney v. Lee*, 171 S. W. 1093.

§ 56 (Ky.) An appeal from an order denying a motion for judgment for plaintiff for \$4 and costs, notwithstanding the verdict followed by a judgment of dismissal, is not within the jurisdiction of the Court of Appeals.—*Potter v. Garrison*, 171 S. W. 147.

§ 61 (Tex.) Improper uniting of two separate causes does not give the Supreme Court jurisdiction on writ of error, where it has no jurisdiction of either case.—*Hunt v. Johnson*, 171 S. W. 1125.

§ 65 (Tex.Civ.App.) Where plaintiff in justice's court, demanding judgment for \$104, recovered judgment for \$76, and on appeal filed in the county court an amendment reducing the demand to \$76, the Court of Civil Appeals had no jurisdiction of an appeal from a judgment for that amount.—*Globe Loan Co. v. Betancourt*, 171 S. W. 308.

### (D) Finality of Determination.

§ 79 (Tex.Civ.App.) A judgment which did not dispose of a party to the suit is not a final judgment.—*St. Louis, S. F. & T. Ry. Co. v. Tudle*, 171 S. W. 797.

§ 84 (Ark.) Where the county court entered the nunc pro tunc order necessary to give the circuit court jurisdiction of an appeal from a judgment establishing a drainage district, no appeal from dismissal of petitioner's appeal from the nunc pro tunc order will lie.—*Drainage Dist. No. 1, Cross County, v. Rolfe*, 171 S. W. 892.

### (E) Nature, Scope, and Effect of Decision.

§ 101 (Tex.Civ.App.) No appeal can be taken from an order denying motion to vacate the appointment of a receiver; but the appeal must be from the order making the appointment.—*Williams v. Watt*, 171 S. W. 268.

§ 119 (Mo.App.) Costs having been retaxed on plaintiff's motion, defendant, who failed to appeal, cannot, his motion for retaxation made at the following term having been denied, appeal from the latter judgment.—*Parkes v. Woolsey*, 171 S. W. 948.

## IV. RIGHT OF REVIEW.

### (A) Persons Entitled.

§ 139 (Tex.Civ.App.) An appeal, by a nominal party, who is not affected by the judgment, will not be considered.—*Style v. Lantrip*, 171 S. W. 786.

## V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

### (A) Issues and Questions in Lower Court.

§ 169 (Mo.) Under Rev. St. 1909, § 2081, a point not made in the circuit court during the trial, or in the motion for new trial, cannot be considered on appeal.—*In re Aiken*, 171 S. W. 342.

§ 170 (Mo.App.) A constitutional question not raised below may not be raised on appeal.—*Boonville Special Road Dist. v. Fuser*, 171 S. W. 962.

§ 171 (Mo.) Where a cause was tried in the circuit court on one theory, the court on appeal must dispose of the case on the same theory.—*In re Aiken*, 171 S. W. 342.

§ 171 (Mo.App.) Plaintiff cannot on appeal change his theory as to the effect of a notation on the note sued on.—*Lebrecht v. Nellist*, 171 S. W. 11.

§ 173 (Ark.) Where the defense of limitations was not raised in the court below, it cannot be raised for the first time on appeal.—*Lochridge Dry Goods Co. v. Daniels Transfer Co.*, 171 S. W. 863.

§ 173 (Mo.App.) No issue of estoppel having been raised by objection or instructions, it will not be considered on appeal.—*Kieselhorst Piano Co. v. Porter*, 171 S. W. 949.

### (B) Objections and Motions, and Rulings Thereon.

§ 195 (Ark.) Where defendant declined to plead further after its special plea had been correctly overruled, it cannot on appeal object to an amendment to the declaration as stating a new cause of action.—*American Hardwood Lumber Co. v. T. J. Ellis & Co.*, 171 S. W. 899.

§ 199 (Ky.) That defendant was prematurely forced to trial cannot be reviewed in the absence of an objection below.—*Braun's Ex'r v. Williams*, 171 S. W. 996.

§ 204 (Mo.) Though opinion evidence of a fact is admitted without objection, such evidence cannot be considered by the court on appeal, if the fact was not provable by such evidence.—*Lyman v. Dale*, 171 S. W. 352.

§ 204 (Mo.App.) Objections to testimony as being evidence of estoppel in pais not pleaded cannot be urged for the first time on appeal.—*Colley v. National Live Stock Ins. Co.*, 171 S. W. 663.

§ 213 (Tex.Civ.App.) Error could not be predicated on the submission of an issue of negligence of defendant's driver, in absence of objection thereto and request for submission of any other theory of negligence pleaded.—*Martinez v. Medina Valley Irr. Co.*, 171 S. W. 1035.

§ 218 (Tex.Civ.App.) Where no objection was made to an instruction that, if the jury answered a certain question in the negative, they need not answer questions following, error could not be predicated on failure, after returning a negative answer, to answer such questions.—*Martinez v. Medina Valley Irr. Co.*, 171 S. W. 1035.

§ 231 (Ark.) Plaintiff could not object to an instruction requiring him to "satisfy" the jury by a "fair" preponderance of the evidence, where no specific objection was made to the words quoted at the trial.—*Hays v. Williams*, 171 S. W. 892.

§ 237 (Mo.App.) A statement, volunteered by plaintiff after answering a proper question, does not require a reversal, where there was no objection thereto and no motion to strike.—*Brown v. City of St. Joseph*, 171 S. W. 935.

§ 238 (Mo.) Rev. St. 1909, § 10440, authorizes an appeal from damages awarded for the taking of land for a road and from the order establishing the road, and a county complaining of the judgment awarding damages may not, in the absence of a motion in arrest, complain of the failure of the circuit court to find jurisdictional facts.—*In re Aiken*, 171 S. W. 342.

### (C) Exceptions.

§ 261 (Mo.App.) Where not excepted to below, improper argument of counsel cannot be considered.—*Brown v. Barr*, 171 S. W. 4.

§ 262 (Tex.Civ.App.) Erroneous giving of peremptory instruction *held* fundamental error, reviewable without an exception, notwithstanding the act of the Thirty-Third Legislature (Acts 33d Leg. c. 59).—Henderson & Grant v. Gilbert, 171 S. W. 304.

§ 263 (Tex.Civ.App.) Refusal of charges is not reviewable, unless exceptions were reserved as required by statute.—St. Louis Southwestern Ry. Co. of Texas v. Mathews, 171 S. W. 797.

§ 263 (Tex.Civ.App.) Under Acts 33d Leg. c. 59, an objection that the submission of a special defense was error could not be considered, where defendant did not except to the instructions or request an instructed verdict.—Elser v. Putnam Land & Development Co., 171 S. W. 1052.

Under Acts 33d Leg. c. 59, error in giving an instruction not excepted to is an invited error, of which advantage cannot be taken on appeal.—Id.

§ 272 (Tex.Civ.App.) Under Rev. St. 1911, §§ 1971-1973, 2061, as amended by Acts 33d Leg. c. 59, plaintiff, not excepting to refusal of his requested special charges, and whose only objection was filed after judgment, *held* to have approved the charge.—Moore v. Cooper Mfg. Co., 171 S. W. 1034.

§ 273 (Tex.Civ.App.) A charge not having been excepted to as authorizing a double recovery, objection to it on that account is waived under the law with reference to charges as amended by Acts 33d Leg. c. 59.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

§ 274 (Tex.Civ.App.) Objection that a charge permits a double recovery is not presented by an exception: "It is not the law; there is no pleading and no evidence to support the issue."—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

§ 274 (Tex.Civ.App.) In an action against a sheriff and his bondsmen for damages in failing to file a record of attachment, exception to exclusion of the writ and amended return *held* not to show the materiality of the excluded evidence, so that it would not be considered.—Neville v. Miller, 171 S. W. 1109.

§ 275 (Mo.) Under Rev. St. 1909, § 2081, a point not ruled on by the circuit court cannot be determined on appeal.—In re Aiken, 171 S. W. 342.

#### (D) Motions for New Trial.

§ 282 (Tex.Civ.App.) Under Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), requiring assignments of error to be filed, and making the assignments of error in a motion for a new trial the assignments on appeal, *held*, that where findings of fact and conclusions of law were not filed by the trial court, and plaintiff in error did not file a motion for a new trial therein, there were no assignments of error which could be considered.—Pollard v. Allen & Sims, 171 S. W. 302.

§ 301 (Tex.Civ.App.) In an action to recover land, assignments that the court erred in awarding to defendants only three forty-seconds of the land, because there was no evidence that a tram company under which plaintiff claimed was a bona fide purchaser, etc., *held* not to present errors of law apparent on the face of the record, and not reviewable, where they were not presented as grounds for new trial.—Conn v. Houston Oil Co. of Texas, 171 S. W. 520.

§ 302 (Tenn.) Where defendant railroad company moved for a peremptory instruction, and made the denial a ground for its motion for new trial, its contention that an action for the death of an employe engaged in interstate commerce could not, under the federal Employers' Liability Act, be maintained by the widow, is sufficiently presented.—Cincinnati, N. O. & T. P. Ry. Co. v. Bonham, 171 S. W. 79.

§ 302 (Tex.Civ.App.) Where a motion for a new trial contained no charges of error or any

claim that the evidence was insufficient to sustain the verdict, it was insufficient to present any question for review under Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), making the grounds for new trial the assignments of error on appeal.—Murphy v. Murphy, 171 S. W. 263.

### VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

#### (A) Time of Taking Proceedings.

§ 345 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 2080, and notwithstanding the amendment (Acts 33d Leg. c. 136; Vernon's Sayles' Ann. Civ. St. 1914, art. 1612) and Supreme Court rule 24 (142 S. W. xii), a writ of error *held* too late, though filed within 12 months after denial of new trial.—St. Louis & S. F. Ry. Co. v. Stapp, 171 S. W. 1080.

§ 349 (Ky.) Under Civ. Code Prac. § 745, giving a year after removal of disability for appeal by an infant defendant, the suit being to sell land of two infants, in which each owns an undivided interest, appeal by them less than a year after removal of disability of the one, but more than that after removal of that of the other, is effectual as to the one, but not the other.—Hays v. Wicker, 171 S. W. 447.

#### (B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 360 (Tex.) Where defendant in error filed an answer, as authorized by Supreme Court rule 5 (142 S. W. viii), based on Vernon's Sayles' Ann. Civ. St. 1914, arts. 1542a-1542c, without reserving a right to be heard, the court will at once dispose of the case.—Tyler Building & Loan Ass'n v. Biard & Scales, 171 S. W. 1122.

#### (C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 384 (Tex.Civ.App.) Under a petition, for a partnership receiver, showing that the individual defendants are the real parties in interest, an appeal bond in the firm name of defendants, but not in their individual capacity, is insufficient.—Style v. Lantrip, 171 S. W. 786.

§ 395 (Tex.Civ.App.) Under Rev. St. 1895, art. 1025, a defective bond gives the Court of Civil Appeals jurisdiction.—Bauer v. Crow, 171 S. W. 206.

#### (D) Writ of Error, Citation, or Notice.

§ 430 (Mo.App.) A showing that a notice of a writ of error was mailed to the chief counsel on the opposite side in time to reach him in due course of mail with three days to spare shows good cause for failure to give notice under Rev. St. 1909, § 2071.—German-American Bank v. Cramery, 171 S. W. 31.

### X. RECORD AND PROCEEDINGS NOT IN RECORD.

#### (A) Matters to be Shown by Record.

§ 499 (Tex.Civ.App.) Assignments of error complaining of the admission of testimony will not be considered where the objections are not stated in the bills of exception reserved to its introduction.—Denton v. English, 171 S. W. 248.

§ 499 (Tex.Civ.App.) A bill of exceptions to the giving of a special charge should show that the particular objection urged on appeal was called to the attention of the trial court, as required by Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1971), although the language of that article mentions only the general charge.—Beard v. International & G. N. Ry. Co., 171 S. W. 553.

§ 499 (Tex.Civ.App.) Making of objections and taking of exceptions to rulings on charges under Act March 29, 1913 (Acts 33d Leg. c.

59), *held* not properly shown by the record, in the absence of a bill of exceptions.—Texas Midland R. R. v. Becker & Cole, 171 S. W. 1024.

§ 499 (Tex.Civ.App.) The refusal of special charges will not be reviewed, where the bill of exceptions fails to show that they were requested before the main charge was read to the jury.—Tannehill v. Tannehill, 171 S. W. 1050.

§ 501 (Tex.Civ.App.) Assignments on the refusal of special charges will not be reviewed, unless exceptions were preserved by bills taken according to Acts 33d Leg. c. 59.—Anderson & Day v. Darsey, 171 S. W. 1089.

§ 511 (Ark.) Where the record failed to show when the bill of exceptions was filed, except by a certificate of the clerk to the transcript, made after the time allowed, the bill of exceptions could not be considered.—Williams v. McCabe, 171 S. W. 1194.

#### (B) Scope and Contents of Record.

§ 525 (Ky.) Where the instructions have been stricken, the only remaining questions for review are whether the pleadings support the judgment and the verdict is warranted by the proof.—Cincinnati, N. O. & T. P. Ry. Co. v. Dungan, 171 S. W. 1007.

§ 528 (Mo.App.) A motion for new trial is not a part of the record on appeal, unless made a part of the bill of exceptions.—Wonderly v. Haynes, 171 S. W. 564.

#### (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 547 (Tex.Civ.App.) Error cannot be assigned to the refusal to submit special issues to the jury, where no bill of exceptions was taken to the charge or such refusal.—Missouri, K. & T. Ry. Co. of Texas v. Churchill, 171 S. W. 517.

§ 547 (Tex.Civ.App.) Assignments of error complaining of instructions to which no proper bills of exception were reserved below will be overruled.—Gulf, T. & W. Ry. Co. v. Dickey, 171 S. W. 1097.

Error could not be predicated on refusal of instructions submitting an issue, where no proper bill of exceptions was taken to the charge on the issue of defendant's liability.—Id.

§ 547 (Tex.Civ.App.) Assignments of error complaining of instructions to which no proper bills of exceptions have been taken will be overruled.—Williams v. Phelps, 171 S. W. 1100.

§ 548 (Tex.Civ.App.) An objection to a charge will not be reviewed, unless the objection is preserved by a proper bill of exceptions incorporated in the record.—Conn v. Houston Oil Co. of Texas, 171 S. W. 520.

§ 548 (Tex.Civ.App.) Error cannot be assigned on a charge or the refusal of requested charges, unless a bill of exceptions is taken to the portion of the charge complained of or to the court's action in refusing charges.—O'Neil Engineering Co. v. City of San Augustine, 171 S. W. 524.

§ 548 (Tex.Civ.App.) Assignments to the admission of testimony will not be considered, unless preserved by bill of exceptions.—Thomas v. Barthold, 171 S. W. 1071.

§ 549 (Tex.Civ.App.) Rulings on instructions cannot be reviewed where there is no bill of exceptions showing objections made before the court finally instructed the jury and an opportunity given the court to cure the errors, as provided by Acts 33d Leg. c. 59.—Horton v. Texas Midland R. R., 171 S. W. 1023.

§ 553 (Tex.Civ.App.) Certain exceptions in a statement of facts, together with an order entered on the minutes, *held* not to constitute a "bill of exceptions" to the charge given.—Gulf, T. & W. Ry. Co. v. Dickey, 171 S. W. 1097.

§ 553 (Tex.Civ.App.) Objections to the charge which do not show that they were presented be-

fore the charge was read, or that they were overruled and exception taken, will not be considered on appeal.—Williams v. Phelps, 171 S. W. 1100.

#### (D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 564 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 2073, a statement of facts filed before the transcript is required to be filed is filed in time, though not filed within the time specified by the trial court.—Conn v. Houston Oil Co. of Texas, 171 S. W. 520.

#### (E) Abstracts of Record.

§ 581 (Mo.App.) Excluded evidence must be shown in the abstract; otherwise, an objection to its exclusion cannot be reviewed.—Jennemann v. Bucher, 171 S. W. 613.

§ 584 (Mo.) Where the dividing line between the record proper and the bill of exceptions clearly appeared in the abstract, it will not be disregarded on the ground that matters of exception and matters of the record proper were commingled.—City of Caruthersville v. Huffman, 171 S. W. 323.

§ 586 (Ark.) Where appellant abstracted the testimony on the only point sought to be raised on the appeal, *held*, that the appeal would not be dismissed for noncompliance with rule 9.—St. Louis, I. M. & S. R. Co. v. Craft, 171 S. W. 1185.

#### (H) Transmission, Filing, Printing, and Service of Copies.

§ 630 (Tex. Civ. App.) Where respondent's counsel, who lost the clerk's transcript of the record after it was filed in the Court of Civil Appeals, failed to have certified a substitute transcript offered by them, *held*, that the motion to substitute would be overruled, and the statement of the case and statements supporting the assignments of error in appellant's brief will be treated as correct.—Patterson v. Sylvan Beach Co., 171 S. W. 515.

#### (I) Defects, Objections, Amendment, and Correction.

§ 637 (Mo.App.) Under Rev. St. 1909, § 2029, as amended by Laws 1911, p. 139, it was not ground for dismissing an appeal that the bill of exceptions was not filed within the time allowed by the trial court.—Grouch v. Heffner, 171 S. W. 23.

§ 648 (Tex.Civ.App.) The district court has jurisdiction to correct the record, notwithstanding an appeal has been perfected and the transcript filed in the Court of Civil Appeals.—Neville v. Miller, 171 S. W. 1109.

§ 649 (Tex.Civ.App.) The district court in vacation may entertain a motion to strike out a bill of exceptions.—Neville v. Miller, 171 S. W. 1109.

§ 655 (Tex.Civ.App.) Motion to strike bill of exceptions not filed within the 30 days after filing of the transcript allowed by rule 8 for Courts of Civil Appeals (142 S. W. x1) *held* too late to be considered.—Neville v. Miller, 171 S. W. 1109.

#### (J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 669 (Tex.Civ.App.) Bill of exceptions *held* not impeachable by the trial judge's certificate that he was misled into signing it, but that the proper proceeding was to have the record corrected in the trial court.—Neville v. Miller, 171 S. W. 1109.

#### (K) Questions Presented for Review.

§ 671 (Ark.) On review of a finding on an agreed statement of facts, nothing can be interpolated into the statement to aid a recital

therein.—*Klingensmith v. Logan County*, 171 S. W. 1191.

§ 671 (Ky.) Where it did not appear from the bill of exceptions that the alleged improper argument was made, and there was nothing in the affidavit copied into the bill or in the record to indicate the court's ruling on appellant's objection thereto, the court could not say whether there was error.—*City of Louisville v. Hehemann*, 171 S. W. 165.

§ 671 (Mo.) Where appellant's abstract statement, brief, and argument did not disclose that her motion for a new trial was preserved in a bill of exceptions, the court could decline to consider any question not appearing by the record proper.—*Jodd v. Mehrtens*, 171 S. W. 322.

§ 671 (Mo.App.) The effect of a bill *held* not to be considered on appeal, where the abstract of record does not show that it was admitted in evidence.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

§ 677 (Tex.Civ.App.) A citation showing that one of the parties therein was not served and that one was dead *held* not evidence for the consideration of the Court of Civil Appeals, unless it came up in a proper statement of facts.—*Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran*, 171 S. W. 294.

§ 690 (Tex.Civ.App.) The exclusion of evidence cannot be reviewed on appeal, unless the bill of exceptions shows that the witnesses would have testified to the facts sought to be proved, but excluded.—*Miller v. Campbell*, 171 S. W. 251.

§ 701 (Tex.Civ.App.) In the absence of a statement of facts, assignments complaining of the court's refusal to give requested charges will not be considered.—*Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran*, 171 S. W. 294.

§ 707 (Tex.Civ.App.) In absence of statement of facts, *held*, that the court could not determine that a judgment was erroneous because based on a finding on the theory of negligence submitted.—*Martinez v. Medina Valley Irr. Co.*, 171 S. W. 1035.

## XI. ASSIGNMENT OF ERRORS.

§ 719 (Tex.Civ.App.) It is within the province of the Court of Civil Appeals to determine whether it has jurisdiction, regardless of whether the matter is presented by an assignment of error.—*Banks v. Blake*, 171 S. W. 514.

§ 719 (Tex.Civ.App.) Lack of jurisdiction of the trial court is fundamental, and it must be considered on appeal, even without assignments.—*Milner v. Sims*, 171 S. W. 784.

§ 719 (Tex.Civ.App.) Error, if any, in instructing a verdict for defendant, when the admitted and proven facts entitled plaintiff to a judgment, was fundamental error, as to which no assignment of error is necessary.—*Neville v. Miller*, 171 S. W. 1109.

§ 722 (Tex.Civ.App.) An assignment of error predicated on a bill of exception *held* to complain of the admission of testimony and reviewable within Act 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612).—*Martin v. Stires*, 171 S. W. 836.

§ 722 (Tex.Civ.App.) That, under the law, a motion for new trial constitutes assignments of error *held* not to render the statutes and rules governing the requisites of assignments inoperative.—*Killman v. Young*, 171 S. W. 1065.

§ 724 (Tex.Civ.App.) An assignment of error failing to direct the court's attention to any error will not be considered, in view of Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612).—*Martin v. Stires*, 171 S. W. 836.

§ 724 (Tex.Civ.App.) Assignments of error, which do not set out the substance of the bill of exception referred to simply by number, cannot be considered.—*Anderson & Day v. Darsey*, 171 S. W. 1089.

§ 731 (Tex.Civ.App.) An assignment of error that the verdict was contrary to the law and the evidence and should have been for the full amount of plaintiff's claim was too general.—*Moore v. Cooper Mfg. Co.*, 171 S. W. 1034.

§ 736 (Tex.Civ.App.) An assignment of error which sets forth exceptions and objections, which embody several separate and distinct questions of law and fact, will be disregarded as multifarious.—*Killman v. Young*, 171 S. W. 1065.

§ 736 (Tex.Civ.App.) An assignment complaining of the overruling of distinct and unrelated motions cannot be considered.—*Anderson & Day v. Darsey*, 171 S. W. 1089.

§ 737 (Tex.Civ.App.) Assignments which were grouped, though complaining of sustaining of exceptions to answer raising various questions, will not be considered.—*Bray v. Sewall*, 171 S. W. 795.

§ 742 (Tex.Civ.App.) Assignments of error *held* to relate to the same question, so that they could be grouped in the brief, and considered together.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

Propositions under assignments of error *held* not germane or relevant to, or included in, the assignments.—*Id.*

Assignments of error not propositions in themselves, and followed by no propositions, but referring merely to propositions under another assignment, not germane to them, will not be considered.—*Id.*

Assignments of error *held* to present questions so related that the assignments may be grouped in the brief, and considered together.—*Id.*

§ 742 (Tex.Civ.App.) Statement accompanying assignments of error complaining of the sustaining of special exceptions to answer *held* not in compliance with the rules.—*Bray v. Sewall*, 171 S. W. 795.

§ 742 (Tex.Civ.App.) Assignment of error in overruling plaintiff's motion for a new trial, submitted as a proposition, *held* too general and indefinite to be considered.—*Moore v. Cooper Mfg. Co.*, 171 S. W. 1034.

§ 742 (Tex.Civ.App.) An assignment of error, which does not contain a copy of the paragraph of the motion for new trial referring to the subject must be disregarded under Vernon's Sayles' Ann. Civ. St. 1914, art. 1612, and Court Rules 23, 29 (142 S. W. xii).—*E. G. Rall Grain Co. v. Burke-Simmons Co.*, 171 S. W. 1043.

§ 742 (Tex.Civ.App.) An assignment of error complaining of the refusal of special instructions will not be considered, where it is not followed by a statement from the record showing that such charges were called for by the evidence.—*Tannehill v. Tannehill*, 171 S. W. 1050.

Statement under assignment of error complaining of peremptory instruction *held* insufficient, under rule 34 for Courts of Civil Appeals, relative to propositions complaining of fundamental errors.—*Id.*

§ 742 (Tex.Civ.App.) An assignment of error unaccompanied by the required statement will not be considered.—*Athlison, T. & S. F. Ry. Co. v. Boyce*, 171 S. W. 1094.

§ 747 (Tex. Civ. App.) A cross-assignment, wherein appellee insists that the judgment should have been for a greater amount, will not be considered where no statement was submitted under the assignment.—*Lee v. White*, 171 S. W. 1056.

§ 750 (Tex.Civ.App.) An assignment of error that under a defense pleaded, the evidence introduced, and the verdict thereon, it was error to render judgment for plaintiff does not raise the issue that the answer denied was a bar to recovery.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 750 (Tex.Civ.App.) An assignment that the court erred in overruling plaintiff's motion to set aside the judgment and to retry the case, because the judgment did not dispose of all the

parties or issues, was not sufficient to present the question whether the judgment was final.—*Banks v. Blake*, 171 S. W. 514.

§ 750 (Tex.Civ.App.) In action against two carriers, assignments of error that there was no evidence against either, and that the great preponderance of the evidence showed no cause of action, *held* properly overruled, where the evidence supported a finding against one carrier.—*Texas Midland R. R. v. Becker & Cole*, 171 S. W. 1024.

§ 753 (Tex.Civ.App.) Where there are no valid assignments of error in the record, and where the purported assignments are not properly briefed, the Court of Civil Appeals is confined to the consideration of fundamental errors, or errors apparent on the face of the record, of which it must take notice without assignments and briefs.—*Pollard v. Allen & Sims*, 171 S. W. 302.

## XII. BRIEFS.

§ 759 (Tex.Civ.App.) An assignment of error not copied in the brief will not be considered.—*Bulloch v. Missouri, K. & T. Ry. Co., of Texas*, 171 S. W. 808.

§ 759 (Tex.Civ.App.) Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), does not require Courts of Civil Appeals to consider an assignment of error not copied in the brief.—*Martin v. Stires*, 171 S. W. 836.

§ 759 (Tex.Civ.App.) Presenting in one group some 13 assignments, with a reference to the record to find out the exceptions, *held* improper.—*Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.*, 171 S. W. 1103.

§ 760 (Tex.Civ.App.) Where the brief filed by appellant failed to comply with rule 31 for Courts of Civil Appeals (142 S. W. xiii), requiring statements of proceedings in the record necessary to an understanding of the propositions, the assignments of error will not be considered.—*Pollard v. Allen & Sims*, 171 S. W. 302.

§ 761 (Mo.App.) Attorneys citing in their briefs Missouri cases should add parallel references to the official reports when they cite the Southwestern Reporter, though cases from other states may be cited from the Reporters alone.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 770 (Tex.Civ.App.) Though the appellant files no brief, a suggestion by the appellee that the appeal was taken for delay only requires the court to reverse the judgment for any material error there may be therein.—*W. A. Leyhe Piano Co. v. American Multigraph Sales Co.*, 171 S. W. 494.

§ 773 (Tex.Civ.App.) Where the judgment disposed of all the parties and was in conformity with the issues, it will be affirmed, in the absence of briefs.—*Bartholomew v. Culver*, 171 S. W. 498.

## XVI. REVIEW.

### (A) Scope and Extent in General.

§ 837 (Tex.Civ.App.) In the absence of any findings of fact or conclusions of law by the trial court, the Court of Civil Appeals must look to the record to see if under the pleadings, there is evidence to sustain the judgment entered by the trial court.—*Childs v. McGrew*, 171 S. W. 506.

§ 839 (Ark.) Defendant, which appealed only from part of judgment allowing recovery for pain and suffering, *held* not entitled to complain that there could be no recovery both for the death and for the pain and suffering.—*St. Louis, I. M. & S. R. Co. v. Craft*, 171 S. W. 1185.

§ 842 (Mo.App.) In action for injuries to person struck by automobile, where the evidence was conflicting, *held* that whether a street car had stopped at its usual stopping place for plaintiff, and whether warning of the automo-

bile's approach was given, were jury questions, and not reviewable.—*Grouch v. Heffner*, 171 S. W. 23.

§ 847 (Ark.) In equity the court may look to the exhibits to ascertain the nature of the cause of action.—*Stuckey v. Stephens*, 171 S. W. 908.

§ 854 (Mo.App.) Rule as to affirming judgment if sustainable upon any theory in a case tried without a jury, where no findings are made or declarations of law given or requested, *held* inapplicable, where evidence of a perfectly valid defense was excluded.—*Martin v. Printz*, 171 S. W. 642.

§ 867 (Mo.App.) On appeal from the granting of a new trial on one of several assigned grounds, all the grounds assigned may be considered.—*Kelly v. City of Higginsville*, 171 S. W. 966.

### (C) Parties Entitled to Allege Error.

§ 877 (Mo.) Under Rev. St. 1909, § 2082, a county appealing from a judgment of the circuit court, awarding damages for the taking of land for a public road, rendered on appeal by the owner from a judgment of the county court establishing the road and awarding damages, may not complain because damages were not awarded to a third person for his land taken for the road.—*In re Aiken*, 171 S. W. 342.

Where, in proceedings to establish a public road, an owner of land taken for the road did not file exceptions to the report of the commissioners failing to award him any damages, the county permitting a judgment of the county court establishing and opening the road could not thereafter complain because damages were not awarded to the landowner.—*Id.*

§ 882 (Mo.) A party inviting by requested instructions the submission of an issue may not complain of the submission.—*Thummel v. Surplus*, 171 S. W. 929.

§ 882 (Tex.Civ.App.) Error, in an instruction, cannot be complained of on appeal, where invited by plaintiff in error in special charges requested by him.—*Miller v. Campbell*, 171 S. W. 251.

§ 882 (Tex.Civ.App.) Error, if any, in the admission of evidence of the contents of a telegram, brought out by appellant on cross-examination, *held* not error of which appellant could complain.—*Memphis Cotton Oil Co. v. Goode*, 171 S. W. 284.

§ 882 (Tex.Civ.App.) Where plaintiff alleged perfect health, except a slight weakness incident to an operation, she could not complain of an instruction that the car should be heated sufficiently for a person in normal health.—*Bulloch v. Missouri, K. & T. Ry. Co. of Texas*, 171 S. W. 808.

§ 883 (Mo.App.) Where a defendant was permitted to make defense of contributory negligence under a general denial, plaintiff could not claim on appeal that the court properly refused defendant's instruction on that issue because not pleaded.—*Stephens v. City of El Dorado Springs*, 171 S. W. 657.

§ 884 (Ark.) A claimant against a county who acquiesced in an order setting aside a portion of his claim and allowing it in full *held* not entitled, on appeal from an order setting aside the allowance in full, to complain that the order allowing it in part was final.—*Jennings v. Ft. Smith Dist. of Sebastian County*, 171 S. W. 920.

### (E) Presumptions.

§ 907 (Ark.) Where the instructions are not set out, it will be assumed that the case went to the jury under instructions correctly declaring the law.—*Meyer v. Holland*, 171 S. W. 893.

§ 907 (Mo.App.) Where there is no showing to the contrary, the presumption is always in favor of correct action on the part of the trial judge.—*Jennemann v. Bucher*, 171 S. W. 613.

§ 907 (Tex.Civ.App.) Where there was no statement of facts, it must be presumed that a judgment recital that defendants announced ready for trial was true, and that all the parties were before the court, to authorize judgment, as provided by law.—*Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran*, 171 S. W. 294.

§ 927 (Ark.) On appeal from a directed verdict, the Supreme Court must take that view of the evidence most favorable to appellant.—*Clark v. J. R. Watkins Medical Co.*, 171 S. W. 136.

§ 927 (Mo.App.) In passing upon the question whether plaintiff made out a case for the jury, the evidence must be considered in the light most favorable to him, where the jury's verdict is in his favor.—*Grouch v. Heffner*, 171 S. W. 23.

§ 927 (Mo.App.) In reviewing the refusal to direct a verdict for defendant, the evidence must be considered in the light most favorable to the plaintiff.—*Hicks v. Hammond Packing Co.*, 171 S. W. 937.

§ 928 (Mo.App.) In determining alleged error in refusal to give instructions on defendant's theory, the appellate court must accept as true the evidence most favorable to defendant.—*Stephens v. City of El Dorado Springs*, 171 S. W. 657.

§ 933 (Mo.App.) The court on appeal from a judgment rendered on a second trial, after the setting aside of a verdict for error in compelling plaintiff to elect on which of two counts in the petition he would proceed, must presume, in the absence of anything to the contrary, that the issues raised by the two counts were submitted.—*Wonderly v. Haynes*, 171 S. W. 564.

§ 934 (Tex.Civ.App.) Where the court filed no findings of fact or conclusions of law, the court on appeal must indulge every reasonable presumption in support of the judgment.—*First State Bank of Amarillo v. Jones*, 171 S. W. 1057.

§ 938 (Tex.Civ.App.) In the absence of a direct appeal from the striking of appellant's bill of exceptions and the substitution of another bill, it would be presumed that the order was properly made.—*Neville v. Miller*, 171 S. W. 1109.

#### (F) Discretion of Lower Court.

§ 971 (Ark.) Exercise of trial court's discretion in allowing cross-examination on collateral facts is not ground for reversal, unless such discretion has been abused to the prejudice of the objecting party.—*St. Louis, T. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

§ 971 (Mo.App.) Unless there is a flagrant violation of the rule against leading questions, the discretion of the court will not be reviewed.—*Jennemann v. Bucher*, 171 S. W. 613.

§ 977 (Mo.App.) The discretionary rulings of the trial court on a motion for new trial, while presumptively correct may be reversed for abuse of discretion.—*Kelly v. City of Higginsville*, 171 S. W. 966.

§ 981 (Mo.App.) Ruling on a motion for a new trial for newly discovered evidence will not be reviewed, unless there was an abuse of discretion.—*Iaser v. Nelson*, 171 S. W. 6.

#### (G) Questions of Fact, Verdicts, and Findings.

§ 987 (Tex.) The Court of Civil Appeals, reversing a judgment rendered on a ground adjudged erroneous, *held* required to remand the case, in view of a finding of the trial court sustained by evidence.—*Post v. State*, 171 S. W. 707.

Where the evidence is without conflict, the Court of Civil Appeals may render the proper judgment, but where there is any conflict on a material issue, it may not substitute its findings for those of the trial court.—*Id.*

§ 989 (Tex.) After verdict for plaintiff, the Supreme Court, passing on a question of fact, must reject all evidence favorable to defendant, and consider only that sustaining the verdict.—*Cartwright v. Canode*, 171 S. W. 696.

§ 994 (Tex.Civ.App.) The credibility of the witnesses is for the jury and not the appellate court.—*Denton v. English*, 171 S. W. 248.

§ 997 (Tex.Civ.App.) On an appeal by plaintiff from a judgment on a verdict directed for defendant, the plaintiff's evidence must be taken as true.—*Dawson v. King*, 171 S. W. 257.

§ 1001 (Mo.App.) Where there was substantial evidence to support the verdict, it cannot be disturbed on appeal.—*Hufft v. Dougherty*, 171 S. W. 17.

§ 1001 (Mo.App.) Where, in an action on an insurance policy, the question of bad faith of the appraisers was submitted on substantial evidence, its verdict will be sustained.—*Jones v. Orient Ins. Co.*, 171 S. W. 28.

§ 1001 (Tex.Civ.App.) Where there was evidence to support the findings on the controlling issues, the verdict cannot be disturbed, although the evidence was not conclusive.—*W. A. Leyhe Piano Co. v. American Multigraph Sales Co.*, 171 S. W. 494.

§ 1001 (Tex.Civ.App.) A verdict sustained by evidence will not be disturbed.—*Paul Stone Co. v. Saucedo*, 171 S. W. 1038; *Ft. Worth Horse & Mule Co. v. Burnett*, *Id.* 1076.

§ 1002. Where the evidence is conflicting, the verdict is final, unless there is some error of law.

—(Mo. App.) *Iaser v. Nelson*, 171 S. W. 6; *First Nat. Realty & Loan Co. v. Mason*, *Id.* 971;

(Tex. Civ. App.) *Thomas v. Barthold*, 171 S. W. 1071; *Memphis Cotton Oil Co. v. Gardner*, *Id.* 1082.

§ 1003 (Ark.) Where it was not physically impossible under the evidence that plaintiff was injured by catching his foot in an unblocked frog, as he claimed, a judgment for plaintiff will not be reversed, though it was highly improbable that the accident so occurred.—*Missouri & N. A. R. Co. v. Johnson*, 171 S. W. 478.

§ 1003 (Ky.) Under Civ. Code Prac. § 340, subsec. 6, the appellate court will reverse only when the verdict is clearly against the weight of the evidence.—*Adams Express Co. v. Tucker*, 171 S. W. 428.

§ 1003 (Mo.App.) A verdict for a pedestrian for injuries will not be disturbed for fatal variance, as to the date of injury, between the proof and the notice given, under Rev. St. 1909, § 8863, where there was substantial evidence that the date was as stated in the notice, though the preponderance of the evidence was that the injury was received on another date.—*Willis v. City of St. Joseph*, 171 S. W. 27.

§ 1003 (Tex.Civ.App.) Unless the verdict is manifestly against the evidence, it will not be disturbed.—*Horton v. Texas Midland R. R.*, 171 S. W. 1023.

§ 1003 (Tex.Civ.App.) A verdict reasonably supported by the evidence will not be overturned because against the preponderance thereof.—*Thomas v. Barthold*, 171 S. W. 1071.

§ 1004 (Ky.) It is for the jury, not the appellate court, to compare plaintiff's contributory negligence with that of the defendant and, after ascertaining the full amount of his damages, to award such proportional part thereof as the negligence attributable to the defendant bore to the entire negligence attributable to both.—*Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451.

§ 1004 (Mo.App.) Allowance of damages for vexatious refusal of an insurance company to pay and for counsel fee being for the jury, under Rev. St. 1909, § 7068, *held* that the court on appeal would not interfere therewith.—*Dodt v. Prudential Ins. Co. of America*, 171 S. W. 655.

§ 1004 (Tex.Civ.App.) Verdict supported by testimony will not be disturbed, though appellate court might have found differently.—*Texas Midland R. R. v. Becker & Cole*, 171 S. W. 1024.

§ 1008 (Ark.) Findings of fact by the court are as conclusive on appeal as a verdict.—*Cherry v. Peay*, 171 S. W. 924.

§ 1008 (Mo.App.) Though findings of fact in a case tried without a jury have the force of a special verdict, if supported by substantial testimony, it must appear, to sustain the finding, that correct principles of law were applied to the facts in the case.—*Meyer v. Bobb*, 171 S. W. 600; *Same v. Goldsmith*, Id. 606.

§ 1009 (Mo.App.) While appellate courts will review the evidence in a suit in equity, they will defer to the finding of the chancellor, where the evidence is conflicting.—*Troll v. Dougherty & Bush Real Estate Co.*, 171 S. W. 665.

§ 1010 (Mo.App.) A finding of fact by the trial court is conclusive, if supported by substantial evidence.—*Hollrah-Diekmann Refrigerator & Fixture Co. v. St. Louis House & Window Cleaning Co.*, 171 S. W. 576; *Jennemann v. Bucher*, Id. 613.

#### (H) Harmless Error.

§ 1027 (Tex.Civ.App.) Defendant may not complain of the insufficiency of evidence of grounds of negligence, alleged in the petition, other than those which were submitted to the jury.—*Southern Pac. Co. v. Walker*, 171 S. W. 264.

§ 1033 (Ky.) A party cannot complain on appeal of an instruction which was more favorable to him than the law allowed.—*Keiner v. Collins*, 171 S. W. 399.

§ 1033 (Mo.App.) Defendant cannot complain that an instruction, correctly stating that he was required to exercise a high degree of care under the circumstances, is inconsistent with other instructions requiring only ordinary care.—*Hufft v. Dougherty*, 171 S. W. 17.

§ 1033 (Tex.Civ.App.) Error, if any, in admitting impeaching evidence, tending to strengthen the theory of appellant, held not reversible error on his complaint.—*Memphis Cotton Oil Co. v. Goode*, 171 S. W. 284.

§ 1033 (Tex.Civ.App.) Defendants could not complain of an instruction in their favor that plaintiff could not recover if he stepped back to avoid a street car and so placed himself that those in charge of defendants' automobile could not avoid injury to plaintiff.—*Prince v. Taylor*, 171 S. W. 826.

§ 1039 (Tex.Civ.App.) In trespass to try title by partnership, sustaining of plea in abatement for misjoinder held harmless as to one of the partners who was permitted to proceed as plaintiff for the recovery of the surveys to which he claimed title.—*J. D. Fields & Co. v. Allison*, 171 S. W. 274.

§ 1040 (Tex.Civ.App.) Any error in overruling exceptions to certain allegations of a petition held harmless.—*Gulf, T. & W. Ry. Co. v. Dickey*, 171 S. W. 1097.

§ 1040 (Tex.Civ.App.) Overruling of exception to paragraph in defendant's answer, held harmless, where the issue raised thereby was not submitted, and no assignment was presented to the admission of any testimony thereon.—*Williams v. Phelps*, 171 S. W. 1100.

Where no bill of exception was taken to an instruction that a contract was nonenforceable, error could not be assigned to the overruling of exceptions to allegations of the answer that the contract was invalid.—*Id.*

§ 1042 (Tex.Civ.App.) Where loss was due to initial carrier furnishing improper car, carrier held not prejudiced by exclusion of an allegation of answer that liability should terminate on delivery to connecting carrier.—*International &*

*G. N. Ry. Co. v. J. E. Bryant & Co.*, 171 S. W. 815.

§ 1043 (Ky.) The denial of a continuance to procure medical testimony was not prejudicial, where four experts testified for defendant and one of them was the first physician who saw plaintiff after the injury.—*Cumberland Telephone & Telegraph Co. v. Laird*, 171 S. W. 386.

§ 1046 (Tex.Civ.App.) Harm to plaintiff from holding of night session of court when his leading counsel was absent through illness held not apparent.—*Kirkland v. Rutherford*, 171 S. W. 1031.

§ 1047 (Tex.Civ.App.) Where the record did not show that a finding for plaintiff might not have been based entirely on incompetent testimony, refusal of a motion to strike it was reversible error.—*St. Louis Southwestern Ry. Co. of Texas v. Anderson*, 171 S. W. 806.

§ 1048 (Ark.) Where an officer of a corporation, a defendant in an action, did not admit that he had filed or was responsible for an answer filed in a former action, but asserted that he did not remember that the answer was filed, and no attempt was made to contravert his testimony by exhibiting the answer, the corporation was not prejudiced.—*Ft. Smith Lumber Co. v. Shackelford*, 171 S. W. 99.

§ 1048 (Mo.App.) Any error in permitting an employé suing for a personal injury to show that his foreman testifying for the employer received \$100 a month as wages was harmless.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 1048 (Tex.Civ.App.) Error in allowing a witness to be improperly cross-examined as to his character held not harmless.—*Houston Chronicle Pub. Co. v. Tiernan*, 171 S. W. 542.

§ 1050 (Ark.) The admission of a dying declaration of one run down by a train held prejudicial error, being the only evidence that the servants of the railroad company would have discovered him had they maintained a lookout.—*St. Louis, I. M. & S. Ry. Co. v. Enlow*, 171 S. W. 912.

§ 1050 (Mo.App.) In an injunction suit, the admission of the conclusion of a witness as to who were the sole heirs of a person, held not prejudicial error, in view of his previous testimony.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

§ 1050 (Mo.App.) In an action for injuries which plaintiff received when defendant's wagon was backed against him, the improper admission of evidence that defendant could have unloaded its wagon at another place held prejudicial.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

§ 1050 (Tex.Civ.App.) The court having only submitted to the jury the negligence charged in the petition, any admission of evidence bearing on negligence in another respect was harmless.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 1050 (Tex.Civ.App.) In an action for injuries to a licensee while alighting from the wrong side of a train in the presence of the conductor, the issue of discovered peril not having been submitted, defendant was not prejudiced by evidence that the conductor knew that it would be dangerous for plaintiff to so alight.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 171 S. W. 517.

§ 1050 (Tex.Civ.App.) Defendant could not successfully object to the introduction of a deed in evidence, where there was nothing in the statement subjoined to the assignment showing that plaintiff's title to any part of the land depended on the deed or was in any way affected thereby.—*Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.*, 171 S. W. 537.

§ 1050 (Tex.Civ.App.) Where a passenger claimed that a cold contracted on defendant's

train resulted in tuberculosis, the exclusion of a question of a medical expert as to whether that was not unusual is not reversible error.—*Missouri, K. & T. Ry. Co. of Texas v. Dellmon*, 171 S. W. 799.

§ 1050 (Tex.Civ.App.) Error in admitting evidence to prove allegations to which exceptions should have been sustained *held* harmless.—*Gulf, T. & W. Ry. Co. v. Dickey*, 171 S. W. 1097.

The admission of evidence of statements made by railroad employé *held* harmless, where there was competent evidence to the same effect.—*Id.*

§ 1050 (Tex.Civ.App.) The admission of immaterial testimony that a shipper was unable to pay the legal rate on the shipment *held* prejudicial, under Court of Civil Appeals rule 62a (149 S. W. x).—*Wichita Falls & W. Ry. Co. of Texas v. Asher*, 171 S. W. 1114.

§ 1051 (Tex.Civ.App.) Testimony of witness as to finding corner of a survey *held* not prejudicial, where other witnesses testified to the same matters and the corner was established beyond a reasonable doubt to be where he said he found it.—*Denton v. English*, 171 S. W. 248.

§ 1051 (Tex.Civ.App.) Admission of evidence of circumstances tending to make property plaintiff's separate estate *held* harmless, if error, where a deed properly admitted in evidence vested her with a separate estate.—*Molloy v. Brower*, 171 S. W. 1079.

§ 1052 (Tex.Civ.App.) Plaintiff having been found negligent, admission of conclusion that he got in the best position he could was harmless.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 1052 (Tex.Civ.App.) Under Rules of Courts of Civil Appeals, rule 62a (149 S. W. x), admission of testimony over objection that the witnesses were not properly qualified *held* harmless where duly qualified witnesses gave similar evidence.—*Williams v. Phelps*, 171 S. W. 1100.

§ 1053 (Mo.App.) The admission of evidence that an employer, sued for injuries to an employé, had liability insurance, was not ground for reversal, where the evidence came in only incidentally and was promptly stricken out on objection.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 1053 (Tex.Civ.App.) Plaintiff's testimony of his having received an injury other than those alleged in the petition, having been expressly withdrawn from the jury, was harmless.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 1056 (Ky.) Error in excluding a schedule value for taxation of property sought to be condemned *held* not prejudicial, in view of the little weight of such evidence.—*Sandy Valley & E. Ry. Co. v. Bentley*, 171 S. W. 178.

§ 1056 (Mo.App.) Where there was nothing in the alleged deposition which would have affected the judgment of the lower court, its rejection, though improper, is harmless.—*Dubowsky v. Binggeli*, 171 S. W. 12.

§ 1056 (Mo.App.) Error in excluding testimony as to the time a demand was made by an indemnity insurance company for the balance of premium due on a canceled policy is not prejudicial to the assured, where interest was allowed only from the date of the suit.—*Aetna Life Ins. Co. v. Kansas City Electric Light Co.*, 171 S. W. 580.

§ 1056 (Mo.App.) The improper exclusion of photographs is harmless, where they would not have added to the information of the jury.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

§ 1057 (Ky.) The exclusion of evidence of a fact abundantly established by other evidence is harmless.—*Keiner v. Collins*, 171 S. W. 399.

§ 1057 (Tex.Civ.App.) In action against a sheriff for failure to record an attachment lien, defendant's admission, if any, of the issuance of the writ and the levy on the property alleged, *held* to make the exclusion of the attachment

and levy immaterial and harmless.—*Neville v. Miller*, 171 S. W. 1109.

§ 1058 (Ark.) The exclusion of a statement by plaintiff's ancestor that he would rent the land in controversy to witness, if he would fence it, was not prejudicial, where the witness was elsewhere allowed to testify as to his opinion of the value.—*St. Louis, I. M. & S. Ry. Co. v. Brundidge*, 171 S. W. 859.

§ 1060 (Tex.Civ.App.) Argument of counsel, which was without the record and held up one of the plaintiffs as a swindler and defendant as an honest old farmer, *held* prejudicial.—*Anderson & Day v. Darsey*, 171 S. W. 1089.

§ 1062 (Ark.) Where, in an action for personal injury, the court, over objection, submitted to the jury three grounds of negligence, if testimony was wanting as to any one of them, it was prejudicial error.—*St. Louis, I. M. & S. Ry. Co. v. Middleton*, 171 S. W. 869.

§ 1064 (Ark.) Error in instruction as to carrier's duty is harmless, where the carrier's negligence was not disputed.—*Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 913.

§ 1064 (Ky.) In a railway employé's action for injuries caused by a train backing into cars between which he was working, an instruction as to the right of his superior to presume that he had coupled the air brakes, and was in a place of safety, though unnecessary, *held* not prejudicial to plaintiff.—*McKee v. Cincinnati, E. & S. E. R. Co.*, 171 S. W. 425.

§ 1064 (Mo.App.) In an action for the malicious prosecution of a bankruptcy proceeding, an instruction that, if defendant in good faith and "without malice" took the advice of counsel, there was no malice *held* reversible error.—*McDonald v. Goddard Grocery Co.*, 171 S. W. 650.

§ 1064 (Mo.App.) A clerical error in an instruction as to the place of the accident does not require a reversal.—*Brown v. City of St. Joseph*, 171 S. W. 935.

§ 1064 (Tex.Civ.App.) Error in the charge is not reversible, under the express provisions of Court of Civil Appeals rule 62a (149 S. W. x), unless it probably caused an improper judgment.—*Miller v. Campbell*, 171 S. W. 251.

§ 1064 (Tex.Civ.App.) Where a person who was injured while accompanying a car of fruit was a mere licensee, because traveling on a non-transferrable pass issued to another, an instruction that he was not a passenger because he had the car stopped at a place not authorized by the bill of lading, while unnecessary, was not prejudicial to plaintiff.—*Beard v. International & G. N. Ry. Co.*, 171 S. W. 553.

§ 1066 (Ark.) Giving of an erroneous instruction on the effect on plaintiff's right to recover in case of delay to give notice, there being no evidence of delay, *held* ground for reversal, where it could not be determined that the jury did not base their verdict thereon.—*Spencer & Co. v. Bank of Hickory Ridge*, 171 S. W. 128.

§ 1066 (Ky.) In an action against a city for injury from a fall on a defective sidewalk on the northeast corner of certain streets, where the testimony of plaintiff and all her witnesses located the accident there, instructions that to find for plaintiff the jury must believe that it occurred there were not prejudicial to plaintiff.—*Mulloy v. City of Louisville*, 171 S. W. 190.

§ 1066 (Mo.App.) In a passenger's action for injury from a collision, where the plaintiff's proof raised the presumption of defendant's negligence, and defendant offered no evidence as to negligence, so that its negligence was not in issue, an instruction that the burden of proving due care was on defendant *held* harmless.—*Tierney v. United Rys. Co. of St. Louis*, 171 S. W. 977.

§ 1066 (Tex.Civ.App.) A party may not allege error as to instruction on an issue not pleaded by him.—*Bulloch v. Missouri, K. & T. Ry. Co. of Texas*, 171 S. W. 808.

§ 1067 (Ark.) In an action for injuries, defendant was not prejudiced by the court's refusal to require the jury to reduce the amount found as compensation for injuries to its present value, where plaintiff's counsel, after stating the amount he calculated plaintiff had lost by his diminished earning power, told the jury to reduce that sum to its present value.—*St. Louis, I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

§ 1067 (Mo.App.) In an action on a quantum meruit for boring a well, where the jury were told that, if plaintiff agreed to produce a completed well with a strong and lasting flow of water, he could not recover unless he did so, the refusal of defendant's instruction on its counterclaim held immaterial, in view of the verdict for plaintiff.—*Daniels v. McDaniels*, 171 S. W. 14.

§ 1068 (Ark.) A judgment for plaintiff in an action for damages from fire, spreading from a right of way should not be reversed for error in instructing as to the measure of damages, where the verdict is based on the undisputed evidence of plaintiff as to damages.—*Kansas City Southern Ry. Co. v. Wilson*, 171 S. W. 484.

§ 1068 (Ark.) Error in an instruction, allowing recovery for permanent injury to plaintiff's land by the construction of a railway embankment, and also for loss of rent for two years, was harmless where the jury found a verdict for the permanent injury only.—*St. Louis, I. M. & S. Ry. Co. v. Brundidge*, 171 S. W. 859.

§ 1068 (Ky.) Where the jury found for defendants, they were not prejudiced by instructions on the question of damages.—*Lee v. Woods*, 171 S. W. 339.

§ 1068 (Mo.) In an action against a city for personal injury, any error in instructing on the evidence that plaintiff might recover the expenses of medical services that he was reasonably certain to incur in the future, held harmless in view of his injury and the award therefor.—*Sang v. City of St. Louis*, 171 S. W. 347.

§ 1068 (Mo.App.) An instruction which authorized the jury to allow damages for certain items not exceeding the amounts claimed in the petition, which was greater than the amount shown by the evidence, is not prejudicial, where the verdict does not indicate that any amount in excess of those shown by the evidence was allowed.—*Warneke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 1068 (Tex.Civ.App.) Error, if any, in charge on damages raised by defendant's plea held without prejudice to plaintiff, where the verdict was against defendant's claim for damages.—*Moore v. Cooper Mfg. Co.*, 171 S. W. 1034.

§ 1074 (Tex.Civ.App.) Where no objection is raised to the consideration of findings of fact and conclusions of law certified in the record, any error in failing to file them within the time prescribed by statute is harmless.—*Rogers v. Harris*, 171 S. W. 809.

#### (I) Error Waived in Appellate Court.

§ 1075 (Tex.Civ.App.) An assignment of error abandoned by plaintiff in error, in open court, will not be considered.—*Miller v. Campbell*, 171 S. W. 251.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (A) Decision in General.

§ 1106 (Ky.) Where the court, on appeal in an equitable action, has not any basis on which to direct a proper judgment, the case must be re-referred to the commissioner to make report

in accordance with the facts.—*Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 171 S. W. 407.

#### (B) Affirmance.

§ 1140 (Mo.) Where the award of punitive damages which was based on an erroneous instruction could be separated from the award of actual damages, the error in the instruction may be cured by a remittitur of the punitive damages.—*Keller v. Summers*, 171 S. W. 336.

§ 1140 (Mo.) Where the amount erroneously included in a verdict can be definitely ascertained the court may affirm the judgment for the proper amount, on the successful party entering a remittitur for the excessive amount.—*In re Aiken*, 171 S. W. 342.

§ 1140 (Mo.App.) Where the trial court found the verdict excessive, resulting from an honest overestimate, the appellate court may order a remittitur.—*Kelly v. City of Higginsville*, 171 S. W. 966.

§ 1140 (Tex.Civ.App.) Where, after appeal, appellee remitted damages improperly awarded, the judgment, under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2014, will be affirmed, though the costs will be taxed against the appellee.—*Atchison, T. & S. F. Ry. Co. v. Boyce*, 171 S. W. 1094.

#### (D) Reversal.

§ 1169 (Ky.) A verdict for plaintiff, in an action under the federal Employers' Liability Act, for the death of a railroad employé who was undoubtedly guilty of contributory negligence must be reversed where all of the grounds of negligence but one upon which the jury based their verdict were improperly submitted.—*Louisville & N. R. Co. v. Heinig's Adm'r*, 171 S. W. 853.

§ 1169 (Tex.Civ.App.) Where the court on appeal cannot determine on which of two issues the verdict was rendered, the error in instructions submitting one of the issues necessitates a reversal.—*Killman v. Young*, 171 S. W. 1065.

§ 1170 (Mo.App.) In action on insurance policy on automobile, admission of evidence as to difference in value of the machine immediately before and after the fire held not reversible error, within *Rev. St. 1909*, § 2082, though the policy fixed a different measure of damages.—*Jones v. Orient Ins. Co.*, 171 S. W. 28.

§ 1170 (Mo.App.) Error in an instruction allowing recovery for loss of future earnings, which was unwarranted by the evidence, does not require a reversal, where the verdict was for less than the loss of earnings up to the time of the trial, under *Rev. St. 1909*, §§ 1850, 2082.—*Warneke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 1175 (Tenn.) Where it appeared from the face of the record itself that plaintiff was not entitled to sue, a judgment for her must be reversed on appeal.—*Cincinnati, N. O. & T. P. Ry. Co. v. Bonham*, 171 S. W. 79.

A judgment recovered by the widow of an employé, killed while engaged in interstate commerce, must be reversed, where the action was instituted in her individual capacity, but it should be without prejudice to any rights the personal representative of the deceased may have under the federal Employers' Liability Act.—*Id.*

§ 1175 (Tex.Civ.App.) Where the case was fully developed below, it is the duty of the appellate court, if possible, to render such judgment as should have been rendered by the trial court.—*Ball-Carden Co. v. Ridgell*, 171 S. W. 509.

§ 1180 (Mo.App.) The reversal of a judgment at the instance of appearing defendants held not to leave the judgment binding on defendants brought in by publication, but not appearing.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

**(F) Mandate and Proceedings in Lower Court.**

§ 1188 (Ky.) Under Civ. Code Prac. § 760, judgments of the Court of Appeals do not become final until the issuance of the mandate after 30 days, or, if a petition for rehearing is filed, after the disposition of such petition.—*Chesapeake & O. Ry. Co. v. Kelly's Adm'x*, 171 S. W. 182.

§ 1194 (Ky.) A decision by the Court of Appeals that it was a question for the jury whether the one whose negligence caused plaintiff's injury was engaged in the work of a company or in that of an independent contractor was conclusive on a subsequent trial, where the evidence was substantially the same.—*National Cash Register Co. v. Williams*, 171 S. W. 162.

§ 1195 (Ky.) Instructions not criticized on appeal become the law of the case on another trial.—*Standard Oil Co. v. Marlow*, 171 S. W. 436.

**XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.**

§ 1236 (Ky.) Damages will not be awarded on affirmance, unless the supersedeas bond is in the record and an order of supersedeas has issued; but, when the bond has been executed, it will be presumed that an order of supersedeas issued, unless the contrary appears.—*Chesapeake & O. Ry. Co. v. Kelly's Adm'x*, 171 S. W. 182.

After opinion for affirmance had been handed down, but before mandate had been issued, *held*, that supplementary record might be filed to bring supersedeas bond into the record, that damages might be awarded.—*Id.*

**APPEARANCE.**

See Justices of the Peace, § 161.

§ 8 (Mo.App.) The recital of the clerk of court in an order as to a motion for new trial that the motion was filed for appearing defendants and "other defendants" *held* not to enter the appearance of nonresident defendants brought in by publication.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

**APPLIANCES.**

See Master and Servant, §§ 101-129.

**APPLICATION.**

See Payment, § 39.

**APPOINTMENT.**

See Receivers, § 35.

**APPROPRIATION.**

See Waters and Water Courses, §§ 138-152.

**ARBITRATION AND AWARD.**

See Insurance, § 574.

**ARGUMENT OF COUNSEL.**

See Criminal Law, §§ 699-728; Trial, §§ 115-133.

**ARREST.**

See Bail.

**ASSAULT AND BATTERY.**

See Carriers, §§ 247, 283, 319, 321.

**I. CIVIL LIABILITY.**

(A) Acts Constituting Assault or Battery and Liability Therefor.

§ 18 (Mo.App.) One who is present aiding and abetting another who actually commits an assault is as much a "principal" as the actual assailant.—*Brown v. Barr*, 171 S. W. 4.

**(B) Actions.**

§ 24 (Mo.App.) The defense of son assault demesne, unless especially pleaded in the answer, will be deemed waived, and, where not set up in the answer the question whether the defendant in an assault case acted in self-defense need not be submitted.—*Brown v. Barr*, 171 S. W. 4.

§ 26 (Ark.) Where an assault was admitted by defendant, the burden is upon him to prove justification, unless the evidence establishing the assault also shows justification.—*Robertson v. Sisk*, 171 S. W. 880.

§ 31 (Mo.) The jury, in determining whether language used by plaintiff suing defendant for assault and battery was violent and threatening, may consider the accompanying acts and gestures.—*Thummel v. Surplus*, 171 S. W. 929.

§ 35 (Mo.App.) In an action for damages for an assault committed by defendant's son, evidence *held* to show that defendant aided, abetted, and encouraged his son in committing the assault.—*Brown v. Barr*, 171 S. W. 4.

§ 43 (Ark.) Plaintiff *held* entitled to an instruction that the assault was admitted, and that no complete justification therefor was shown.—*Robertson v. Sisk*, 171 S. W. 880.

Where defendant admitted the assault, but denied the serious injuries claimed by plaintiff, an instruction that plaintiff could not recover unless the alleged injuries resulted from the blows was erroneous.—*Id.*

**ASSESSMENT.**

See Municipal Corporations, §§ 450-519; Taxation, § 431.

**ASSETS.**

See Marshaling Assets and Securities.

**ASSIGNMENT OF ERRORS.**

See Appeal and Error, §§ 547, 719-753, 1075; Criminal Law, § 1163.

**ASSIGNMENTS.**

See Chattel Mortgages, § 210; Covenants, §§ 74-84; Fraudulent Conveyances; Landlord and Tenant, §§ 32, 79; Vendor and Purchaser, §§ 261, 265, 266; Venue, § 32.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

See Bankruptcy.

**ASSOCIATIONS.**

See Beneficial Associations, § 14; Joint-Stock Companies.

**ASSUMPSIT, ACTION OF.**

See Work and Labor.

**ASSUMPTION OF RISK.**

See Master and Servant, §§ 87½, 203-226, 288.

**ATTACHMENT.**

See Carriers, § 58; Garnishment; Sheriffs and Constables, § 130.

**V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.**

§ 180 (Tex.Civ.App.) Under Rev. St. 1911, art. 267, relating to the lien of attachment, *held*, that the subsequent record of a deed to one purchasing from defendant in an attachment suit prior to the attachment would not affect the respective rights of the parties.—*Neville v. Miller*, 171 S. W. 1109.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

§ 209 (Tex.Civ.App.) A judgment foreclosing an attachment against a nonresident is not bad because neither the notice served nor the copy of the petition delivered to the nonresident showed the attachment.—*Findlay v. Lumsden*, 171 S. W. 818.

**ATTORNEY AND CLIENT.**

See Appeal and Error, § 1060; Bills and Notes, § 491; Costs, § 4; Courts, § 169; Criminal Law, §§ 699-728, 1053, 1171; District and Prosecuting Attorneys: Husband and Wife, § 19; Insurance, §§ 865, 675; Judgment, § 427; Libel and Slander, § 42; Malicious Prosecution, § 25; Municipal Corporations, §§ 214, 220, 244, 488, 489; Trial, §§ 115-133, 415; Trusts, § 103.

**II. RETAINER AND AUTHORITY.**

§ 77 (Tex.Civ.App.) Rule that a principal must give notice of a limitation on the apparent authority of his agent does not apply to one employed only as an attorney at law to collect a debt as to his right to accept anything but money in payment.—*Magill v. Rugeley*, 171 S. W. 528.

§ 99 (Tex.Civ.App.) An attorney at law has no authority to accept anything but money in payment of a judgment recovered on a claim left with him for collection, without his client's express consent.—*Magill v. Rugeley*, 171 S. W. 528.

That an attorney recovering judgment on a note had an interest therein to the extent of 10 per cent. and \$60 additional, under an agreement with his client, did not make him a joint owner, so as to entitle him to satisfy the judgment on receipt of trust certificates instead of money.—*Id.*

§ 103 (Tex.Civ.App.) An attorney's unauthorized settlement of a judgment, by receiving certain trust certificates, *held* not ratified where the client, as soon as he learned of the settlement, refused to accept the certificates and placed the collection of the judgment in the hands of other attorneys.—*Magill v. Rugeley*, 171 S. W. 528.

**AUTHORITY.**

See Attorney and Client, §§ 77-103; Executors and Administrators, §§ 132, 137; Principal and Agent, §§ 102, 136.

**AUTOMOBILES.**

See Highways, §§ 169, 181, 184; Insurance, § 660; Master and Servant, §§ 305, 330; Municipal Corporations, §§ 705, 706; Trial, §§ 192, 296.

**BAGGAGE.**

See Carriers, §§ 387, 406.

**BAIL.****II. IN CRIMINAL PROSECUTIONS.**

§ 43 (Tex.Cr.App.) Where it appeared with reasonable certainty that accused killed deceased, and that the evidence would raise no question of self-defense or of the lesser degrees of homicide, it was proper to refuse accused admission to bail.—*Ex parte Kellett*, 171 S. W. 711.

**BAILMENT.**

See Pledges.

**BALLOTS.**

See Elections, § 172.

**BANKRUPTCY.**

See Appeal and Error, § 1064; Malicious Prosecution, § 12.

**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.**

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 205 (Tex.Civ.App.) Where the legal title and the mortgagee's title vested in a trustee in bankruptcy there was no merger of the mortgage lien, as it was to the advantage of the trustee to keep the lien alive to defeat a junior mortgage.—*Fidelity & Deposit Co. of Maryland v. Albrecht*, 171 S. W. 819.

(E) Actions by or Against Trustee.

§ 303 (Mo.) Evidence *held* to justify a finding that the conveyances were not fraudulent, but made to the bankrupt's wife in settlement of her husband's indebtedness to her.—*Wellman v. Kaiser Inv. Co.*, 171 S. W. 370.

**BANKS AND BANKING.**

See Carriers, § 58; Justices of the Peace, § 157.

**II. BANKING CORPORATIONS AND ASSOCIATIONS.**

(E) Insolvency and Dissolution.

§ 84 (Ark.) The word "draft," as used in Kirby's Dig. § 1814, making it a felony for a bank to receive drafts on deposit when the bank is insolvent, etc., includes checks and other orders for the payment of money.—*Cunningham v. State*, 171 S. W. 855.

Where the cashier of a bank, with knowledge of its insolvency, received a check drawn on the bank and payable to a depositor, and charged the drawer's account and credited the depositor's account, he violated Kirby's Dig. § 1814, though no new money came into the bank.—*Id.*

§ 85 (Ark.) Evidence as to loans made by the bank within a month after the receipt of a deposit, while insolvent, to the cashier's brother, and as to the amount of money in the bank when it passed into the hands of a receiver, *held* admissible on the question of insolvency.—*Cunningham v. State*, 171 S. W. 885.

Evidence that accused's account was short was admissible on the issue of the bank's insolvency when accused, the cashier, received a deposit.—*Id.*

Evidence as to the insolvency of defendant's father and brother, who were large borrowers of the bank, was admissible as bearing on the bank's insolvency at the time a deposit was received by defendant, the cashier.—*Id.*

**III. FUNCTIONS AND DEALINGS.**

(C) Deposits.

§ 148 (Ark.) Where dealers, having agreed to honor a draft on condition that bills of lading be attached, state this fact to a bank to which the draft is presented with forged bills of lading attached, and subsequently pay the bank the amount of the draft, acting on their own opinion and not on any representation of the bank, they cannot recover from the bank the amount so paid it.—*Spencer & Co. v. Bank of Hickory Ridge*, 171 S. W. 128.

That the drawees of a draft with forged bills of lading attached did not notify the bank of the forgery until about 30 days after they had paid the bank the amount of the draft could not prevent them from recovering such payment from the bank, where they gave notice immediately on discovering the forgery.—*Id.*

**BAR.**

See Judgment, §§ 540, 701-744; Limitation of Actions.

**BASTARDS.**

See Divorce; Habeas Corpus, § 99.

**BATTERY.**

See Assault and Battery.

**BENEFICIAL ASSOCIATIONS.**

See Insurance, §§ 693-825.

§ 14 (Tex.Civ.App.) The officers of a local lodge of a fraternal beneficial insurance association are, when in the discharge of their duties, agents of the order, and it is liable to a member negligently injured by the officers of a local lodge when initiating him.—Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve v. Johnson, 171 S. W. 490.

§ 18 (Tex.Civ.App.) Beneficiary of member in fraternal association held entitled to funeral benefits, notwithstanding the member was in arrears to the general society, and also in arrears in payment of dues to the local society.—Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve, 171 S. W. 489.

**BEQUESTS.**

See Wills.

**BEST AND SECONDARY EVIDENCE.**

See Criminal Law, §§ 400, 404; Evidence, §§ 178-185; Witnesses, § 78.

**BETTING.**

See Gaming.

**BIAS.**

See Jury, § 131; Witnesses, §§ 372-377.

**BIGAMY.**

See Criminal Law, § 440; Witnesses, § 277.

§ 7 (Tex.Cr.App.) Under Pen. Code 1911, art. 52, one accused of bigamy, who admitted a second marriage while a first wife was living, has the burden of proving that he contracted the second marriage under a mistake of fact.—Coy v. State, 171 S. W. 221.

§ 8 (Tex.Cr.App.) Where accused claimed that he celebrated a third marriage under the mistaken belief that his second wife had procured a divorce, a copy of the decree showing a divorce by his first wife held admissible on the issue of his proper care in determining whether his second marriage had been dissolved.—Coy v. State, 171 S. W. 221.

§ 13 (Tex.Cr.App.) Where the indictment charged that accused, having a wife in New Jersey, unlawfully married another, that he had previously been married in Michigan will not justify a peremptory charge on the ground that the New Jersey marriage was invalid, where accused testified to a divorce from his first wife.—Coy v. State, 171 S. W. 221.

**BILL OF EXCEPTIONS.**

See Exceptions, Bill of.

**BILL OF LADING.**

See Carriers, § 58.

**BILLS AND NOTES.**

See Brokers, § 49; Compromise and Settlement, § 23; Corporations, § 121; Dismissal and Nonsuit, § 50; Embezzlement, §§ 28, 43; Evidence, § 423; Gifts, § 49; Husband and

Wife, §§ 119, 131; Larceny, §§ 30, 52, 68; Limitation of Actions, § 48; Payment, § 70; Trial, § 404; Usury, § 22; Vendor and Purchaser, §§ 261, 266.

**V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 256 (Tenn.) Where holder of notes accepted discount for renewals thereof, on condition that maker would get renewal notes properly signed by the surety, who was ill and could not sign, held, that there was no agreement binding upon the holder to extend the time of payment within Negotiable Instruments Law, § 120, subd. 6, and hence the surety was not discharged.—Hamilton Nat. Bank v. Breeden, 171 S. W. 86.

(D) Bona Fide Purchasers.

§ 353 (Mo.App.) The rule that a bank discounting negotiable paper for a customer does not become a bona fide purchaser, unless it makes payment or incurs increased obligations on the faith thereof, does not apply to a bank's purchase of a draft with a bill of lading attached.—Tapee v. Varley-Wolter Co., 171 S. W. 19.

**VIII. ACTIONS.**

§ 451 (Mo.App.) That a note is negotiable in form does not deprive the maker of any defense as against the payee that he would otherwise have.—Long v. Shafer, 171 S. W. 690.

§ 453 (Mo.App.) The payee of a negotiable note is not a holder in due course, as defined by Rev. St. 1909, § 10022, and hence the note is subject to equities under section 10028.—Long v. Shafer, 171 S. W. 690.

§ 487 (Mo.App.) An amended petition correcting the allegations of the original petition so as to conform to the note sued on held not subject to a motion to strike as setting up a new cause of action.—First Nat. Bank of Madison v. Stam, 171 S. W. 567.

§ 489 (Mo.App.) In an action on a note, where the defense is a total failure of consideration, evidence of a partial failure of consideration is admissible.—Lebrecht v. Nellist, 171 S. W. 11.

§ 491 (Mo.App.) Where a note provides for a 10 per cent. attorney's fee, the holder is entitled to judgment for that amount without proving that it is reasonable.—First Nat. Bank of Madison v. Stam, 171 S. W. 567.

§ 523 (Mo.App.) Where it was uncontradicted that the plaintiff had purchased the note sued on, and that the payee who indorsed it was a defendant who by his default admitted plaintiff's ownership, the makers cannot object that there was no proof of indorsement.—First Nat. Bank of Madison v. Stam, 171 S. W. 567.

**BLACKLISTING.**

See Constitutional Law, §§ 89, 90, 238; Master and Servant, § 11.

**BONA FIDE PURCHASERS.**

See Bills and Notes, § 353; Executors and Administrators, § 388; Husband and Wife, § 267; Vendor and Purchaser, §§ 224-243.

**BONDS.**

See Appeal and Error, §§ 274, 395, 1236; Counties, § 182; Elections, § 305; Guardian and Ward, § 182; Injunction, § 27; Municipal Corporations, § 918; Principal and Surety; Replevin, § 126; Sequestration, § 20.

**BOUNDARIES.**

See Adverse Possession, §§ 19, 68; Evidence, § 317; Fences; Municipal Corporations, §§ 28, 33; Trespass to Try Title, § 38; Trial, §§ 296, 350; Witnesses, § 268.

**I. DESCRIPTION.**

§ 3 (Tex.Civ.App.) The rule that a call for a corner or line of an adjoining survey controls a call for distance is not of absolute application in all cases.—*Miller v. Campbell*, 171 S. W. 251.

**II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.**

§ 46 (Tex.Civ.App.) Failure of party to boundary agreement to tell other party of survey by state surveyor establishing the boundary line some distance from a fence adopted as the boundary by the agreement *held* fraud justifying a rescission.—*Denton v. English*, 171 S. W. 248.

**BREACH.**

See Contracts, §§ 278-290; Sales, §§ 162, 181.

**BRIDGES.****II. REGULATION AND USE FOR TRAVEL.**

§ 46 (Ky.) In an action against a city for personal injuries from falling upon a small wooden footbridge over a drain, one board of which was loose leaving a hole in the bridge, evidence *held* to sustain a finding of the city's imputed notice of such defect and its negligence.—*City of Ashland v. Boggs*, 171 S. W. 461.

In an action against a city for personal injury to plaintiff, who fell through a hole in a small bridge over a drain, which she could not see by reason of the packages she was carrying in her arms, *held* that her contributory negligence was for the jury; even though when but one conclusion can be drawn it is for the court to say whether the acts relied upon constituted contributory negligence.—*Id.*

**BRIEFS.**

See Appeal and Error, §§ 759-773.

**BROKERS.****III. DUTIES AND LIABILITIES TO PRINCIPAL.**

§ 38 (Tex.Civ.App.) One, the dimensions of whose property had been misrepresented to a purchaser, and who on discovery was required to remit part of the price, *held* not entitled to recover such amount from the broker making the misrepresentation.—*Scarborough v. Darnell & Stagner*, 171 S. W. 1049.

**IV. COMPENSATION AND LIEN.**

§ 48 (Ark.) Where an owner promised to pay a commission if he traded with E. for any lands owned by or listed with him, and a trade was made for land listed with E. when the promise was made, the broker was entitled to his commission.—*Meyer v. Holland*, 171 S. W. 893.

§ 49 (Tex.Civ.App.) Under contract of sale requiring earnest money payment to be placed in escrow until title was approved, check by broker so deposited *held* a sufficient deposit, if drawn on a fund on which he had a right to draw a check and if it was an assignment of the amount thereof.—*Henderson & Grant v. Gilbert*, 171 S. W. 304.

In contract for sale of land made by brokers, provision for forfeiture of earnest money payment if purchaser did not complete contract *held* not to make contract a mere option rather than a sale.—*Id.*

§ 49 (Tex.Civ.App.) Where a broker procures the execution of an enforceable written contract of purchase on the terms authorized by the principal, he has earned his commissions.—*Williams v. Phelps*, 171 S. W. 1100.

§ 55 (Ark.) Owner agreeing to pay a commission to a broker for agreeing about an exchange

of land, and reserving the right to employ another broker, who effected an exchange, *held* not liable to the first broker.—*Horton & Co. v. Beall*, 171 S. W. 894.

§ 56 (Ky.) Where owner breaks off negotiations with prospective purchaser and withdraws land from the broker's hands to save commissions, the broker is entitled to commissions on a sale subsequently made to such prospective purchaser or to a third person for him.—*Treacy v. Gilman*, 171 S. W. 153.

Where negotiations for sale of land were broken off for want of an acceptable offer and not to save commissions, and owner in subsequently making sale did not know that the purchaser was acting for the person procured by a broker, broker *held* not entitled to commissions.—*Id.*

§ 57 (Tex.Civ.App.) Contract of sale made by brokers for \$23 an acre less 5 per cent. commission, part of the price to be paid several months after the execution of the contract, upon delivery of the deed, *held* not in compliance with listing contract stating terms of sale as "\$23 per acre, 5 per cent. commission included on basis of all cash."—*Henderson & Grant v. Gilbert*, 171 S. W. 304.

Where brokers authorized to make a sale of land for \$23 an acre, plus their commission, made a sale under which their commission was to be deducted from the price of \$23 an acre, if such contract was ratified, they were entitled to the agreed percentage.—*Id.*

§ 58 (Tex.Civ.App.) To entitle brokers to commissions, a contract negotiated by them need not be enforceable if the purchaser is ready and willing to perform it.—*Henderson & Grant v. Gilbert*, 171 S. W. 304.

A contract of sale made by brokers was not void because one of the brokers executed it for the proposed purchaser, if he acted in good faith and with fairness towards the vendor and the vendor knew that he was acting for the purchaser.—*Id.*

§ 61 (Mo.App.) An owner of land *held* liable for commission to a broker for procuring a sale where the purchase was not completed because of defect in the title.—*Maddux v. St. Louis Union Trust Co.*, 171 S. W. 669.

§ 65 (Mo.App.) Where the broker has represented another without the consent of his principal, he forfeits his commission.—*Maddux v. St. Louis Union Trust Co.*, 171 S. W. 669.

§ 65 (Tex.Civ.App.) Owner whose son represented her in signing a contract for an exchange of property could not complain that she was prejudiced by the broker's misrepresentation to the other party as to the size of the lot.—*Scarborough v. Darnell & Stagner*, 171 S. W. 1049.

A broker who effected an exchange of property upon terms satisfactory to the owner, and who in no way misrepresented the purchaser, was entitled to his commission, though a third person represented both the broker and the purchaser in the deal.—*Id.*

§ 66 (Tex.Civ.App.) An agreement between two brokers that they should equally divide commissions on effecting a certain sale is enforceable by one of them, though he had no agency to sell the lands involved.—*Bauer v. Crow*, 171 S. W. 296.

Where two brokers agreed that on making a certain sale they would divide the commissions, and one of them introduced the parties and started the negotiations, he is entitled to his share of the commission, though he performed no further act; it appearing that nothing else was required of him.—*Id.*

Where plaintiff and another broker agreed to divide commissions, plaintiff's rights in a note for the commission are superior to those of one who became the partner of the other broker after the agreement as well as to rights based

on a decree in an action against the other broker to which plaintiff was not a party.—Id.

§ 73 (Tex.Civ.App.) Where a partner in a real estate firm obtaining an exclusive contract to procure a purchaser brought about a sale with knowledge of the owner he is entitled, on purchasing his co-partner's interest, to recover the commissions.—*Adams & Garrett v. Randle*, 171 S. W. 256.

## V. ACTIONS FOR COMPENSATION.

§ 84 (Mo.App.) Fraud of a broker forfeiting his commission in representing adverse interests may not be presumed, but must be found from substantial evidence.—*Maddux v. St. Louis Union Trust Co.*, 171 S. W. 669.

§ 84 (Tex.Civ.App.) In a broker's action for a commission on an exchange of properties, where his employment was only to sell, *held*, that the burden was on plaintiff to prove that the parties to the exchange had reached a definite agreement.—*Williams v. Phelps*, 171 S. W. 1100.

§ 85 (Tex.Civ.App.) Where the evidence was conflicting whether any definite oral agreement to exchange properties was made, evidence of the market values of the properties was properly admitted.—*Williams v. Phelps*, 171 S. W. 1100.

§ 86 (Ky.) In broker's action for commissions evidence *held* to show that negotiations with prospective purchaser procured by broker were broken off for want of an acceptable offer, and that in subsequently selling the property defendant did not know that such prospective purchaser was interested in the purchase.—*Treacy v. Gilman*, 171 S. W. 153.

§ 86 (Tex.Civ.App.) Evidence *held* to establish an agreement between brokers to divide commissions.—*Bauer v. Crow*, 171 S. W. 296.

§ 86 (Tex.Civ.App.) In broker's action for commissions, evidence *held* to warrant finding that the list price was to be net to defendant, exclusive of commissions.—*Ridenhower v. Collins*, 171 S. W. 1078.

§ 86 (Tex.Civ.App.) Evidence, in a broker's action for commissions on an exchange of properties, *held* to sustain a verdict for defendant.—*Williams v. Phelps*, 171 S. W. 1100.

§ 88 (Mo.App.) Evidence *held* not sufficient to go the jury on whether a broker had forfeited his commission by representing adverse interests.—*Maddux v. St. Louis Union Trust Co.*, 171 S. W. 669.

§ 88 (Tex.Civ.App.) Evidence *held* to authorize submitting issue whether broker abandoned his contract before any sales were made.—*Elser v. Putnam Land & Development Co.*, 171 S. W. 1052.

## BURGLARY.

## II. PROSECUTION AND PUNISHMENT.

§ 41 (Ky.) In a prosecution for burglary, evidence *held* to sustain a conviction.—*Cheek v. Commonwealth*, 171 S. W. 998.

## BY-LAWS.

See Insurance, § 693.

## CANCELLATION OF INSTRUMENTS.

See Deeds, §§ 196, 211; Descent and Distribution, § 91; Good Will, § 7; Quieting Title; Trial, § 370; Wills, § 257.

## II. PROCEEDINGS AND RELIEF.

§ 51 (Ky.) In a suit to set aside a deed on the ground of mental incapacity, an instruction that testator must not merely know the objects of his bounty and the nature of his property, but also "his property rights" *held* erroneous.—*Sellers v. Sellers*, 171 S. W. 449.

## CARRIERS.

See Appeal and Error, §§ 750, 1042, 1050, 1064, 1066; Commerce, §§ 8, 33; Courts, § 97; Damages, § 214; Evidence, § 178; Mechanics' Liens, § 50; Railroads; Release, § 34; Street Railroads; Trial, §§ 125, 191, 194, 252.

## II. CARRIAGE OF GOODS.

### (B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 58 (Mo.App.) Where a bank discounted a draft with a bill of lading for potatoes attached, it was not an intermediate purchaser of the potatoes, and after acceptance and payment of the draft, and delivery of the potatoes to the buyer, the bank could not be made liable for defects and deficiencies in the potatoes.—*Tapee v. Varley-Wolter Co.*, 171 S. W. 19.

§ 58 (Mo.App.) In attachment, where a bank claimed the property by the purchase of a draft attached to a bill of lading, evidence *held* to show that the bank had paid out the amount of the draft.—*Price Brokerage Co. v. Rushfeldt*, 171 S. W. 976.

A bank which purchased a draft attached to a bill of lading and paid out the amount has a claim against the property as against a subsequent attaching creditor.—Id.

### (D) Transportation and Delivery by Carrier.

§ 86 (Mo.App.) Ordinarily, where a carrier delivers the property in good condition to the consignee, it is relieved from further liability.—*Bilby v. Chicago, B. & Q. R. Co.*, 171 S. W. 39.

§ 91 (Tex.Civ.App.) A misquotation of an interstate freight rate by a carrier's agent gives the shipper no right of action.—*Wichita Falls & W. Ry. Co. of Texas v. Asher*, 171 S. W. 1114.

§ 94 (Ark.) In an action for the value of sheeting, evidence *held* to support finding that transfer company, which received the shipment from a railroad company for delivery to T., delivered it to the L. Company, which used the sheeting.—*Lochridge Dry Goods Co. v. Daniels Transfer Co.*, 171 S. W. 863.

§ 94 (Tex.Civ.App.) Where an article, shipped by the seller to himself with directions to notify the buyer, came into possession of the buyer without the consent of the carrier, the buyer, appropriating the article, was liable to the carrier for conversion, the price not having been paid.—*San Antonio & A. P. Ry. Co. v. Smith*, 171 S. W. 282.

Where a buyer obtained from a carrier with its consent, an article shipped by the seller to himself with directions to notify the buyer, and no demand was made for a return thereof, and possession was not obtained on a promise to pay the charges on it, the carrier could not pay a draft drawn by the seller and make the buyer liable therefor.—Id.

### (E) Delay in Transportation or Delivery.

§ 104 (Tex.Civ.App.) Testimony by a shipper that he did not have enough money to pay the legal rate, which was more than the quoted rate, was immaterial.—*Wichita Falls & W. Ry. Co. of Texas v. Asher*, 171 S. W. 1114.

§ 105 (Ark.) Under a complaint for delay in the delivery by an express company of machinery for plaintiff's sawmill, there can be no recovery for depreciation in the logs on hand during the idleness of the mill where that was not alleged as an element of special damage.—*Wells Fargo & Co. Express v. W. B. Baker Lumber Co.*, 171 S. W. 132.

§ 105 (Tex.Civ.App.) The carrier not being apprised that any such special damages would ensue from delay in transporting a car of household goods, recovery cannot be had for board bills and room rent paid by the owner while

awaiting their arrival.—Pecos & N. T. Ry. Co. v. Grundy, 171 S. W. 318.

The measure of damages for delay of a carrier in transporting household goods is the reasonable value of their use to the owner during the delay.—Id.

**(F) Loss of or Injury to Goods.**

§ 134 (Ky.) In an action against an express company for the loss of diamonds, evidence *held* not to show a delivery of the gems to the company.—Adams Express Co. v. Tucker, 171 S. W. 428.

**(G) Carrier as Warehouseman.**

§ 139 (Tex.Civ.App.) A carrier is liable as warehouseman for the keeping of goods after the shipper has refused to pay the legal rate.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

**(H) Limitation of Liability.**

§ 159 (Mo.App.) Provision in a bill of lading that claims for delay should be made in writing within four months after delivery of the property *held* not limited to damages to the goods shipped, but to include injury to fruit to have been packed in the barrels shipped by their becoming overripe.—Bailey v. Missouri Pac. Ry. Co., 171 S. W. 44.

**(I) Connecting Carriers.**

§ 177 (Tex.Civ.App.) The common-law liability of each carrier is limited to damages accruing on its own line, in the absence of a special agreement for liability for the entire carriage.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

The Carmack amendment (Act June 29, 1906, § 7) to Interstate Commerce Act Feb. 4, 1887, § 20, does not apply to a shipment through another state to a point in the same state as the point of origin.—Id.

§ 180 (Tex.Civ.App.) An initial carrier of an intrastate shipment may limit its liability for damages occurring on its own line.—San Antonio & A. P. Ry. Co. v. Grady, 171 S. W. 1019.

§ 183 (Tex.Civ.App.) Under the amendment to the Interstate Commerce Act, § 20, a shipper may sue both the initial and connecting carrier for damages for delay occurring on the connecting carrier's line.—Atchison, T. & S. F. Ry. Co. v. Boyce, 171 S. W. 1094.

§ 187 (Tex.Civ.App.) It is a question for the jury whether oral negotiations between a shipper and a carrier's agent amount to a contract for liability for damages on connecting lines.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

**(J) Charges and Liens.**

§ 189 (Tex.Civ.App.) The filed and published freight rates for an interstate shipment are conclusive as to the rate to be charged.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

§ 193 (Tex.Civ.App.) A published tariff, not affecting an initial carrier, may be considered in determining the through rate on an interstate shipment from a combination of the local rate of the initial carrier and the published rate of the other carrier.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

**III. CARRIAGE OF LIVE STOCK.**

§ 206 (Mo.App.) Where a carrier failed to furnish cars for a shipment of cattle, although its agent had stated the cars would be ready, an action for injuries to the cattle by the delay is based, not upon any verbal contract, but upon the carrier's common-law duty.—Rittman v. Missouri Pac. Ry. Co., 171 S. W. 8.

That defendant's servants abandoned a train

in Central Missouri because of the cold, and for that reason cars for the transportation of plaintiff's fat cattle were not furnished, shows negligence.—Id.

§ 211 (Mo.App.) A carrier of live stock, such as hogs, is bound to use every precaution to keep them from becoming overheated, and for that purpose should not only throw water over them, but should give them water to drink.—Bilby v. Chicago, B. & Q. R. Co., 171 S. W. 39.

A carrier which negligently failed to provide for the watering of stock in the pens at its station is liable, where hogs died because they could not be watered at the pens where they were delivered by the carrier.—Id.

§ 211 (Tex.Civ.App.) A violation by a carrier of the Twenty-Eight Hour Law, relating to feeding of animals, is negligence per se.—Atchison, T. & S. F. Ry. Co. v. Hill, 171 S. W. 1028.

A carrier may not justify a violation of the Twenty-Eight Hour Law by relying on rules of the Bureau of Animal Industry, unless it could not provide uninfected pens.—Id.

§ 212 (Mo.App.) Where a shipment of hogs was unloaded and placed in the custody and under the control of the consignee, there was a delivery.—Bilby v. Chicago, B. & Q. R. Co., 171 S. W. 39.

§ 213 (Tex.Civ.App.) Carrier's agreement to deliver cattle at market on particular day *held* not complied with by delivering them too late to unload them and get them on the market before its close.—Texas Midland R. R. v. Becker & Cole, 171 S. W. 1024.

§ 215 (Mo.App.) In the transportation of live stock the liability of the carrier is not restricted to losses while the stock is in its possession, but it is liable for a loss occurring after delivery, if the cause of the loss began while they were in its possession.—Bilby v. Chicago, B. & Q. R. Co., 171 S. W. 39.

§ 218 (Ky.) A provision of an interstate stock transportation contract that damage claims shall be in writing, verified, and delivered to specified agents within ten days from the time the stock is removed from the cars is valid.—Howard & Callahan v. Illinois Cent. R. Co., 171 S. W. 442.

A provision of an interstate stock transportation contract, requiring sworn claims to be filed within ten days, was for the carrier's benefit and could be waived.—Id.

Acts of a carrier's agent at the place of destination of certain stock *held* a waiver of a provision in the contract requiring a verified notice of damage to be filed within ten days after removal of the animals from the cars.—Id.

Agents of an interstate carrier authorized to receive sworn claims for damages within ten days *held* authorized to waive compliance by acts or conduct within such time reasonably calculated to induce the shipper to believe that written notice would not be required.—Id.

§ 218 (Mo.App.) A stipulation in a contract for an interstate shipment of live stock as to notice *held* not to apply to a loss from decline in market caused by delay in transportation.—Riddler v. Missouri Pac. Ry. Co., 171 S. W. 632.

Correspondence between a carrier of live stock and the shipper *held* not to have waived notice of the shipper's claim for loss for shrinkage by delay in transportation.—Id.

A stipulation *held* not to show a waiver of notice of the shipper's claim for loss from shrinkage.—Id.

A stipulation in a contract for the shipment of live stock as to serving of notice of loss within one day after delivery at destination *held* not unreasonable under the facts.—Id.

§ 218 (Mo.App.) A stipulation, in a contract for interstate carriage of live stock, as to no-

tice of loss *held* valid, and a shipper giving notice after the expiration of the time limit may not recover.—*Smith v. St. Louis Southwestern Ry. Co.*, 171 S. W. 635.

§ 218 (Mo.App.) Failure to observe provisions in a contract for the shipment of a car load of mules as to times within which to give written notice of damages, file a written notice of claim, and bring action *held* to prevent recovery of damages.—*Bowman v. Missouri, K. & T. Ry. Co.*, 171 S. W. 642.

§ 219 (Tex.Civ.App.) Under Act Cong. June 29, 1906, § 7, initial carrier *held* liable for damages to cattle from delay or rough handling on the line of a connecting carrier.—*Texas Midland R. R. v. Becker & Cole*, 171 S. W. 1024.

§ 223 (Tex.Civ.App.) Where a carrier accepted a shipment of cattle, knowing that a flood had carried away a bridge on its line, but did not inform the shipper, it cannot justify delay on account of the flood.—*Atchison, T. & S. F. Ry. Co. v. Boyce*, 171 S. W. 1094.

§ 228 (Mo.App.) A delay of nearly double the usual time for a shipment of live stock for immediate sale establishes, under Rev. St. 1909, § 3121, as amended by Laws 1913, p. 177, a prima facie case of negligent delay.—*Riddler v. Missouri Pac. Ry. Co.*, 171 S. W. 632.

§ 228 (Tex.Civ.App.) Testimony that delay in transportation and rough handling of cattle complained of was all along the route *held* admissible.—*Texas Midland R. R. v. Becker & Cole*, 171 S. W. 1024.

§ 230 (Mo.App.) In an action against a railroad company for the death of hogs after delivery to the consignee, the question whether the consignee was negligent in immediately driving them home from the railroad pens where they could not be watered *held*, under the evidence, for the jury.—*Bilby v. Chicago, B. & Q. R. Co.*, 171 S. W. 39.

#### IV. CARRIAGE OF PASSENGERS.

##### (A) Relation Between Carrier and Passenger.

§ 239 (Ark.) Purchase of a ticket is not always a prerequisite to the relationship of passenger and carrier.—*St. Louis, I. M. & S. Ry. Co. v. De Witt*, 171 S. W. 906.

§ 244 (Tex.Civ.App.) An agent of the owner of a car of fruit who attempts to ride along with the car on a nontransferable pass issued to his principal, believing that the employes will permit him to do so, is not a passenger, but a licensee.—*Beard v. International & G. N. Ry. Co.*, 171 S. W. 553.

§ 246 (Tex.Civ.App.) One who attempts to ride on a nontransferable pass issued to another has the burden of showing that he was accepted by the carrier as a passenger.—*Beard v. International & G. N. Ry. Co.*, 171 S. W. 553.

§ 247 (Mo.App.) Where plaintiff was assaulted by defendants' ticket agent when endeavoring to induce him to return plaintiff's change for ticket purchased, plaintiff was a passenger to whom the carrier owed a duty of protection from unlawful assaults by employes.—*Bledsoe v. West*, 171 S. W. 622.

§ 247 (Tex.Civ.App.) A passenger at a transfer point boarding a wrong train in the nighttime, in the absence of a watchman and sufficient light, *held* a passenger on such train.—*Ft. Worth & R. G. Ry. Co. v. Dubose*, 171 S. W. 1090.

##### (C) Performance of Contract of Transportation.

§ 269 (Ark.) A carrier is liable for injuries from exposure, by misrepresentations of its agent as to train connections.—*Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 913.

§ 277 (Ark.) A verdict for \$350 for the illness of a passenger lasting two months *held* not excessive.—*Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 913.

##### (D) Personal Injuries.

§ 280 (Ky.) The duty of a street car conductor to move his car is unaffected by the requests of passengers to move his car.—*Louisville Ry. Co. v. Dott*, 171 S. W. 438.

Where a street car passenger's peril is seen, or notice thereof is given, carmen must avert it if possible, and any suggestions from passengers as to what the conductor shall or shall not do merely carries knowledge to him of the danger.—*Id.*

§ 281 (Ark.) Carrier *held* bound to bestow on insane passenger any reasonable special care, and liable if failure to use such care permitted her to jump from the car window.—*Weirling v. St. Louis, I. M. & S. Ry. Co.*, 171 S. W. 901.

§ 283 (Mo.App.) Where a railroad ticket agent assaulted a passenger trying to induce the agent to return his change for a ticket purchased, the assault was within the scope of the ticket agent's employment, and defendant is liable therefor.—*Bledsoe v. West*, 171 S. W. 622.

§ 284 (Ky.) A carrier must exercise the highest degree of care to protect passengers from assault by fellow passengers or strangers.—*Louisville Ry. Co. v. Dott*, 171 S. W. 438.

A street car passenger, injured by a missile thrown into the car, as a part of a difficulty occurring before the passenger boarded the car cannot recover from the company.—*Id.*

§ 303 (Ky.) Street car conductor, knowing that elderly woman passenger was about to leave the car while it was in motion, *held* required to give her some warning or notice of the danger, or to try to prevent her from alighting.—*Paducah Traction Co. v. Tolar*, 171 S. W. 1009.

§ 304 (Tex.Civ.App.) The conductor of a vestibuled train, with knowledge that plaintiff had boarded it to assist his mother and her other children, was bound to hold the train a reasonable time to allow plaintiff to disembark, and, the train having started before plaintiff had time to alight, the conductor was bound to stop it to permit plaintiff to do so.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 171 S. W. 517.

§ 316 (Mo.App.) Where a collision between street cars injures a passenger, the maxim "res ipsa loquitur" applies, and negligence is presumed.—*Tierney v. United Rys. Co. of St. Louis*, 171 S. W. 977.

§ 318 (Tex.Civ.App.) In an action for injuries to plaintiff while alighting from a train which he had boarded to assist his mother and her children, evidence *held* to sustain a finding that the conductor was negligent.—*Missouri, K. & T. Ry. Co. of Texas v. Churchill*, 171 S. W. 517.

§ 319 (Mo.App.) In an action for injuries to a youth assaulted by defendants' railroad ticket agent, a verdict allowing plaintiff \$1,000 actual damages and \$500 punitive damages, *held* excessive, and should be reduced to \$500 actual damages and \$500 punitive damages.—*Bledsoe v. West*, 171 S. W. 622.

§ 320 (Ark.) In an action for injuries to a passenger, while sitting on the edge of a station platform asleep, by being struck by an approaching train, evidence *held* to require submission of the carrier's negligence to the jury.—*St. Louis, I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

§ 320 (Ky.) It is a question for the jury whether, considering the age or discretion of a party alighting from a car in motion, it was negligence on the conductor's part not to warn her of the danger.—*Paducah Traction Co. v. Tolar*, 171 S. W. 1009.

In an action by a passenger for injuries from alighting from a moving street car, it was for the jury to say whether she knew the car was in motion, and whether the conductor should have warned her of the danger.—*Id.*

§ 321 (Ark.) An instruction that, before the jury could find for plaintiff, they must find that defendant's employes saw or by ordinary care

could have seen plaintiff in a perilous position in time to have avoided injuring him, *held* tantamount to charging that they saw or could have seen that plaintiff was a human being in time to have avoided injuring him.—St. Louis, I. M. & S. Ry. Co. v. McMichael, 171 S. W. 115.

§ 321 (Ark.) In action for death of passenger who became insane and threw herself from a car window, instructions *held* to have correctly declared the law and the measure of the carrier's duty to her.—Weirling v. St. Louis, I. M. & S. Ry. Co., 171 S. W. 901.

§ 321 (Mo.App.) Where plaintiff was assaulted by defendants' ticket agent during the purchase of a transportation ticket, a request to charge that, if the assault grew out of a personal difficulty between plaintiff and defendants' agent, plaintiff could not recover, was properly refused.—Bledsoe v. West, 171 S. W. 622.

**(E) Contributory Negligence of Person Injured.**

§ 333 (Ky.) A woman passenger, alighting while the street car was in motion, *held* negligent.—Paducah Traction Co. v. Tolar, 171 S. W. 1000.

§ 333 (Tex.Civ.App.) Where plaintiff, being unable to alight from the right side of a train after it had started because of the conductor's misconduct, rushed to the opposite side and attempted to alight, but was struck by a depot roof support, he did not assume the risk.—Missouri, K. & T. Ry. Co. of Texas v. Churchill, 171 S. W. 517.

§ 346 (Tex.Civ.App.) In an action for injuries to plaintiff while alighting from a train which he had boarded to assist his mother and her other children, evidence *held* to sustain a finding that the plaintiff was not negligent.—Missouri, K. & T. Ry. Co. of Texas v. Churchill, 171 S. W. 517.

**(F) Ejection of Passengers and Intruders.**

§ 382 (Tex.Civ.App.) A verdict for \$750 *held* not excessive for wrongful eviction from a train of a woman 67 years of age and infirm, in view of the place of eviction and the number of children with her.—Ft. Worth & R. G. Ry. Co. v. Dubose, 171 S. W. 1090.

**(G) Passengers' Effects.**

§ 387 (Ark.) Carrying baggage is incident to transportation of passengers, and payment of fare is usually a necessary prerequisite to liability therefor.—St. Louis, I. M. & S. Ry. Co. v. De Witt, 171 S. W. 906.

Becoming a passenger or purchasing a ticket entitles a passenger to have his baggage carried on the same or some other train, though under Kirby's Dig. § 6615, he has a right to have it sent on the same train.—Id.

§ 406 (Ark.) Where a passenger entitled by Kirby's Dig. § 6615, to transportation of baggage was assured by the agent of the initial carrier that the baggage would be checked to his final destination, though he had bought a ticket only to the end of the initial line, *held*, that the connecting carrier was liable under section 6617, for loss after the baggage had reached its final destination.—St. Louis, I. M. & S. Ry. Co. v. De Witt, 171 S. W. 906.

The act of an agent of a connecting carrier in issuing through baggage checks on purchase of ticket on his own line and the passenger's agreement to purchase ticket to complete the journey was within the apparent scope of his authority and binding on both carriers.—Id.

**CAVEAT EMPTOR.**

See Sales, § 269.

**CERTIFICATE.**

See Acknowledgment, § 36; Corporations, § 98; Depositions, § 111; Lost Instruments, § 23.

**CERTIFIED COPIES.**

See Evidence, § 341.

**CERTIORARI.**

**II. PROCEEDINGS AND DETERMINATION.**

§ 68 (Tenn.) A concurrent finding of facts by the probate court and of the Court of Civil Appeals cannot be considered in the Supreme Court on certiorari.—Shaller v. Garrett, 171 S. W. 486.

A probate court decree dismissing a petition to contest a will and a finding of the Court of Civil Appeals on appeal *held* a concurrent finding of facts not reviewable in the Supreme Court.—Id.

**CHALLENGE.**

See Jury, § 131.

**CHANCERY.**

See Equity.

**CHARGE.**

To jury, see Criminal Law, §§ 763-829; Trial, §§ 191-296.

**CHARITIES.**

See Taxation, § 241.

**CHATTEL MORTGAGES.**

See Marshaling Assets and Securities, §§ 2, 4; Pledges.

**VI. ASSIGNMENT OF MORTGAGE OR DEBT.**

§ 210 (Tex.Civ.App.) Where mortgaged property is turned over to the mortgagee to apply the proceeds on the debt, a junior mortgagee who acquires the property with notice thereof, on taking an assignment of the debt and senior mortgage, must apply the proceeds accordingly to discharge the debt secured by that mortgage.—Keasler v. Wray, 171 S. W. 534.

**VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.**

**(A) Rights and Liabilities of Parties.**

§ 225 (Tex.Civ.App.) By sale of part of mortgaged chattels with mortgagee's consent, but without waiving lien, neither mortgagee nor mortgagor injured or displaced any right of a junior mortgagee in respect to the security acquired under a mortgage made thereafter on the property not sold.—Keasler v. Wray, 171 S. W. 534.

Where a mortgagee of chattels consents to a sale of part, but without waiving lien, the buyers may require the mortgagee to first exhaust the lien on the remaining property before having recourse to the property sold, and, if that is sufficient to satisfy the debt, they become the absolute owners free from the lien.—Id.

**CHECKS.**

See Bills and Notes.

**CHILDREN.**

See Guardian and Ward; Infants; Parent and Child.

**CISTERNS.**

See Landlord and Tenant, §§ 164, 169.

**CITATION.**

See Process.

**CITIES.**

See Municipal Corporations.

**CIVIL RIGHTS.**

See Constitutional Law, §§ 89, 90, 238, 245.

**CLAIM AND DELIVERY.**

See Replevin.

**CLAIMS.**

See Executors and Administrators, § 275.

**CLOUD ON TITLE.**

See Quieting Title.

**CLUBS.**

See Intoxicating Liquors, §§ 260, 274; Taxation, § 241.

**CODICIL.**

See Wills, §§ 190, 535.

**COLLATERAL SECURITY.**

See Pledges.

**COMMERCE.**

See Appeal and Error, § 302; Carriers.

**I. POWER TO REGULATE IN GENERAL.**

§ 8 (Ky.) A contract made in Illinois for shipment of animals to a point in Kentucky, being an interstate contract, is governed exclusively by federal laws, though in conflict with the state Constitution and laws.—Howard & Callahan v. Illinois Cent. R. Co., 171 S. W. 442.

§ 8 (Mo.) A fireman on a locomotive, drawing a train of empty cars to a point in another state and along an interstate railroad, is engaged in interstate commerce, and the action for his death must be brought under the federal Employers' Liability Act.—Thompson v. Wabash Ry. Co., 171 S. W. 364.

§ 8 (Mo.App.) The Carmack amendment to the Hepburn Act excludes state laws and policies from the field of the liability of carriers growing out of interstate shipments.—Bailey v. Missouri Pac. Ry. Co., 171 S. W. 44.

§ 8 (Mo.App.) An interstate shipment is governed by the Interstate Commerce Act and the construction placed thereon by the federal courts.—Smith v. St. Louis Southwestern Ry. Co., 171 S. W. 635.

§ 8 (Tenn.) A signalman, whose duties were connected with electric signals controlling the operations of both intrastate and interstate trains, is engaged in interstate commerce, and where he was run down while discharging his duties, an action for his death must be prosecuted under the federal Employers' Liability Act.—Cincinnati, N. O. & T. P. Ry. Co. v. Bonham, 171 S. W. 79.

§ 8 (Tex.Civ.App.) The states have no power to control beyond their own limits the conduct of corporations and individuals engaged in interstate commerce, and any such legislation is void as creating an unwarranted burden thereon.—Bailey v. Western Union Telegraph Co., 171 S. W. 839.

The amendment of 1910 to the Interstate Commerce Act does not supersede the laws of a state permitting the recovery for mental anguish for the failure to deliver an interstate message, notwithstanding the Carmack Amendment.—Id.

**II. SUBJECTS OF REGULATION.**

§ 16 (Ky.) A contract made in Illinois for shipment of animals to a point in Kentucky held an interstate contract.—Howard & Callahan v. Illinois Cent. R. Co., 171 S. W. 442.

§ 27 (Mo.) A fireman on a locomotive, drawing a train of empty cars to a point in another state and along an interstate railroad, is en-

gaged in interstate commerce.—Thompson v. Wabash Ry. Co., 171 S. W. 364.

§ 27 (Tenn.) A signalman, whose duties were connected with electric signals controlling the operations of both intrastate and interstate trains, is engaged in interstate commerce, and where he was run down while discharging his duties, an action for his death must be prosecuted under the federal Employers' Liability Act.—Cincinnati, N. O. & T. P. Ry. Co. v. Bonham, 171 S. W. 79.

§ 28 (Ark.) An action for mental anguish will not lie for the failure to deliver an interstate message.—Western Union Telegraph Co. v. Johnson, 171 S. W. 859.

§ 33 (Mo.App.) When a commodity has been delivered to a common carrier to be transported continuously to a point outside the state where received, it is thenceforward interstate commerce, whether the shipment be made on a through bill of lading or upon a bill issued for transportation between intrastate points.—Bailey v. Missouri Pac. Ry. Co., 171 S. W. 44.

§ 33 (Tex.Civ.App.) A shipment of goods which traverses another state, though the points of origin and destination are in the same state, is interstate commerce.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

§ 40 (Mo.) Sale of goods by a foreign corporation through an agent taking orders from house to house and sending them to the corporation to be filled and delivered by such agent held "interstate commerce," within Const. U. S. art. 1, § 8, pt. 3, so that the agent was not subject to a local tax imposed on mercantile agents.—Fleming v. City of Mexico, 171 S. W. 321.

**III. MEANS AND METHODS OF REGULATION.**

§ 80 (Ark.) Right of foreign corporation to recover for goods furnished under a written contract, if constituting a sale, held not defeated by noncompliance with Wingo Act, § 2.—Clark v. J. R. Watkins Medical Co., 171 S. W. 136.

**COMMERCIAL PAPER.**

See Bills and Notes.

**COMMISSION.**

See Depositions.

**COMMISSION AND COMMISSIONERS.**

See Counties, §§ 81, 89; Court Commissioners; Hospitals, § 4.

**COMMISSIONS.**

See Brokers, §§ 48-88.

**COMMON CARRIERS.**

See Carriers.

**COMMON LAW.**

See Carriers, § 177; Customs and Usages; Dedication, § 1; Fences, § 27; Guardian and Ward, § 44; Master and Servant, §§ 159, 250½; Statutes, § 222; Trial, § 139.

**COMMON SCHOOLS.**

See Schools and School Districts.

**COMMUNITY PROPERTY.**

See Husband and Wife, §§ 262-274.

**COMPENSATION.**

See Brokers, §§ 48-88; District and Prosecuting Attorneys, § 5; Eminent Domain, §§ 124-150; Jury, § 131.

**COMPENSATORY DAMAGES.**

See Damages, §§ 23-43.

**COMPETENCY.**

See Evidence, §§ 106-150, 539½; Weights and Measures, § 8; Witnesses, §§ 35-141.

**COMPETITION.**

See Trade-Marks and Trade-Names, § 70.

**COMPLAINT.**

See Indictment and Information; Pleading.

**COMPROMISE AND SETTLEMENT.**

See Payment; Release.

§ 23 (Ark.) In an action on a note, evidence held to support a finding that two parties executed notes as a final settlement of all matters between them.—*Cherry v. Peay*, 171 S. W. 924.

**CONDEMNATION.**

See Eminent Domain.

**CONDITIONAL SALES.**

See Sales, §§ 473-479.

**CONDITIONS.**

See Escrows.

**CONDONATION.**

See Divorce, §§ 48, 49.

**CONFESSION.**

See Criminal Law, §§ 517, 519.

**CONFLICT OF LAWS.**

See Commerce, § 8; Corporations, § 216.

**CONNECTING CARRIERS.**

See Carriers, §§ 177-187, 219.

**CONSIDERATION.**

See Bills and Notes, § 489; Fraudulent Conveyances, § 95.

**CONSPIRACY.**

See Criminal Law, §§ 59, 369, 422-427, 517, 800, 814, 1166½, 1172; Homicide, §§ 29, 30, 169, 172, 235, 269; Monopolies, § 17.

**CONSTABLES.**

See Sheriffs and Constables.

**CONSTITUTIONAL LAW.**

See Corporations § 239; Costs, § 4; Courts, §§ 231, 489; Criminal Law, § 205; District and Prosecuting Attorneys, § 5; Eminent Domain, § 2; Intoxicating Liquors, §§ 6, 14; Jury, §§ 11, 58; Master and Servant, §§ 11, 16½; Municipal Corporations, § 971; Perjury, § 19; Statutes, §§ 64, 114, 115, 141; Taxation, §§ 193, 230, 241.

**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

§ 13 (Ark.) The intent of a constitutional provision must be gathered from both the letter and the spirit of the instrument.—*State v. New York Life Ins. Co.*, 171 S. W. 871.

§ 14 (Ark.) Words in a Constitution must be given their natural meaning.—*State v. New York Life Ins. Co.*, 171 S. W. 871.

§ 15 (Ark.) One provision in a Constitution must be construed with reference to every other provision.—*State v. New York Life Ins. Co.*, 171 S. W. 871.

§ 48 (Tex.) A law will be recognized as valid, if, by reasonably fair construction, it appears that the Legislature was empowered to enact it.—*St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 171 S. W. 703.

**III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.****(B) Judicial Powers and Functions.**

§ 68 (Tex.Civ.App.) The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute.—*Watson v. Cochran*, 171 S. W. 1067.

§ 70 (Ark.) The courts must give effect to the language of a statute, regardless of its harshness.—*American Hardwood Lumber Co. v. T. J. Ellis & Co.*, 171 S. W. 899.

§ 70 (Mo.App.) The penalty imposed by Rev. St. 1909, § 10533, is within legislative discretion, and the amount thereof within the statute will not be disturbed.—*Boonville Special Road Dist. v. Fuser*, 171 S. W. 962.

**IV. POLICE POWER IN GENERAL.**

§ 81 (Tex.Cr.App.) The police power of the state includes the right to regulate, control, and prohibit occupations endangering the health, morals, and safety of the general public.—*Longmire v. State*, 171 S. W. 1165.

**V. PERSONAL, CIVIL AND POLITICAL RIGHTS.**

§ 89 (Tex.) The impairment of a corporation's right to discharge employes at will without cause by the Blacklisting Law is violative of its constitutional right of liberty of contract.—*St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 171 S. W. 703.

§ 90 (Tex.) The provisions of the Blacklisting Law for compelling a corporation to give a discharged employe a statement of the cause of discharge are violative of the liberty to speak and write secured by Const. art. 1, § 8.—*St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 171 S. W. 703.

**X. EQUAL PROTECTION OF LAWS.**

§ 238 (Tex.) The impairment of a corporation's right to discharge employes without cause by the Blacklisting Law is a denial of the equal protection of the laws secured by Const. U. S. Amend. 14.—*St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 171 S. W. 703.

§ 245 (Tex.Civ.App.) The Workmen's Compensation Act is not violative of the equal protection clause of Const. U. S. Amend. 14.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

**XI. DUE PROCESS OF LAW.**

§ 301 (Tex.Civ.App.) The Workmen's Compensation Act is not violative of the due process of law clause of Const. U. S. Amend. 14, and Const. Tex. art. 1, § 19.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

**CONSTRUCTION.**

See Constitutional Law, §§ 13-48; Contracts, §§ 147-176; Covenants, §§ 21-89; Dedication, § 46; Insurance, §§ 146, 150; Mortgages, § 151; Pleading, §§ 34, 35; Release, §§ 29-37; Sales, §§ 71-87; Statutes, §§ 190, 222; Trial, § 296; Wills, §§ 452-693.

**CONSTRUCTIVE TRUSTS.**

See Trusts, §§ 103, 110.

## CONTEST.

See Elections, § 305.

## CONTINUANCE.

See Appeal and Error, § 1043; Criminal Law, §§ 603, 614.

§ 22 (Ark.) Denial of continuance for a witness, whose deposition was taken by plaintiff under Kirby's Dig. § 3157, in order to cross-examine him, *held* not an abuse of discretion.—*Western Union Telegraph Co. v. Scanlon*, 171 S. W. 916.

§ 26 (Ky.) Where plaintiff's testimony did not take defendant by surprise, *held* that it was not entitled to a continuance because it was unable to procure plaintiff's deposition under Civ. Code Prac. § 606, subsec. 8, where the effort was not made until a few days before trial.—*Cumberland Telephone & Telegraph Co. v. Laird*, 171 S. W. 386.

§ 33 (Ark.) A continuance for the absence of a witness is properly denied under Kirby's Dig. § 6173, where the statement of what the witness would testify to is admitted as a deposition.—*Ezell v. Barner*, 171 S. W. 911.

§ 33 (Ky.) Under Civ. Code Prac. § 315, the denial of a continuance, because of the absence of a witness who was not a party, *held* not an abuse of discretion, where the affidavit as to what the witness would testify was read as his testimony, though the affiant may not have been able to give all the evidence that the witness might have given, if present.—*Bon Jellico Coal Co. v. Murphy*, 171 S. W. 160.

§ 33 (Mo.App.) Where the deposition of a witness, absent because ill, would have been admissible, and plaintiff admitted that two other absent witnesses, if present, would have testified as set out in an application for a continuance, denial of the application was not error.—*Stephens v. City of El Dorado Springs*, 171 S. W. 657.

§ 35 (Mo.App.) Where continuance was applied for because of absence of three witnesses, plaintiff, by admitting that two of them would testify as alleged in the application, did not deprive himself of the right to question the sufficiency of the application as to the third.—*Stephens v. City of El Dorado Springs*, 171 S. W. 657.

§ 37 (Tex.Civ.App.) A motion for continuance, which alleges the materiality of the testimony of the absent defendant and states generally that defendant was absent for some cause over which he has no control, is properly overruled.—*Muldoon v. J. E. Bray Land Co.*, 171 S. W. 1027.

## CONTRACTS.

See Action, §§ 27, 32; Bills and Notes; Boundaries, § 46; Brokers; Cancellation of Instruments; Carriers, §§ 187, 218; Chattel Mortgages; Commerce, §§ 8, 16; Constitutional Law, § 89; Corporations, §§ 116, 180, 216, 398, 448; Counties, §§ 114, 124, 182; Covenants; Customs and Usages, § 17; Damages, §§ 23, 78, 120; Deeds; Descent and Distribution, § 91; Evidence, §§ 178, 419, 434, 441, 445; Fraud, § 31; Frauds, Statute of; Gaming; Homestead, § 117; Husband and Wife, §§ 30, 278, 279; Infants, § 57; Insane Persons, §§ 73-79; Insurance; Interest; Landlord and Tenant; Limitation of Actions, § 24; Mines and Minerals, § 106; Mortgages; Municipal Corporations, §§ 226, 244; Negligence, § 2; Partnership; Pleading, § 58; Pledges; Principal and Agent; Principal and Surety; Sales; Specific Performance; Telegraphs and Telephones, § 54; Trial, §§ 121, 296; Usury; Vendor and Purchaser; Work and Labor.

## I. REQUISITES AND VALIDITY.

### (B) Parties, Proposals, and Acceptance.

§ 28 (Ark.) Declarations by the members of a family that the property of the family was accumulated by them and held in common, did not tend to prove a written contract claimed by plaintiff, by the terms of which the father and sons each were to receive 2 parts and the mother and daughters 1½ parts of the property.—*Penrose v. Baker*, 171 S. W. 482.

§ 28 (Mo.App.) Where defendant made a written offer to plaintiff which was not accepted before a conversation at which defendant claimed that the written offer was modified, the burden is on the plaintiff to prove that defendant's offer when accepted was the same as the written offer.—*Ratcliffe v. Missouri Benefit Ass'n*, 171 S. W. 32.

### (C) Formal Requisites.

§ 32 (Ark.) An oral contract for a lease became effective, though it was agreed that it should be subsequently embodied in a written signed instrument.—*Alexander-Amberg & Co. v. Hollis*, 171 S. W. 915.

### (F) Legality of Object and of Consideration.

§ 122 (Tex.Civ.App.) A lease of space for a fruit stand outside a store, providing that if the occupation of the space be contrary to ordinance, then the lessee shall have space inside, is not illegal, though an ordinance is passed forbidding the erection of such stand on the sidewalk.—*Wicks v. Comves*, 171 S. W. 774.

§ 138 (Tex.Civ.App.) The court will not enforce an illegal contract where the illegality appears in the proof, though not pleaded.—*Bishop v. Japhet*, 171 S. W. 499.

The court will not enforce an illegal contract, whether the illegality is *malum in se* or merely *malum prohibitum*.—*Id.*

§ 139 (Tex.Civ.App.) Where plaintiff, under an illegal contract, procured the ostensible sale of a liquor business to defendant, intending to own it himself and on his repudiation of the contract sued defendant, who by a cross-action claimed title, the court properly refused to render judgment for plaintiff, but erred in refusing to render judgment for defendant sustaining his title and on a sequestration bond.—*Bishop v. Japhet*, 171 S. W. 499.

## II. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§ 147 (Mo.App.) The parties to a contract are presumed to intend that the language used shall be given its ordinary meaning.—*Wainscott v. Haley*, 171 S. W. 983.

§ 155 (Ark.) A written contract is to be construed most strongly against the party preparing it.—*Clark v. J. R. Watkins Medical Co.*, 171 S. W. 136.

§ 170 (Ark.) In construing a contract the court may consider the construction which the parties themselves have placed upon it.—*Clark v. J. R. Watkins Medical Co.*, 171 S. W. 136.

§ 176 (Ark.) Where the terms of a contract are unambiguous, it is the province of the court to construe it, and declare its purport.—*Clark v. J. R. Watkins Medical Co.*, 171 S. W. 136.

## IV. RESCISSION AND ABANDONMENT.

§ 264 (Mo.App.) A party induced to contract by fraud may rescind and recover back what he has paid or sold, by tendering the benefits he has received, or he may affirm and sue for damages, without waiving right to recover damages for the fraud.—*Horne v. John A. Hertel Co.*, 171 S. W. 598.

**V. PERFORMANCE OR BREACH.**

§ 278 (Ark.) A contestant in a popularity contest may recover for breach of the contract by a change of the conditions thereof, so that another received more votes than plaintiff.—*Mill-saps v. Urban*, 171 S. W. 1198.

§ 280 (Tex.Civ.App.) Where a contract employing engineers to construct a waterworks plant not only required them to furnish plans and specifications, but gave them entire control of the construction, they were bound to exercise reasonable care in employing a competent superintendent and labor, and were liable to the city for any damage occasioned by a failure to do so.—*O'Neil Engineering Co. v. City of San Augustine*, 171 S. W. 524.

§ 284 (Tex.Civ.App.) Where a contract for the sale of gravel provided that the buyers should pay only for material usable under their contract for locks and dams as interpreted by the United States engineer in charge, the determination of the engineer is conclusive.—*Ball-Carden Co. v. Ridgell*, 171 S. W. 509.

§ 290 (Tex.Civ.App.) Though the engineer permitted some of the gravel delivered for government work, to be used by addition of cement, *held* that the buyers were not estopped from denying that the gravel tendered by the seller was not up to specifications.—*Ball-Carden Co. v. Ridgell*, 171 S. W. 509.

Under a contract for gravel according to the specifications of a government contract, *held* that the government engineer could not permit the furnishing of gravel not up to specifications and require the contractor to use additional cement so as to compel the buyers to accept gravel not up to specifications.—*Id.*

**VI. ACTIONS FOR BREACH.**

§ 324 (Mo.App.) Where a contract has been fully performed, and nothing remains but payment of the price, plaintiff may sue on a quantum meruit; the recovery therein being limited to the contract price.—*Daniels v. McDaniels*, 171 S. W. 14.

§ 349 (Tex.Civ.App.) In an action by a railroad against a street railway for breach of contract to keep a subway free from inflammable material, a letter with an attached bill against defendant for damages *held* inadmissible as proof of the claim.—*Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.*, 171 S. W. 1103.

**CONTRADICTION.**

See Witnesses, §§ 405-407.

**CONVERSION.**

See Trover and Conversion.

**CONVEYANCES.**

See Chattel Mortgages; Deeds; Fraudulent Conveyances; Partition.

**COPIES.**

See Evidence, §§ 183, 185.

**CORAM NON JUDICE.**

See Habeas Corpus, § 112.

**CORPORATIONS.**

See Abatement and Revival, § 39; Action, § 27; Appeal and Error, § 1048; Banks and Banking; Carriers; Commerce, § 80; Constitutional Law, §§ 89, 90, 238; Fraud, § 25; Injunction, § 27; Insurance; Joint-Stock Companies; Judgment, § 701; Master and Servant, § 11; Mines and Minerals, §§ 97, 106; Municipal Corporations; Parties, § 94;

Railroads; Set-Off and Counterclaim, § 35; Street Railroads; Taxation, §§ 193, 230; Telegraphs and Telephones.

**IV. CAPITAL, STOCK, AND DIVIDENDS.****(C) Issue of Certificates.**

§ 98 (Mo.App.) The placing of corporate stock in the name of defendant on the books of the corporation is not a complete delivery to him, but he is entitled to the actual delivery of the certificate.—*Lebrecht v. Nellist*, 171 S. W. 11.

§ 99 (Tex.Civ.App.) A dissatisfied stockholder cannot require directors to account for stock received by them for the transfer to the corporation of a franchise which they paid nothing for; there being no showing as to the value of the franchise.—*Thomas v. Barthold*, 171 S. W. 1071.

**(D) Transfer of Shares.**

§ 116 (Mo.App.) Cancellation of a contract for the sale of corporate stock cannot be had because of the seller's statement that the stock was very valuable, or for his breach of a promise.—*Rigler v. Reid*, 171 S. W. 952.

§ 117 (Mo.App.) Where defendant, after having ratified a purchase of corporate stock on March 9, 1911, sought to set aside a purchase made May 16th following, false representations antedating and concurring with the prior purchase were irrelevant and inadmissible.—*Rigler v. Reid*, 171 S. W. 952.

Evidence *held* insufficient to warrant a finding that defendant was induced to purchase certain corporate stock from plaintiff by false representations.—*Id.*

Where defendant was induced to purchase corporate stock by fraud on May 16, 1911, but took no steps to rescind until July 29th, he did not act immediately—i. e., within a reasonable time—and therefore waived his right.—*Id.*

§ 119 (Tex.Civ.App.) Where plaintiffs acquired the entire stock of a corporation, all of the physical properties of the corporation were conveyed to them.—*Vick v. Park*, 171 S. W. 1039.

§ 121 (Mo.App.) In an action on a note, given for corporate stock which had never been delivered, plaintiff cannot recover without tendering the stock to defendant, or offering to deliver it into court, upon payment of the note, even though defendant had written plaintiff that he would not be able to pay the note.—*Lebrecht v. Nellist*, 171 S. W. 11.

§ 121 (Mo.App.) A petition by one of two stockholders of a corporation, who bought out the shares of the other stockholder, to recover an overpayment, *held* to state a good cause of action, without an averment of a promise to pay.—*Jennemann v. Bucher*, 171 S. W. 613.

Where one of two stockholders in a corporation sought to recover an overpayment made to the other stockholder by mistake, in which the defense was that the transaction was closed, evidence that the value of the good will was not figured in, the sale *held* inadmissible.—*Id.*

In an action for money had and received, based on mistake in overpaying the seller of stock, a valuation of the stock on the invoice value *held* to be considered its book value, as alleged in the petition.—*Id.*

Evidence *held* to sustain a finding that the stockholder buying the stock of the other stockholder had overpaid the seller by reason of a mutual mistake in adding the outstanding assets to the half share of the seller in arriving at the valuation of the stock.—*Id.*

§ 121 (Mo.App.) One induced to purchase corporate stock by fraud has one election, to rescind, or affirm and recover damages, and his election once made is final.—*Rigler v. Reid*, 171 S. W. 952.

**V. MEMBERS AND STOCKHOLDERS.****(A) Rights and Liabilities as to Corporation.**

§ 180 (Ky.) The majority of the stockholders of a corporation must determine how its affairs are to be conducted, and to whom and under what restrictions the management of such affairs shall be intrusted; but the right of such majority as to a contract between the corporation and directors personally interested therein is not absolute.—*Beha v. Martin*, 171 S. W. 393.

**(D) Liability for Corporate Debts and Acts.**

§ 216 (Mo.App.) Stockholders' liability for obligations of corporation, though contractual, *held* to be determined by the laws of the state under which the corporation is organized.—*Rogers v. Stag Mining Co.*, 171 S. W. 676.

§ 218 (Tex.Civ.App.) For improvement of the property of a corporation, under contract with one of the two stockholders, authorized to do so by the other, the corporation is primarily liable, and the two stockholders are sureties as to each other, though they be principals as to the holder of the debt.—*Zachry & Gearhart v. Peterson & Avant*, 171 S. W. 494.

§ 232 (Mo.App.) One seeking to enforce stockholders' liability *held* not bound by the statement in the articles of agreement, pursuant to Rev. St. 1909, § 3339, as amended by Acts 1911, p. 148, as to the value of property received for stock, especially in view of section 2981 and Const. art. 12, § 8.—*Rogers v. Stag Mining Co.*, 171 S. W. 676.

One seeking to enforce stockholders' liability *held* not estopped to show that property received for stock was not of the value stated in the articles of incorporation, though filed and recorded as required by Rev. St. 1909, §§ 2975, 3340.—*Id.*

§ 239 (Mo.App.) Under Const. art. 12, § 9, and Rev. St. 1909, §§ 3004, 3006, stockholders *held* liable to the extent of their unpaid stock subscriptions on judgments against the corporation for torts.—*Rogers v. Stag Mining Co.*, 171 S. W. 676.

**VI. OFFICERS AND AGENTS.****(A) Election or Appointment, Qualification, and Tenure.**

§ 283 (Ky.) In a suit by minority stockholders to enjoin defendants, as stockholders and officers, from collecting the salaries voted them at a directors' meeting, and to recover the sums paid them, evidence *held* to show that the stockholders, by electing officers, who were only eligible as such because they were directors, intended to and did elect such officers directors.—*Beha v. Martin*, 171 S. W. 393.

§ 289 (Tex.Civ.App.) Officers of a corporation, not selected in the statutory manner, are not even "de facto officers," and their acts are not binding.—*Exline-Reimers Co. v. Lone Star Life Ins. Co.*, 171 S. W. 1060.

**(B) Authority and Functions.**

§ 298 (Ky.) That only two of the three members of a board of directors were present at a meeting called in an emergency to postpone a sale of corporate property *held* not to invalidate their action, where both voted for postponement of the sale.—*Paducah & Illinois Ferry Co. v. Robertson*, 171 S. W. 171.

In order that the appointment of an auctioneer to sell corporate property may bind the corporation, the board of directors should act in an official meeting in delegating to him the power of sale, and such act must be shown by the corporate records.—*Id.*

**(C) Rights, Duties, and Liabilities as to Corporation and Its Members.**

§ 308 (Ky.) The directors of a corporation, especially where they own a majority of the

stock, have large powers in the selection of, and the salaries to be paid to, its officers, with which discretion the courts will not ordinarily interfere.—*Beha v. Martin*, 171 S. W. 393.

Majority stockholders, who were directors and officers of a corporation, are not bound to serve gratuitously for the benefit of a minority stockholder, who had entered the employ of a competitor.—*Id.*

Where majority stockholders, as directors of a corporation, vote themselves salaries, equity, on application by minority stockholders, will review the reasonableness of such salaries, and if it finds them unreasonable will enjoin payment and adjudge a recovery for the excess over a reasonable salary.—*Id.*

In a suit by minority stockholders to enjoin payment of salaries, voted by majority stockholders as directors to themselves as officers, *held*, that the minority stockholders have the burden of showing that the salaries were unreasonable, and that on the facts appearing the court could not say that they were unreasonable and oppressive.—*Id.*

Resolution whereby three directors of a corporation voted themselves salaries as officers *held* invalid, because it could not be shown that no one of the directors voted in his own case.—*Id.*

§ 320 (Tex.Civ.App.) Where a stockholder was damaged by the negligence of the directors, he can only recover 6 per cent. simple interest on his damages.—*Thomas v. Barthold*, 171 S. W. 1071.

Where plaintiff asserted misrepresentations in selling him stock and mismanagement on the part of the corporate directors, others who acquired stock at different times cannot intervene as parties plaintiff.—*Id.*

In an action by a stockholder against directors, the question whether defendants failed to account for certain funds received *held* for the jury.—*Id.*

**VII. CORPORATE POWERS AND LIABILITIES.****(B) Representation of Corporation by Officers and Agents.**

§ 398 (Tex.Civ.App.) Officers of corporation, who are not even de facto officers, may not make a purchase for the corporation or bind it by adopting an unauthorized contract of the promoter.—*Exline-Reimers Co. v. Lone Star Life Ins. Co.*, 171 S. W. 1060.

§ 404 (Ky.) The action of stockholders in ratifying a resolution of the directors for a sale of the corporate property at a certain time and place *held* not to invalidate a subsequent resolution of the directors postponing the sale without consent of the stockholders.—*Paducah & Illinois Ferry Co. v. Robertson*, 171 S. W. 171.

The failure of the president of a board of directors to object to the appointment of an auctioneer by a stockholder, to sell corporate property, *held* an acquiescence by him in such appointment.—*Id.*

§ 423 (Ky.) Where the bookkeeper of a corporation, in stating the account of an employé, added a libelous charge of \$1.50 for "mnlage," not authorized by the corporation, the bookkeeper was not acting within the scope of his employment.—*Case v. Steele Coal Co.*, 171 S. W. 993.

§ 425 (Tex.Civ.App.) Legally constituted officers of a corporation are not estopped from denying unlawful acts done by officers not even de facto officers.—*Exline-Reimers Co. v. Lone Star Life Ins. Co.*, 171 S. W. 1060.

§ 426 (Tex.Civ.App.) Where officers of a corporation repudiated a promise to pay a debt made by one who was not even a de facto officer, there was no acquiescence in the unauthorized act.—*Exline-Reimers Co. v. Lone Star Life Ins. Co.*, 171 S. W. 1060.

**(D) Contracts and Indebtedness.**

§ 448 (Tex.Civ.App.) A debt incurred by a promoter of a corporation on its behalf, prior to the filing of its charter, is not an original liability of the corporation.—*Exline-Reimers Co. v. Lone Star Life Ins. Co.*, 171 S. W. 1060.

A contract by a promoter of a proposed corporation cannot be ratified by the corporation, but liability may arise by adoption of the contract by acceptance of benefits.—*Id.*

Notwithstanding Rev. St. 1895, art. 3096h, a corporation held not liable for material ordered by the promoter and delivered to an officer, where the acts of the corporators and of the directors and officers were void.—*Id.*

**(E) Torts.**

§ 492 (Mo.App.) Where the secretary of a corporation converted corporate stock sent in to be transferred on the books, the corporation is not liable, unless he was acting for the company.—*Mayger v. Nichols*, 171 S. W. 593.

**(F) Civil Actions.**

§ 503 (Tex.Civ.App.) Under section 24, art. 1830, Vernon's Sayles' Ann. Civ. St. 1914, relating to venue of actions against corporations, held, that suit on claim for defendant's delivery of damaged goods bought in C. county to be delivered there, and paid for by taking up draft, might be brought in C. county.—*Rhome Milling Co. v. Cunningham*, 171 S. W. 1081.

**VIII. INSOLVENCY AND RECEIVERS.**

§ 553 (Tex.Civ.App.) Courts of equity will not appoint a receiver of a corporation at the suit of a stockholder on the ground of fraud, mismanagement, etc., on the part of the corporate authorities, but will merely enjoin or forbid the wrong complained of.—*Williams v. Watt*, 171 S. W. 266.

§ 556 (Tex.Civ.App.) Under Rev. St. 1911, art. 2128, a stockholder of a corporation is not entitled to the appointment of a receiver on the ground that it is insolvent, or in imminent danger of insolvency, unless he has a right of action independent of his stockholder's interest.—*Williams v. Watt*, 171 S. W. 266.

**XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.**

§ 603 (Ky.) The act of the directors of a corporation in adopting a resolution providing for a sale of all the corporate property is not of itself a "dissolution" of the corporation.—*Paducah & Illinois Ferry Co. v. Robertson*, 171 S. W. 171.

**XII. FOREIGN CORPORATIONS.**

§ 636 (Ark.) In the absence of constitutional limitations, the Legislature may exclude foreign corporations from the state or admit them on such terms as it deems proper.—*State v. New York Life Ins. Co.*, 171 S. W. 871.

§ 642 (Ark.) Under the Wingo Act, § 2, held that one receiving its goods under contract and retailing them was "doing business," so as to subject the corporation to such penalty, if he was its agent and not a mere retailer.—*Clark v. J. R. Watkins Medical Co.*, 171 S. W. 136.

§ 642 (Tex.Civ.App.) Foreign corporation which sold and installed screen doors and window screens held transacting business in the state, and if without a permit not entitled to sue for the price.—*Buhler v. E. T. Burrowes Co.*, 171 S. W. 791.

A single transaction is sufficient to constitute the transaction of business in this state by a foreign corporation not having a permit to transact business in the state.—*Id.*

§ 665 (Ark.) Under Kirby's Dig. § 834, construed with section 825, any court has jurisdiction

over a foreign corporation, regardless of the nature of the action or the county in which service was had.—*American Hardwood Lumber Co. v. T. J. Ellis & Co.*, 171 S. W. 899.

Act of April 1, 1909 (Laws 1909, p. 293), does not impliedly repeal Kirby's Dig. § 834, giving jurisdiction to any court in the state upon service on the designated agent of a foreign corporation.—*Id.*

§ 668 (Ark.) Acts 1909, p. 293, provides for an additional and cumulative method of service of process, in an action against a corporation in aid of the law, declaring that service can be had on a corporation in the county where it is situated, or where it has its principal office or place of business, or in the county where its chief officer resides.—*Ft. Smith Lumber Co. v. Shackelford*, 171 S. W. 99.

The agent of a lumber company in charge of its commissary store, situated in a county where it is engaged in logging, held an agent in charge of an "other place of business" of the corporation, within Acts 1909, p. 293.—*Id.*

§ 674 (Ark.) In an action for the price of goods sold under a written contract, defended on the ground that it was unenforceable because the plaintiff had not complied with Wingo Act, § 2, the question whether the transaction was a sale or an agency held for the jury.—*Clark v. J. R. Watkins Medical Co.*, 171 S. W. 136.

**COSTS.**

See Appeal and Error, §§ 119, 1140; Highways, § 58.

**I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.**

§ 4 (Tex.) Acts 31st Leg. c. 47, authorizing taxation of attorney's fees in certain actions against railroad companies held constitutional.—*Gulf, T. & W. Ry. Co. v. Lunn*, 171 S. W. 1121.

§ 32 (Tex.Civ.App.) Where in trespass to try title to certain surveys, defendant admitted plaintiff's title to such surveys, but denied that a fence was on the boundary and the jury found that the fence was not on the boundary, costs held properly taxed to plaintiff.—*J. D. Fields & Co. v. Allison*, 171 S. W. 274.

§ 32 (Tex.Civ.App.) The award of costs in favor of the widow of an employé of a railroad company who ultimately recovered judgment under the federal Employers' Liability Act, as his personal representative, held not improper though the railroad company prevailed in an action instituted by the widow as such.—*St. Louis, S. F. & T. Ry. Co. v. Smith*, 171 S. W. 512.

**VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.**

§ 238 (Tex.Civ.App.) Where a judgment is reformed and affirmed, the costs on appeal will be taxed against appellant when the objectionable feature would doubtless have been corrected by the trial court had its attention been called thereto.—*Soto v. State*, 171 S. W. 279.

§ 260 (Tex.Civ.App.) Damages for the taking of an appeal for delay will not be awarded, unless it appears that there was absolutely no just cause for the appeal.—*W. A. Leyhe Piano Co. v. American Multigraph Sales Co.*, 171 S. W. 494.

**COTENANCY.**

See Tenancy in Common.

**COUNTERCLAIM.**

See Set-Off and Counterclaim.

## COUNTIES.

See Appeal and Error, § 238; Courts, § 183; District and Prosecuting Attorneys; Hospitals, § 4; Taxation, § 431.

### II. GOVERNMENT AND OFFICERS.

#### (D) Officers and Agents.

§ 81 (Ky.) Under Acts 1898, c. 50, the commissioners have no power to have indexes made of the records, since the power to determine the necessity for that work and to let contracts therefor was vested in the county judge and the justices of the peace living in the district by Acts 1883-84, c. 956.—Commissioners of Campbell County Courthouse Dist. v. List, 171 S. W. 467.

§ 89 (Ky.) Under Ky. St. § 513, the clerk of the county court for Campbell county need not index the papers affecting titles in the courthouse district and recorded in the office at Newport.—Commissioners of Campbell County Courthouse Dist. v. List, 171 S. W. 467.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (B) Contracts.

§ 114 (Ark.) Under Kirby's Dig. § 1011, an architect employed by the county judge to construct a jail *held* not entitled to recover where he was not employed by the county court.—Klingensmith v. Logan County, 171 S. W. 1191.

§ 124 (Ark.) In view of Kirby's Dig. § 1014, an architect cannot recover from the county for services in drafting plans for a courthouse, where it was ordered erected on property not owned by the county.—Jennings v. Ft. Smith Dist. of Sebastian County, 171 S. W. 920.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 182 (Tex.Civ.App.) Under Rev. St. 1911, art. 632, providing that bonds shall remain in the custody of the commissioners' court until sold for cash at not less than par, an order of the commissioners' court transferring the custody of bonds to the county attorney and giving him unrestricted authority to sell is void.—Jones v. Veltmann, 171 S. W. 287.

A county cannot, in the absence of statute conferring the power upon it, give the custody of bonds issued by it to the county attorney with absolute discretion in him to make a sale thereof.—Id.

A contract, by which the commissioners' court gave to the county attorney the custody of bonds with the authority to sell them at the best price obtainable, delegated authority to him to bind the sale, and is therefore void under Rev. St. 1911, art. 632.—Id.

§ 196 (Tex.Civ.App.) Under Rev. St. 1911, art. 4643, subds. 1, 2, relating to injunctions, *held*, that a taxpayer in a county might maintain a suit to enjoin the creation of a void debt and an illegal tax levy, in excess of the county's constitutional debt limit.—Tullos v. Church, 171 S. W. 803.

A petition of a taxpayer in a suit to enjoin creation of a contract obligation by a county in excess of its constitutional limit must show that its existing indebtedness was valid when the new obligation was sought to be created.—Id.

### VI. ACTIONS.

§ 217 (Ky.) Under Ky. St. §§ 1840, 3948, county jailer *held* not entitled to recover by ejectment county property leased by the fiscal court whether such court had authority to lease it or not.—Bath County v. Denton, 171 S. W. 1000.

§ 218 (Ky.) Under Acts 1881-82, c. 1107, creating the courthouse district in Campbell county, a suit against the district is properly brought against the commissioners for the court-

house as defendants, and not against the district itself.—Commissioners of Campbell County Courthouse Dist. v. List, 171 S. W. 467.

§ 222 (Tex.Civ.App.) Plaintiff, in a suit to obtain a judgment on a county's obligation, must plead and prove all the things requisite to make it a valid obligation.—Tullos v. Church, 171 S. W. 803.

## COURT COMMISSIONERS.

§ 2 (Ky.) Under Ky. St. §§ 396, 1740, the court may not make an allowance to a special commissioner until a verified written statement has been made, and then an allowance cannot exceed \$3 per day.—Connecticut Fire Ins. Co. v. Union Mercantile Co., 171 S. W. 407.

## COURTS.

See Appeal and Error; Constitutional Law, § 68; Contracts, § 138; Corporations, § 95; Court Commissioners; Criminal Law, § 103; District and Prosecuting Attorneys, § 5; Eminent Domain, § 206; Habeas Corpus, § 112; Infants, §§ 34, 37; Injunction, §§ 80, 85, 105; Judges; Justices of the Peace; Master and Servant, § 250½; Municipal Corporations, § 28; Prohibition, §§ 9, 10; Trial, §§ 370-404.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 24 (Tex.) Want of jurisdiction of the subject-matter cannot be waived by the parties nor disregarded by the court.—Hunt v. Johnson, 171 S. W. 1125.

§ 37 (Mo.) Questions of jurisdiction may be raised at any time in the trial court or on appeal.—Bowles v. Troll, 171 S. W. 326.

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (D) Rules of Decision, Adjudications, Opinions, and Records.

§ 90 (Tex.Civ.App.) A decision of the Court of Criminal Appeals adjudging constitutional Vernon's Sayles' Ann. Civ. St. 1914, arts. 6319a-6319n, relating to pool halls, will be followed by a Court of Civil Appeals.—Watson v. Cochran, 171 S. W. 1067.

§ 97 (Mo.App.) The state court must follow decisions of the United States court in interstate commerce cases, recognizing the validity of reasonable stipulations in shipping contracts for the giving of notice of claims, whether supported by the consideration of a reduced rate or not.—Bailey v. Missouri Pac. Ry. Co., 171 S. W. 44.

§ 97 (Mo.App.) A contract for an interstate transportation of freight is governed by and must be construed with reference to the federal decisions.—Riddler v. Missouri Pac. Ry. Co., 171 S. W. 632.

§ 116 (Mo.) No statute of limitation applies to and bars the right of a court to put in proper form at any time that which appears from its record to have been done and to have been imperfectly or informally recorded.—Farris v. Burchard, 171 S. W. 361.

### IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169 (Tex.Civ.App.) The attorney's fee sought to be recovered under Rev. St. 1911, art. 2178, in an action for the value of a mule killed by defendant's train, was a part of the "amount in controversy."—St. Louis, B. & M. Ry. Co. v. Knowles, 171 S. W. 245.

§ 183 (Ark.) The county court, being created and given jurisdiction for special purposes, can exercise only the powers expressly conferred on it and those necessarily implied.—Jennings v. Ft. Smith Dist. of Sebastian County, 171 S. W. 920.

## VI. COURTS OF APPELLATE JURISDICTION.

### (A) Grounds of Jurisdiction in General.

§ 207 (Ark.) As the Arkansas Supreme Court controls inferior courts only through its supervisory jurisdiction over the circuit court, it cannot issue a writ of prohibition against the probate court.—*Ferguson v. Martineau*, 171 S. W. 472.

### (B) Courts of Particular States.

§ 231 (Mo.) Where the corpus of the estate amounted to only \$10,000, the Supreme Court is without jurisdiction of an appeal in an action between the nonresident and local guardians of the ward's estate, each of whom claimed a right to handle the property, for the right involved could not equal \$7,500.—*Bowles v. Troll*, 171 S. W. 326.

§ 231 (Mo.) For the Supreme Court to obtain jurisdiction of a cause certified to it from one of the Courts of Appeals on the theory that the decision is in conflict with a decision of the Supreme Court or of one of the Courts of Appeals, the Court of Appeals must have rendered a decision decisive of the case.—*Keller v. Summers*, 171 S. W. 336.

The purpose of Const. Amend. 1884, § 6, allowing the certification of cases from the Courts of Appeals to the Supreme Court is to prevent conflict in the rulings of the appellate courts.—*Id.*

The dissent of one of the judges of a Court of Appeals, together with the order certifying the cause to the Supreme Court, *held* to show that the dissent was from the decision of the Court of Appeals, and hence the Supreme Court had jurisdiction of the cause under Const. Amend. 1884, § 6.—*Id.*

Where a case is certified to the Supreme Court on dissent of a member of a Court of Appeals, who asserted that the decision was in conflict with decisions of the Supreme Court, the Supreme Court, under the direct provisions of Const. Amend. 1884, § 6, takes jurisdiction of the whole case just as if it had been brought there originally.—*Id.*

§ 231 (Mo.App.) A decision of the Kansas City Court of Appeals that defect in a petition was waived *held* not in conflict with holdings of the Supreme Court and other Courts of Appeals that similar petitions were defective.—*Roth v. City of St. Joseph*, 171 S. W. 944.

## VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

### (A) Courts of Same State, and Transfer of Causes.

§ 488 (Mo.) Though the Supreme Court having once denied a motion to retransfer a cause to one of the Courts of Appeals might treat the question as foreclosed, it should correct its own decision if it be erroneous.—*Bowles v. Troll*, 171 S. W. 326.

§ 488 (Mo.App.) Where a cause is transferred from the Court of Appeals to the Supreme Court because involving title to realty and constitutional questions and the case is retransferred as involving no such questions, such questions are out of the case.—*Meyer v. Bobb*, 171 S. W. 600; *Same v. Goldsmith*, *Id.* 603.

### (B) State Courts and United States Courts.

§ 489 (Ky.) Const. U. S. Amend. 7, relative to jury trials, does not apply to actions in the state courts under federal Employers' Liability Act, § 6, as amended by Act April 5, 1910, and a state circuit court has jurisdiction, though under Const. § 248, and Ky. St. § 2268, three-fourths of the jurors may return a verdict.—*Chesapeake & O. Ry. Co. v. Kelly's Adm'r*, 171 S. W. 185.

The state courts may take jurisdiction to enforce civil rights and liabilities arising under congressional legislation, unless there be something in the congressional legislation forbidding them to take jurisdiction of cases thereunder.—*Id.*

§ 497 (Tex.Civ.App.) Under Act Cong. March 2, 1833, and Act Cong. Feb. 23, 1887, property introduced from without the United States and in the possession of a carrier for transportation in bond, is beyond the jurisdiction of the state courts.—*Galveston, H. & S. A. Ry. Co. v. Terrazas*, 171 S. W. 303.

## COVENANTS.

See Injunction, § 113; Landlord and Tenant, § 130.

## II. CONSTRUCTION AND OPERATION.

### (A) Covenants in General.

§ 21 (Tex.Civ.App.) The intention of the parties is to be ascertained from the deed itself, construed in connection with the circumstances existing at the time of execution.—*Hooper v. Lottman*, 171 S. W. 270.

### (D) Covenants Running with the Land.

§ 74 (Tex.Civ.App.) That a covenant, restricting the use of lots in a residence subdivision, was omitted in conveyances of land to a water company will not prevent other grantees from enforcing the covenant; the furnishing of water to persons living in the district being a necessity, and the necessary use of land by a water company being inconsistent with covenants applicable to residence property.—*Hooper v. Lottman*, 171 S. W. 270.

§ 77 (Tex.Civ.App.) Whether a person, not a party to a restrictive covenant may enforce it depends upon the intention of the parties making the covenant.—*Hooper v. Lottman*, 171 S. W. 270.

§ 79 (Tex.Civ.App.) Where the owner of land, intended to be sold for residence purposes, imposed restrictive covenants, calculated to preserve the residential character of the property, in the deeds to the several grantees, the restriction is for the benefit of all of the lots, and individual lot owners may enforce the covenant.—*Hooper v. Lottman*, 171 S. W. 270.

That a covenant restricting the building of stables upon lots in a residence subdivision varied does not show that the covenants were not imposed pursuant to a general scheme to make the locality more attractive, and will not prevent an individual purchaser from enforcing the same.—*Id.*

§ 84 (Tex.Civ.App.) A covenant restricting the use of lots which were part of a tract divided and sold for residence purposes may be enforced against a grantee of an original purchaser, where he bought with actual or constructive knowledge of the purpose of the covenant to benefit all of the lots.—*Hooper v. Lottman*, 171 S. W. 270.

## CREDIBILITY.

See Witnesses, §§ 331½-407.

## CREDITORS.

See Bankruptcy; Fraudulent Conveyances; Garnishment; Marshalling Assets and Securities.

## CRIMINAL LAW.

See Abduction; Bail; Bigamy; Burglary; District and Prosecuting Attorneys; Elections, § 328; Embezzlement; Gaming; Grand Jury; Homicide; Indictment and Information; Intoxicating Liquors, §§ 138-236; Larceny;

Lewdness; Libel and Slander, § 152; Perjury; Physicians and Surgeons, § 6; Rape; Receiving Stolen Goods; Seduction; Sunday.

### III. PARTIES TO OFFENSES.

§ 59 (Tex.Cr.App.) Where a crime was committed in furtherance of a conspiracy and was such as might result from the execution of the conspiracy, all were guilty.—*Serrato v. State*, 171 S. W. 1133.

Principals and accomplices defined and distinguished.—*Id.*

§ 59 (Tex.Cr.App.) To constitute one an accessory, his acts must have occurred after the offense, while the acts of an accomplice must have occurred before the offense.—*Gonzales v. State*, 171 S. W. 1146.

§ 80 (Tex.Cr.App.) Pen. Code 1911, art. 90, requiring a principal, if arrested, to be tried first, *held* to control the general provision of Code Cr. Proc. 1911, art. 727, relating to the severance on trial of defendants, so that one indicted as an accessory could not be tried first.—*Zweig v. State*, 171 S. W. 747.

### VII. FORMER JEOPARDY.

§ 198 (Ark.) Where, in a prosecution for taking orders for the sale of intoxicants in non-license territory, the state's evidence covered all orders taken within a year prior to the date of the prosecution, an acquittal is a bar to any subsequent prosecution based upon orders taken within that period.—*Sanders v. State*, 171 S. W. 142.

### VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 205 (Tex.Cr.App.) Notwithstanding Const. art. 1, § 10, and Code Cr. Proc. 1911, arts. 4, 447, a prosecution for a felony may be initiated by filing a complaint with a justice, issuance of a warrant, and accused's arrest thereunder.—*Baskins v. State*, 171 S. W. 723.

### X. EVIDENCE.

#### (A) Judicial Notice, Presumptions, and Burden of Proof.

§ 308 (Tex.Cr.App.) Defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt.—*Witty v. State*, 171 S. W. 229.

§ 311 (Tex.Cr.App.) Every man is presumed to be sane until the contrary appears to the satisfaction of the jury.—*Guerrero v. State*, 171 S. W. 731.

§ 331 (Tex.Cr.App.) The burden of proof is on defendant setting up insanity as a defense to show that he was insane at the time of the commission of the offense.—*Guerrero v. State*, 171 S. W. 731.

#### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338 (Tex.Cr.App.) On a trial for carrying intoxicating liquor into prohibition territory, the testimony of a police officer that he saw a third person go to a negro coach, and saw a negro's arm handing out a valise containing bottles of whisky, and that when the third person saw the officer he threw the valise under the coach, *held* admissible, against the objection that it was not shown that it was accused who handed out the valise.—*Johnson v. State*, 171 S. W. 211.

§ 346 (Tex.Cr.App.) Where another's purchase of land was fixed as the date of an unlawful sale of intoxicants, evidence that the actual sale of the land occurred at a time without the period of limitations is admissible.—*Wade v. State*, 171 S. W. 713.

§ 351 (Ky.) As against proof that defendant, immediately after shooting deceased, fled to another state, where he remained till brought

back under arrest, he cannot show that he came back without requiring a requisition.—*Rogers v. Commonwealth*, 171 S. W. 464.

§ 359 (Tex.Cr.App.) Where witness repudiated his testimony on former trial that N., from whom defendant claimed he bought the animal stolen, sought to bribe M. to testify defendant admitted the theft, and witness testified that he, impersonating N., so sought to bribe M., testimony by N., denying any interview with M., was admissible.—*Swafford v. State*, 171 S. W. 225.

§ 361 (Tex.Cr.App.) Where the plea was insanity and where defendant, while the jury was in the box, would throw his head about, shake his hands, and shuffle his feet, evidence for the state that such conduct did not occur when defendant was not in view of the jury *held* admissible.—*Guerrero v. State*, 171 S. W. 731.

§ 364 (Tex.Cr.App.) Statement of deceased, a few minutes after being shot, as to who did the killing, *held* admissible as res gestæ.—*Shamblin v. State*, 171 S. W. 718.

§ 365 (Mo.) In a prosecution for abduction, evidence that the girl claimed to have been taken away, and who was received in accused's house of prostitution and sent to a room with a man from whom she received money, was forced by him to have sexual intercourse *held* admissible as part of the res gestæ.—*State v. Corrigan*, 171 S. W. 51.

Acts which are res gestæ are always admissible, though they may show the commission by defendant of another crime or other crimes.—*Id.*

§ 365 (Tex.Cr.App.) When extraneous crimes are res gestæ of an offense on trial, they are admissible.—*Serrato v. State*, 171 S. W. 1133.

§ 366 (Ark.) Where deceased exclaimed within 20 seconds after he was shot, "He shot me for nothing," it was admissible as part of the res gestæ.—*Plumley v. State*, 171 S. W. 925.

§ 366 (Ky.) Testimony that, immediately after the shot, deceased called to witness, a few feet away, and she hurrying there, and, asking why he did not get out of the way, he said, "I didn't know he was fixing to shoot me," is admissible as res gestæ.—*Rogers v. Commonwealth*, 171 S. W. 464.

§ 366 (Tex.Cr.App.) A witness' testimony as to statement made to him by the injured person immediately after the theft *held* admissible as part of the res gestæ.—*Watts v. State*, 171 S. W. 202.

§ 368 (Ky.) A statement, to be admissible as res gestæ, need not have been made in accused's presence, but only contemporaneously with or immediately after the exciting cause, and while the party was under the excitement.—*Rogers v. Commonwealth*, 171 S. W. 464.

#### (C) Other Offenses, and Character of Accused.

§ 369 (Tex.Cr.App.) Evidence obtained from accused in developing the homicide with which he was charged was not objectionable because it also showed a conspiracy to violate the neutrality laws.—*Serrato v. State*, 171 S. W. 1133.

§ 371 (Tex.Cr.App.) When extraneous crimes tend to show intent, or tend to connect accused with the offense, they are admissible.—*Serrato v. State*, 171 S. W. 1133.

#### (D) Materiality and Competency in General.

§ 396 (Tex.Cr.App.) An ex parte written statement made by a witness for defendant to the city attorney was properly admitted on rebuttal, over defendant's objection that it was hearsay, where defendant had previously elicited testimony as to the contents of a portion thereof.—*Watts v. State*, 171 S. W. 202.

**(E) Best and Secondary and Demonstrative Evidence.**

§ 400 (Tex.Cr.App.) The complaint and warrant on which accused was arrested for seduction or certified copies *held* the best evidence thereof.—*Baskins v. State*, 171 S. W. 723.

That a complaint was prepared by the district attorney, delivered to a justice, and accused arrested for seduction on a warrant, *held* provable by parol, in a subsequent prosecution for abandonment, to show pendency of prosecution when accused married complainant.—*Id.*

§ 400 (Tex.Cr.App.) Testimony of one of the company alleged to have been the original owner of stolen goods that it was a corporation was admissible as a fact that the witness personally knew.—*Zweig v. State*, 171 S. W. 747.

§ 404 (Tex.Cr.App.) Where, on a trial for carrying intoxicating liquor into prohibition territory, there was evidence that a valise containing whisky was the property of accused and that he had transported the same into the territory from a point in the state, the action of the court in allowing the district attorney to open the valise in the presence of the jury, and introduce it and the whisky contained therein in evidence, was proper.—*Johnson v. State*, 171 S. W. 211.

**(F) Admissions, Declarations, and Hearsay.**

§ 406 (Tex.Cr.App.) Defendant's reply to an inquiry as to why he had killed the deceased girl, to the effect that in Mexico they were killing lots of them—why could not he kill one, *held* an admission that he killed the girl, and admissible to prove that fact.—*Guerrero v. State*, 171 S. W. 731.

**(G) Acts and Declarations of Conspirators and Codefendants.**

§ 422 (Tex.Cr.App.) Statements and acts of conspirators during the pendency of the conspiracy to convert property to their own use *held* admissible against another conspirator, even though made in his absence.—*Zweig v. State*, 171 S. W. 747.

§ 422 (Tex.Cr.App.) Where a company, organized to invade Mexico, incidentally killed decedent, and the conspiracy lasted until the company were incarcerated, evidence of their words and acts after decedent's death was admissible.—*Serrato v. State*, 171 S. W. 1133.

Acts and statements of conspirators pending the conspiracy are admissible against a conspirator on trial though said and done in his absence.—*Id.*

§ 422 (Tex.Cr.App.) Where a conspiracy is shown, the acts of each of the conspirators are admissible against any one on trial.—*Vasquez v. State*, 171 S. W. 1160.

§ 423 (Tex.Cr.App.) Evidence of acts and declarations of a conspirator in furtherance of the common design is admissible against another conspirator including anything that is within the contemplation of the conspiracy.—*Serrato v. State*, 171 S. W. 1133.

§ 427 (Tex.Cr.App.) Proof of a plot must precede proof of declarations by conspirators.—*Serrato v. State*, 171 S. W. 1133.

**(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.**

§ 432 (Tex.Cr.App.) In prosecution for homicide committed as an incident to a conspiracy to illegally organize in Texas a company to invade Mexico, the state was properly allowed to introduce a newspaper which accused testified contained articles which induced him to join in the conspiracy.—*Gonzales v. State*, 171 S. W. 1149.

§ 440 (Tex.Cr.App.) Where accused claimed that he married a third time under the mistaken belief that his second wife had procured a di-

vorce, a copy of a decree divorcing him from his first wife, introduced to show that he did not exercise due care, need not be filed for three days and notice given.—*Coy v. State*, 171 S. W. 221.

**(I) Opinion Evidence.**

§ 479 (Tex.Cr.App.) Medical experts may testify that, from their examination of prosecuting witness, the weapon used was calculated to produce serious bodily injury, though they did not see it.—*Nesbitt v. State*, 171 S. W. 1126.

**(J) Testimony of Accomplices and Codefendants.**

§ 508 (Tex.Cr.App.) A person charged, in a separate indictment, with the same offense as defendant, and convicted thereof, was incompetent to testify on defendant's behalf, though sentence had been suspended and not pronounced against him.—*Watts v. State*, 171 S. W. 202.

**(K) Confessions.**

§ 517 (Tex.Cr.App.) Evidence that the conspirators first arrested told the officers where the others could be found, and that they were found there, *held* not objectionable as a confession made after arrest.—*Martinez v. State*, 171 S. W. 1153.

§ 519 (Tex.Cr.App.) Where accused escaped from a sheriff's posse, and was detected the next day by a ranchman, conversation between accused and the ranchman *held* admissible.—*Serrato v. State*, 171 S. W. 1133.

**XI. TIME OF TRIAL AND CONTINUANCE.**

§ 603 (Tex.Cr.App.) An application for a continuance for absence of a witness must, under Code Cr. Proc. 1911, art. 608, show not only the materiality of the testimony, but the diligence used to secure the attendance of the witness and explain why process was not applied for, in case none was issued.—*Lewis v. State*, 171 S. W. 217.

§ 603 (Tex.Cr.App.) An application for continuance for absent witness, based on information and belief, and not stating and verifying the source of information, is insufficient.—*Byars v. State*, 171 S. W. 1132.

A motion for a continuance for absent witness *held* not to show diligence, where there was no further process issued after a return not found.—*Id.*

§ 614 (Tex.Cr.App.) Causing subpoena to issue is not a showing of diligence entitling defendant to a second continuance for absent witness; but it must be shown that the process was served and returned.—*Swilley v. State*, 171 S. W. 734.

It cannot avail defendant as diligence, as regards his right to a second continuance for absence of a witness, that a person was served with process issued by the state for such witness, if he was not such witness.—*Id.*

As regards right of defendant to a second continuance for absence of a witness, there must be an affirmative showing that he was not absent with defendant's consent.—*Id.*

Regarding a second continuance for absence of a witness, who testified at preliminary hearings, the court could conclude one served as he, if he was absent with consent of defendant's counsel, who told him he need not attend, if, as he claimed, he was not such witness.—*Id.*

**XII. TRIAL.****(B) Course and Conduct of Trial in General.**

§ 656 (Tex.Cr.App.) In a prosecution for murder, questions by the court to a witness to determine the admissibility of *res gestae* statements as to who did the killing *held* not misleading, or calculated to impress the jury

that the court thought deceased saw the assailant.—*Shamblin v. State*, 171 S. W. 718.

**(C) Reception of Evidence.**

§ 673 (Ky.) In a prosecution for homicide, where evidence was admitted which showed ill feeling on the part of accused toward deceased, but did not show independent crimes, the court need not at the time of its introduction charge the jury that it was competent only on the question of motive.—*Childers v. Commonwealth*, 171 S. W. 149.

§ 683 (Tex.Cr.App.) In view of Pen. Code 1911, arts. 39, 40, and of defendant's evidence, held, that the state was properly permitted to prove in rebuttal various acts which tended to disprove defendant's insanity, where the effect of such evidence was expressly limited by an instruction that it should be considered only on the issue whether defendant was insane at the time of the killing.—*Witty v. State*, 171 S. W. 229.

§ 684 (Ky.) The court may in its discretion allow the introduction in rebuttal of evidence which should have been introduced in chief.—*Childers v. Commonwealth*, 171 S. W. 149.

**(E) Arguments and Conduct of Counsel.**

§ 699 (Tex.Cr.App.) That the defense had put two character witnesses on the stand before offering to make an opening statement does not defeat his right to make such statement under Code Cr. Proc. 1911, art. 717.—*House v. State*, 171 S. W. 206.

§ 711 (Ky.) It is within the discretion of the trial court to determine what is a reasonable time for argument.—*Childers v. Commonwealth*, 171 S. W. 149.

A reasonable time should be allowed for argument, and it is improper, where a large number of witnesses were examined and much conflicting evidence heard, to restrict the parties to an hour a side.—*Id.*

§ 719 (Ky.) It is highly improper for attorneys for the state to call the attention of the jury to material evidence that the court excluded.—*Childers v. Commonwealth*, 171 S. W. 149.

§ 719 (Tex.Cr.App.) A statement of the district attorney to the jury that defendant had committed a crime in Mexico held reversible error, where there was no such evidence in the record.—*Gusman v. State*, 171 S. W. 770.

§ 721 (Tex.Cr.App.) In a prosecution for murder, remarks of district attorney held not objectionable as a reference to defendant's failure to testify.—*Guerrero v. State*, 171 S. W. 731.

§ 722 (Tex.Cr.App.) Statement of the district attorney in argument that accused was a member of a faction in Mexico, whose principles were murder, rapine, and plunder, held proper.—*Gonzales v. State*, 171 S. W. 1149.

§ 726 (Ky.) Questionable remarks in argument of the commonwealth's attorney, objections to which were overruled, appearing to have been in reply to questionable argument of defendant's attorney, held not reversible.—*Rogers v. Commonwealth*, 171 S. W. 464.

§ 728 (Tex.Cr.App.) Where no objection was made to questions asked by the county attorney, the court did not err in refusing a special charge that the jury should not consider the questions as any evidence of defendant's guilt.—*Swafford v. State*, 171 S. W. 225.

**(F) Province of Court and Jury in General.**

§ 731 (Mo.App.) It is not error to charge on a trial for slander that the jury are the judges of the law and fact and not bound to find as the judge directs.—*State v. Westbrook*, 171 S. W. 616.

§§ 763, 764 (Ark.) An instruction held not on the weight of the testimony.—*Kennedy v. State*, 171 S. W. 878.

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

§ 769 (Tex.Cr.App.) In a misdemeanor case, the court need not charge the jury.—*Goode v. State*, 171 S. W. 714.

§ 772 (Tex.Cr.App.) Failure to submit the theory of accused, supported by evidence contradicting that of the state, held reversible error.—*Vasquez v. State*, 171 S. W. 1160.

§ 778 (Tex.Cr.App.) A charge, which cast on one accused of bigamy the burden of proving that he contracted a subsequent marriage under a mistake of fact "beyond a reasonable doubt," is erroneous.—*Coy v. State*, 171 S. W. 221.

§ 780 (Ark.) An instruction on testimony corroborating the testimony of an accomplice held not erroneous, as defining the quality of such testimony necessary to a conviction.—*Kennedy v. State*, 171 S. W. 878.

Accused is entitled on request to an instruction on accomplice's testimony in the language of Kirby's Dig. § 2384.—*Id.*

§ 784 (Tex.Cr.App.) Where there was evidence that accused admitted killing deceased, a charge on circumstantial evidence was not required.—*Cook v. State*, 171 S. W. 227.

§ 784 (Tex.Cr.App.) Where defendant admitted to a witness that he had killed the deceased, the court did not err in refusing a charge on circumstantial evidence.—*Guerrero v. State*, 171 S. W. 731.

§ 800 (Tex.Cr.App.) In a prosecution for murder committed as an incident to a conspiracy, the court did not err in omitting to define conspiracy.—*Serrato v. State*, 171 S. W. 1133.

§ 800 (Tex.Cr.App.) Where the evidence conclusively showed a conspiracy between accused and third persons, the court need not define "conspiracy."—*Vasquez v. State*, 171 S. W. 1160.

§ 804 (Tex.Cr.App.) While in misdemeanor cases the court need not charge the jury, yet, if he does so, the charge should be submitted to counsel for inspection.—*Goode v. State*, 171 S. W. 714.

§ 805 (Tex.Cr.App.) A charge must be given in several paragraphs, and in determining its sufficiency it must be construed as a whole and not by isolated extracts.—*Hicks v. State*, 171 S. W. 755.

§ 811 (Mo.App.) An instruction held erroneous as singling out testimony of a witness and commenting thereon.—*State v. Westbrook*, 171 S. W. 616.

§ 814 (Mo.App.) On a trial for slander, an instruction held erroneous because not supported by evidence.—*State v. Westbrook*, 171 S. W. 616.

§ 814 (Tex.Cr.App.) Where the information alleged that defendant charged current money of the United States for medical services, an instruction, authorizing a conviction if he charged money of any sort, held not within the issues.—*Collins v. State*, 171 S. W. 729.

§ 814 (Tex.Cr.App.) The court properly refused to charge on conspiracy to specifically kill decedent, where the state only claimed that decedent was killed as incidental to a conspiracy to commit a different crime.—*Serrato v. State*, 171 S. W. 1133.

§ 815 (Tex.Cr.App.) In a prosecution for unlawfully carrying a pistol, evidence for defendant held to present a defensive issue, the refusal to submit which was error.—*Ranola v. State*, 171 S. W. 1123.

§ 822 (Tex.Cr.App.) A charge should be considered as a whole.—*Witty v. State*, 171 S. W. 229.

§ 822 (Tex.Cr.App.) In determining the sufficiency of a charge, it must be construed as a whole and not by isolated extracts.—Hicks v. State, 171 S. W. 755.

§ 823 (Ark.) Where the court gave full instructions as to innocence and reasonable doubt, defendant was not prejudiced by a refusal to instruct that an indictment raised no presumption of guilt, and in modifying an instruction requested on reasonable doubt.—Mobbs v. State, 171 S. W. 89.

§ 823 (Mo.App.) In a prosecution for unlawfully issuing a prescription for whisky, error in an instruction, which was misleading as not requiring a finding that defendant intended the whisky to be used for other than medicinal purposes, *held* cured by another instruction requiring such finding.—State v. Steel, 171 S. W. 10.

§ 823 (Tex.Cr.App.) In a prosecution for homicide, error in an instruction on manslaughter, which limited the provocation to the acts at the time of the killing, *held* to have been cured by other instructions, that the jury consider all the facts and circumstances in regard to the adequacy of the provocation.—House v. State, 171 S. W. 206.

§ 823 (Tex.Cr.App.) Instructions defining murder in the second degree, and its elements, were not erroneous because they ignored the issue of insanity, where such issue was fully and correctly presented in other instructions.—Witty v. State, 171 S. W. 229.

§ 823 (Tex.Cr.App.) An instruction submitting murder in the second degree but not excepting both self-defense and manslaughter, which are specifically submitted in other parts of the charge, is not reversible error.—Hicks v. State, 171 S. W. 755.

#### (H) Requests for Instructions.

§ 824 (Tex.Cr.App.) Failure of the court to limit the effect of evidence, admissible only for impeachment purposes, was not error, in the absence of a request for such an instruction.—Watts v. State, 171 S. W. 202.

§ 825 (Tex.Cr.App.) In view of the instructions requested and secured by defendant, *held*, that the court's failure to instruct on manslaughter without a request was not error.—Witty v. State, 171 S. W. 229.

§ 826 (Tex.Cr.App.) A requested instruction should be called to the court's attention before he reads his charge to the jury.—Watts v. State, 171 S. W. 202.

§ 829 (Mo.) On trial for taking girl under 18 from her father for purpose of prostitution, instruction to find accused not guilty unless she so took the girl away *held* to cover sufficiently defensive matter involved in requested instruction to find her not guilty, if the girl went to accused's disorderly house with another girl.—State v. Corrigan, 171 S. W. 51.

§ 829 (Tex.Cr.App.) The refusal of requested charges covered by those given is not error.—Speer v. State, 171 S. W. 201; Goode v. Same, Id. 714; Merkel v. Same, Id. 738; Zweig v. Same, Id. 747.

§ 829 (Tex.Cr.App.) It is not error to refuse requests to charge substantially covered by instructions given.—Cook v. State, 171 S. W. 227; Longmire v. Same, Id. 1165.

§ 829 (Tex.Cr.App.) The court having charged on presumption of innocence and reasonable doubt and presented accused's defense affirmatively, the charge was not objectionable because not charging that if the elements of the offense were not proven to acquit.—Serrato v. State, 171 S. W. 1133.

#### (J) Custody, Conduct, and Deliberations of Jury.

§ 854 (Tex.Cr.App.) One juror's tardiness of thirty seconds to a minute and a half, during

which time it was impossible for him to have met any person, *held* not a "separation" of the jury.—Guerrero v. State, 171 S. W. 731.

§ 857 (Tex.Cr.App.) The failure of accused to take the stand as a witness should not be considered against him or alluded to by the jury in their deliberations.—Witty v. State, 171 S. W. 229.

§ 858 (Tex.Cr.App.) Code Cr. Proc. 1911, art. 751, allowing the jury to take all the original papers in the case, *held* permissive only and the refusal to permit letters offered by defendant to be taken by the jury was not reversible error.—Hicks v. State, 171 S. W. 755.

§ 866 (Tex.Cr.App.) On finding the defendant guilty of any degree of murder, it is improper for the jury, in fixing the penalty, to decide the same by lot.—Witty v. State, 171 S. W. 229.

§ 866 (Tex.Cr.App.) A quotient verdict amounting to a sentence for 19 years and some months, which the jurors agreed to reduce by making it 19 years even, was valid.—Hicks v. State, 171 S. W. 755.

#### (K) Verdict.

§ 885 (Tex.Cr.App.) Where no application for suspended sentence was made by accused, the jury has no right to recommend such suspension.—Speer v. State, 171 S. W. 201.

§ 887 (Tex.Cr.App.) The jurors are bound by the trial court's instructions.—Witty v. State, 171 S. W. 229.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 918 (Tex.Cr.App.) An objection that defendant, a negro, was discriminated against, in violation of U. S. Const. Amendments 14 and 15, in that the jury commission did not draw a negro on the petit jury, came too late when first made after conviction.—Watts v. State, 171 S. W. 202.

§ 922 (Tex.Cr.App.) Under Acts 33d Leg. c. 138, objections to the charge cannot for the first time be made on motion for new trial.—Lewis v. State, 171 S. W. 217.

§ 942 (Tex.Cr.App.) A new trial will not be granted for newly discovered evidence going merely to the impeachment of a witness.—Merkel v. State, 171 S. W. 738.

§ 949 (Tex.Cr.App.) A motion for a new trial, not sworn to by appellant or any one else, or if sworn to before appellant's attorney, *held* insufficient.—Hicks v. State, 171 S. W. 755.

§ 956 (Tex.Cr.App.) Under article 837, Code Cr. Proc. 1911, and in view of article 26, *held*, that it is necessary on a motion for new trial attacking the verdict on matters extrinsic the record that defendant support the motion by affidavit.—Hicks v. State, 171 S. W. 755.

### XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 981 (Ark.) Kirby's Dig. § 4003, providing for insanity inquests by the probate court, was enacted solely to protect the civil and property rights of insane persons, and has no reference to determining the question of the sanity of one who has been convicted and sentenced to be executed for a criminal offense.—Ferguson v. Martineau, 171 S. W. 472.

Acts 1913, p. 172, providing that when a judgment of death is pronounced on any person such person shall be conveyed to the state penitentiary and there kept until executed, does not by implication repeal Kirby's Dig. § 2454, authorizing the sheriff to hold an inquest into the sanity of the person sentenced to be executed.—Id.

## KV. APPEAL AND ERROR, AND CERTIORARI.

### (A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1023 (Ky.) Under Cr. Code Prac. § 281, irregularities in the manner of obtaining or selecting the panel are not available on appeal.—Childers v. Commonwealth, 171 S. W. 149.

### (B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1032 (Ky.) Sufficiency of an indictment cannot be reviewed when raised for the first time on appeal.—Cheek v. Commonwealth, 171 S. W. 998.

§ 1038 (Tex.Cr.App.) Under Acts 33d Leg. c. 138, the refusal of requested charges will not be considered, where no objection was filed to the charge when it was presented to counsel for inspection.—Speer v. State, 171 S. W. 201.

§ 1038 (Tex.Cr.App.) Objection to a charge made for the first time in the motion for a new trial cannot be reviewed.—Martinez v. State, 171 S. W. 1153.

§ 1055 (Tex.Cr.App.) Misconduct of the attorney in argument cannot be considered, where no exception was taken or request for instruction or venire de novo made, though the misconduct was such as could not be cured by instruction.—Johnson v. State, 171 S. W. 1128.

§ 1056 (Tex.Cr.App.) Where defendant first complained of a charge in his motion for a new trial, the Court of Criminal Appeals, under Code Cr. Proc. 1911, art. 743, could not reverse the conviction unless the error was prejudicial.—Hicks v. State, 171 S. W. 755.

§ 1064 (Ky.) Though exception to instructions is not required for review, it is necessary that accused make alleged errors therein grounds for new trial.—Cheek v. Commonwealth, 171 S. W. 998.

### (C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1083 (Tex.Cr.App.) A recognizance in open court after conviction did not oust the jurisdiction of the county court to determine a motion for a new trial, as a notice of appeal was requisite to attach the jurisdiction of the Court of Criminal Appeals.—Collins v. State, 171 S. W. 729.

### (D) Record and Proceedings Not in Record.

§ 1091 (Tex.Cr.App.) A bill of exceptions to evidence is too general where it includes a number of statements, some of which are admissible, and there is nothing pointing out specifically the supposed objectionable parts.—Zweig v. State, 171 S. W. 747.

§ 1092 (Tex.Cr.App.) Where bills of exception were filed after the 20 days authorized by the statute in a county court case, the matters therein will not be reviewed.—Renteria v. State, 171 S. W. 712.

§ 1092 (Tex.Cr.App.) A bill of exceptions, to authorize the Court of Criminal Appeals to querr, it, should be filed during term time.—Guerrero v. State, 171 S. W. 731.

§ 1092 (Tex.Cr.App.) Where a bill of exceptions was filed long after the adjournment of the court, evidence, even if contained in the bill, could not be considered.—Merkel v. State, 171 S. W. 738.

§ 1092 (Tex.Cr.App.) Under Acts 32d Leg. c. 119, § 7 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2078), where the only order in the record granted defendant 30 days after adjournment, a bystanders' bill filed 38 days thereafter will not be considered.—Hicks v. State, 171 S. W. 755.

§ 1099 (Tex.Cr.App.) A statement of facts, not filed until four months after the adjournment of the term of court at which defendant

was convicted, could not be considered on appeal.—Romano v. State, 171 S. W. 201.

An assignment of error, complaining of the refusal of a requested instruction, could not be considered on appeal, where no statement of facts was filed in time.—Id.

§ 1099 (Tex.Cr.App.) Where accused, through no fault of his, has been unable to file a statement of facts until after the 90 days allowed, the judgment should be reversed.—Wertheimer v. State, 171 S. W. 224.

An order of the trial court that the statement of facts, filed in a criminal case on September 26th, be filed as of July 27th, being unauthorized, the clerk properly refused to obey such order.—Id.

§ 1099 (Tex.Cr.App.) Where the statement of facts was filed after the 20 days authorized by the statute in a county court case, the matters therein will not be reviewed.—Renteria v. State, 171 S. W. 712.

§ 1119 (Tex.Cr.App.) To have the overruling of an application for a severance reviewed, the bill of exceptions must state matters which would show the error in the ruling of the court.—Zweig v. State, 171 S. W. 747.

§ 1122 (Tex.Cr.App.) Where a prosecution was tried after Act April 5, 1913 (Acts 33d Leg. c. 138), took effect, objections to a charge not shown to have been made before the argument cannot be reviewed.—Gonzales v. State, 171 S. W. 1149.

### (G) Review.

§ 1134 (Tex.Cr.App.) On appeal from a conviction of unlawfully carrying a pistol on the street, defenses not supported by any evidence will not be considered.—Alexander v. State, 171 S. W. 224.

§ 1137 (Ark.) Where the court charged on accomplice testimony, as requested by counsel for accused, accused could not complain because instructions were not in accordance with Kirby's Dig. § 2384.—Kennedy v. State, 171 S. W. 878.

§ 1137 (Ark.) Where evidence as to a memorandum attached to a note was given by a witness in response to a question asked by defendant's attorney, error in permitting it to stand, if any, was invited.—Cunningham v. State, 171 S. W. 885.

§ 1137 (Tex.Cr.App.) In a prosecution for homicide, where a witness testified to an admission by defendant, defendant, who on cross-examination elicited the witness' question, "For God's sake what have you done?" could not complain of its admission, if harmful.—Guerrero v. State, 171 S. W. 731.

§ 1153 (Ky.) Unless an abuse is shown, the act of the trial court in allowing the introduction in rebuttal of evidence which should have been introduced in chief will not be reviewed.—Childers v. Commonwealth, 171 S. W. 149.

§ 1154 (Ky.) The discretion of the trial court as to time for argument will not be reversed unless abused.—Childers v. Commonwealth, 171 S. W. 149.

§ 1159 (Ky.) A conviction will not be disturbed, though the evidence leave the court on appeal in doubt as to the guilt of accused.—Crews v. Commonwealth, 171 S. W. 188.

§ 1159 (Tex.Cr.App.) The weight of evidence and the credibility of the witnesses is for the jury and not for the appellate court.—Watts v. State, 171 S. W. 202.

§ 1159 (Tex.Cr.App.) In reviewing the sufficiency of the evidence to sustain the verdict, it is not necessary to consider evidence which might tend to weaken the state's evidence, or the conclusions from it.—Shamblin v. State, 171 S. W. 718.

§ 1163 (Tex.Cr.App.) Where no error in the charge was pointed out, an assignment of error in a misdemeanor case, complaining of a

failure to submit the charge to counsel before it was given, cannot be considered.—Goode v. State, 171 S. W. 714.

§ 1166½ (Ark.) Error in examining a juror for actual bias, where he was conclusively presumed incompetent for "implied bias" *held* reversible error, where defendant had exhausted his peremptory challenges before completion of the jury.—Holman v. State, 171 S. W. 107.

§ 1166½ (Tex.Cr.App.) That on one occasion the sheriff did not take the handcuffs off caused until the jury were being brought in, without showing that the jury saw him take the handcuffs off, *held* not reversible error.—Guerrero v. State, 171 S. W. 731.

§ 1166½ (Tex.Cr.App.) In a prosecution of an alleged conspirator for killing deceased, accused was not prejudiced by the bringing into court during his trial of his alleged co-conspirators manacled.—Martinez v. State, 171 S. W. 1153.

§ 1169 (Ky.) Any error in admission of opinion of a physician from examination of deceased's bullet wound, as to relative position of the parties when the shot was fired, was cured by exclusion thereof before submission of the case to the jury.—Rogers v. Commonwealth, 171 S. W. 464.

§ 1169 (Tex.Cr.App.) Admission of testimony disclosing defendant's former conviction *held* cured, where the court instructed that such testimony should not be considered for any purpose.—Witty v. State, 171 S. W. 229.

§ 1169 (Tex.Cr.App.) Where an indictment did not properly charge previous convictions so as to warrant additional punishment under Penal Code, art. 1618, error in admitting records of such prior convictions *held* prejudicial.—Collins v. State, 171 S. W. 729.

§ 1169 (Tex.Cr.App.) Defendant *held* not prejudiced by admission in evidence of the hat worn by decedent, the rope with which his hands were tied, and a belt by which a load was fastened to his shoulders while in custody of the conspirators.—Martinez v. State, 171 S. W. 1153.

§ 1170½ (Mo.) On trial for taking girl under 18 away from her father for purpose of prostitution, cross-examination of accused as to running another house of prostitution *held* harmless, where girl testified accused told her she was running such house.—State v. Corrigan, 171 S. W. 51.

§ 1170½ (Tex.Cr.App.) In a prosecution for cattle theft, defendant *held* not prejudiced by a question calling for an explanation of defendant's association with a codefendant, who, he proved, had to his knowledge a bad reputation.—Swafford v. State, 171 S. W. 225.

§ 1171 (Tex.Cr.App.) Argument of the district attorney that the state had proved the case and that he had other witnesses who would have given the same testimony, if necessary, *held* harmless, where it was undisputed that defendant killed deceased.—Hicks v. State, 171 S. W. 755.

§ 1172 (Tex.Cr.App.) Where accused was a principal if guilty at all, he was not prejudiced by an instruction defining principals with a proviso that the offense must have been committed during the existence and in the execution of a common design.—Serrato v. State, 171 S. W. 1133.

§ 1173 (Mo.) On trial for taking girl under 18 away from her father for purpose of prostitution, failure to define "taking away" *held* harmless, as instruction such as might have been given would have hurt accused's case with the jury.—State v. Corrigan, 171 S. W. 51.

§ 1173 (Tex.Cr.App.) Accused was not prejudiced by the court's refusal to charge that

the burden of proof is on the state throughout the trial and never shifts to defendant.—Gonzales v. State, 171 S. W. 1149.

§ 1175 (Tex.Cr.App.) Any inconsistency of finding implied in imposing a fine on C. as an absent witness, and a finding on the motion for new trial, that the person summoned as C. was not he, cannot be complained of by defendant.—Swilley v. State, 171 S. W. 734.

## XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1208 (Ky.) Under the Parole Act of 1910 and the former Parole Laws of 1888 and 1900, a person sentenced to imprisonment for life prior to 1900 may, after serving five years, be paroled in the discretion of the Board of Prison Commissioners, but is not entitled to a parole as a matter of right.—Gray v. Board of Prison Com'rs of Kentucky, 171 S. W. 181.

§ 1208 (Ky.) Under Parole Act of 1910, person imprisoned under indeterminate sentence of from two to ten years *held* not entitled to parole after two years, less commutation for good behavior provided for by Ky. St. 1909, § 3801.—Rogers v. Board of Prison Com'rs of Kentucky, 171 S. W. 181.

## CROPS.

§ 5 (Mo.App.) A deed without reservation conveys the vendor's entire interest in the lands, including his interest in the crops to be raised by a tenant.—Tillman v. Bungenstock, 171 S. W. 938.

## CROSS-EXAMINATION.

See Witnesses, §§ 268-277.

## CRUELTY.

See Divorce, § 27.

## CUSTODY.

See Criminal Law, §§ 854-866; Divorce, §§ 323, 324; Guardian and Ward, § 44; Habeas Corpus, § 112; Trial, § 317.

## CUSTOMS AND USAGES.

See Insurance, § 818; Sales, § 416.

§ 17 (Tex.Civ.App.) Where a contract of sale provided that no conditions, except those mentioned therein, should be claimed, evidence that it was customary for a buyer to give directions *held* inadmissible.—Rhome Milling Co. v. Cunningham, 171 S. W. 1081.

## DAMAGES.

See Appeal and Error, § 1140; Carriers, §§ 105, 187, 277, 319, 382; Commerce, § 8; Death, §§ 95, 99; Eminent Domain, §§ 124-150, 222, 303; Forcible Entry and Detainer, § 29; Insurance, § 668; Nuisance, § 50; Physicians and Surgeons, § 18; Sales, §§ 377, 384, 398, 418, 442; Sheriffs and Constables, § 130; Telegraphs and Telephones, §§ 27-74; Trial, §§ 194, 203, 244; Trover and Conversion, §§ 44-53; Vendor and Purchaser, § 208; Waste, § 18; Waters and Water Courses, §§ 158½, 178.

## II. NOMINAL DAMAGES.

§ 9 (Mo.App.) An action for breach of contract to purchase a cow, by refusing to receive it, may be maintained for nominal damages, where the vendor has suffered no pecuniary loss.—Roston v. Alexander, 171 S. W. 582.

### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

#### (A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 23 (Ky.) Where an ordinary contract is violated, the damages are limited to such as are within the reasonable contemplation of the parties.—*Dice's Adm'r v. Zweigart's Adm'r*, 171 S. W. 195.

§ 38 (Tex.Civ.App.) A railway mail clerk *held* entitled to damages for diminished earning capacity in other lines of business.—*Gulf, C. & S. F. Ry. Co. v. McKinnell*, 171 S. W. 1091.

§ 39 (Ark.) In an action by an owner and his tenant for damages to a pasture from fire spreading from a right of way, an instruction allowing the jury to take into consideration the rental value of the pasture for the remainder of the season *held* proper.—*Kansas City Southern Ry. Co. v. Wilson*, 171 S. W. 484.

§ 43 (Mo.) Where the evidence in an action for injuries is not sufficient to show a probable necessity for future medical services to replace a dislocated organ, such future services were improperly submitted as an element of damages.—*Sang v. City of St. Louis*, 171 S. W. 347.

Future expenses for medical services may be recovered in an action for personal injury.—*Id.*

### IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 78 (Mo.App.) A contract which stipulates that a sum is agreed on as liquidated damages for a breach provides for liquidated damages.—*Wainscott v. Haley*, 171 S. W. 983.

### V. EXEMPLARY DAMAGES.

§ 87 (Mo.) Punitive damages may be recovered where a proper basis therefor is laid in the petition and proof, although plaintiff recovers only nominal actual damages.—*Keller v. Summers*, 171 S. W. 336.

### VI. MEASURE OF DAMAGES.

#### (A) Injuries to the Person.

§ 95 (Ark.) In an action for injuries, the measure of damages stated.—*St. Louis, I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

#### (B) Injuries to Property.

§ 105 (Tex.Civ.App.) The owner, in an action for loss of his personal clothing and household goods, may testify to their value, the loss to him in money; market value of secondhand goods not being the measure of damages.—*Pecos & N. T. Ry. Co. v. Grundy*, 171 S. W. 318.

#### (C) Breach of Contract.

§ 120 (Ky.) Where an automobile agency contract provided for the present sale of six machines at 20 and 10 per cent. less than catalogue prices which plaintiffs were to sell at the catalogue prices, the fact that the machines were never shipped by reason of defendant's breach of the contract was sufficient to show plaintiffs' damage consisting of the difference between the contract price of the machines and their reasonable market value.—*Studebaker Corporation of America v. Dodds & Runge*, 171 S. W. 167.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 131 (Mo.App.) A verdict for \$1,375 for a severe injury to the sciatic nerve, *held* not excessive.—*Hicks v. Hammond Packing Co.*, 171 S. W. 937.

§ 132 (Ark.) In an action for injuries, consisting of the loss of both legs below the knee, a verdict awarding plaintiff \$35,000 *held* excessive, and should be reduced to \$25,000.—*St. Louis, I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

§ 132 (Ky.) An award of \$5,000 for personal injuries to plaintiff's foot, as well as to his kidneys, etc., *held* not excessive.—*Cumberland Telephone & Telegraph Co. v. Laird*, 171 S. W. 336.

§ 132 (Ky.) Ten thousand dollars is not excessive damages for injuries to a brakeman 28 years of age, resulting in amputation of his leg near the hip where the physical and mental suffering lasted for a long time, and his earning capacity was necessarily decreased, conceding that plaintiff was guilty of contributory negligence.—*Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451.

§ 132 (Ky.) In an action for injuries, a verdict awarding plaintiff \$2,500 *held* not excessive.—*Cincinnati, N. O. & T. P. Ry. Co. v. Dungan*, 171 S. W. 1007.

§ 132 (Mo.App.) An award of \$1,500 damages for injuries to a woman's knee, resulting in permanent weakness and perhaps stiffness, *held* not excessive.—*Brown v. City of St. Joseph*, 171 S. W. 935.

§ 132 (Mo.App.) A verdict for \$2,500 for a personal injury, whereby plaintiff's leg was permanently injured, and its strength and usefulness greatly impaired, will not be disturbed as excessive.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 132 (Mo.App.) A verdict of \$6,500 to a woman passenger, two of whose ribs were broken, who received injuries to her back, head, and neck and a severe shock, and whose heart was affected and her general health greatly and probably permanently impaired, *held* not excessive.—*Tierney v. United Rys. Co. of St. Louis*, 171 S. W. 979.

§ 132 (Tex.Civ.App.) In an action for injuries to an employe, a verdict allowing him \$8,500, from which he remitted \$412, *held* not so excessive as to indicate passion and prejudice.—*Kirby Lumber Co. v. Hamilton*, 171 S. W. 546.

§ 134 (Ky.) A verdict for \$6,500 damages *held* not excessive.—*National Cash Register Co. v. Williams*, 171 S. W. 162.

§ 139 (Tex.Civ.App.) That verdict for damages to cattle was for greater amount than damages estimated by one of plaintiff's witnesses *held* not conclusive that it was excessive.—*Texas Midland R. R. v. Becker & Cole*, 171 S. W. 1024.

### VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

#### (A) Pleading.

§ 141 (Mo.App.) Where, in an action for injuries, no punitive damages are claimed, allegations as to the poverty and wealth of the parties are improper.—*Fowler v. Burris*, 171 S. W. 620.

§ 158 (Tex.Civ.App.) Ordinarily personal injuries other than those alleged in the petition cannot be proved.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 159 (Tex.Civ.App.) Alleging and proving physical and mental condition which would necessarily result in loss of earning capacity is sufficient pleading and proof of diminished earning capacity.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 160 (Mo.App.) A recovery for unpaid medical expenses incurred by one suing for a personal injury is not allowed, under an allegation and prayer, for no other expenses than those incurred and paid.—*Hicks v. Hammond Packing Co.*, 171 S. W. 937.

A petition, alleging that plaintiff has and will be compelled to expend large sums for medicine and medical attention, justifies a recovery for unpaid medical expenses incurred.—*Id.*

**(B) Evidence.**

§ 166 (Tex.Civ.App.) Testimony concerning an operation performed on plaintiff is inadmissible in the absence of evidence that it was made necessary by the injuries.—*Gulf, C. & S. F. Ry. Co. v. McKinnell*, 171 S. W. 1091.

§ 168 (Tex.Civ.App.) Plaintiff's testimony held sufficient to authorize the admission of testimony by others that plaintiff limped after an accident.—*Gulf, C. & S. F. Ry. Co. v. McKinnell*, 171 S. W. 1091.

§ 173 (Tex.Civ.App.) The wages received by plaintiff and his ability to fire on an engine, though not expressly pleaded, may be shown in a servant's action for injury while employed about an engine.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 177 (Tex.Civ.App.) Plaintiff's testimony as to what he was earning held inadmissible to show the value of the time lost while he was nursing his injured boy.—*Gulf, T. & W. Ry. Co. v. Dickey*, 171 S. W. 1097.

§ 185 (Ark.) Evidence held not to show a failure by an injured passenger to minimize the damages.—*Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 913.

§ 185 (Tex.Civ.App.) In a personal injury action, evidence held sufficient to sustain an award of \$4,500 damages.—*Missouri, O. & G. Ry. Co. v. Flemmons*, 171 S. W. 259.

**(C) Proceedings for Assessment.**

§ 208 (Mo.) In an action for personal injury, evidence held sufficient to go to the jury on the question whether the displacement of an organ was or was not caused by the accident.—*Sang v. City of St. Louis*, 171 S. W. 347.

In an action for personal injuries, evidence as to the probable necessity for future medical services because of the injury to plaintiff's leg and a rupture held sufficient to go to the jury.—*Id.*

§ 208 (Tex.Civ.App.) Testimony that a passenger who contracted a cold from exposure on defendant's train was directed to consult a throat specialist does not alone raise an issue for the jury as to whether the passenger failed to procure competent medical treatment.—*Missouri, K. & T. Ry. Co. of Texas v. Dellmon*, 171 S. W. 799.

§ 208 (Tex.Civ.App.) Evidence of personal injury, from which it may be inferred from an opinion of a physician that plaintiff could not do active work, justified submission of the matter of future diminished capacity to earn money.—*Prince v. Taylor*, 171 S. W. 826.

§ 210 (Mo.App.) Where a petition for personal injuries alleged specific acts of negligence, although with useless verbiage, an instruction following the language of the petition is not erroneous as allowing recovery for general negligence which was not claimed by the petition.—*Hufft v. Dougherty*, 171 S. W. 17.

§ 214 (Ark.) Instructions requested by the carrier as to the passenger's duty to minimize the damages held properly refused.—*Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 913.

§ 216 (Mo.App.) An instruction on the measure of damages in an action for an assault, which employed the term "liable to suffer" in connection with the future consequences of the injury, is not bad.—*Brown v. Barr*, 171 S. W. 4.

§ 216 (Mo.App.) Where the petition, in a personal injury action, pleaded future pain and suffering, and the evidence showed that plaintiff's injuries would be likely to cause such pain and suffering, it was proper to submit that question to the jury.—*Bethel v. City of St. Joseph*, 171 S. W. 42.

§ 221 (Tex.Civ.App.) A verdict finding that \$7,000 would fairly compensate plaintiff for his injuries, that his earning capacity was decreased

by his injuries \$5,000, and that the first amount should be diminished two-fifths on account of his contributory negligence, is sufficiently certain to sustain a judgment.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

An issue submitted to the jury in a personal injury case held to include a consideration of diminished earning capacity in the future.—*Id.*

Where, under issues submitted, the jury find the whole amount of plaintiff's damages from his injury to be \$7,000, and the amount of his damages from diminished earning capacity to be \$5,000, the latter being included in the former, only the \$7,000 can be considered in rendering judgment.—*Id.*

**(D) Computation and Amount, Double and Treble Damages, and Remission.**

§ 226 (Ark.) A jury, in an action for personal injuries, after finding the sum which will afford plaintiff just compensation for his injuries, should reduce that amount to its present value and return the verdict for such reduced amount.—*St. Louis, I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

Where plaintiff lost both legs at a time when he was earning \$65 per month, evidence that he was in line for promotion, and might ultimately receive as much as \$1,680 a year, did not authorize the computation of his loss of earning capacity on the basis of the latter amount.—*Id.*

**DAMS.**

See Waters and Water Courses, § 156.

**DEATH.**

See Abatement and Revival, §§ 54, 72; Appeal and Error, § 302; Carriers, § 321; Commerce, §§ 8, 28; Criminal Law, § 981; Death, § 2; Electricity, § 19; Insurance, § 693; Landlord and Tenant, § 164; Limitation of Actions, § 127; Master and Servant, §§ 265, 281, 284, 286, 289; Railroads, § 398; Trial, § 244.

**I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.**

§ 2 (Tex.Civ.App.) Within Rev. St. 1911, art. 5707, creating presumption of death from absence beyond seas or "elsewhere" does not mean outside the state.—*Supreme Ruling of Fraternal Mystic Circle v. Hoskins*, 171 S. W. 812.

**II. ACTIONS FOR CAUSING DEATH.****(A) Right of Action and Defenses.**

§ 14 (Ky.) Ky. St. § 6, is confined to actions for death caused by torts, and not by reason of breach of contract.—*Dice's Adm'r v. Zweigart's Adm'r*, 171 S. W. 195.

§ 31 (Tenn.) Under the federal Employers' Liability Act, giving to the personal representatives of employes killed while engaged in interstate commerce a right of action, the widow and sole surviving heir of a deceased employe cannot in her own name maintain an action for his death.—*Cincinnati, N. O. & T. P. Ry. Co. v. Bonham*, 171 S. W. 79.

**(D) Pleading and Evidence.**

§ 62 (Ark.) A dying declaration of one run down by a train is not admissible in an action for his death.—*St. Louis, I. M. & S. Ry. Co. v. Enlow*, 171 S. W. 912.

§ 77 (Ark.) In action for death of employe and for pain and suffering, evidence held to support jury finding that he suffered conscious pain.—*St. Louis, I. M. & S. R. Co. v. Craft*, 171 S. W. 1185.

**(E) Damages, Forfeiture, or Fine.**

§ 82 (Ark.) Under the federal Employers' Liability Act, as amended April 5, 1910, there may be a recovery both for the pecuniary loss

to the next of kin and for the suffering endured by an employé prior to his death.—*St. Louis, I. M. & S. R. Co. v. Craft*, 171 S. W. 1185.

§ 95 (Ky.) The damages recoverable under the federal Employers' Liability Act as amended are such as will compensate his surviving relatives for actual pecuniary loss from his death.—*Louisville & N. R. Co. v. Johnson's Adm'r*, 171 S. W. 847.

§ 95 (Mo.App.) The measure of a parent's damages for the death of a minor child is the pecuniary value of the child's services during minority and the expenses incurred by his death, less the cost of his maintenance.—*Kelly v. City of Higginsville*, 171 S. W. 966.

§ 99 (Ark.) In an action for death of a railroad car repairer, a verdict awarding \$3,000 for his estate and \$12,000 for his widow and children held not excessive.—*St. Louis, I. M. & S. Ry. Co. v. Sharp*, 171 S. W. 95.

§ 99 (Ark.) Verdict for \$11,000 for conscious pain and suffering of brakeman struck by car which plinned him to the ground held excessive, and reduced to \$5,000.—*St. Louis, I. M. & S. R. Co. v. Craft*, 171 S. W. 1185.

§ 99 (Mo.App.) An award of \$2,300 for loss of services of a 17 year old boy held excessive.—*Kelly v. City of Higginsville*, 171 S. W. 966.

## DEBTOR AND CREDITOR.

See Bankruptcy; Fraudulent Conveyances; Garnishment.

## DECEDENTS.

See Descent and Distribution; Witnesses, §§ 139, 140.

## DECEIT.

See Fraud.

## DECISION.

See Courts, §§ 90-116.

## DECLARATION.

See Pleading.

## DECLARATIONS.

See Evidence, § 271.

## DEDICATION.

See Evidence, § 474½; Insurance, § 670; Limitation of Actions, § 6.

### I. NATURE AND REQUISITES.

§ 1 (Tex.Civ.App.) Common-law dedications are divided into express and implied dedications, and in both there must be an appropriation of land by the owner to public uses, in the one case by express manifestation of such purpose, and in the other by some act or course of conduct from which the law will imply such an intent.—*City of Kaufman v. French*, 171 S. W. 831.

§ 15 (Tex.Civ.App.) To constitute a dedication, it is essential that the donor intend to set apart and appropriate the land to a public use, and, where such intent is expressed by visible conduct and open acts inducing the belief of an intent to dedicate to a public use and action thereon by the public, the donor cannot assert that he had no intent to dedicate.—*City of Kaufman v. French*, 171 S. W. 831.

The doctrine of presumed dedication held to rest on the principle that a man is presumed to intend the usual and natural consequences of his own acts and declarations; but if the acts and declarations would not lead an ordinarily prudent man to infer an intent to dedicate, or if they forbade an inference of such intent, the donor might show his mistake and avoid the dedication.—Id.

An owner who, at the time of her deeds referring to a plat for description, did not intend to

dedicate the land to a public use, as the grantors knew or might have known, held not to have dedicated it.—Id.

§ 19 (Tex.Civ.App.) A dedication may be established against the owner of land by showing that he has platted it as an addition to a city by a map placed on the public records, and has sold lots by deeds referring to the map for the description, or that he has adopted a map or plat made by another person.—*City of Kaufman v. French*, 171 S. W. 831.

An owner's execution and delivery of deeds calling for and referring to a plat or map of her land made by another person and filed as a public record, in the absence of evidence to rebut the implied dedication, held a dedication of the land to public use.—Id.

§ 20 (Tex.Civ.App.) An owner held not to have dedicated his land for a public road.—*Bryson v. Abney*, 171 S. W. 508.

§ 31 (Tex.Civ.App.) Proof of a city's acceptance of land dedicated by a map or plat and by reference thereto in deeds held not necessary.—*City of Kaufman v. French*, 171 S. W. 831.

§ 35 (Mo.) An offer to dedicate the streets in a subdivision, the plat of which was recorded, held to have been accepted by the municipality's opening of streets in accordance with the plat, and hence a purchaser, whose deed referred to the plat, could not acquire adverse title by inclosing part of the streets.—*City of Caruthersville v. Huffman*, 171 S. W. 323.

§ 41 (Mo.App.) Where an owner built a fence and for more than ten years allowed the public to continuously use ground beyond the fence, it will be presumed that he intended to dedicate it as a road.—*Boonville Special Road Dist. v. Fuser*, 171 S. W. 962.

§ 44 (Tex.Civ.App.) In an action to enjoin a city from the use of land for a public street, evidence held insufficient to sustain a finding that plaintiff had informed grantees from his mother, by deeds referring to a map and plat for description, that the land in controversy was reserved.—*City of Kaufman v. French*, 171 S. W. 831.

### II. OPERATION AND EFFECT.

§ 46 (Mo.) In construing plats dedicating land, the courts must give effect to the plain meaning and intent they exhibit by their outlines as well as their words.—*City of Caruthersville v. Huffman*, 171 S. W. 323.

§ 48 (Mo.) Persons to whom property was conveyed by reference to a plat, which attempted to dedicate the streets to the public, adopt the dedication by accepting the conveyance.—*City of Caruthersville v. Huffman*, 171 S. W. 323.

## DEEDS.

See Acknowledgment, § 36; Appeal and Error, § 1050; Cancellation of Instruments, § 51; Covenants; Crops, § 5; Escrows, § 4; Estoppel, §§ 38, 39; Frauds, Statute of, § 128; Homestead, § 118; Husband and Wife, §§ 119, 279; Infants, § 30; Insane Persons, § 61; Limitation of Actions, § 173; Lost Instruments, § 23; Mortgages; Trial, § 370; Vendor and Purchaser, § 224; Wills, § 88.

### I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 6 (Tex.Civ.App.) Instrument construed and held a present conveyance and not an executory contract to convey.—*Porterfield v. Taylor*, 171 S. W. 793.

#### (E) Validity.

§ 68 (Ark.) To invalidate a deed, a party must be unable to exercise a reasonable judgment regarding the matter involved, and disqualified from intelligently acting upon the business affairs out of which it grew.—*McEvoy v. Tucker*, 171 S. W. 888.

§ 68 (Ky.) The mental incapacity invalidating a deed, stated.—*Wathens v. Skaggs*, 171 S. W. 193.

#### IV. PLEADING AND EVIDENCE.

§ 196 (Tex.Civ.App.) The burden rests on parties seeking to set a deed aside for incapacity of the grantor to show such fact.—*Milner v. Sims*, 171 S. W. 784.

§ 211 (Ark.) Evidence held to show by clear preponderance that grantor was incompetent when deed was executed, notwithstanding chancellor's finding to the contrary.—*McEvoy v. Tucker*, 171 S. W. 888.

§ 211 (Ky.) Evidence held insufficient to show that a deed was induced by threats that the grantor's daughter would be sent to the penitentiary unless it was executed.—*Wathen v. Skaggs*, 171 S. W. 193.

Evidence held not to show mental incapacity of the grantor.—*Id.*

To overcome the presumption that a grantor was possessed of mental capacity to sustain his deed, there must be more than a mere equilibrium of testimony, and the burden is upon the party alleging incapacity.—*Id.*

In an action for the cancellation of a deed, held, that there was no proof of inadequacy of consideration, which, as coupled with the grantor's weakness of mind, would destroy the validity of his deed.—*Id.*

§ 211 (Ky.) In a suit by the children of a deceased grantor to set aside his deed of a home to their stepmother on the ground of undue influence and mental incapacity, evidence, held not to sustain a decree for plaintiffs.—*Sellers v. Sellers*, 171 S. W. 449.

§ 211 (Tex.Civ.App.) Evidence held insufficient to support a finding that a grantor was mentally incompetent when executing a deed.—*Milner v. Sims*, 171 S. W. 784.

#### DEFAMATION.

See Libel and Slander.

#### DEFAULT.

See Judgment, § 101.

#### DELAY.

See Carriers, §§ 104, 105, 183, 223, 228.

#### DELIVERY.

See Corporations, § 98; Escrows; Gifts, § 4.

#### DEMONSTRATIVE EVIDENCE.

See Evidence, § 194.

#### DEMURRER.

See Pleading, §§ 194, 214; Trial, § 156.

#### DEPOSITARIES.

See Escrows.

#### DEPOSITIONS.

See Continuance, §§ 22, 26, 33.

§ 77 (Ark.) Depositions taken in a cause in which a nonsuit is taken before the court convenes held not admissible in another action between same parties on the same cause of action; the depositions being prima facie inadmissible by reason of the omission of a notary to seal, as required by Kirby's Dig. § 3186.—*Missouri & N. A. R. Co. v. Johnson*, 171 S. W. 478.

§ 90 (Mo.App.) Where a witness is within the jurisdiction of the court, his deposition should not be used.—*Dubowsky v. Binggeli*, 171 S. W. 12.

§ 103 (Ark.) Where depositions were taken in a cause in which a nonsuit was taken before the court convened, and the depositions were sought to be used in another action on the same cause of action, Kirby's Dig. § 3191, providing that no exception other than to the competency of witnesses, etc., shall be regarded, unless filed before the commencement of trial, can have no application.—*Missouri & N. A. R. Co. v. Johnson*, 171 S. W. 478.

§ 111 (Ark.) A certificate of a notary to a deposition that by consent the signatures of the witnesses were expressly waived, etc., held not to cover the act of the notary in sending a deposition unsealed to the attorney, who sealed and transmitted it to the clerk, contrary to Kirby's Dig. § 3186, requiring the notary to seal and transmit.—*Missouri & N. A. R. Co. v. Johnson*, 171 S. W. 478.

#### DEPOSITS.

See Banks and Banking, § 148.

#### DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Husband and Wife, § 14; Wills.

#### III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTUTES.

(A) Nature and Establishment of Rights in General.

§ 91 (Mo.) A suit to cancel, for fraud and undue influence, a contract whereby one who had since died intestate exchanged a stock of merchandise for certain lands, cannot be maintained by the heirs, since the personal property vested in the administratrix.—*Toler v. Judd*, 171 S. W. 339.

The refusal of the administratrix to sue to cancel a contract for the exchange of the intestate's stock of merchandise for real property does not entitle the heirs to maintain the suit, joining the administratrix as a defendant therein.—*Id.*

#### DESCRIPTION.

See Boundaries, § 3; Wills, §§ 506, 535.

#### DISCHARGE.

See Mortgages, §§ 298, 376; Principal and Surety, §§ 115-129.

#### DISCOVERED PERIL.

See Carriers, § 280; Master and Servant, §§ 248, 265, 278; Street Railroads, § 103.

#### DISCRETION OF COURT.

See Appeal and Error, §§ 971-981; Continuance, §§ 22, 33; Criminal Law, §§ 684, 711, 1154; Drains, § 14; New Trial, §§ 99, 124; Pleading, § 245; Trial, § 115.

#### DISMISSAL AND NONSUIT.

See Abatement and Revival, § 4; Depositions, §§ 77, 105; Justices of the Peace, §§ 141, 164.

#### II. INVOLUNTARY.

§ 50 (Mo.App.) Where there is a material variance between the note declared on and that filed as an exhibit, while the petition is not demurrable, since the exhibit is not a part thereof, the cause may be dismissed for failure to file the instrument declared on as required by Rev. St. 1909, § 1844.—*First Nat. Bank of Madison v. Stam*, 171 S. W. 567.

§ 75 (Ky.) Where use of name S. by S. Company was enjoined as unfair competition, without determining whether S., from whom it leased space and whose relatives were interested in it, had broken his agreement, on sale of stock in

C. & S., not to engage in the same business, held that dismissal as to him was properly without prejudice.—Crutcher & Starks v. Starks, 171 S. W. 433.

## DISORDERLY HOUSE.

See Intoxicating Liquors, §§ 260, 274; Pleading, § 35.

## DISSOLUTION.

See Corporations, § 603.

## DISTRIBUTION.

See Descent and Distribution.

## DISTRICT AND PROSECUTING ATTORNEYS.

See Jury, § 131.

§ 5 (Tex.Civ.App.) Under Const. art. 5, § 21, and Rev. St. art. 356a, an order of the commissioners' court employing a county attorney for one year at the salary of \$1,200 for services in preparing and issuing road bonds held invalid as an attempt to increase the compensation of the attorney for services he was required by law to perform.—Jones v. Veltmann, 171 S. W. 287.

The commissioners' court has no authority to employ and compensate the county attorney at a yearly salary to defend suits that may be brought against the county, although it may employ him to represent it in a pending suit.—Id.

Where the only services rendered by a county attorney in connection with certain bonds had been paid for, an order of the commissioners' court that he be paid a certain sum for services in connection with those bonds is contrary to Const. art. 3, § 53, prohibiting extra compensation to an officer after the services have been rendered.—Id.

The fact that the legal compensation of a county attorney affords no remuneration for the service required of him does not authorize the commissioners' court to pay him further compensation in violation of law, or the courts to sustain an order for such compensation; but relief must be sought from the Legislature.—Id.

## DISTRICTS.

See Drains; Levees, § 23; Municipal Corporations, § 450; Schools and School Districts, § 37.

## DITCHES.

See Drains.

## DIVORCE.

See Bigamy, § 8; Judgment, § 744.

## II. GROUNDS.

§ 27 (Tex.Civ.App.) Whipping defendant's stepdaughter held not cruel treatment entitling the husband to a divorce.—Murchison v. Murchison, 171 S. W. 790.

## III. DEFENSES.

§ 48 (Tex.Civ.App.) Condonation applies to cruelty, except that the cruelty is condoned only until the particular act is repeated.—Murchison v. Murchison, 171 S. W. 790.

§ 49 (Tex.Civ.App.) Act of a wife in whipping her minor stepdaughter held condoned so as not to constitute ground for divorce.—Murchison v. Murchison, 171 S. W. 790.

## VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 323 (Mo.App.) In the absence of a provision made for the maintenance of minor children, the father continues primarily liable therefor after divorce; and the mother having their cus-

tody may ordinarily recover from him for the maintenance, if he fails to furnish it.—La Rue v. Kempf, 171 S. W. 588.

Where, in connection with divorce proceedings, a settlement is made between the parents, whereby the father makes provision for the support of minor children, which is accepted by the mother as satisfactory, he is no longer liable in an action by her for their support and maintenance furnished by her.—Id.

§ 324 (Mo.App.) In an action by a divorced wife to recover from her former husband for the maintenance of their minor children, whose custody had been awarded to her, the fact that the father had offered to take the children himself and support them held no defense to the action; and her refusal to permit him to take them did not justify his refusal to provide for their maintenance.—La Rue v. Kempf, 171 S. W. 588.

## DOCTORS.

See Physicians and Surgeons.

## DOCUMENTS.

See Criminal Law, §§ 432, 440; Evidence, §§ 333-383.

## DOMICILE.

See Venue, §§ 22, 32.

## DONATIONS.

See Gifts.

## DOWER.

See Homestead, § 117; Limitation of Actions, § 19.

## II. INCHOATE INTEREST.

### (A) Rights and Remedies of Wife.

§ 32 (Ky.) Where a sale under a trust deed executed by a husband alone was made to pay debts, including a debt secured by a mortgage signed by the wife, the amount of the mortgage debt must be deducted from the proceeds in fixing the value of her inchoate right of dower.—Mulligan v. Mulligan, 171 S. W. 420.

Where the debts included tax liens in favor of a city, the amount of the tax liens must be deducted from the proceeds to determine the value of the wife's inchoate right of dower.—Id.

### (B) Bar, Release, or Forfeiture.

§ 43 (Ky.) Ky. St. § 2132, protects the rights of each spouse in the realty of the other and does not affect the right to enforce a lien for taxes conferred by section 3176.—Mulligan v. Mulligan, 171 S. W. 420.

## DRAINS.

See Equity, § 21; Municipal Corporations, §§ 301, 304, 753.

## I. ESTABLISHMENT AND MAINTENANCE.

§ 14 (Ark.) An objection that an appeal was not well taken to the circuit court from an order establishing a drainage district, for want of an affidavit for and an order granting the appeal, held unsustainable.—Jack Bayou Drainage Dist. v. St. Louis, I. M. & S. Ry. Co., 171 S. W. 887.

A drainage district should not be established under Laws 1909, p. 832, § 2, as amended by Laws 1911, p. 195, where petitioners are less than a majority of the landowners in number, acreage, or value, unless the improvement clearly will greatly benefit the land.—Id.

On appeal from a judgment establishing a drainage district, it was within the trial court's discretion, after the matter had been thoroughly developed, to refuse to hear further testimony.—Id.

§ 19 (Ark.) Landowners in a drainage district *held* not entitled to a return of unexpended funds, where there is a future use for them.—*Snowden v. Thompson*, 171 S. W. 919.

§ 20 (Ark.) A complaint in a suit to distribute unexpended funds of a drainage district, which alleges that bonds were issued, and that out of the proceeds there was a surplus after paying the improvement, *held* not to warrant relief.—*Snowden v. Thompson*, 171 S. W. 919.

## DRAMSHOPS.

See Intoxicating Liquors.

## DRUNKARDS.

See Street Railroads, §§ 98, 100; Wills, § 44.

## DUE PROCESS OF LAW.

See Constitutional Law, § 301.

## DYING DECLARATIONS.

See Death, § 62.

## EASEMENTS.

See Dedication; Highways; Waters and Water Courses, § 156.

## I. CREATION, EXISTENCE, AND TERMINATION.

§ 8 (Tex.Civ.App.) Where a use by the public of uninclosed land of a tract, not platted into lots or streets, was permissive only, an easement of a public way by prescription could not be acquired.—*Bryson v. Abney*, 171 S. W. 508.

§ 16 (Mo.) The purchaser of one of two adjoining tracts of land formerly owned by the same person, touching both a street and alley, has no implied easement over the alley merely because before the sale it was used as a way of convenience.—*Jablonsky v. Wussler*, 171 S. W. 641.

## EJECTION.

See Carriers, § 362.

## EJECTION.

See Counties, § 217; Trespass to Try Title.

## III. PLEADING AND EVIDENCE.

§ 76 (Mo.) An amended petition in ejection to recover a fractional quarter of a section correcting a description in the land sued for by changing section 27 to section 28 does not state a new cause of action, but is within Rev. St. 1909, § 1848, authorizing an amendment correcting a mistake in the name of a party or a "mistake in any other respect."—*Broyles v. Eversmeyer*, 171 S. W. 334.

## ELECTION OF REMEDIES.

See Corporations, § 121; Vendor and Purchaser, § 261.

## ELECTIONS.

See Constitutional Law, § 68; Injunction, §§ 80, 85; Intoxicating Liquors, § 39; Municipal Corporations, § 918; Principal and Agent, § 136; Work and Labor, § 4.

## VI. NOMINATIONS AND PRIMARY ELECTIONS.

§ 124 (Mo.) Political parties may fuse by nominating the same candidates.—*State ex rel. Frazier v. Seibel*, 171 S. W. 69.

§ 147 (Mo.) Political parties may fill vacancies on their tickets occurring after primary nominations by ratifying the nomination of a candidate of another party.—*State ex rel. Frazier v. Seibel*, 171 S. W. 69.

## VII. BALLOTS.

§ 172 (Mo.) Rev. St. 1909, § 5848, *held* not to authorize the county clerk to refuse to place the names of Democratic candidates on the ballot as also candidates of the Progressive party in the place of Progressive candidates resigned on the ground that they were not members of the Progressive party.—*State ex rel. Frazier v. Seibel*, 171 S. W. 69.

## X. CONTESTS.

§ 305 (Ky.) Under Ky. St. § 1596a, subsec. 12, the giving of a bond is a condition precedent to the right of appeal in election contests, and unless the bond is duly given the appellant has no standing in court.—*Smith v. Johnson*, 171 S. W. 425.

## XI. VIOLATIONS OF ELECTION LAWS.

§ 328 (Tex.Cr.App.) An indictment for making a false canvass of votes as judge of a city election *held* insufficient because not alleging the names of the voters so falsely canvassed, or, if that could not be done, that their names were unknown.—*Beach v. State*, 171 S. W. 715.

## ELECTRICITY.

§ 14 (Mo.App.) Those who transmit electricity on wires along a city street must exercise the highest degree of care to protect persons rightfully using the streets from injury.—*Kelly v. City of Higginsville*, 171 S. W. 966.

§ 19 (Mo.App.) Question of negligence of city in maintenance of wires *held*, under the evidence, for the jury.—*Kelly v. City of Higginsville*, 171 S. W. 966.

Proof that a pedestrian on a public street was injured by a current of electricity escaping from a wire establishes *prima facie* negligence.—*Id.*

Evidence that a wire from which a current of electricity had escaped had been tested shortly before the accident *held* not to establish the required degree of care on the part of the owner.—*Id.*

Evidence *held* sufficient to take to the jury the question whether plaintiff's son was killed by an electric shock.—*Id.*

Evidence *held* not to show as a matter of law, the boy killed was negligent.—*Id.*

## EMBEZZLEMENT.

See Larceny, §§ 30, 52, 68; Receiving Stolen Goods, § 1.

§ 11 (Ky.) Appropriation by a deputy sheriff of taxes collected is embezzlement.—*Cline v. Commonwealth*, 171 S. W. 412.

§ 28 (Tex.Cr.App.) An indictment charging the theft or embezzlement of a note which merely described the instrument as one vendor's lien note for the payment of \$8,000 and of the value of \$8,000 is sufficient.—*Pye v. State*, 171 S. W. 741.

§ 43 (Tex.Cr.App.) In a prosecution for theft or embezzlement of a note, evidence that when the owner learned defendant had pledged the note he made no objection is admissible to show the owner's consent.—*Pye v. State*, 171 S. W. 741.

§ 47 (Ky.) Evidence, in a prosecution for embezzlement, *held* sufficient to take the case to the jury.—*Cline v. Commonwealth*, 171 S. W. 412.

§ 47 (Tex.Cr.App.) In a prosecution for theft or embezzlement, whether defendant believe he had the owner's permission to use the note for his own benefit *held* for the jury.—*Pye v. State*, 171 S. W. 741.

§ 48 (Ky.) Instructions, in a prosecution for embezzlement of taxes collected, in failing to charge, if he lost the money or it was stolen, he was not guilty, *held* erroneous.—*Cline v. Commonwealth*, 171 S. W. 412.

## EMINENT DOMAIN.

See Appeal and Error, § 1056.

### I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Ky.) In view of Const. § 242, *held*, that a city maintaining a garbage dump, making residence in the vicinity annoying and dangerous, was liable for injury to the property rights of a resident.—*City of Louisville v. Hehemann*, 171 S. W. 165.

§ 6 (Tenn.) "Condemnor" and "appropriator" necessarily include as parts of their meaning one who subjects the lands of another.—*Southern Ry. Co. v. Jennings*, 171 S. W. 82.

### II. COMPENSATION.

(C) Measure and Amount.

§ 124 (Ky.) Under the rule that the owner is entitled to the fair value of the property at the time of the trial, where an appeal is taken to the circuit court and in the meantime the property owner in good faith makes reasonable improvements on the property, he may recover their value.—*Sandy Valley & E. Ry. Co. v. Bentley*, 171 S. W. 178.

§ 145 (Mo.) The measure of damages for taking land for a public road is the value of the land taken and the damage to the tract of which it forms a part, from which must be deducted the benefits peculiar to the tract from the road.—*In re Aiken*, 171 S. W. 342.

§ 147 (Tenn.) Where a railroad company takes possession of land under a deed from the life tenant, the measure of damages recoverable by remaindermen for the company's appropriation of the land is the value of the land at the termination of the life estate rather than at the date of the taking.—*Southern Ry. Co. v. Jennings*, 171 S. W. 82.

§ 150 (Ky.) In proceedings to condemn business property for railroad purposes, *held*, under the evidence that an award of \$43,000 would not be set aside on appeal as excessive.—*Sandy Valley & E. Ry. Co. v. Bentley*, 171 S. W. 178.

### III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 202 (Ky.) Where business property in a town was sought to be condemned for railroad purposes, evidence that practically all the property in the town was owned by a coal company and was not for sale was admissible.—*Sandy Valley & E. Ry. Co. v. Bentley*, 171 S. W. 178.

§ 222 (Ky.) In condemnation proceedings, an instruction to award defendants the fair market value and defining the same as the fair value between one who desires to purchase and one who desires to sell was correct.—*Sandy Valley & E. Ry. Co. v. Bentley*, 171 S. W. 178.

§ 222 (Mo.) An instruction, directing the jury in assessing damages in proceedings for the establishment of a road, *held* not erroneous as permitting double damages.—*In re Aiken*, 171 S. W. 342.

§ 235 (Mo.) Under Rev. St. 1909, §§ 10,438-10,440, an owner not excepting to the report of the commissioners in proceedings for the establishment of a road disallowing damages to him cannot thereafter claim damages for the taking of his land for the road.—*In re Aiken*, 171 S. W. 342.

### IV. REMEDIES OF OWNERS OF PROPERTY.

§ 266 (Tenn.) While the chancery court has no jurisdiction of condemnation proceedings under Shannon's Code, § 1866, it may entertain a bill in equity filed by remaindermen to have the rights declared as against a deed from the life tenant, under which a railroad company

claims and may grant complete relief.—*Chambers v. Chattanooga Union Ry. Co.*, 171 S. W. 84.

§ 288 (Tenn.) Where a railroad company, instead of instituting condemnation proceedings, took a conveyance of land from the life tenant, the one-year period of limitations prescribed by Shannon's Code, § 1866, did not apply to an action brought by a remainderman to recover damages for the appropriation of such land.—*Southern Ry. Co. v. Jennings*, 171 S. W. 82.

§ 303 (Tenn.) The damages recoverable by a remainderman from a railroad company for the appropriation of land under a deed from the life tenant, in which the remainderman joined while an infant, were properly assessed as of the date of the death of the life tenant, where the deed was void as to the remainderman.—*Chambers v. Chattanooga Union Ry. Co.*, 171 S. W. 84.

## EMPLOYERS' LIABILITY ACTS.

See Appeal and Error, §§ 302, 1169, 1175; Commerce, §§ 8, 27; Courts, § 489; Death, §§ 31, 82, 95; Master and Servant, §§ 179, 190, 228, 248, 250½, 256, 284, 286; Trial, § 194.

## EMPLOYÉS.

See Master and Servant.

## ENTIRETIES.

See Homestead, § 142; Husband and Wife, § 14.

## ENTRY, WRIT OF.

See Ejectment.

## EQUITY.

See Appeal and Error, § 847; Cancellation of Instruments; Corporations, §§ 308, 553; Estoppel, § 110; Execution, § 171; Fraudulent Conveyances; Infants, §§ 34, 37; Injunction, § 105; Insane Persons, § 61; Judgment, §§ 427-460; Marshaling Assets and Securities; Partition; Prohibition, § 10; Quietening Title; Set-Off and Counterclaim; Specific Performance; Trusts.

## I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 21 (Ark.) Unexpended funds of a drainage district are trust funds, and equity may distribute them, in the absence of statutory provision therefor.—*Snowden v. Thompson*, 171 S. W. 919.

## ERROR, WRIT OF.

See Appeal and Error.

## ESCROWS.

See Brokers, § 49.

§ 4 (Tex.) A deed delivered by the grantor to his agent with specific instructions as to delivery to the grantee is not in escrow while in the hands of the agent.—*Tyler Building & Loan Ass'n v. Biard & Scales*, 171 S. W. 1122.

## ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Landlord and Tenant; Life Estates; Remainders; Tenancy in Common; Wills.

## ESTOPPEL

See Action, § 27; Appeal and Error, §§ 173, 750; Contracts, § 290; Corporations, §§ 232, 425; Fences, § 27; Homestead, §§ 118, 122;

Husband and Wife, §§ 278, 279; Insurance, §§ 387, 697, 735; Judgment, §§ 540, 701-744; Municipal Corporations, §§ 488, 489; Parties, § 97; Partnership, § 34; Principal and Agent, § 76; Vendor and Purchaser, § 228; Wills, § 481.

## II. BY DEED.

### (B) Estates and Rights Subsequently Acquired.

§ 38 (Mo.App.) Under a general warranty deed conveying no title, or a defective title, a subsequently acquired title inures to the benefit of the grantee in the deed.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

§ 39 (Mo.App.) Where a consent decree involving title to land expressly provides that the title to the lands conveyed to defendant is not warranted, a superior title thereafter acquired by plaintiff and its representative will not inure to the grantee in the decree.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

## III. EQUITABLE ESTOPPEL.

### (E) Pleading, Evidence, Trial, and Review.

§ 110 (Mo.App.) Evidence of an estoppel in pais is not admissible unless the estoppel is specially pleaded.—*Colley v. National Live Stock Ins. Co.*, 171 S. W. 663.

## EVIDENCE.

See Abduction, §§ 9, 11; Appeal and Error, §§ 204, 499, 548, 581, 690, 882, 927, 928, 971, 987-1010, 1027, 1033, 1043, 1047, 1048, 1050-1053, 1056-1058; Assault and Battery, §§ 26, 35; Bankruptcy, § 303; Banks and Banking, § 85; Bigamy, §§ 7, 8; Bills and Notes, §§ 489, 523; Bridges, § 46; Brokers, §§ 84-86; Burglary, § 41; Carriers, §§ 58, 94, 104, 134, 189, 193, 228, 246, 316, 318, 346; Compromise and Settlement, § 23; Continuance, §§ 22, 26; Contracts, § 28; Corporations, §§ 117, 121, 283; Criminal Law, §§ 308-519, 1137, 1153, 1159, 1169; Customs and Usages, § 17; Damages, §§ 166-185; Death, §§ 62, 77; Dedication, §§ 31, 41, 44; Deeds, §§ 196, 211; Depositions; Drains, § 14; Electricity, § 19; Embezzlement, § 43; Eminent Domain, § 202; Estoppel, § 110; Exchange of Property, § 8; Executors and Administrators, § 275; Forcible Entry and Detainer, § 29; Fraud, § 58; Gifts, § 49; Grand Jury, § 36; Guardian and Ward, § 182; Habeas Corpus, § 99; Highways, §§ 161, 184; Homestead, § 57; Homicide, §§ 11, 151-254, 338; Husband and Wife, §§ 40½, 131, 262, 313; Injunction, § 128; Insane Persons, § 26; Insurance, §§ 84, 660, 665, 693, 818, 819; Intoxicating Liquors, §§ 231, 236; Judgment, §§ 741, 951; Landlord and Tenant, § 76; Larceny, §§ 52-58; Lewdness, § 10; Lost Instruments, § 23; Malicious Prosecution, §§ 16, 59; Master and Servant, §§ 265, 268, 270, 277-281; Mines and Minerals, § 97; Mortgages, §§ 38, 292; Municipal Corporations, § 818; Nuisance, § 49; Parent and Child, § 5; Payment, § 70; Physicians and Surgeons, §§ 6, 24; Principal and Agent, §§ 23, 189; Railroads, §§ 397, 398, 441, 443, 482; Rape, § 51; Receiving Stolen Goods, §§ 1, 8; Replevin, §§ 63-71; Sales, §§ 87, 181, 416, 417, 479; Sheriffs and Constables, § 138; Taxation, § 204; Telegraphs and Telephones, § 20; Trespass to Try Title, §§ 38, 41; Trial, §§ 139-145, 250-253; Trover and Conversion, § 34; Trusts, §§ 44, 110; Vendor and Purchaser, §§ 44, 243; Venue, § 32; Waste, § 20; Waters and Water Courses, §§ 152, 179; Wills, §§ 166, 205, 324; Witnesses; Work and Labor, § 27.

Reception of, see Criminal Law, §§ 665-684; Trial, §§ 36-105.

## I. JUDICIAL NOTICE.

§ 13 (Mo.App.) Judicial knowledge cannot be taken that a cow once breach is incurable.—*Boston v. Alexander*, 171 S. W. 582.

§ 20 (Mo.App.) The court can take judicial notice that a letter mailed in Macon City on the fifth of the month should be delivered to the addressee in Bowling Green on the sixth or seventh of the same month.—*German-American Bank v. Cramery*, 171 S. W. 31.

## II. PRESUMPTIONS.

§ 83 (Mo.) Where an administrator with the will annexed was appointed and qualified, there is a presumption that he faithfully discharged the duties of his office.—*Farris v. Burchard*, 171 S. W. 361.

## IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

### (A) Facts in Issue and Relevant to Issues.

§ 106 (Tex.Civ.App.) Plaintiff, in a libel action, may introduce proof of good character, if the libelous publication attacks his character, or such an attack is made in defendant's pleadings, or the nature of the action involves his character.—*Houston Chronicle Pub. Co. v. Tiernan*, 171 S. W. 542.

§ 113 (Ark.) In an action for the flooding of plaintiff's land by the construction of an embankment in 1910, testimony that the former owner of the land offered to rent it to witness for two years, if he would fence it, is inadmissible, where the only evidence as to the time of statement was that it was before 1910, and the conditions were not shown to have been the same.—*St. Louis, I. M. & S. Ry. Co. v. Brundidge*, 171 S. W. 859.

### (B) Res Gestæ.

§ 119 (Tex.Civ.App.) In an action to recover money paid under a contract for feeding cattle, evidence that plaintiff when contracting, knew the feeding price at another place, and gave defendant a telegram showing the price at that place, held admissible as original evidence, part of the transaction, or "res gestæ."—*Memphis Cotton Oil Co. v. Goode*, 171 S. W. 284.

§ 126 (Ark.) A declaration made by one run down by a train, nearly a week after the accident, is not admissible as res gestæ.—*St. Louis, I. M. & S. Ry. Co. v. Enlow*, 171 S. W. 912.

§ 127 (Tex.Civ.App.) Evidence of declarations of present pain and suffering in the nature of verbal acts is admissible to show that a party suffered personal injuries.—*Missouri, O. & G. Ry. Co. v. Plemmons*, 171 S. W. 259.

§ 127 (Tex.Civ.App.) In an action for personal injuries, declarations of plaintiff to his physician held not admissible as complaints of present pain and suffering.—*Gulf, C. & S. F. Ry. Co. v. McKinnell*, 171 S. W. 1091.

### (C) Similar Facts and Transactions.

§ 130 (Tex.Civ.App.) In an action against a landlord on a promise to pay for goods furnished his tenant, that the landlord had given checks to the tenant to buy groceries with is res inter alios acta.—*Chilson v. Oheim*, 171 S. W. 1074.

### (E) Competency.

§ 150 (Ark.) Evidence as to experiments, after the injury, to test the accuracy of the testimony of witnesses to the occurrence, is admissible, if made under conditions substantially the same as at the time of the occurrence.—*St. Louis, I. M. & S. Ry. Co. v. McMichael*, 171 S. W. 115.

Conditions surrounding the making of experiments by witnesses testifying on plaintiff's behalf held sufficiently similar to those surround-

ing the accident to justify the court in admitting evidence of the experiments.—Id.

### V. BEST AND SECONDARY EVIDENCE.

§ 178 (Tex.Civ.App.) Where a carrier did not contend that it did not issue contracts for return transportation of a shipper who lost them, he could testify to their contents.—San Antonio & A. P. Ry. Co. v. Grady, 171 S. W. 1019.

§ 183 (Ark.) Foundation for admission of secondary evidence of copies of letters held insufficient.—Wells Fargo & Co. Express v. W. B. Baker Lumber Co., 171 S. W. 132.

§ 185 (Ky.) A party desiring to introduce evidence of written rules promulgated by the adverse party must give notice to produce a copy for use on the trial, and only on the failure so to do may the contents be proved by parol.—Louisville & N. R. Co. v. Johnson's Adm'r, 171 S. W. 847.

### VI. DEMONSTRATIVE EVIDENCE.

§ 194 (Tex.Civ.App.) The shoes which plaintiff wore when injured by the coming off of a belt while he was putting it on, being in the same condition as at the time of the accident, are admissible.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

### VII. ADMISSIONS.

#### (A) Nature, Form, and Incidents in General.

§ 220 (Tex.Civ.App.) Failure of railroad superintendent, discussing the widening of a subway, to assert street railroad's contract liability for burning bridge over it, held not an admission that the street railroad was not so liable.—Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co., 171 S. W. 1103.

#### (D) By Agents or Other Representatives.

§ 242 (Tex.Civ.App.) Agent's disclaimer to be admissible must be made concerning act within his authority, and if made before or after such act is not admissible.—Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co., 171 S. W. 1103.

§ 243 (Ark.) In action for delay in delivery of telegram addressed to plaintiff, written statement of sender after sending of the message held not admissible against plaintiff as an admission of her agent.—Western Union Telegraph Co. v. Scanlon, 171 S. W. 916.

§ 244 (Tex.Civ.App.) Declarations by an engineer the day following his striking with his engine a fellow employé were inadmissible.—Paris & G. N. R. Co. v. Lackey, 171 S. W. 540.

### VIII. DECLARATIONS.

#### (A) Nature, Form, and Incidents in General.

§ 271 (Mo.App.) On an issue as to the quantity of corn included in a contract of sale, evidence of a memorandum made by defendant's agent when he made the contract by telephone communication held inadmissible as self-serving.—Horner v. Franklin, 171 S. W. 568.

### IX. HEARSAY.

§ 317 (Ark.) In an action for the flooding of plaintiff's land by an embankment, testimony as to a statement made by plaintiff's ancestor before his death, relative to the value of the land, was incompetent as hearsay.—St. Louis, I. M. & S. Ry. Co. v. Brundidge, 171 S. W. 859.

§ 317 (Tex.Civ.App.) In an action involving a disputed boundary, the testimony of a witness that on a survey he found the corner of the survey by trees called for in the field notes was not hearsay, but related to knowledge gained by him on the ground.—Denton v. English, 171 S. W. 248.

### X. DOCUMENTARY EVIDENCE.

#### (A) Public or Official Acts, Proceedings, Records, and Certificates.

§ 333 (Tex.Civ.App.) Under Rev. St. 1911, arts. 3694, 5397, and the article providing that books, papers, etc., required to be kept in any executive department shall constitute a part of the archives thereof, report of state surveyor of survey made by him held admissible in trespass to try title between private parties.—Denton v. English, 171 S. W. 248.

Where a document containing a report of the acts of the state surveyor concerning a survey also contained argument and opinions, they were not admissible in trespass to try title.—Id.

§ 335 (Ky.) The original plat accompanying a patent issued by the state is admissible to determine the location of the land.—New Era Land Co. v. Childs, 171 S. W. 417.

#### (B) Exemplifications, Transcripts, and Certified Copies.

§ 341 (Mo.App.) In an action to recover an overpayment made to the seller of stock of a corporation, due to mistake in adding the whole of the outstanding assets to the half share of the seller, a certified copy from the office of the secretary of state of the report of the corporation, made by plaintiff, is irrelevant to show the value of the stock.—Jennemann v. Bucher, 171 S. W. 613.

#### (C) Private Writings and Publications.

§ 359 (Mo.App.) Photographs held admissible in evidence, although the situation was not precisely the same as it was at the time of the injury.—Lauff v. J. Kennard & Sons Carpet Co., 171 S. W. 986.

#### (D) Production, Authentication, and Effect.

§ 366 (Ark.) The introduction of an original complaint in another suit in evidence should not be permitted, without proof of permission to withdraw the complaint from the files of the other court.—Missouri & N. A. R. Co. v. Johnson, 171 S. W. 478.

§ 383 (Ky.) The original plat accompanying a patent issued by the state is either preponderating or alone conclusive.—New Era Land Co. v. Childs, 171 S. W. 417.

Where copies of an original survey and a certified copy of the patent contain a clerical error in the light of the map accompanying the patent, the error must be disregarded and the map must control in determining the location of the land.—Id.

### XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

#### (A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 408 (Ky.) Where an express company issued a receipt reciting that a sealed package was said to contain diamonds, the receipt was not conclusive that the package contained them.—Adams Express Co. v. Tucker, 171 S. W. 428.

§ 408 (Mo.App.) A receipt for money which recited that it was to be used for a loan on a deed of trust was merely a memorandum constituting evidence of the oral agreement between the parties, subject to explanation by parol testimony.—Martin v. Printz, 171 S. W. 642.

§ 419 (Mo.App.) Where defendant executed a note for \$200 for the price of a piano, parol evidence that \$200 was the entire price, and that plaintiff had failed to give defendant credit for \$75, was admissible.—Kieselhorst Piano Co. v. Porter, 171 S. W. 949.

§ 419 (Tex.Civ.App.) A written contract for the sale of goods at the invoice price is not varied by parol evidence that the invoice price on one article was less than represented by the seller and paid by the buyer.—Midgley & Curt-singer v. Taylor, 171 S. W. 301.

§ 423 (Mo.App.) As between the original parties to a note, signers may show by parol that they were accommodation makers or sureties, and have been released pro tanto by the payee's release of collateral security without their consent.—Long v. Shafer, 171 S. W. 690.

(B) Invalidating Written Instrument.

§ 434 (Mo.App.) The rule that all prior and contemporaneous oral representations are merged in the written contract does not apply to fraudulent representations made to induce a party to enter into the contract.—Horne v. John A. Hertel Co., 171 S. W. 598.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Mo.App.) Where a contract for the sale of corporate stock was in writing and contained no option to return at the end of 30 days if defendant was dissatisfied, such option could not be proved by parol.—Rigler v. Reid, 171 S. W. 952.

§ 441 (Tex.Civ.App.) In an action for breach of contract, parol testimony of prior negotiations seeking to vary the terms of the contract held inadmissible.—Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co., 171 S. W. 1103.

§ 445 (Tex.Civ.App.) Evidence of a parol agreement, made after written authority to the broker to sell, that defendant should pay no commission on an exchange of properties, unless the exchange was fully consummated, held properly admitted.—Williams v. Phelps, 171 S. W. 1100.

## XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Mo.App.) In an action to recover premiums due on a canceled policy, a question, asked plaintiff's witness, whether payments were not made by defendant on the theory that they covered all then owing, was subject to the objection that the witness could not testify as to the theory upon which they were made.—Aetna Life Ins. Co. v. Kansas City Electric Light Co., 171 S. W. 580.

§ 471 (Mo.App.) A question to a witness as to who were the sole heirs of a person named called for a conclusion.—Barron v. H. D. Williams Cooperage Co., 171 S. W. 683.

§ 471 (Tex.Civ.App.) Testimony of persons who knew plaintiff before and after his injury that thereafter they noticed a changed condition in his ability to talk connectedly, relating what they observed, is not opinion evidence as to his mental condition.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

§ 471 (Tex.Civ.App.) A question whether witness' husband had obtained a conveyance of the interests of his brothers and sisters in the land in controversy, which conveyances were claimed to have been lost, held not objectionable as calling for a conclusion.—Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 171 S. W. 537.

§ 471 (Tex.Civ.App.) Testimony of plaintiff's companion to condition of plaintiff's health held not opinion.—Missouri, K. & T. Ry. Co. of Texas v. Dellmon, 171 S. W. 799.

Where a passenger claimed that exposure on a train resulted in a cold and tuberculosis, a witness may testify that since the trip the least exertion tired him out.—Id.

§ 472 (Tex.Civ.App.) The opinion of a family physician as to mental capacity to make a will or deed is inadmissible.—Milner v. Sims, 171 S. W. 784.

§ 474½ (Ky.) Dedication of a public street cannot be shown by opinion of an individual that citizens of the town had a right to use it.—Louisville & N. R. Co. v. Shoemaker's Adm'r, 171 S. W. 383.

§ 477 (Tex.Civ.App.) Testimony by a physician as to the effect of a partial dislocation of the hip is improper, where there is no evidence that plaintiff has such injury.—Gulf, C. & S. F. Ry. Co. v. McKinnell, 171 S. W. 1091.

§ 501 (Ky.) That witnesses to the value of property were unable to give facts to sustain their opinions did not render them inadmissible, where there had been no sales of similar property sufficient to afford a fair basis of market value.—Sandy Valley & E. Ry. Co. v. Bentley, 171 S. W. 178.

§ 501 (Tex.Civ.App.) To qualify the owner to testify to the value of his wearing apparel and household goods, lost by defendant, he need not state their cost and the period of their use and their condition.—Pecos & N. T. Ry. Co. v. Grundy, 171 S. W. 318.

(B) Subjects of Expert Testimony.

§ 512 (Mo.) The use of a halter with a rein five or six feet for the leading of both horses and mules on the public highway is one of such long standing that expert testimony as to the due care used is inadmissible.—Lyman v. Dale, 171 S. W. 352.

(C) Competency of Experts.

§ 539½ (Ky.) One qualified from experience or observation to describe unusual speed of railroad cars, or condition of rails, may testify that a car was running at an unusual speed, and describe the slippery condition of the rails on account of rain.—Louisville & N. R. Co. v. Johnson's Adm'r, 171 S. W. 847.

(D) Examination of Experts.

§ 553 (Tex.Civ.App.) An hypothetical question is properly excluded where based upon a premise contrary to the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Dellmon, 171 S. W. 799.

§ 558 (Ark.) Certain witnesses, testifying for a railroad company as experts, held properly asked on cross-examination whether they had frequently been called by defendant and other railroad companies to testify as experts.—St. Louis, I. M. & S. Ry. Co. v. McMichael, 171 S. W. 115.

§ 558 (Mo.App.) A question, asked defendant's expert on cross-examination, whether plaintiff's injury would likely subject her to rheumatism, was not objectionable as an attempt to show that she had rheumatism.—Brown v. City of St. Joseph, 171 S. W. 935.

## XIV. WEIGHT AND SUFFICIENCY.

§ 584 (Mo.App.) A prima facie case is that which is received or continues until the contrary is shown, and is, in the absence of contradiction, sufficient to establish the facts.—Gilmore v. Modern Brotherhood of America, 171 S. W. 629.

"Prima facie evidence" means evidence which is sufficient to establish the fact, unless rebutted; evidence which, unexplained, would warrant the conclusion to support which it is introduced.—Id.

§ 586 (Tex.Civ.App.) Testimony of witnesses that they did not hear the bell on an engine has probative force, provided they were so situated that in the ordinary course of events they would have heard the bell had it been rung.—Paris & G. N. R. Co. v. Lackey, 171 S. W. 540.

§ 588 (Mo.App.) The testimony on behalf of plaintiff cannot be disregarded, although contrary to that of defendant, unless plaintiff's testimony is directly, wholly, and beyond doubt contrary to physical laws.—Warnke v. A. Leschen & Sons Rope Co., 171 S. W. 643.

§ 589 (Mo.App.) Plaintiff's testimony that defendant's wagon was backed against him a second after he passed it and started to mount a

freight platform *held* not contrary to the physical facts in the use of the term "second."—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

§ 594 (Mo.App.) The jury are not required to accept the uncontradicted testimony of defendant's servants as to the care exercised by them.—*Kelly v. City of Higginsville*, 171 S. W. 966.

## EXAMINATION.

See Witnesses, §§ 240-300.

## EXCEPTIONS.

See Appeal and Error, §§ 261-275; Mortgages, § 561; Trial, §§ 85-105.

## EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 499-707, 1040; Criminal Law, §§ 1091, 1092, 1119.

## II. SETTLEMENT, SIGNING, AND FILING.

§ 39 (Ark.) A bill of exceptions must be signed and filed with the clerk in the time allowed.—*Williams v. McCabe*, 171 S. W. 1194.

§ 42 (Tex.Civ.App.) The time for filing bills of exception *held* to relate to formalities in bringing a case to the appellate court within Court of Civil Appeals rule 8 (142 S. W. xi), so that failure to file in time is waived where a motion to strike is not filed and docketed within 30 days after the filing of the transcript.—*Conn v. Houston Oil Co. of Texas*, 171 S. W. 520.

## EXCESSIVE DAMAGES.

See Damages, §§ 131-139.

## EXCHANGE OF PROPERTY.

See Husband and Wife, § 268.

§ 8 (Tex.Civ.App.) In suit to rescind exchange of property for false representations, in the absence of any issue of laches or limitation, evidence as to time when plaintiff discovered their falsity *held* incompetent.—*Kirkland v. Rutherford*, 171 S. W. 1031.

In suit to rescind exchange for fraud, evidence that plaintiff was deceived *held* immaterial, where jury found that defendant neither made nor authorized any false representations.—*Id.*

Where, on exchange of property, defendant neither made nor authorized false representations and the exchange resulted from negotiations between her and plaintiff, misrepresentations of her husband *held* not to justify rescission.—*Id.*

## EXCUSABLE HOMICIDE.

See Homicide, § 111.

## EXECUTION.

See Husband and Wife, § 274; Injunction, § 105; Prohibition, § 10.

## V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 171 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, a debtor against whom final judgment had been rendered in the district court and who had been garnished in an action in the county court against his judgment creditor might have the district court enjoin the collection of the judgment by an assignee until the right to the fund had been settled in the county court.—*Barcus v. O'Brien*, 171 S. W. 492.

§ 171 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, the owner of real estate *held* entitled to enjoin a sale under execution against another, though his remedy at

law was adequate.—*Winkie v. Conatser*, 171 S. W. 1017.

Equity will enjoin a sale of a husband's land on execution against his wife, where parol evidence is necessary to show that she was not sued for necessities.—*Id.*

§ 172 (Ky.) A judgment creditor of a non-resident grantor, having no lien, and who did not extend credit on the faith of reserved oil and coal rights, would be enjoined from levy and sale of them where the reservation was questioned by the grantee for fraud.—*Hyden v. Calames*, 171 S. W. 186.

§ 172 (Tex.Civ.App.) In a wife's action to restrain an execution sale, based on a judgment against the husband, admission in evidence of deed which did not in terms limit the property to the wife's separate use *held* not error, though the pleadings, which did not set out the tenor of the deed, declared that it was so limited.—*Molloy v. Brower*, 171 S. W. 1079.

Evidence, in a wife's action to enjoin a sale of her property under an execution against her husband, *held* to sustain an implied finding that the writ of execution had been levied on her property.—*Id.*

## EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Evidence, § 83; Wills.

## IV. COLLECTION AND MANAGEMENT OF ESTATE.

### (B) Real Property and Interests Therein.

§ 132 (Ark.) An administrator with the will annexed, appointed after the executrix had been declared insane, had no power to build a family dwelling house on the land of the estate.—*Stuckey v. Stephens*, 171 S. W. 908.

§ 137 (Ark.) A private sale by an administrator not authorized to sell at a private sale or without an order of court, in view of Kirby's Dig. § 3793, making private sales "not in substantial compliance with statutory provisions" voidable, will not be confirmed.—*Gibbs v. Singfield*, 171 S. W. 144.

§ 148 (Tex.Civ.App.) A purchaser of an estate's interest in land at an administrator's sale *held* to have acquired no title, where he knew at the time of the sale that the intestate had conveyed the land long prior to his death by a deed of record.—*Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.*, 171 S. W. 537.

## VI. ALLOWANCE AND PAYMENT OF CLAIMS.

### (D) Priorities and Payment.

§ 275 (Tex.Civ.App.) Where an administrator in August, 1850, recited that, some time in 1843 or 1844 he conveyed the land in controversy to S. in consideration of his claims against the intestate's estate, it would be presumed, the deed being lost, that the conveyance was subsequent to Act Feb. 3, 1844 (Gammel's Laws, p. 990; Hartley's Dig. art. 1075), and was therefore based on legal authority.—*Houston Oil Co. of Texas v. Sudduth*, 171 S. W. 556.

## VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

### (A) When Authorized.

§ 324 (Ark.) Expenditures by an administrator with the will annexed for the benefit of the widow and children *held* not debts of the estate or "expenses of administration," so as to entitle him to a judgment lien against the estate for the excess of expenditures.—*Stuckey v. Stephens*, 171 S. W. 908.

§ 329 (Ark.) Abandonment of the homestead by the widow does not affect the rights of the minor children, so as to permit its sale for pay-

ment of deceased's debts during the minority of any of his children.—*Martin v. Conner*, 171 S. W. 125.

The administrator's sale, for payment of deceased's debts, of land, a portion of which constituted his homestead, being made during minority of some of his children, is void, though it had been assigned to the widow as dower.—*Id.*

(C) Sale.

§ 388 (Tex.Civ.App.) A purchaser of land at an administrator's sale may be an innocent purchaser regardless of the form of the deed, if it was the intention to sell the land, as distinguished from a mere chance of title, and the purchaser intended to buy the land and was without notice of an adverse claim.—*Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.*, 171 S. W. 537.

Where an administrator's deed purported to convey only the estate's interest, which was nil, to the knowledge of the grantee, a subsequent purchaser was charged with notice and could not occupy the position of an innocent purchaser.—*Id.*

## EXEMPLARY DAMAGES.

See Damages, § 87.

## EXEMPTIONS.

See Homestead; Taxation, §§ 198-241.

## EXPERIMENTS.

See Evidence, § 150.

## EXPERT TESTIMONY.

See Criminal Law, § 479; Evidence, §§ 471-558.

## EXPLOSIVES.

Master and Servant, §§ 125, 278, 289.

## FACTORS.

See Brokers.

## FALSE IMPRISONMENT.

See Malicious Prosecution; Trial, § 251.

## FALSE PRETENSES.

See Larceny, §§ 13, 55, 68.

## FALSE SWEARING.

See Perjury.

## FEDERAL EMPLOYERS' LIABILITY ACTS.

See Appeal and Error, §§ 302, 1169, 1175; Commerce, §§ 8, 27; Courts, § 489; Death, §§ 31, 82, 95; Master and Servant, §§ 179, 190, 228, 248, 250½, 256, 284, 286.

## FELLOW SERVANTS.

See Master and Servant, §§ 150-201.

## FENCES.

See Highways, § 161.

§ 27 (Tex.Civ.App.) Defendant, a lessee of school lands within plaintiff's inclosure, held liable for removing a portion of his fence to which plaintiff had joined to complete his inclosure, allowing his cattle access to plaintiff's pasture.—*Jameson v. Board*, 171 S. W. 1037.

That plaintiff alleged a violation of the "fence statute" held not to preclude him from recovering for resulting trespass of stock as at common law.—*Id.*

§ 28 (Ark.) Under Kirby's Dig. § 1913, one removing a fence not on the boundary line, but on his land, is not guilty of destroying the fence of another.—*Tegarden v. State*, 171 S. W. 910.

## FERRIES.

See Carriers, §§ 104, 105, 134, 139, 159, 177-187, 206-406.

## FINDINGS.

See Appeal and Error, §§ 987-1010; Trial, §§ 350-356.

## FIRES.

See Negligence, § 140; Railroads, §§ 453-482.

## FIXTURES.

§ 15 (Mo.App.) Under a mining lease giving the lessee the right to erect a mill and other necessary buildings on the premises, and to remove them at or before the termination of the lease, the mill is personal property.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

## FORCIBLE DEFILEMENT.

See Rape.

## FORCIBLE ENTRY AND DETAINER.

### I. CIVIL LIABILITY.

§ 29 (Ark.) Evidence in unlawful detainer to recover possession of land occupied by defendant as a tenant held sufficient to sustain a verdict for possession with \$170 damages.—*Alexander-Amberg & Co. v. Hollis*, 171 S. W. 915.

## FORECLOSURE.

See Mortgages, §§ 336-561.

## FOREIGN CORPORATIONS.

See Corporations, §§ 636-674.

## FORFEITURES.

See Brokers, §§ 49, 65, 88; Insurance, §§ 310-336; Limitation of Actions, § 35; Logs and Logging, § 3.

## FORGERY.

See Banks and Banking, § 148.

## FORMER ADJUDICATION.

See Judgment, §§ 540, 701-744.

## FORMER JEOPARDY.

See Criminal Law, § 198.

## FORNICATION.

See Lewdness.

## FRANCHISES.

See Taxation, § 193.

## FRATERNAL ORGANIZATIONS.

See Beneficial Associations.

## FRAUD.

See Bankruptcy, § 303; Boundaries, § 46; Brokers, §§ 38, 65, 84; Carriers, § 269; Contracts, § 264; Corporations, §§ 117, 121, 553; Descent and Distribution, § 91; Evidence, § 434; Exchange of Property, § 8; Frauds, Statute of; Fraudulent Conveyances; Homestead, §§ 118, 122; Injunction, § 128; Insurance, §§ 138, 264, 291, 310, 553, 723; Princi-

pal and Agent, § 189; Release, §§ 17, 58; Sales, §§ 40, 53; Specific Performance, § 53; Venue, § 32; Wills, §§ 186, 324.

## I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 18 (Mo.App.) For the sales manager of a publishing house to represent to a prospective agent that the book which he was to sell was the only extant publication of that nature, when there were similar publications, is a misrepresentation of an existing and material fact.—*Horne v. John A. Hertel Co.*, 171 S. W. 598.

§ 25 (Mo.App.) Where the sales manager of a publishing house in inducing an agent to enter into its service misrepresented the facts, it is no defense to an action for fraud brought by an agent that he was impetuous.—*Horne v. John A. Hertel Co.*, 171 S. W. 598.

§ 25 (Tex.Civ.App.) Purchasers of the entire stock of a corporation held not entitled to recover for misrepresentations by defendants that it was fully paid in.—*Vick v. Park*, 171 S. W. 1039.

## II. ACTIONS.

### (A) Rights of Action and Defenses.

§ 31 (Mo.App.) A party induced to contract by fraud may rescind and recover back what he has paid or sold, by tendering the benefits he has received, or he may affirm and sue for damages, without waiving right to recover damages for the fraud.—*Horne v. John A. Hertel Co.*, 171 S. W. 598.

### (C) Evidence.

§ 58 (Mo.App.) Fraud or bad faith must often be inferred from the acts and misconduct of the persons charged therewith and the necessary result of such misconduct.—*Jones v. Orient Ins. Co.*, 171 S. W. 28.

## FRAUDS, STATUTE OF.

See Infants, § 30; Trusts, § 63½.

## V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 44 (Ark.) An oral contract to lease land for one year, to commence at a date subsequent to the contract, is not within the statute of frauds.—*Alexander-Amberg & Co. v. Hollis*, 171 S. W. 915.

§ 44 (Mo.App.) A contract, by which defendant agreed to purchase a mining lease from plaintiffs and to work the property under the lease, which then had more than nine years to run, and the purchase price for which was not to be paid for more than one year, is required to be in writing by the statute of frauds (Rev. St. 1909, § 2783).—*Aylor v. McInturf*, 171 S. W. 606.

## VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Mo.App.) An agreement by which plaintiff delivered money to defendant to be invested in a deed of trust was not one required to be in writing under the statute of frauds.—*Martin v. Printz*, 171 S. W. 642.

§ 63 (Mo.App.) A contract, assigning a 10-year mining lease on a royalty basis must be in writing by statute of frauds (Rev. St. 1909, § 2783).—*Aylor v. McInturf*, 171 S. W. 606.

## VII. SALES OF GOODS.

### (A) Contracts Within Statute.

§ 85 (Mo.App.) A sale of goods of a value exceeding \$30 is within the statute of frauds, and no recovery can be had where there was neither written memorandum nor payment of earnest money, unless there was a delivery and acceptance of a part of the goods.—*Hollrah-Dieckmann Refrigerator & Fixture Co. v. St.*

*Louis House & Window Cleaning Co.*, 171 S. W. 576.

### (B) Acceptance of Part of Goods.

§ 89 (Mo.App.) Where a sale of goods was within the statute, an acceptance of all and delivery of only a part of the goods satisfies the statute of frauds (Rev. St. 1909, § 2784).—*Hollrah-Dieckmann Refrigerator & Fixture Co. v. St. Louis House & Window Cleaning Co.*, 171 S. W. 576.

Acceptance and delivery on sale of goods need not be contemporaneous, and acceptance may precede delivery, although, to take the case out of the statute of frauds, delivery must be made in pursuance of the contract.—*Id.*

## IX. OPERATION AND EFFECT OF STATUTE.

§ 119 (Mo.App.) Where defendant entered into possession under an oral contract for the assignment of a mining lease having more than 10 years to run and took ore from the premises, plaintiffs, not being entitled to recover on the contract, may recover the value of the ores taken.—*Aylor v. McInturf*, 171 S. W. 606.

§ 128 (Ky.) Where a deed was given, admittedly as security for a debt, it cannot be changed by a subsequent parol agreement, so as to make it an absolute transfer of the title.—*Koehler v. Almy*, 171 S. W. 147.

§ 129 (Mo. App.) Part performance does not entitle the plaintiffs to maintain an action at law.—*Aylor v. McInturf*, 171 S. W. 606.

The delivery of possession under a mining lease which plaintiffs orally agreed to sell to defendant is only partial, and not complete, performance by them, where no written assignment of the lease, which is required by Rev. St. 1909, § 2782, was executed until the defendant repudiated the contract by refusing to make a payment due more than a year after the contract.—*Id.*

Where defendant entered into possession under an oral contract for the assignment of a mining lease having more than 10 years to run and took ore from the premises, that fact does not entitle plaintiffs to recover on the contract.—*Id.*

§ 131 (Mo.App.) An agreement by which plaintiff delivered money to defendant for investment in a deed of trust not being within the statute of frauds could be varied or altered by a subsequent parol agreement, that the money might be used in the purchase of a house and lot.—*Martin v. Printz*, 171 S. W. 642.

§ 139 (Mo.App.) Full performance of an oral contract by one of the parties does not take the contract out of the statute of frauds, where the agreements to be performed by the other party were not to be performed within the year.—*Aylor v. McInturf*, 171 S. W. 606.

§ 144 (Mo. App.) Defendant does not lose his right to plead the statute of frauds by admitting in his answer that he made the oral agreement claimed by plaintiff.—*Aylor v. McInturf*, 171 S. W. 606.

## FRAUDULENT CONVEYANCES.

## I. TRANSFERS AND TRANSACTIONS INVALID.

### (B) Consideration.

§ 95 (Mo.) That obligations received by a wife from her husband in part settlement of a judgment she had recovered against him were those of a third person did not affect their availability as a good consideration for a transfer of real property by her husband to her, as against his creditors.—*Wellman v. Kaiser Inv. Co.*, 171 S. W. 370.

## FUNERAL BENEFITS.

See Beneficial Associations, § 18.

**FUSION.**

See Elections, § 124.

**GAMING.**

See Lotteries.

**III. CRIMINAL RESPONSIBILITY.****(A) Offenses.**

§ 62 (Tex.Cr.App.) For the owner of a buggy to sell cigars for a dollar apiece, and to allow purchasers to draw numbers, one of which would entitle the holder to the vehicle, constitutes the offense of raffling.—*Martin v. State*, 171 S. W. 712.

**GARBAGE.**

See Municipal Corporations, § 736.

**GARNISHMENT.****II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.**

§ 44 (Tex.Civ.App.) A defendant against whom a judgment which is final has been rendered is subject to garnishment.—*Barcus v. O'Brien*, 171 S. W. 492.

A judgment from which the debtor gave notice of appeal, but thereafter abandoned the appeal, and on which execution had been issued, was final, so as to authorize garnishment against the judgment debtor, though 12 months had not elapsed since its rendition.—*Id.*

**III. PROCEEDINGS TO PROCURE.**

§ 82 (Mo.App.) Under Laws 1911, p. 141, §§ 1, 2, *held*, that a garnishment proceeding in an action in which there had been no personal service on defendant, and which accrued in a city of more than 100,000 inhabitants, should have been brought in that city.—*J. W. Jenkins Sons Music Co. v. Sage*, 171 S. W. 672.

Under Laws 1911, p. 141, §§ 1, 2, *held*, on the record, in a proceeding in which defendant was not personally served, that the action would be treated as though he did not reside in the city or county in which the cause of action accrued.—*Id.*

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

§ 133 (Tex.Civ.App.) A garnishee, to protect himself from having to pay the debt twice, may interplead all claimants of the fund in his hands.—*Barcus v. O'Brien*, 171 S. W. 492.

**GIFTS.**

See Husband and Wife, § 49½.

**I. INTER VIVOS.**

§ 4 (Ky.) To constitute a gift inter vivos, the donor's purpose must be clearly established, and the gift must be completed by actual, constructive, or symbolical delivery without power of revocation.—*Reynolds v. Thompson*, 171 S. W. 379.

§ 16 (Ky.) Intention is not sufficient to constitute a gift inter vivos, but it must be carried out by conveying the title and possession as fully as it may be done under the circumstances.—*Reynolds v. Thompson*, 171 S. W. 379.

§ 49 (Ky.) Evidence *held* not to sustain a gift inter vivos of a mortgage note.—*Reynolds v. Thompson*, 171 S. W. 379.

Where a note constituted practically all of the estate of the holder, the court, in determining whether he made a gift inter vivos thereof, will be slow to indulge a presumption that he intended to deprive himself of his estate, and that can only be done on satisfactory proof.—*Id.*

**GOOD FAITH.**

See Bills and Notes, § 353; Executors and Administrators, § 388; Husband and Wife, § 267; Vendor and Purchaser, §§ 224-243.

**GOOD WILL.**

§ 7 (Ky.) Though S. Company, organized by persons none of whom were named S., was properly enjoined from using that name at the instance of C. & S., *held* that cancellation of lease of space in S. building erected by party who sold his stock in C. & S. with agreement not to engage in the same business, was properly denied.—*Crutcher & Starks v. Starks*, 171 S. W. 433.

**GRAND JURY.**

See Indictment and Information.

§ 36 (Tex.Cr.App.) Witnesses need not be personally before the grand jury, as examining trials are had, testimony taken, reduced to writing and sworn to and transmitted to the grand jury, which is authorized to return an indictment thereon if found sufficient.—*Zweig v. State*, 171 S. W. 747.

**GRANTS.**

See Public Lands.

**GUARANTY.**

See Principal and Surety.

**GUARDIAN AND WARD.**

See Landlord and Tenant, § 76.

**III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.**

§ 44 (Tex.Civ.App.) Under Rev. St. arts. 4124, 4136, 4137, 4139, *held*, that a guardian, renting without an order of court, was not limited to a lease for a year, but had power to lease for a longer term.—*Rogers v. Harris*, 171 S. W. 809.

A guardian at common law can lease a ward's real estate for any term of years not extending beyond minority.—*Id.*

**VIII. LIABILITIES ON GUARDIANSHIP BONDS.**

§ 182 (Tex.Civ.App.) The burden is upon the sureties on a guardian's bond to clearly establish a defense which would relieve them of liability.—*Childs v. McGrew*, 171 S. W. 506.

In an action on a guardian's bond for misappropriation of the ward's money, *held*, that the evidence sustained a finding that, when the ward gave certain money to the guardian, he was a minor.—*Id.*

**HABEAS CORPUS.****II. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 99 (Tex.Civ.App.) Evidence *held* insufficient to support finding that father was not fit party to have custody of child, and to show that fitness of the parents was equal to that of the defendants.—*Smith v. Moore*, 171 S. W. 822.

Award of custody of illegitimate child to the father's sister, to whom its parents had delivered it, *held* erroneous, where the fitness of the parents to rear the child was equal to that of the sister and her husband.—*Id.*

In habeas corpus to recover custody of illegitimate child from the father's sister, evidence *held* insufficient to support finding that the child was abandoned by its parents when delivered to the sister.—*Id.*

§ 112 (Mo.App.) Habeas corpus proceedings between a father and grandparents for the custody of a child are not within Rev. St. 1909, § 2510, for preserving jurisdiction over the subject-matter in actions between husband and wife, and a clause in the order remanding the child, by which the court assumes to retain jurisdiction over the cause, is coram non iudice.—State ex rel. Ahrens v. Rassieur, 171 S. W. 688.

A clause in the judgment in habeas corpus, by which the court assumes to retain jurisdiction over the cause, is not within the issues.—Id.

## HARMLESS ERROR.

See Appeal and Error, §§ 1027-1074.

## HEARING.

See New Trial.

## HEARSAY.

See Evidence, § 317.

## HEIRS.

See Descent and Distribution; Wills, § 506.

## HIGHWAYS.

See Appeal and Error, §§ 238, 877; Bridges; Dedication, § 20; Eminent Domain, § 145; Limitation of Actions, § 35; Municipal Corporations, §§ 450, 755-822; Railroads, § 95.

### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 6 (Mo.App.) Where the public used a road outside a fence continuously for a time longer than to create a prescriptive title, it became a public road by prescription.—Boonville Special Road Dist. v. Fuser, 171 S. W. 962.

(B) Establishment by Statute or Statutory Proceedings.

§ 58 (Mo.) A landowner in proceedings for the establishment of a road, who appealed to the circuit court on an affidavit averring that he believed that he was injured by the verdict and the judgment of the county court, and that the appeal was from the merits and an order and judgment taxing costs, merely appealed on the issue of damages.—In re Aiken, 171 S. W. 342.

(C) Alteration, Vacation, or Abandonment.

§ 70 (Mo.App.) Act March 23, 1868 (Laws 1868, p. 150) § 5, authorizing proceedings to reduce the width of a road, was repealed by Act March 18, 1872 (Wag. St. c. 120, art. 1, § 72), and an order reducing the width after the repeal was void.—Boonville Special Road Dist. v. Fuser, 171 S. W. 962.

### V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

§ 161 (Mo.App.) A notice of the obstruction of a road by defendant held sufficient within Rev. St. 1909, § 10533, though not served by the road overseer.—Boonville Special Road Dist. v. Fuser, 171 S. W. 962.

A road district which absorbs another district after service of notice by its overseer of an obstruction of a road may sue for the statutory penalty for failure to remove the obstruction.—Id.

Surveys held inadmissible to prove that a section line was the center of the road, when not showing such to be the fact.—Id.

An order of the county court straightening another part of the road was inadmissible to show a relocation of the road at the place of obstruction.—Id.

Where nothing was done pursuant to an order reducing the width of a road, and an adjacent owner put a fence in the road actually used by the public, he was not relieved from the penalty imposed by Rev. St. 1909, § 10533.—Id.

A direction from a surveyor as to the true line of the road and where the fence could be placed was properly excluded.—Id.

Rev. St. 1909, § 10533, imposing a penalty for obstructing public road is penal and must be strictly construed.—Id.

### (B) Use of Highway and Law of the Road.

§ 169 (Ark.) A traveler by automobile has no greater rights to the use of the highway than the driver of a mule.—Butler v. Cabe, 171 S. W. 1190.

§ 181 (Ark.) When a driver knew that his mule would become frightened on meeting an automobile, he was not negligent in driving the mule along a highway where he knew he was liable to meet automobiles.—Butler v. Cabe, 171 S. W. 1190.

§ 181 (Mo.App.) The failure of an automobile, approaching a buggy slowly from the rear without warning, to stop would not be negligence, unless the driver of the automobile saw or should have seen that the horses were frightened.—Fields v. Sevier, 171 S. W. 610.

§ 184 (Ky.) In an action for injury to plaintiff's horses, frightened by defendant's automobile, governed by the motor vehicle laws, an instruction that defendant's chauffeur, approaching the curve, was bound not to exceed eight miles per hour, held not objectionable, as declaring defendant not liable if his speed was less than eight miles per hour.—Wade v. Brents, 171 S. W. 188.

Evidence held to sustain a verdict for defendant.—Id.

Where defendant's chauffeur did not discover plaintiff's standing team until he was almost on it, evidence for plaintiff relative to observations made and measurements taken at the place of the accident held not material.—Id.

§ 184 (Mo.App.) In an action for injuries to the occupant of a buggy from an automobile coming up behind and frightening the horses, evidence held to take the question of defendant's negligence to the jury, as against a demurrer to the evidence.—Fields v. Sevier, 171 S. W. 610.

In an action for injuries to the occupant of a buggy, caused by an automobile frightening the horses, an instruction, basing negligence on the fact that the automobile suddenly came upon the buggy from the rear, held based on the pleadings.—Id.

A petition alleging that defendant drove his automobile almost upon plaintiff and frightened her team authorizes an instruction that it was defendant's duty to keep a lookout for plaintiff and to stop when necessary to prevent injury.—Id.

In an action for injuries to the occupant of a buggy, caused by an automobile frightening the horses, an instruction, that if defendant approached the buggy from the rear, and failed to stop his automobile soon enough to prevent frightening the horses, and thereby caused the runaway, the plaintiff could recover, is erroneous, as authorizing a recovery without showing negligence.—Id.

## HOLIDAYS.

See Sunday.

## HOMESTEAD.

See Husband and Wife, § 274.

### I. NATURE, ACQUISITION, AND EXTENT.

(C) Acquisition and Establishment.

§ 38 (Tex.Civ.App.) When a homestead dedication has not been effected by actual occupan-

cy, such effect must be accorded to ownership and visible acts of preparation to use it for a home.—*Miller v. Flattery*, 171 S. W. 253.

§ 57 (Tex.Civ.App.) Evidence *held* to warrant a finding that premises were impressed with a homestead status at the time of their conveyance by plaintiffs.—*Miller v. Flattery*, 171 S. W. 253.

§ 57½ (Tex.Civ.App.) Use of lots, on which plaintiff and his family did not reside, for agricultural purposes and to provide a residence for plaintiff's son, who paid no rent, *held* insufficient, as a matter of law, to establish that the property was homestead.—*Franklin v. Smith*, 171 S. W. 501.

## II. TRANSFER OR INCUMBRANCE.

§ 117 (Mo.App.) The wife of the owner of a homestead not vested interest therein during his lifetime, notwithstanding Rev. St. 1909, § 6704.—*Wainscott v. Haley*, 171 S. W. 983.

The inchoate interest of a wife in her husband's homestead is the right to succeed him as the head of the family or owner on his death or abandonment of the family.—*Id.*

A contract by a husband to convey his homestead is valid, notwithstanding Rev. St. 1909, § 6704, and he is liable for damages on the refusal of his wife to join in a deed.—*Id.*

§ 118 (Tex.Civ.App.) Title to a homestead could not pass without the wife's joinder in the conveyance, untainted by fraud of any kind upon her rights, and, if the deed was delivered by her husband in fraud of her rights, she would not be precluded from asserting them against the purchaser.—*Miller v. Flattery*, 171 S. W. 253.

Where a wife signed a deed of her homestead, reciting a consideration of \$2,200, understanding that it was to be cash, and her husband, without her knowledge or consent, delivered it for a consideration partly in notes, there was a fraud upon her rights, entitling her to rescind as against a purchaser with notice of the recital, who had made no inquiry as to the husband's authority to deliver on other terms of payment.—*Id.*

§ 122 (Tex.Civ.App.) Vendor, whose homestead had been conveyed to a purchaser in fraud of her right to have the entire consideration paid in cash, *held* estopped to rescind as against a subsequent purchaser, after the first purchaser had been in peaceable possession, collecting the revenues for several months.—*Miller v. Flattery*, 171 S. W. 253.

§ 129 (Tex.Civ.App.) One purchasing from the purchaser of a homestead for value, with notice of a recited cash consideration and actual notice that notes had been substituted for part thereof, *held* justified in assuming that the substitution of the notes was authorized or ratified by the vendor, and not bound to inquire as to the substitution.—*Miller v. Flattery*, 171 S. W. 253.

## III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 141 (Tenn.) Where a husband and wife owned land as tenants by the entireties, wife, after husband's death, *held* entitled to homestead exemption as against debts contracted by her after his death.—*Wilkey v. Wilkey*, 171 S. W. 78.

§ 142 (Tenn.) Minor children, after death of surviving wife, *held* entitled to homestead exemption in land owned by husband and wife as tenants by the entireties, as against the wife's debts.—*Wilkey v. Wilkey*, 171 S. W. 78.

## HOMICIDE.

See Bail, § 43; Criminal Law, §§ 406, 432, 673, 800, 823, 1137; Homicide, § 166; Witnesses, § 406.

### II. MURDER.

§ 7 (Tex.Cr.App.) Where a person of sound memory and discretion unlawfully kills another with malice aforethought, he is guilty of murder.—*Witty v. State*, 171 S. W. 229.

§ 11 (Tex.Cr.App.) "Malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sane memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act.—*Witty v. State*, 171 S. W. 229.

§ 11 (Tex.Cr.App.) In the absence of the passion that reduces a homicide to manslaughter, the unattended adequate cause may become evidence of malice, and, instead of constituting an extenuation of the crime, may and would become an aggravating circumstance.—*Hicks v. State*, 171 S. W. 755.

§ 13 (Tex.Cr.App.) Malice will be inferred from the fact of an unlawful killing.—*Hicks v. State*, 171 S. W. 755.

§ 22 (Tex.Cr.App.) "Murder in the first degree" distinguished from "murder in the second degree."—*Witty v. State*, 171 S. W. 229.

§ 23 (Tex.Cr.App.) The distinguishing characteristic of "murder in the second degree" is implied malice aforethought.—*Witty v. State*, 171 S. W. 229.

"Implied malice," as an ingredient of murder in the second degree, is that which the law infers from, or imputes to, certain acts however suddenly done.—*Id.*

§ 23 (Tex.Cr.App.) Malice is a necessary ingredient of murder in the second degree, and it will be inferred from the fact of an unlawful killing.—*Hicks v. State*, 171 S. W. 755.

When an unlawful killing is established and the facts do not establish express malice nor justify the act nor reduce the killing below the grade of murder, the law implies malice, and the offense is murder in the second degree.—*Id.*

§ 23 (Tex.Cr.App.) One who in a sudden passion, aroused without adequate cause, with no rational fear of death or serious bodily injury, killed another, was guilty of murder in the second degree.—*Gusman v. State*, 171 S. W. 770.

When the unlawful killing is shown and the facts do not establish express malice or justify the act, the law implies malice, and the murder is in the second degree.—*Id.*

§ 27 (Tex.Cr.App.) Where it appears from the evidence that defendant was not of sound mind but was insane, and that such affection was the efficient cause of the act, he should be acquitted.—*Witty v. State*, 171 S. W. 229.

In order that insanity shall be a defense in a homicide case, the degree must have been sufficiently great to have controlled defendant's will.—*Id.*

Where the mind of a defendant was sufficiently sound to be capable of reasoning and knowing that the act committed was unlawful and wrong and knowing the consequences of the act, and he had the mental power to refrain from its commission, the defense of insanity is not available.—*Id.*

The "sound mind and discretion" essential to murder in the second degree means that the person committing the homicide must have capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing.—*Id.*

Since insanity goes only to the punishment and not to the character of an act, it never mitigates a homicide.—*Id.*

§ 29 (Tex.Cr.App.) Where the state claimed that deceased was killed as an incident to a conspiracy, those not immediately concerned with the killing could be convicted only on proof that the killing was done in pursuance of a conspiracy to do an unlawful act.—*Martinez v. State*, 171 S. W. 1153.

§ 30 (Tex.Cr.App.) Where decedent was killed by a company of armed men, organized to invade Mexico, accused, one of the company, held a principal and not an accomplice.—*Serrato v. State*, 171 S. W. 1133.

§ 30 (Tex.Cr.App.) Where decedent was killed as an incident to a conspiracy to commit another crime and accused was engaged in the conspiracy, but not in the killing, he was a principal.—*Gonzales v. State*, 171 S. W. 1146.

Where accused was near a killing, accomplished incidental to a conspiracy to commit another crime, that he was not present did not prevent his being a principal.—*Id.*

Where a company organized to invade Mexico, agreeing to resist all interference, the killing of a deputy sheriff was within the common purpose, and all were guilty as principals.—*Id.*

§ 30 (Tex.Cr.App.) All persons conspiring to invade Mexico and arming themselves are principals in a murder committed by some of them.—*Vasquez v. State*, 171 S. W. 1160.

### III. MANSLAUGHTER.

§ 39 (Tex.Cr.App.) Under the statute, sudden passion is requisite to constitute manslaughter, which is homicide committed under the immediate influence of sudden passion arising from an adequate cause.—*Hicks v. State*, 171 S. W. 755.

§ 40 (Tex. Cr. App.) "Manslaughter" is the killing of a human being under sudden passion before time to reflect.—*Cook v. State*, 171 S. W. 227.

§ 43 (Tex.Cr.App.) To constitute "manslaughter" as defined by Pen. Code, art. 1128, it is essential that there be, not only adequate cause as defined by article 1130, but an existing passion caused by what deceased has said or done.—*Witty v. State*, 171 S. W. 229.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 111 (Tex.Cr.App.) Where a company was organized to invade Mexico, and on being approached by a sheriff and his deputies captured two and the other two fled, want of legal authority to make the investigation was no justification for the killing of one of the captured officers some three hours later.—*Serrato v. State*, 171 S. W. 1133.

Where a company was organized in Texas to invade Mexico, a sheriff was justified in investigating the organization, though no complaints had been filed nor warrants of arrest issued.—*Id.*

Where a deputy sheriff was surprised and captured and later killed by a body of men organized to invade Mexico, it was the sheriff's duty to use all necessary force to pursue and capture the criminals without a warrant.—*Id.*

### VII. EVIDENCE.

#### (A) Presumptions and Burden of Proof.

§ 151 (Tex.Cr.App.) Where defendant proved that he was insane at a time prior to the killing, the state must prove beyond a reasonable doubt that he was sane at the time of the killing and responsible for his acts.—*Witty v. State*, 171 S. W. 229.

#### (B) Admissibility in General.

§ 163 (Ky.) Evidence held not a general attack on character of deceased which would authorize the state to introduce evidence of his good character.—*Childers v. Commonwealth*, 171 S. W. 149.

§ 166 (Ky.) Evidence that a wife charged with killing her husband desired to be rid of him and frequently cursed and threatened to kill him held admissible on the question of motive.—*Childers v. Commonwealth*, 171 S. W. 149.

Evidence of difficulties several years before the homicide was not too remote.—*Id.*

§ 166 (Tex.Cr.App.) In a prosecution for murder, certain conversation between the father of the murdered girl and defendant held admissible as tending to show defendant's motive in killing deceased.—*Guerrero v. State*, 171 S. W. 731.

§ 169 (Tex.Cr.App.) Defendant held entitled to show, as a circumstance tending to support his version of the difficulty, that deceased had attempted to induce another young man to go with a young lady whom defendant had won away from deceased.—*House v. State*, 171 S. W. 206.

§ 169 (Tex.Cr.App.) In a prosecution for killing decedent as an incident to a conspiracy to invade Mexico by an organized company, such organization constituted a felony under Pen. Code 1911, arts. 1433-1441, so that a flag and a bugle found at the camp were admissible.—*Serrato v. State*, 171 S. W. 1133.

In a prosecution for killing decedent pursuant to a conspiracy to organize in Texas a company to invade Mexico, evidence concerning the carrying of arms and ammunition into Mexico was admissible.—*Id.*

§ 169 (Tex.Cr.App.) In a prosecution for homicide in furtherance of a conspiracy to organize an armed company to invade Mexico, evidence that accused secured arms from the camp, carried them while he was in the company, and was armed when arrested, was admissible.—*Gonzales v. State*, 171 S. W. 1146.

§ 172 (Tex.Cr.App.) In a prosecution for homicide in furtherance of an illegal conspiracy to invade Mexico, a manifesto found on the person of one of the conspirators held admissible against accused.—*Martinez v. State*, 171 S. W. 1153.

In a prosecution for homicide as an incident to a conspiracy to organize in Texas a force to invade Mexico, evidence of war material found on one of the conspirators and at the camp was admissible to show the conspiracy and its purpose.—*Id.*

Where decedent was killed as an incident to a conspiracy, which did not end until the conspirators were arrested, all that took place and what each of them said and did up to the time of the arrest was admissible.—*Id.*

#### (E) Weight and Sufficiency.

§ 234 (Tex.Cr.App.) Evidence held to sustain a verdict finding that accused did the killing.—*Shamblin v. State*, 171 S. W. 718.

§ 235 (Tex.Cr.App.) In a prosecution for homicide in furtherance of an illegal conspiracy to organize in Texas an armed band to invade Mexico, evidence held to warrant a conviction.—*Martinez v. State*, 171 S. W. 1153.

§ 250 (Tex.Cr.App.) Evidence held to sustain a conviction of murder pursuant to a conspiracy.—*Serrato v. State*, 171 S. W. 1133.

§ 254 (Ark.) On a trial for murder, evidence held to warrant a conviction of murder in the second degree.—*Plumley v. State*, 171 S. W. 925.

§ 254 (Tex.Cr.App.) Evidence held to sustain a conviction of murder in the second degree.—*Hicks v. State*, 171 S. W. 755.

### VIII. TRIAL.

#### (B) Questions for Jury.

§ 269 (Tex.Cr.App.) Evidence held to justify submission of the question of a specific conspiracy to take the life of decedent, though the preponderance of the evidence indicated that he was killed as an incident to a conspiracy to

commit another offense.—*Martinez v. State*, 171 S. W. 1153.

§ 270 (Tex.Cr.App.) The presumption raised by the introduction in evidence of an adjudication of defendant's insanity at a time prior to the killing *held* not to prevent the submission to the jury of the question of his insanity at the time of the killing.—*Witty v. State*, 171 S. W. 229.

(C) Instructions.

§ 290 (Tex.Cr.App.) In a prosecution for homicide effected by striking with an axe handle, defendant *held* entitled to an instruction as to law contained in White's Ann. Pen. Code 1911, art. 719, relating to intent, where the means used are not calculated to produce death.—*House v. State*, 171 S. W. 206.

§ 294 (Tex.Cr.App.) Where, in a homicide case, the defense was insanity, and the state's evidence tended to prove that defendant was sane when he killed the deceased, the state had a right to have such issue submitted to the jury by proper instructions.—*Witty v. State*, 171 S. W. 229.

Instruction on the evidence sufficient to establish defendant's sanity at the time of the killing *held* proper.—*Id.*

§ 295 (Tex.Cr.App.) Where the evidence did not show that deceased made any threat against defendant, no charge on threats was called for.—*Hicks v. State*, 171 S. W. 755.

Where the state's evidence tended to show that defendant did not kill deceased because of insulting words and conduct towards defendant's wife charge on insulting words and conduct as adequate cause *held* not reversible error.—*Id.*

Charge on provocation and sudden passion *held* proper.—*Id.*

§ 300 (Ark.) Where there was no testimony that defendant was not a person of ordinary reason, an instruction that a bare fear is not sufficient to justify the killing, but it must appear that the circumstances were sufficient to excite the fears of a reasonable person, was not erroneous.—*Plumley v. State*, 171 S. W. 925.

On a trial for murder, instructions *held* not objectionable as denying the defendant the right to act upon the danger as it appeared to him.—*Id.*

§ 300 (Ky.) An instruction in homicide on self-defense *held* not objectionable as making the jury judges of the reasonableness of the means of averting the injury.—*Rogers v. Commonwealth*, 171 S. W. 464.

§ 300 (Tex.Cr.App.) Charge on self-defense, if called for by the evidence, *held* not objectionable as requiring a finding that deceased had used words towards defendant when no words were used or relied on by defendant.—*Hicks v. State*, 171 S. W. 755.

§ 300 (Tex.Cr.App.) A charge on self-defense *held* sufficient presentation of the right of self-defense as raised by the evidence.—*Nesbitt v. State*, 171 S. W. 1126.

§ 308 (Tex.Cr.App.) An instruction defining murder in the second degree and its elements need not state the facts or circumstances which will extenuate or excuse the homicide.—*Witty v. State*, 171 S. W. 229.

§ 309 (Tex.Cr.App.) Defendant *held* entitled under the evidence to an instruction applying the law of manslaughter to the acts of deceased and of those whom defendant contended were acting with deceased.—*House v. State*, 171 S. W. 206.

Evidence *held* to require an instruction that the jury should consider the question of provocation from the standpoint of the defendant as the facts were presented to his mind.—*Id.*

§ 309 (Tex.Cr.App.) Evidence *held* insufficient to present the issue of manslaughter.—*Cook v. State*, 171 S. W. 227.

§ 309 (Tex.Cr.App.) In a prosecution for murder *held*, on the evidence, that there was no issue of manslaughter in the case; and hence no error in refusing to give a specially requested charge thereon.—*Guerrero v. State*, 171 S. W. 731.

## X. APPEAL AND ERROR.

§ 338 (Ky.) Admission of deceased's statement, that had he known defendant was fixing to shoot him he would have gotten away, *held* not prejudicial.—*Rogers v. Commonwealth*, 171 S. W. 464.

§ 340 (Tex.Cr.App.) Where on the evidence self-defense was not in the case, a charge thereon was in defendant's favor and he could not complain of it.—*Hicks v. State*, 171 S. W. 755.

## HOSPITALS.

§ 4 (Tex.Civ.App.) Section 12 of Act March 26, 1913, *held* not to require appointment by county commissioners of a board to take charge of a building constructed for, but never used as, a hospital, and abandoned as unfit therefor.—*Glasscock v. Wells*, 171 S. W. 782.

Section 12 of Act March 26, 1913, *held* not to require the appointment by county commissioners of managers to take charge of pest-houses used only occasionally to treat cases of smallpox.—*Id.*

A hospital operated by a city and county jointly under section 14 of Act March 26, 1913, is not a county hospital, within section 12, requiring the appointment of a manager therefor.—*Id.*

## HUMANITARIAN DOCTRINE.

See Carriers, § 280; Master and Servant, §§ 248, 265, 278; Street Railroads, § 103.

## HUSBAND AND WIFE.

See Bigamy; Divorce; Dower; Execution, §§ 171, 172; Fraudulent Conveyances, § 95; Homestead, §§ 117, 118, 122, 141, 142, 166; Judgment, § 744; Limitation of Actions, § 73; Mortgages, § 376; Statutes, § 115; Trusts, § 276; Wills, § 693; Witnesses, §§ 139, 140.

### I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 14 (Tenn.) Upon the death of a husband, the wife holds land, which was vested in them as tenants by the entirety, as survivor in her own right, and not under or by inheritance from her husband.—*Wilkey v. Wilkey*, 171 S. W. 78.

§ 19 (Ky.) Where a trustee, under a trust deed executed by a husband alone, filed suit against the husband and wife for the construction of the deed and for a settlement of the trust, a claim for legal services for the wife was not "necessaries," within Ky. St. § 2130.—*Mulligan v. Mulligan*, 171 S. W. 420.

In a suit by a trustee, in a trust deed executed by a husband alone, for the construction of the deed and for a settlement of the trust, the fees of the wife's counsel cannot be adjudged a proper charge on the estate of the husband, though deemed necessities, within Ky. St. § 2130.—*Id.*

### II. MARRIAGE SETTLEMENTS.

§ 30 (Mo.App.) Postnuptial settlements having no element of fraud in them are upheld by the courts.—*Banner v. Banner*, 171 S. W. 2.

### III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 49½ (Ark.) Where a husband furnished money to purchase stock in a building association and had it transferred to his wife, the presumption was that any money he used in the

purchase and transfer was a gift to her.—Johnson v. Johnson, 171 S. W. 475.

The presumption that, when a man purchases property and takes the title in the name of his wife, he intends it as a gift may be overcome by testimony of declarations or circumstances.—Id.

In a wife's action to recover stock alleged to have been paid for with her own money, and to have been transferred into her name on the books of the corporation, *held* that the finding in her favor was not against the preponderance of the evidence.—Id.

## V. WIFE'S SEPARATE ESTATE.

### (A) What Constitutes.

§ 115 (Mo.) Where a wife had accepted notes of a third person from her husband as part payment of a prior judgment for breach of promise, her subsequent marriage did not invalidate her claim to the notes.—Wellman v. Kaiser Inv. Co., 171 S. W. 370.

§ 119 (Tex.Civ.App.) A deed from husband to wife necessarily vests the wife with a separate estate in the property conveyed.—Molloy v. Brower, 171 S. W. 1079.

§ 131 (Mo.) Where a wife received notes of a third person in part payment of a judgment recovered against her husband for breach of promise, her subsequent lending of the notes to him that he might use them as collateral security for a loan to him did not raise a presumption of payment of the part of the debt represented by the notes.—Wellman v. Kaiser Inv. Co., 171 S. W. 370.

## VI. ACTIONS.

§ 221 (Tex.Civ.App.) Rev. St. 1911, art. 1841, was not repealed by Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624); therefore a husband was a necessary party to a suit to partition land claimed by his wife.—Tannehill v. Tannehill, 171 S. W. 1050.

## VII. COMMUNITY PROPERTY.

§ 262 (Tex.Civ.App.) Land conveyed to a husband is *prima facie* community property.—Winkie v. Conatser, 171 S. W. 1017.

§ 262 (Tex.Civ.App.) There is a presumption of law that land acquired during coverture is community property.—Martin v. Burr, 171 S. W. 1044.

§ 265 (Tex.) Where community land is conveyed to one member of the community, he holds the other's interest in trust.—Mitchell v. Schofield, 171 S. W. 1121.

§ 267 (Tex.) Where land passes to one member of a community by deed or judgment, the legal title is vested in that one, and such deed or judgment is not notice to bona fide purchasers for value of the community interest of the other.—Mitchell v. Schofield, 171 S. W. 1121.

§ 268 (Tex.Civ.App.) A judgment recovered against a husband is a charge upon the community estate of the husband and wife, because within the spirit and intent of the Constitution and statutes she is a party to the suit.—Seabrook v. First Nat. Bank of Port Lavaca, 171 S. W. 247.

§ 268 (Tex.Civ.App.) Debt due from a wife for commissions for an exchange of her separate property is not for necessities within Vernon's Sayles' Ann. Civ. St. 1914, art. 4624, and community property is not liable therefor.—Winkie v. Conatser, 171 S. W. 1017.

§ 274 (Tex.Civ.App.) Where a widow continued to live on community property, which was the homestead, after the death of her husband, so long as her homestead existed, the children could claim no homestead rights, and their interests were therefore subject to sale on execution.—Johnston v. Rockhold, 171 S. W. 282.

## VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 278 (Mo.App.) Agreements between a husband and wife for separation and separate maintenance, if made in prospect of an immediate separation and reasonable, fair, and voluntary, are valid.—Banner v. Banner, 171 S. W. 2.

Separation agreement *held* void so far as it precluded the wife from asking an allowance of suit money with which to defend an action by the husband for divorce as against public policy.—Id.

§ 279 (Mo.App.) Where a reasonable provision is made in a deed of separation for the wife's separate maintenance, she is estopped from suing for further support.—Banner v. Banner, 171 S. W. 2.

## IX. ABANDONMENT.

§ 302 (Tex.Cr.App.) Filing of complaint for seduction before justice and arrest of accused on warrant, *held* the commencement of a prosecution within Pen. Code 1911, art. 1450.—Baskins v. State, 171 S. W. 723.

§ 304 (Tex.Cr.App.) Mere absence of a husband with his wife's consent, while at work, with no intention to abandon, does not constitute abandonment, but proof that he forced her to live with people who treated her so cruelly that she was compelled to leave was sufficient to show abandonment.—Baskins v. State, 171 S. W. 723.

§ 313 (Tex.Cr.App.) That a justice issuing a warrant for accused for seduction was justice of precinct No. 7 in M. county, Tex., *held* admissible in subsequent prosecution for abandonment.—Baskins v. State, 171 S. W. 723.

Proof of treatment of wife in the home of her husband's parents *held* admissible, in a prosecution against him for abandonment, to show that she did not leave voluntarily.—Id.

§ 314 (Tex.Cr.App.) On an issue as to whether a wife had been guilty of acts justifying a divorce as a defense to a prosecution for abandonment, the court properly submitted such issue in general terms for finding.—Baskins v. State, 171 S. W. 723.

## HYPOTHETICAL QUESTIONS.

See Evidence, § 553.

## IMPEACHMENT.

See Witnesses, §§ 331½-407.

## IMPLIED CONTRACTS.

See Work and Labor.

## IMPRISONMENT.

See Habeas Corpus.

## IMPROVEMENTS.

See Municipal Corporations, §§ 260-519.

## INCOMPETENT PERSONS.

See Insane Persons.

## INDEMNITY.

See Insurance, §§ 146, 183; Principal and Surety.

## INDEX.

See Counties, §§ 81, 89.

## INDICTMENT AND INFORMATION.

See Bigamy, § 13; Criminal Law, §§ 814, 823, 1032, 1169; Elections, § 328; Embezzlement, § 28; Grand Jury; Intoxicating Liquors, §§ 205, 210; Larceny, §§ 30, 31; Lewdness, § 5; Libel and Slander, § 152; Perjury, §§ 19, 21, 24, 25; Receiving Stolen Goods, § 7; Witnesses, § 78.

## II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 11 (Tex.Cr.App.) Legality of an indictment presented by a quorum of the grand jury *held* not affected by the fact that the clerk neglected to enter the fact on his minutes.—Serrato v. State, 171 S. W. 1133.

### V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 57 (Mo.App.) Defects in an indictment for unlawfully issuing prescriptions for whisky, which alleged the date of issuance as subsequent to the date the prescription was filled, and the date of the indictment, were cured by Rev. St. 1908, § 5115.—State v. Steel, 171 S. W. 10.

§ 60 (Tex.Cr.App.) If an indictment avers the constituent elements of the offense so as to enable defendant to plead the judgment in bar of another prosecution, it is sufficient.—Zweig v. State, 171 S. W. 747.

The office and purpose of an "indictment" is to notify one of the offense with which he is charged, and the elements thereof, that he may properly prepare his defense.—Id.

§ 114 (Tex.Cr.App.) Information *held* insufficient under Pen. Code 1911, art. 1618, authorizing additional punishment of one previously convicted of the same offense.—Collins v. State, 171 S. W. 729.

§ 119 (Tex.Cr.App.) Where an indictment alleged the filing of a complaint against accused for seduction in a justice court of M. county, the further words, "precinct No. — of" was surplusage.—Baskins v. State, 171 S. W. 723.

## VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125 (Tex.Cr.App.) An indictment charging conjunctively a violation of Allison Act, § 4, charges but one offense, committed in any of the ways specified.—Johnson v. State, 171 S. W. 211.

Where several offenses are embraced in the same general statutory definition, and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count, and a conviction may be had on proving the commission of the offense in any of the ways alleged.—Id.

§ 132 (Tex.Cr.App.) In a trial for bringing stolen goods into the state, the state *held* not required to elect upon which count in the indictment it would ask for a conviction.—Zweig v. State, 171 S. W. 747.

## VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 409, defendant's motion to quash the indictment because the grand jurors' names had been published before the term without any challenge when they were impaneled *held* properly denied.—Merkel v. State, 171 S. W. 738.

§ 139 (Tex.Cr.App.) Under Code Cr. Proc. 1911, arts. 232, 630, and Supreme Court Rule 110 (142 S. W. xxv), a motion to quash because the record did not show that indictment was presented by a quorum of the grand jury could not be made in the court to which the venue was changed.—Serrato v. State, 171 S. W. 1133.

## IX. ISSUES, PROOF, AND VARIANCE.

§ 169 (Tex.Cr.App.) Where the information did not properly allege previous convictions so as to obtain the additional punishment authorized by Pen. Code 1911, art. 1618, the admission of the records of prior convictions was error.—Collins v. State, 171 S. W. 729.

§ 173 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 560, as to substitution of real name

in an indictment, that one commonly known as "Ranols," and indicted as such, was in fact named "Randall," presented no variance.—Ranols v. State, 171 S. W. 1128.

§ 174 (Tex.Cr.App.) One charged as a principal cannot be convicted as an accomplice.—Serrato v. State, 171 S. W. 1133.

## INDORSEMENT.

See Bills and Notes, §§ 256, 358; Insurance, § 150.

## INFANTS.

See Death, § 95; Divorce, §§ 323, 324; Guardian and Ward; Habeas Corpus, §§ 99, 112; Homestead, § 142; Judgment, § 744; Landlord and Tenant, § 164; Parent and Child.

## III. PROPERTY AND CONVEYANCES.

§ 30 (Tenn.) A deed given in consideration of a covenant void under the statute of frauds, being clearly to the infant's prejudice, need not be disaffirmed.—Chambers v. Chattanooga Union Ry. Co., 171 S. W. 84.

§ 34 (Ky.) The power of equity to sell an infant's land is wholly statutory, so that such a sale by it, if not authorized by statute, is void.—Hays v. Wicker, 171 S. W. 447.

§ 37 (Ky.) Under Civ. Code Prac. § 489, providing that a vested estate of an infant in real property may be sold by a court of equity for his maintenance and education, it may sell the underlying coal, without selling the surface, though both are owned by him.—Hays v. Wicker, 171 S. W. 447.

A sale by a court of equity nominally of the mineral rights in an infant's lands should not be made with such indefinite rights to the purchaser, as to use of the surface and timber for mining purposes, so as to make it impossible to sell the surface, except at a great sacrifice.—Id.

## IV. CONTRACTS.

§ 57 (Tenn.) Where it is uncertain whether an infant's contract benefits or prejudices her, and she marries while yet an infant, she should disaffirm the contract within a reasonable time, if she desires to avoid it.—Chambers v. Chattanooga Union Ry. Co., 171 S. W. 84.

## INFORMATION.

See Indictment and Information.

## INFRINGEMENT.

See Trade-Marks and Trade-Names, § 70.

## INHERITANCE.

See Descent and Distribution.

## INITIATION.

See Insurance, § 694.

## INJUNCTION.

See Appeal and Error, § 1050; Constitutional Law, § 68; Corporations, §§ 283, 308, 553; Counties, § 196; Dedication, § 44; Dismissal and Nonsuit, § 75; Execution, § 172; Intoxicating Liquors, §§ 260-277; Judgment, §§ 256, 449, 743; Limitation of Actions, § 6; Logs and Logging, § 4; Pleading, §§ 34, 35; Prohibition, § 10; Taxation, § 611; Trial, § 398.

## I. NATURE AND GROUNDS IN GENERAL.

(A) Nature and Form of Remedy.

§ 7 (Tex.Civ.App.) Where a party could have procured relief by appeal from an order of which he complained, he is not entitled to an injunction.

tion to give him the same relief.—*Williams v. Watt*, 171 S. W. 266.

**(B) Grounds of Relief.**

§ 13 (Tex.Civ.App.) Performance of official duty will be enjoined only on showing that the act is unlawful and will result in a private injury to complainant.—*Marion County v. Perkins Bros. Co.*, 171 S. W. 789.

**II. SUBJECTS OF PROTECTION AND RELIEF.**

**(A) Actions and Other Legal Proceedings.**

§ 27 (Tex.Civ.App.) That a receiver is unfit or is not properly discharging duties of his office is not ground for enjoining him from acting, or enjoining parties on whose petition he was appointed from further prosecuting their suit, for the surety on the receiver's bond is liable for any misconduct.—*Williams v. Watt*, 171 S. W. 266.

That a receiver was a surety upon the cost bond of the plaintiff at whose suit he was appointed, and that such plaintiff was indebted to the corporation for which the receiver was ordered, is no ground for enjoining the receiver from acting; the court never having been asked to remove him, nor to order him to sue plaintiff.—*Id.*

That a receiver is selling property of a corporation to himself is no ground for enjoining him from continuing to act, for his bond will protect those injured.—*Id.*

Where a receiver of the assets of a corporation was ordered by the court to sell them, he will not be enjoined from selling because the assets may be sacrificed.—*Id.*

Where a receiver of a corporation was appointed, the fact that the trial court refused to hear the plea in abatement of those objecting to the appointment until he tried the case upon the merits is no ground for enjoining the receiver from acting, and those who instituted the receivership suit from continuing to prosecute it.—*Id.*

That a receiver of a corporation is conducting the business at a loss, while it had been before conducted at a profit, is no ground for enjoining him from continuing to act as such.—*Id.*

**(B) Property, Conveyances, and Incumbrances.**

§ 36 (Mo.App.) A defendant in a suit to enjoin the cutting of timber may not show that plaintiff acquired title to the timber fraudulently, as against the corporation for which he was an agent.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

§ 52 (Mo.App.) Under Rev. St. 1909, § 2534, injunction lies to prevent the cutting of timber under a claim of right.—*Barron v. H. D. Williams Cooperage Co.*, 171 S. W. 683.

**(C) Public Officers and Boards and Municipalities.**

§ 80 (Tex.Civ.App.) Irregularities which may be invoked under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6319k, to contest a local option election, are not grounds for an injunction to restrain the county judge from publishing the result.—*Watson v. Cochran*, 171 S. W. 1067.

§ 85 (Tex.Civ.App.) The courts have no power to enjoin the county court or judge from publishing election returns and declaring the result thereof pursuant to statute, irrespective of the validity of the statute.—*Watson v. Cochran*, 171 S. W. 1067.

**(D) Criminal Acts, Conspiracies, and Prosecutions.**

§ 105 (Ark.) Courts of equity have no jurisdiction to interfere by injunction with criminal proceedings; their jurisdiction to be confined solely to civil and property rights.—*Ferguson v. Martineau*, 171 S. W. 472.

*Kirby's Dig.* § 2454, providing for an injunction by sheriff's jury into the insanity of persons

sentenced to be executed, affords such person a remedy in case he becomes insane after trial. Hence the chancery court cannot, on the ground that such person has no other remedy, justify an order enjoining his execution.—*Id.*

Regardless of statute, one convicted and sentenced to execution will, where he becomes insane after trial, be granted a stay of execution. Hence the chancery court cannot justify an order enjoining execution on the ground that the party had no remedy at law.—*Id.*

**III. ACTIONS FOR INJUNCTIONS.**

§ 113 (Tex.Civ.App.) A person desirous of enforcing a covenant restricting the use of land will not be denied an injunction for that purpose where they made protest upon discovering the intended violation and instituted suit as soon as the protests were shown to be unavailing.—*Hooper v. Lottman*, 171 S. W. 270.

§ 128 (Tex.Civ.App.) In a suit where it was sought to enjoin a receiver appointed at the suit of stockholders of a corporation from continuing to act, and the stockholders from prosecuting their suit, evidence held insufficient to show that the stockholders were guilty of such fraud in procuring their stock that the receivership should be set aside.—*Williams v. Watt*, 171 S. W. 266.

**IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.**

**(A) Grounds and Proceedings to Procure.**

§ 143 (Tex.Civ.App.) A preliminary injunction should not ordinarily be granted without notice; the status quo being maintained in the meantime by the issuance of a restraining order.—*Soto v. State*, 171 S. W. 279.

§ 152 (Tex.Civ.App.) It is proper, upon the hearing for a temporary injunction to restrain a receiver from acting, to refuse to restrain the parties at whose suit he was appointed from continuing to prosecute their suit.—*Williams v. Watt*, 171 S. W. 266.

**IN PAIS.**

See *Estoppel*, § 110.

**INQUISITION.**

See *Insane Persons*, § 26.

**INSANE PERSONS.**

See *Cancellation of Instruments*, § 51; *Carriers*, §§ 281, 321; *Criminal Law*, §§ 311, 331, 361, 683, 981; *Deeds*, § 68; *Homicide*, §§ 27, 151, 270, 294; *Injunction*, § 105.

**II. INQUISITIONS.**

§ 26 (Ky.) An inquest adjudging one incompetent to manage his estate was conclusive evidence of his condition only at the time of such inquest; and, even if held before his deed was executed, would have been only *prima facie* evidence of incapacity.—*Wathen v. Skaggs*, 171 S. W. 193.

**V. PROPERTY AND CONVEYANCES.**

§ 61 (Ark.) The conveyance of an insane person is void without regard to the adequacy of the consideration, though equity will more readily intervene if, in addition to mental incapacity, there is also inadequacy of consideration.—*McEvoy v. Tucker*, 171 S. W. 888.

§ 61 (Ky.) The deed of a person of unsound mind is not void, but merely voidable.—*Wathen v. Skaggs*, 171 S. W. 193.

**VI. CONTRACTS.**

§ 73 (Tex.Civ.App.) A contract of an insane person, transferring personal property for care, held voidable only.—*Hancock v. Hail*, 171 S. W. 1053.

§ 75 (Tex.Civ.App.) The extent of an insane person's liability for necessities is their reasonable value, regardless of the price he agreed to pay.—*Hancock v. Haile*, 171 S. W. 1053.

§ 79 (Tex.Civ.App.) Where plaintiff, while insane, conveyed personal property to defendant in consideration of care, which was much less in value than the property, plaintiff on recovery could recover the difference, though defendant's appropriation did not amount to conversion.—*Hancock v. Haile*, 171 S. W. 1053.

Where an insane person transferred property of greater value than the value of necessities furnished by the transferee, the insane person was not required to prove a tender of the value of the necessities to recover the difference.—*Id.*

## INSOLVENCY.

See Bankruptcy; Banks and Banking, §§ 84, 85; Corporations, §§ 553, 556.

## INSPECTION.

See Master and Servant, § 124.

## INSTRUCTIONS.

To jury, see Criminal Law, §§ 763-829; Trial, §§ 191-296.

## INSURANCE.

See Appeal and Error, §§ 1001, 1170; Evidence, § 471; Mortgages, §§ 201, 518; Pleading, §§ 291, 433; Taxation, § 230.

### III. INSURANCE AGENTS AND BROKERS.

#### (A) Agency for Insurer.

§ 84 (Mo.App.) In an action by an insurance solicitor for the balance of commissions earned, where defendant claimed that its written offer of commissions at a specified rate was orally modified before acceptance, evidence held insufficient to support a judgment for plaintiff.—*Ratcliffe v. Missouri Benefit Ass'n*, 171 S. W. 32.

### V. THE CONTRACT IN GENERAL.

#### (A) Nature, Requisites, and Validity.

§ 138 (Mo.App.) One unable to read, who signs an application for insurance upon false representations of the insurer's agent as to its contents, is not bound by his signature.—*Colley v. National Live Stock Ins. Co.*, 171 S. W. 663.

#### (B) Construction and Operation.

§ 146 (Mo.App.) In cases of ambiguity, an insurance policy will be construed most strictly against the insurer.—*Wiest v. United States Health & Accident Ins. Co. of Saginaw, Mich.*, 171 S. W. 570.

§ 146 (Mo.App.) Different provisions of an indemnity insurance policy must be construed so as to be in harmony with each other and to give effect to each if possible, although such construction is favorable to the insurer.—*Ætna Life Ins. Co. v. Kansas City Electric Light Co.*, 171 S. W. 580.

§ 150 (Mo.App.) Indorsement by foreign life insurance company on back of policy, without referring to it in the policy or application, held not "part of the policy" within Rev. St. 1889, § 5859, as amended by Laws 1895, p. 197, authorizing exemption of policy from sections 5856, 5858.—*Gibson v. State Mut. Life Assur. Co. of Worcester, Mass.*, 171 S. W. 979.

### VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 183 (Mo.App.) In an action by an indemnity company for premium, held, that the rate was governed by a clause providing for a short term rate if cancellation of the policy was at

the request of the assured, and not by a special agreement for a lower rate, if the assured concluded at the end of the first year to carry no liability insurance.—*Ætna Life Ins. Co. v. Kansas City Electric Light Co.*, 171 S. W. 580.

### IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

#### (A) Grounds in General.

§ 264 (Mo.App.) The word "misrepresentation," in Rev. St. 1909, § 6937, relating to misrepresentations in obtaining a life policy, held to include warranties.—*Dodd v. Prudential Ins. Co. of America*, 171 S. W. 655.

#### (C) Matters Relating to Person Insured.

§ 291 (Mo.App.) A life policy held governed by Rev. St. 1909, § 6937, so that insurer could not defeat a recovery for insured's misrepresentations as to the condition of his health, unless that condition contributed to his death.—*Dodd v. Prudential Ins. Co. of America*, 171 S. W. 655.

### X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

#### (A) Grounds in General.

§ 310 (Tex.Civ.App.) Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4948, misrepresentations of insured held not a defense where notice of insurer's refusal to be bound was not given within 90 days after notice of the misrepresentations.—*Commonwealth Bonding & Casualty Ins. Co. v. Wright*, 171 S. W. 1043.

#### (B) Matters Relating to Property or Interest Insured.

§ 334 (Mo.App.) Assured's obligation to perform the terms of a policy requiring him to call a veterinary, and to notify the insurer of the sickness of the insured animal does not arise until there is substantial reason for believing the animal is sick.—*Colley v. National Live Stock Ins. Co.*, 171 S. W. 663.

§ 336 (Ky.) Where a policy insuring property to the extent of three-fourths of the value thereof permitted other concurrent insurance, a subsequent policy on the same property to the full value thereof was concurrent insurance.—*Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 171 S. W. 407.

### XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 387 (Tex.Civ.App.) That insurance company allowed insured to move his building held not to estop it from relying upon the breach of a condition declaring that the policy should be void if the premises were unoccupied for over 10 days.—*Fireman's Fund Ins. Co. v. Lyon*, 171 S. W. 801.

### XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

#### (E) Accident and Health Insurance.

§ 530 (Mo.App.) Where an accident policy providing an indemnity for loss of one hand declared that loss of the member meant a loss by severance at or above the wrist joint, the insured cannot recover the indemnity for the loss of all of his hand, except the little finger, which became paralyzed.—*Wiest v. United States Health & Accident Ins. Co. of Saginaw, Mich.*, 171 S. W. 570.

### XIV. NOTICE AND PROOF OF LOSS.

§ 553 (Ky.) Insured in a fire policy held not guilty of fraud and false swearing in proofs of

loss so as to avoid the policy.—Connecticut Fire Ins. Co. v. Union Mercantile Co., 171 S. W. 407.

#### XV. ADJUSTMENT OF LOSS.

§ 574 (Mo.App.) An award under an insurance policy may be disregarded if the arbitrators are guilty of bad faith, partiality, or misconduct substantially affecting the result.—Jones v. Orient Ins. Co., 171 S. W. 28.

§ 579 (Mo.App.) Where a payment of a sum less than due on a life policy was made before the beneficiary had commenced or threatened litigation, or had made demand for payment, and was not made by way of compromise, the beneficiary could sue on the policy for the full amount due.—Dodt v. Prudential Ins. Co. of America, 171 S. W. 655.

#### XVIII. ACTIONS ON POLICIES.

§ 629 (Ky.) A petition in an action on a fire policy, which fails to allege that the property destroyed had some value, *held* defective.—Connecticut Fire Ins. Co. v. Union Mercantile Co., 171 S. W. 407.

§ 635 (Ky.) In action on accident insurance policy, petition *held* to sufficiently allege that death resulted independently of all other causes from bodily injuries through external, violent, and accidental means.—Philadelphia Life Ins. Co. v. Farnsley's Adm'r, 171 S. W. 1004.

§ 639 (Ky.) In action on policy, plaintiff *held* not required to negative death by suicide in pleading, whether liability is excluded by a proviso or an exception, and by a distinct clause, or by a provision in the principal clause.—Philadelphia Life Ins. Co. v. Farnsley's Adm'r, 171 S. W. 1004.

§ 660 (Mo.App.) In action on insurance policy on practically new automobile, testimony of cost of replacing damaged parts *held* not objectionable because witnesses estimated such cost at the cost of new parts, without deduction for depreciation.—Jones v. Orient Ins. Co., 171 S. W. 28.

§ 661 (Ky.) Where parts of insured's books of account, including those showing its inventories and cash sales were destroyed, the action of the court in adopting the bank deposits made in the name of insured, together with the unpaid accounts and bills receivable, as a basis for ascertaining the amount of the loss *held* not erroneous.—Connecticut Fire Ins. Co. v. Union Mercantile Co., 171 S. W. 407.

The court, in determining the amount of a fire loss, *held* not authorized to take from the amount of sales of merchandise item of expenses either paid out of money not deposited in bank or out of merchandise.—Id.

§ 665 (Mo.App.) Evidence *held* to support finding that the conduct of the arbitrator appointed by the company prevented a fair appraisal.—Jones v. Orient Ins. Co., 171 S. W. 28.

§ 665 (Mo.App.) The jury may infer that an insured animal died from some disease common to the species, from the fact that the animal was found dead with no external mark of violence.—Colley v. National Live Stock Ins. Co., 171 S. W. 663.

§ 665 (Tex.Civ.App.) In an action on a fire policy, evidence *held* not to show that insured, on procuring permission to move a building, secured a waiver of a condition avoiding the policy if the premises remained vacant for over 10 days.—Fireman's Fund Ins. Co. v. Lyon, 171 S. W. 801.

§ 665 (Tex.Civ.App.) In action on health and accident insurance policy, evidence *held* to support a verdict for \$100 as attorney's fees under Vernon's Sayles' Ann. Civ. St. 1914, art. 4746.—Commonwealth Bonding & Casualty Ins. Co. v. Wright, 171 S. W. 1043.

§ 666 (Mo.App.) The jury may find that the insurer's refusal to pay was vexatious from the failure to establish the grounds on which the

refusal was based.—Colley v. National Live Stock Ins. Co., 171 S. W. 663.

§ 668 (Mo.App.) In an action on a life policy the allowance of damages for vexatious refusal to pay and for counsel fee *held* for the jury.—Under Rev. St. 1909, § 7068, and the court on appeal will not interfere therewith.—Dodt v. Prudential Ins. Co. of America, 171 S. W. 655.

§ 670 (Tex.Civ.App.) In action on insurance policy verdict for specified amount, "with 12 per cent. interest," *held* to justify judgment for 12 per cent. damages for delay, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4746.—Commonwealth Bonding & Casualty Ins. Co. v. Wright, 171 S. W. 1043.

§ 675 (Mo.App.) After a refusal to pay, a demand is not necessary to the right to attorney's fees for the insurer's vexatious refusal to pay.—Colley v. National Live Stock Ins. Co., 171 S. W. 663.

#### XX. MUTUAL BENEFIT INSURANCE.

##### (A) Corporations and Associations.

§ 693 (Tex.Civ.App.) By-law that absence or disappearance of member should not be evidence of his death *held* void under Rev. St. 1911, art. 5707, creating a presumption of death from absence for seven years.—Supreme Ruling of Fraternal Mystic Circle v. Hoskins, 171 S. W. 812.

§ 694 (Mo.App.) Initiation is a condition precedent to membership in an insurance benefit association.—Gilmore v. Modern Brotherhood of America, 171 S. W. 629.

§ 697 (Tex.Civ.App.) Under Rev. St. 1911, art. 4847, declaring that a local branch of a fraternal association cannot waive any provisions of the laws and constitution of the association, the association cannot be estopped by the conduct of a local body.—Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve, 171 S. W. 489.

§ 699 (Tex.Civ.App.) Member of society who disappeared before assumption of society's contracts by defendant, but whose dues were paid, *held* a "contributing member in good standing" and a finding that he was a "living member" was warranted, notwithstanding Rev. St. 1911, § 5707.—Supreme Ruling of Fraternal Mystic Circle v. Hoskins, 171 S. W. 812.

##### (B) The Contract in General.

§ 723 (Ky.) Where an answer in an application is material and untrue, the fact that applicant might have forgotten would not entitle him to recovery; but where an applicant stood in good faith that he never had had a certain disease, and there was no evidence, or only conflicting evidence as to whether he knew that he had had such disease, the literal untruth of his answer would not defeat a recovery.—Brotherhood of Railroad Trainmen v. Swearingen, 171 S. W. 455.

##### (D) Forfeiture or Suspension.

§ 750 (Tex.Civ.App.) Under Rev. St. 1911, art. 4834, a death benefit cannot be recovered where the member was in default in his assessments, and the certificate provided that no benefit could be recovered in such event.—Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve, 171 S. W. 489.

§ 755 (Tex.Civ.App.) Benefit society, by failing to suspend member who disappeared, and continuing to accept dues and assessments, *held* to have waived its right to suspend him pursuant to its laws, and estopped from asserting a suspension.—Supreme Ruling of Fraternal Mystic Circle v. Hoskins, 171 S. W. 812.

##### (F) Actions for Benefits.

§ 805 (Ky.) Fraternal beneficiary associations, may, by adopting a constitution and by-laws, provide reasonable rules for settling their

own disputes, and may establish their own tribunals therefor, and members must conform to its reasonable regulations and exhaust their remedies within the association before the courts will take cognizance of their grievances.—*Brotherhood of Railroad Trainmen v. Swearingen*, 171 S. W. 455.

Claimant under a certificate of a fraternal insurance association *held* to have exhausted her remedies within the order, as required by its constitution, before appealing to the courts.—*Id.*

§ 817 (Mo.App.) The presumption that a certificate was regularly deposited in proper hands cannot be permitted to contradict plain uncontroverted facts as to how it got into the hands of the individual.—*Gilmore v. Modern Brotherhood of America*, 171 S. W. 629.

§ 818 (Mo.App.) In an action on a certificate, defended on the ground that it was delivered without necessary initiation, it was not error to refuse evidence of a contrary custom without an offer to show the number of certificates thus delivered, or such a course of dealing necessarily known to the Supreme Lodge, and that decedent knew that they were thus delivered.—*Gilmore v. Modern Brotherhood of America*, 171 S. W. 629.

In action on certificate, defended on the ground that it was delivered without initiation, required by defendant's by-laws, authorized by Laws 1911, p. 292, § 22, prohibiting a waiver of such a provision by subordinate officers and requiring such initiation, such by-laws were admissible.—*Id.*

§ 819 (Ky.) Evidence *held* to sustain a finding that the insured did not make false statements in his application for membership in regard to his employment as an assistant yardmaster.—*Brotherhood of Railroad Trainmen v. Swearingen*, 171 S. W. 455.

§ 819 (Mo.App.) A prima facie showing by certified copy of a license under Laws 1911, p. 290, § 16, that the licensee is a fraternal benefit society is sufficient, in the absence of contrary evidence, to bring it within the provisions of the law relating thereto.—*Gilmore v. Modern Brotherhood of America*, 171 S. W. 629.

§ 825 (Ky.) Whether insured made false statements in his application as to the condition of his health, *held* properly left to the jury.—*Brotherhood of Railroad Trainmen v. Swearingen*, 171 S. W. 455.

Whether the question whether insured ever had any disease of the urinary organs was understood by him, and, if so, whether his negative answer was false because he had suffered from and been treated for kidney disease, *held* for the jury.—*Id.*

§ 825 (Mo.App.) In an action on certificate, defended on the ground that it was delivered without initiation, required by defendant's by-laws, as a condition precedent to membership, evidence as to the fact of an initiation *held* insufficient to go to the jury.—*Gilmore v. Modern Brotherhood of America*, 171 S. W. 629.

## INTENT.

See Abduction, § 9; Constitutional Law, § 13; Covenants, § 21; Dedication, §§ 1, 15; Gifts, § 16; Wills, § 452.

## INTEREST.

See Corporations, § 320; Trover and Conversion, § 53; Usury; Witnesses, §§ 372-377.

## IV. RECOVERY.

§ 66 (Tex.Civ.App.) In trover for conversion, pleadings *held* to entitle plaintiff to interest from March 21, 1893, and not from January 8, 1900.—*Hancock v. Halle*, 171 S. W. 1053.

## INTERPLEADER.

See Garnishment, § 133.

## INTERROGATORIES.

See Depositions; Trial, §§ 350, 356.

## INTERSTATE COMMERCE.

See Commerce.

## INTOXICATING LIQUORS.

See Criminal Law, §§ 338, 404; Landlord and Tenant, § 34.

### I. POWER TO CONTROL TRAFFIC.

§ 6 (Tex.Cr.App.) The Legislature may enact laws defining offenses for new conditions arising under the prohibition law, to aid in the prevention of illegal sales.—*Johnson v. State*, 171 S. W. 211, following *Fitch v. Same*, 127 S. W. 1040, 58 Tex. Cr. R. 366; *Payne v. Same*, 129 S. W. 1197.

§ 6 (Tex.Cr.App.) As to shipment and delivery of intoxicating liquor wholly within the state, the Legislature alone has authority to deal, so far as it may be necessary to protect the public health, morals, and welfare.—*Longmire v. State*, 171 S. W. 1165.

Under Const. art. 16, § 20, authorizing prohibition, the Legislature must pass all laws necessary to prevent illegal sales of liquor.—*Id.*

### II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

§ 14 (Tex.Cr.App.) The Allison Act prohibiting the shipment of intoxicating liquors into prohibition territory, is constitutional.—*Johnson v. State*, 171 S. W. 211.

### III. LOCAL OPTION.

§ 39 (Tex.Cr.App.) In the absence of a contest of an election adopting prohibition in a county, the court must presume, on a trial for violating the prohibition law, that the steps to enact prohibition were legal.—*Longmire v. State*, 171 S. W. 1165.

§ 40 (Tex.Cr.App.) The Allison Act applies to a county which, prior to its enactment, had adopted prohibition.—*Longmire v. State*, 171 S. W. 1165.

### IV. LICENSES AND TAXES.

§ 66 (Ark.) A petition to the county court under the Going Law, for the issuance of a liquor license for a period authorized by law is not insufficient for failure to allege the year the license is to issue.—*Argenta Retail Liquor Dealers' Ass'n v. McClure*, 171 S. W. 904.

Under the Going Law, it is no objection to a petition for license in a city that another petition in the same year had been set aside for an insufficient number of signers.—*Id.*

### VI. OFFENSES.

§ 138 (Tex.Cr.App.) Under Allison Act, §§ 2-10, defendant's act as an agent in purchasing for and carrying a bottle of whisky to another for his individual use *held* not an offense.—*Ex parte Hopkins*, 171 S. W. 1163.

§ 138 (Tex.Cr.App.) Transportation of liquor from wet territory in the state into dry territory by a citizen thereof for his own use or as agent for another for his own use is not a violation of Allison Act.—*Longmire v. State*, 171 S. W. 1165.

### VIII. CRIMINAL PROSECUTIONS.

§ 205 (Tex.Cr.App.) An indictment charging the transportation and delivery of intoxicating liquor in prohibition territory, which alleges that on a designated date an election was held

under proper authority and that prohibition was adopted, was sufficient, without naming the various voting precincts in the county.—*Johnson v. State*, 171 S. W. 211.

§ 210 (Tex.Cr.App.) Under Allison Act, §§ 2-4, 12, an indictment charging transportation of liquor into a prohibition county need not allege whether the transportation was interstate or intrastate.—*Longmire v. State*, 171 S. W. 1165.

§ 223 (Ark.) In a prosecution for taking orders for the sale of intoxicants in nonlicense territory, the state need not limit the proof to any particular order, but may show any and all orders taken within a year prior to the date of the prosecution.—*Sanders v. State*, 171 S. W. 142.

§ 231 (Tex.Cr.App.) On a trial for carrying intoxicating liquor into prohibition territory, the testimony of an officer seizing the valise of accused, which he had carried into the territory, that the bottles in the valise contained whisky, was admissible.—*Johnson v. State*, 171 S. W. 211.

§ 236 (Tex.Cr.App.) On a trial for unlawfully transporting and delivering intoxicating liquor in prohibition territory from another point in the state, evidence held to sustain a conviction.—*Johnson v. State*, 171 S. W. 211.

§ 236 (Tex.Cr.App.) In a prosecution for engaging in the business of selling intoxicating liquors, evidence held sufficient to support a conviction.—*Waits v. State*, 171 S. W. 708.

#### IX. SEARCHES, SEIZURES, AND FORFEITURES.

§ 257 (Tex.) Parties voluntarily assisting officers in raiding plaintiff's hotel and wrongfully carrying away his stock of liquors, knowing the warrant was illegal, held liable to plaintiff in damages.—*Cartwright v. Canode*, 171 S. W. 696.

#### X. ABATEMENT AND INJUNCTION.

§ 260 (Tex.Civ.App.) The rule that a bona fide club, selling liquor to its members only without profit, and organized for a lawful purpose, is not engaged in selling intoxicating liquor, and cannot be enjoined as a disorderly house under Pen. Code 1911, arts. 496, 503, does not apply to clubs not organized in good faith.—*Soto v. State*, 171 S. W. 279.

§ 274 (Tex.Civ.App.) A petition alleging the use of certain premises by a club for the sale of intoxicating liquor without a license held sufficient to justify an injunction against its continued maintenance as a disorderly house under Pen. Code 1911, arts. 496, 505.—*Soto v. State*, 171 S. W. 279.

Prayer in a petition for injunction to enjoin a liquor nuisance as a disorderly house held sufficiently broad to authorize a preliminary injunction.—*Id.*

Under Pen. Code 1911, art. 505, a verified petition is not essential to the issuance of a preliminary injunction in proceedings to enjoin a liquor nuisance as a disorderly house.—*Id.*

§ 277 (Tex.Civ.App.) Under Pen. Code 1911, arts. 496, 503, an injunction restraining defendants from using premises for the sale or keeping for sale spirituous, etc., liquors, held too broad; the court being authorized to restrain such acts only when done without a license.—*Soto v. State*, 171 S. W. 279.

#### JEOPARDY.

See Criminal Law, § 198.

#### JOINDER.

See Action, § 50; Indictment and Information, § 125.

#### JOINT-STOCK COMPANIES.

§ 19 (Tex.Civ.App.) Under Rev. St. 1911, § 6153, facts held to authorize personal judgment

against members of joint-stock company.—*Bas-trop & Austin Bayou Rice Growers' Ass'n v. Cochran*, 171 S. W. 294.

In an action against a joint-stock association and certain of its members individually, the fact that the judgment did not formally read that the property of the association should be exhausted before executions against the property of individual members, held not to vitiate it, because Rev. St. 1911, § 6153, expressly so provides.—*Id.*

#### JOINT TENANCY.

See Tenancy in Common.

#### JUDGES.

See Court Commissioners; Courts; Injunction, §§ 80, 85; Justices of the Peace; Trial, § 29.

#### III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 25 (Tex.Civ.App.) A special county judge elected by the members of the bar in the absence of the county judge under Rev. St. 1911, art. 1741, may try cases in which the county judge would be disqualified.—*Ford v. Simmons*, 171 S. W. 1077.

Special county judge elected by members of bar under Rev. St. 1911, art. 1741, held to have jurisdiction to try case, though Governor had appointed special judge, who had not qualified, to try such case under article 1738.—*Id.*

#### IV. DISQUALIFICATION TO ACT.

§ 45 (Tex.Civ.App.) A judge is related to his wife's first cousin by affinity, although not to the husband of such cousin, and, where a judgment against the husband would adversely affect the community interest of his wife's cousin, he is disqualified.—*Seabrook v. First Nat. Bank of Port Lavaca*, 171 S. W. 247.

§ 51 (Tex.Civ.App.) The question of the disqualification of the trial judge may be raised by a motion for new trial.—*Seabrook v. First Nat. Bank of Port Lavaca*, 171 S. W. 247.

§ 56 (Tex.Civ.App.) A disqualified judge cannot enter a decree or order agreed to by the parties, and any judgment rendered by him must be reversed.—*Seabrook v. First Nat. Bank of Port Lavaca*, 171 S. W. 247.

#### JUDGMENT.

See Appeal and Error; Attachment, § 203; Costs, § 238; Counties, § 222; Criminal Law, § 981; Execution, § 171; Garnishment; Husband and Wife, § 268; Insurance, § 670; Joint-Stock Companies, § 19; Mortgagees, §§ 292, 298; Municipal Corporations, §§ 18, 33; Partition, § 95; Pledges, §§ 53, 57; Sequestration, § 20; Usury, § 22; Vendor and Purchaser, § 285; Wills, § 353; Witnesses, § 78.

#### I. NATURE AND ESSENTIALS IN GENERAL.

§ 17 (Tex.Civ.App.) A personal judgment against a nonresident is not supported by constructive service, and attachment of property.—*Findlay v. Lumsden*, 171 S. W. 818.

#### IV. BY DEFAULT.

##### (A) Requisites and Validity.

§ 101 (Tex.Civ.App.) A petition good as against general demurrer will sustain a default judgment.—*Findlay v. Lumsden*, 171 S. W. 818.

A petition praying for judgment on notes against "plaintiff" is not bad on general demurrer, and will sustain a default judgment.—*Id.*

#### VI. ON TRIAL OF ISSUES.

##### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 248 (Tex.Civ.App.) A money judgment for deficiency in purchase price in favor of a cor-

poration suing to set aside an alleged unauthorized conveyance of land by its officers *held* without support in the pleadings or evidence.—*Patterson v. Sylvan Beach Co.*, 171 S. W. 515.

§ 252 (Mo.App.) Where plaintiff's petition justifies the relief to which plaintiff is entitled, it may be granted, though it is somewhat different from the specific relief sought.—*Rutherford v. Sample*, 171 S. W. 578.

§ 253 (Mo.App.) Where a petition averred the value of each thing destroyed, the recovery cannot exceed the total of the items.—*First Nat. Realty & Loan Co. v. Mason*, 171 S. W. 971.

§ 256 (Tex.Civ.App.) When a special verdict has been returned, the trial court, in rendering judgment, cannot disregard a finding on a material issue, even though such finding has no support whatever in the testimony.—*Houston & T. C. R. Co. v. Smallwood*, 171 S. W. 292.

§ 256 (Tex.Civ.App.) In an action to enjoin a city from claiming land for a public street, where the jury found that plaintiff's ancestor intended to dedicate, *held* that the court, if of opinion that the evidence did not show such intention, could not give judgment for plaintiff, but should have granted a new trial.—*City of Kaufman v. French*, 171 S. W. 831.

§ 256 (Tex.Civ.App.) A judgment must follow the verdict, though there be good grounds to set the verdict aside on a motion for new trial.—*Hancock v. Haile*, 171 S. W. 1053.

## X. EQUITABLE RELIEF.

### (A) Nature of Remedy and Grounds.

§ 427 (Tex.Civ.App.) An agreement by plaintiff's attorney to dismiss *held* within the scope of his authority, so that defendant could have a judgment thereafter obtained without notice vacated.—*Texas & P. Ry. Co. v. Miller*, 171 S. W. 1069.

§ 449 (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 4647, a judgment debtor cannot ask to have the enforcement of a judgment against him restrained pending the outcome of proceedings in another court in which he was garnished unless he tenders the difference between the amount of the judgment and the amount of the claim in the garnishment proceedings.—*Barcus v. O'Brien*, 171 S. W. 492.

### (B) Jurisdiction and Proceedings.

§ 456 (Tex.Civ.App.) *Rev. St.* 1911, art. 4648, does not apply to an equitable suit to vacate a judgment, the time for which is limited by article 5690.—*Texas & P. Ry. Co. v. Miller*, 171 S. W. 1069.

§ 460 (Tex.Civ.App.) A suit *held* to be a suit to vacate the judgment.—*Texas & P. Ry. Co. v. Miller*, 171 S. W. 1069.

## XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

### (A) Judgments Operative as Bar.

§ 540 (Mo.App.) Former judgment on the merits *held* an absolute bar to another suit between the parties, on the same cause of action.—*La Rue v. Kempf*, 171 S. W. 588.

### (B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 598 (Ark.) In an action for the flooding of plaintiff's land, by the construction of a railway embankment, *held* that the injury was permanent and all recoverable in one action.—*St. Louis, I. M. & S. Ry. Co. v. Brundidge*, 171 S. W. 859.

## XIV. CONCLUSIVENESS OF ADJUDICATION.

### (B) Persons Concluded.

§ 701 (Mo.App.) A judgment in favor of a corporation sued for the conversion of corporate

stock by its secretary *held* not conclusive against the liability of the secretary in an individual action.—*Mayger v. Nichols*, 171 S. W. 593.

§ 702 (Mo.) The ordinary rules of res judicata and estoppel by judgment apply to actions by the state for the collection of taxes.—*State ex rel. Blair v. Center Creek Mining Co.*, 171 S. W. 356.

§ 712 (Ky.) A judgment is not conclusive on the issue of the proper location of a patent for land, where the owner was not a party to the action.—*New Era Land Co. v. Childs*, 171 S. W. 417.

### (C) Matters Concluded.

§ 713 (Mo.) While, as to the same cause of action, a judgment is conclusive upon all matters which could have been decided, yet in a second action between the same parties upon a different claim or demand, the prior judgment operates as an estoppel only as to those matters in fact decided.—*State ex rel. Blair v. Center Creek Mining Co.*, 171 S. W. 356.

A judgment, in an action for city taxes *held* not to estop plaintiff from asserting, in a suit for subsequent taxes, that defendant's property was properly included within the city limits.—*Id.*

§ 713 (Mo.App.) Former judgment on the merits is conclusive in another suit between the parties, on the same cause of action, as to all matters of claim or defense which were or might have been set up.—*La Rue v. Kempf*, 171 S. W. 588.

The doctrine of "res adjudicata" on former adjudication goes upon the theory, on the one hand, that it is to the interest of the state that there should be an end to litigation, and, on the other hand, that the individual shall not be twice vexed for the same cause.—*Id.*

§ 735 (Mo.App.) Estoppel of a previous adjudication of a question upon which liability hinges in a subsequent suit on a different cause of action *held* to operate only as to those matters in issue, upon the determination of which the judgment was actually rendered.—*La Rue v. Kempf*, 171 S. W. 588.

The judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter which came collaterally in question, though within its jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.—*Id.*

§ 741 (Mo.App.) The judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter to be inferred by argument therefrom.—*La Rue v. Kempf*, 171 S. W. 588.

§ 743 (Ark.) A judgment enjoining a district of a county from erecting a courthouse on part of a parcel of land is not an adjudication that the district had title to the remaining portion.—*Jennings v. Ft. Smith Dist. of Sebastian County*, 171 S. W. 920.

§ 744 (Mo.App.) In an action by a divorced wife, awarded the custody of minor children, against her former husband to recover for their maintenance, defended on the ground of a release by an agreement under which defendant paid money in satisfaction of his liability, a former suit by plaintiff for maintenance, in which defendant pleaded the same agreement and had judgment, *held*, as a matter of law, an estoppel against the subsequent action.—*La Rue v. Kempf*, 171 S. W. 588.

## XV. LIEN.

§ 772 (Tex.Civ.App.) A mistake in the amount of a judgment does not render the lien ineffective, and a correction does not destroy the lien as of the date of entry of judgment.—*First State Bank of Amarillo v. Jones*, 171 S. W. 1057.

## XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 951 (Mo.App.) Where the record in a former action does not show what questions were determined therein, they may be shown by extrinsic parol evidence.—*La Rue v. Kempf*, 171 S. W. 588.

§ 951 (Tenn.) The court, in ascertaining the extent and effect of an adjudication in a prior suit, may hear evidence outside of the record to determine what, in fact, was adjudicated.—*Shaller v. Garrett*, 171 S. W. 486.

## JUDICIAL NOTICE.

See Evidence, §§ 13, 20.

## JUDICIAL SALES.

See Execution, §§ 171, 172; Executors and Administrators, §§ 324-388; Limitation of Actions, §§ 44, 73.

## JURISDICTION.

See Appeal and Error, §§ 51, 56, 61, 65, 395, 648, 719; Appearance; Corporations, § 665; Courts; Criminal Law, § 1083; Eminent Domain, § 266; Equity, § 21; Habeas Corpus, § 112; Infants, §§ 34, 37; Injunction, § 105; Judges, § 25; Justices of the Peace, §§ 43, 141, 157, 164, 173; Prohibition, § 10.

## JURY.

See Courts, § 489; Criminal Law, §§ 731-887, 918, 1166½; Grand Jury; New Trial, §§ 42, 44; Trial, §§ 139-356.

## II. RIGHT TO TRIAL BY JURY.

§ 11 (Ky.) Const. U. S. Amend. 7, does not apply to actions in state courts, though brought to enforce rights created by Congress.—*Chesapeake & O. Ry. Co. v. Kelly's Adm'x*, 171 S. W. 185.

## IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 58 (Tex.Cr.App.) Rev. St. 1911, arts. 5151-5158, providing for the drawing of jurors in certain counties by writing their names on cards, placing them in a wheel, and drawing therefrom, *held* constitutional.—*Merkel v. State*, 171 S. W. 738.

## V. COMPETENCY OF JURORS. CHALLENGES, AND OBJECTIONS.

§ 131 (Ark.) Under Kirby's Dig. § 2363, providing that a challenge for "implied bias" may be taken for having served on the grand jury which found the indictment, the court's examination of a juror who had served on such grand jury as if he had been challenged for actual bias, and its finding of competency, *held* erroneous.—*Holman v. State*, 171 S. W. 107.

§ 131 (Tex.Cr.App.) In a prosecution for rape, where defendant was 23 years of age, refusal of question to jurors on their voir dire as to whether they were biased against a 35 year old man having sexual intercourse with a 16 or 17 year old girl *held* not error.—*Merkel v. State*, 171 S. W. 738.

Action of district attorney in asking if jurors had conscientious scruples as to the infliction of the death penalty and in some cases challenging therefor *held* wholly within his discretion.—*Id.*

## JUSTICES OF THE PEACE.

## III. CIVIL JURISDICTION AND AUTHORITY.

§ 43 (Mo.App.) Under Rev. St. 1909, §§ 7758, 7759, giving jurisdiction of justice's court in

replevin, where the value of the property and the damages did not exceed \$250, section 7772, declaring the value to fix the jurisdiction, and section 7395, defining the jurisdiction of justices, *held*, that a justice had no jurisdiction in replevin where the statement and affidavit alleged the value of the property to be \$250, and claimed \$50 damages for detention.—*Stephens v. Reberert*, 171 S. W. 638.

§ 58 (Mo.App.) A justice's court is of limited jurisdiction, and hence jurisdiction assumed must be shown in the proceedings.—*Swezea v. Jenkins*, 171 S. W. 618.

## IV. PROCEDURE IN CIVIL CASES.

§ 90 (Ark.) In proceedings before a justice, the pleadings may be oral.—*Lochridge Dry Goods Co. v. Daniels Transfer Co.*, 171 S. W. 863.

§ 90 (Mo.) In justices' courts the same strict formalities of pleading are not required as in the circuit court, but, if the plaintiff elects to plead in strictness in such court, he is bound by his pleadings.—*Lyman v. Dale*, 171 S. W. 352.

§ 101 (Mo.App.) A statement in justice's court for medical services *held* good after judgment, on proof that the services were rendered under an express promise made before their rendition to pay therefor.—*Hertel v. Cuba*, 171 S. W. 565.

§ 124 (Mo.) A complaint in a justice's court, alleging that injury to a buggy wheel was caused by leading a wild and unruly mule in a negligent manner, does not authorize a recovery for the negligent handling of an ordinary mule.—*Lyman v. Dale*, 171 S. W. 352.

## V. REVIEW OF PROCEEDINGS.

### (A) Appeal and Error.

§ 141 (Mo.App.) On appeal from a justice of the peace, case *held* properly dismissed for want of jurisdiction in the justice, though no notice of appeal had been given.—*J. W. Jenkins Sons Music Co. v. Sage*, 171 S. W. 672.

§ 157 (Ark.) Defendant against whom judgment was rendered in favor of another defendant, on appeal from a justice, *held* to have waived the failure of such successful defendant to file an affidavit for appeal by going to trial without objection.—*Lochridge Dry Goods Co. v. Daniels Transfer Co.*, 171 S. W. 863.

§ 157 (Mo.App.) Where a bank was sued before a justice, and voluntarily appeared as an interpleader, and a personal judgment was rendered against it in the latter capacity, the circuit court was not deprived of jurisdiction of an appeal by the bank, because its affidavit for appeal, filed under Rev. St. 1909, § 7570, referred to it as defendant only.—*Tapee v. Varley-Wolter Co.*, 171 S. W. 19.

§ 161 (Mo.App.) Since taking an appeal from a default judgment does not waive defective service and confer jurisdiction of the person, filing a motion on appeal to dismiss the action would not be an appearance except for the purpose stated therein.—*Swezea v. Jenkins*, 171 S. W. 618.

§ 164 (Ark.) An appeal will not be dismissed because the justice's transcript, required by Kirby's Dig. § 4670, was not filed on the first day of the next term of the circuit court, where less than 10 days intervened between the appeal and the term, so that the case could not be tried in that term, as provided by section 4678, and Acts 1911, p. 112, § 7.—*Polk v. Sparks*, 171 S. W. 866.

§ 164 (Mo.App.) Where the record proper only is brought up on writ of error to the circuit court questioning jurisdiction of the person in a case appealed from a justice, his judgment cannot be held to be necessarily void, because the face of the proceedings fails to show jurisdiction.—*Swezea v. Jenkins*, 171 S. W. 618.

§ 167 (Mo.App.) In a case wherein a justice had jurisdiction of the subject-matter, the circuit court on appeal from a default judgment properly overruled a motion to dismiss the action, questioning the justice's jurisdiction of the subject-matter only.—*Swezea v. Jenkins*, 171 S. W. 618.

§ 173 (Mo.App.) Determination of a justice's jurisdiction of the person may be ascertained from the evidence, and, if that shows that the township where defendants reside adjoins that wherein suit is brought, as required by Rev. St. 1909, § 7399, his judgment is not without jurisdiction.—*Swezea v. Jenkins*, 171 S. W. 618.

§ 174 (Ark.) In proceedings before a justice, the pleadings may be oral, and no greater formality is required when the case reaches the circuit court on appeal.—*Lochridge Dry Goods Co. v. Daniels Transfer Co.*, 171 S. W. 863.

On appeal to circuit court from a justice, party relying on defense of limitations held bound to specifically direct the court's attention to the fact that it pleaded the statute.—*Id.*

## JUSTIFIABLE HOMICIDE.

See Homicide, § 111.

## JUSTIFICATION.

See Assault and Battery, § 26.

## LANDLORD AND TENANT.

See Contracts, §§ 32, 122; Crops, § 5; Damages, § 39; Evidence, § 130; Fences, § 27; Fixtures, § 15; Frauds, Statute of, §§ 44, 63; Good Will, § 7; Guardian and Ward, § 44; New Trial, § 103; Trial, §§ 121, 243.

## II. LEASES AND AGREEMENTS IN GENERAL.

### (A) Requisites and Validity.

§ 32 (Tex.Civ.App.) An assignee of a lease held to ratify a sublease of space for a fruit stand on the sidewalk, by acceptance of rent though the lease contained a provision for inside space if the city compelled the vacation of the stand.—*Wicks v. Comves*, 171 S. W. 774.

§ 34 (Tex.Civ.App.) A lease of a building for the sale of liquor, stipulating that the lessee could cancel if unable to procure a license, held not to require the lessee to sue to enforce his right to a license.—*Fleming & Roberson v. Fred Miller Brewing Co.*, 171 S. W. 1064.

## III. LANDLORD'S TITLE AND REVERSION.

### (A) Rights and Powers of Landlord.

§ 55 (Mo.App.) A petition held to state a cause of action for damages for waste, by a tenant, though averring the value of each thing injured.—*First Nat. Realty & Loan Co. v. Mason*, 171 S. W. 971.

## IV. TERMS FOR YEARS.

### (B) Assignment, Subletting, and Mortgage.

§ 76 (Tex.Civ.App.) Evidence in action by a guardian for rent held to justify a finding that no agreement was made permitting defendants to sublet.—*Rogers v. Harris*, 171 S. W. 809.

§ 79 (Tex.Civ.App.) Where a lease terminable at the end of any quarter was assigned, the assignees could terminate the lease at the end of any quarter, though unable by the act of the landlord to remove their property.—*Martin v. Stires*, 171 S. W. 836.

§ 80 (Tex.Civ.App.) Under an order of court in sequestration proceedings, providing that the surrender of the premises by a sublessee should be without prejudice, the surrender

could not defeat the sublessee's right to future profit in an action on the sublease.—*Wicks v. Comves*, 171 S. W. 774.

## VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

### (B) Possession, Enjoyment, and Use.

§ 128 (Ky.) That there is a little plunder in some of the rooms of a rented house which could be removed in a few minutes is not a failure to give possession where the lessee arrived without notice and gave no time to remove before repudiating the lease.—*Adams v. Hambrick*, 171 S. W. 398.

Where a landlord rents the whole house when he has rented a portion of it to a construction foreman who was in possession with right of occupancy until the construction work was completed, he fails to give the lessee possession.—*Id.*

§ 129 (Ky.) In an action for breach of a rental contract, an instruction to find the reasonable rental value of the contract if plaintiff recovered is erroneous as fixing no standard by which to fix the amount of damages.—*Adams v. Hambrick*, 171 S. W. 398.

§ 130 (Mo.App.) Where a lessor tendered the lessee the key to the premises which were unoccupied, and the lessee began moving his goods in, but was stopped by the police because he was a negro and his locating there would cause trouble, there was no breach of the lessor's implied covenant of peaceable possession.—*Brown v. Wall*, 171 S. W. 586.

§ 130 (Tex.Civ.App.) Conceding that a landlord consented to subletting, his collection of additional rent from the subtenant, who was not disturbed before the end of the term, was not a breach of the covenant for quiet enjoyment, constituting a defense to his suit against his tenant for nonpayment of taxes.—*De Grazier v. Longinotti*, 171 S. W. 506.

§ 132 (Tex.Civ.App.) A tenant is not damaged by his landlord's collection of additional rent from a subtenant.—*De Grazier v. Longinotti*, 171 S. W. 506.

### (B) Injuries from Dangerous or Defective Condition.

§ 162 (Ky.) Ordinarily a landlord need not exercise ordinary care to furnish a tenant reasonably safe premises, but the tenant takes the premises as he finds them.—*Dice's Adm'r v. Zweigart's Adm'r*, 171 S. W. 195.

§ 164 (Ky.) Where a landlord promised to repair a dangerous cistern, but failed to do so, he was not liable for the death of a child of the tenant falling into the cistern after the removal of a defective covering.—*Dice's Adm'r v. Zweigart's Adm'r*, 171 S. W. 195.

§ 169 (Ky.) An allegation that a landlord of a farm reserved control over a dangerous cistern near the dwelling house, and proof that he promised to repair it, did not show such control of the cistern as to impose any liability on the landlord because of its defective condition.—*Dice's Adm'r v. Zweigart's Adm'r*, 171 S. W. 195.

## VIII. RENT AND ADVANCES.

### (A) Rights and Liabilities.

§ 184 (Mo.App.) Where the lessor tendered possession of the unoccupied premises to the lessee, but the latter was prevented by the police from taking possession, the landlord may retain the amount deposited to bind the lease which was to apply on the last two months' rent.—*Brown v. Wall*, 171 S. W. 586.

§ 208 (Tex.Civ.App.) An assignee of a leasehold takes the place of the lessee and must pay the stipulated rent.—*Martin v. Stires*, 171 S. W. 836.

(C) Lien.

§ 252 (Mo.App.) Under Rev. St. 1909, §§ 7888, 7896, a purchaser of a crop from a tenant under a lease for less than one year held not chargeable with constructive notice of the landlord's lien reserved in the lease duly recorded, notwithstanding sections 2809 and 2810.—*Dubach v. Dysart*, 171 S. W. 597.

**LANDS.**

See Public Lands.

**LAPSE.**

See Wills, § 775.

**LARCENY.**

See Burglary; Criminal Law, § 1170½; Embezzlement; Husband and Wife, § 313; Indictment and Information, § 132; Receiving Stolen Goods; Trial, § 251.

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 13 (Tex.Cr.App.) Under Pen. Code 1911, arts. 1332, 1421, one who obtains money by false pretenses with the intent of appropriating it to his own use is guilty of "swindling" if title is passed, and of "theft" if he merely acquires possession.—*Lewis v. State*, 171 S. W. 217.

**II. PROSECUTION AND PUNISHMENT.**

(A) Indictment and Information.

§ 30 (Tex.Cr.App.) An indictment, charging the theft or embezzlement of a note, which merely described the instrument as one vendor's lien note for the payment of \$8,000 and of the value of \$8,000, is sufficient.—*Pye v. State*, 171 S. W. 741.

§ 31 (Tex.Cr.App.) An indictment for theft from the person need not charge the value of the property taken.—*Watts v. State*, 171 S. W. 202.

(B) Evidence.

§ 52 (Tex.Cr.App.) In a prosecution for theft or embezzlement of a note, evidence that where the owner learned defendant had pledged the note he made no objection, is admissible to show the owner's consent.—*Pye v. State*, 171 S. W. 741.

§ 55 (Tex.Cr.App.) In a prosecution for theft by false pretenses, evidence held to warrant a conviction.—*Lewis v. State*, 171 S. W. 217.

§ 55 (Tex.Cr.App.) In a prosecution for cattle theft, evidence held to support a conviction.—*Jones v. State*, 171 S. W. 714.

§ 58 (Ark.) In a prosecution for cattle theft, evidence held to identify the animal butchered and sold by defendant as that taken from pros-ecutor.—*Mobbs v. State*, 171 S. W. 89.

(C) Trial and Review.

§ 68 (Tex.Cr.App.) In a prosecution for theft by false pretenses, evidence held not to raise the issue whether the money was loaned to accused.—*Lewis v. State*, 171 S. W. 217.

§ 68 (Tex.Cr.App.) In a prosecution for theft or embezzlement, whether defendant believed he had the owner's permission to use the note for his own benefit held for the jury.—*Pye v. State*, 171 S. W. 741.

§ 70 (Mo.) An instruction that if accused advised or commanded another to steal the goods of a third person, he should be convicted is bad because not requiring the jury to find that the goods were stolen and taken away with a felonious intent.—*State v. Rader*, 171 S. W. 46.

**LAST CLEAR CHANCE.**

See Carriers, § 280; Master and Servant, §§ 248, 265, 278; Street Railroads, § 103.

**LAW OF THE CASE.**

See Appeal and Error, § 1195.

**LAW OF THE ROAD.**

See Highways, §§ 169-184.

**LEASE.**

See Landlord and Tenant.

**LEGACIES.**

See Wills.

**LETTERS.**

See Evidence, §§ 20, 183.

**LEVEES.**

§ 23 (Ark.) Under Acts 1893, p. 27, as amended by Acts 1903, p. 104, a road owned by a lumber company and located upon the company's land within a levee district is subject to assessment as a tramroad.—*Poinsett Lumber & Mfg. Co. v. Board of Directors of St. Francis Levee Dist.*, 171 S. W. 875.

**LEWDNESS.**

§ 1 (Ky.) The living together of a man and woman unmarried, when generally known throughout the neighborhood, not only constitutes open and gross "lewdness" but is a nuisance per se.—*Adams v. Commonwealth*, 171 S. W. 1006.

§ 5 (Ky.) An indictment charging the maintenance of adulterous relations held good, though not charging the acts were openly, notoriously, and scandalously committed.—*Adams v. Commonwealth*, 171 S. W. 1006.

§ 10 (Ky.) Evidence held to show the creation and maintenance of a common nuisance by carrying on adulterous relations.—*Adams v. Commonwealth*, 171 S. W. 1006.

**LIBEL AND SLANDER.**

See Criminal Law, § 731; Evidence, § 106.

**I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.**

§ 7 (Mo.App.) A charge that plaintiff was a thief is slanderous per se.—*Johnson v. Bush*, 171 S. W. 636.

**II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.**

§ 42 (Tex.Civ.App.) Under Rev. St. 1911, art. 5597, §§ 3, 4, a publication as to disbarment proceedings, including a statement as to what the evidence would show, held not privileged.—*Houston Chronicle Pub. Co. v. Tiernan*, 171 S. W. 542.

**IV. ACTIONS.**

(B) Parties, Preliminary Proceedings, and Pleading.

§ 80 (Mo.App.) Under Rev. St. 1909, § 1837, a petition charging slander need not set forth the names of the persons in whose presence the slanderous words were uttered, or that they were understood by those present.—*Johnson v. Bush*, 171 S. W. 636.

A petition, alleging that on the 6th day of January, in the city of St. Louis, defendant wantonly and maliciously spoke certain slanderous words concerning plaintiff is sufficiently definite and certain as to the place where the words were spoken.—*Id.*

Under Rev. St. 1909, §§ 1818, 1837, a petition charging slander, which set out the slanderous words and alleged that they were spoken at a named time and place, cannot be required to set out the circumstances under which defendant spoke the slanderous words.—*Id.*

**VI. CRIMINAL RESPONSIBILITY.****(B) Prosecution and Punishment.**

§ 152 (Mo.App.) To sustain a criminal charge for slander, substantial proof of the identical words, or enough of them as will support the charge, is necessary.—*State v. Westbrook*, 171 S. W. 616.

An instruction which authorizes a conviction on the jury finding that accused spoke the words charged, "or words substantially the same," is erroneous.—*Id.*

The better practice requires an information charging slander to state separately the several conversations had by accused at different times in the presence of different persons, instead of charging the speaking of the slanderous words at one time in the presence of all the persons.—*Id.*

**LICENSES.**

See Carriers, § 244; Insurance, § 819; Intoxicating Liquors, § 66; Landlord and Tenant, § 34; Railroads, § 275.

**LIENS.**

See Attachment, § 180; Bankruptcy, § 205; Chattel Mortgages, § 225; Dower, §§ 32, 43; Executors and Administrators, § 324; Judgment, § 772; Landlord and Tenant, § 252; Mechanics' Liens; Pledges; Taxation, § 531; Vendor and Purchaser, §§ 260, 261, 265, 266, 270, 275, 285.

**LIFE ESTATES.**

See Dower; Remainders; Wills, § 614.

§ 8 (Tenn.) The possession of a life tenant's grantee cannot become adverse to the remaindermen until the death of the life tenant.—*Chambers v. Chattanooga Union Ry. Co.*, 171 S. W. 84.

**LIMITATION OF ACTIONS.**

See Adverse Possession; Appeal and Error, § 173; Courts, § 116; Criminal Law, § 346; Justices of the Peace, § 174; Principal and Surety, § 116; Remainders, § 17; Sales, §§ 19, 20.

**I. STATUTES OF LIMITATION.****(A) Nature, Validity, and Construction in General.**

§ 6 (Tex.Civ.App.) In an action to enjoin a city from opening or using a street under a dedication by plaintiff's ancestor, *held* that, where less than five years elapsed between the claimed dedication and the statute of 1887 (Acts 20th Leg. c. 41), exempting municipal corporations from limitations, the city's claim to open the street was not barred.—*City of Kaufman v. French*, 171 S. W. 881.

§ 11 (Mo.) In view of Rev. St. 1909, § 9400, giving to cities exclusive control over all streets and alleys, section 1886, declaring that no statute of limitation shall extend to lands given, granted, or appropriated to any public use, applies to lands included in a street of which a city had possession, though it did not have the legal title.—*City of Caruthersville v. Huffman*, 171 S. W. 323.

**(B) Limitations Applicable to Particular Actions.**

§ 19 (Mo.) An action for forfeiture of dower *held* barred by the 31-year statute of limitations (Rev. St. 1909, § 1884), where no person under whom plaintiff claimed had been in possession for 30 years, and no such person had paid any taxes on the premises for 31 years.—*Jodd v. Mehrtens*, 171 S. W. 322.

§ 24 (Ark.) Obligation of a purchaser at an administrator's sale to pay the price arising from acceptance of the administrator's deed is

one based on a contract, not in writing, and therefore barred by the three-year statute of limitations (Kirby's Dig. § 5064, subd. 1).—*Cotham v. Morris*, 171 S. W. 113.

§ 35 (Mo.App.) An action under Rev. St. 1909, § 10533, for obstructing a public road is not one to recover a forfeiture within statute of limitations (section 4949).—*Boonville Special Road Dist. v. Fuser*, 171 S. W. 962.

**II. COMPUTATION OF PERIOD OF LIMITATION.****(A) Accrual of Right of Action or Defense.**

§ 44 (Ark.) The five-year statute of limitations from a judicial sale in which to sue the purchasers does not apply to action by heirs for land sold at administrator's sale, the land having been allotted to his widow as dower, the sale being inoperative as to her dower, and the heirs not being entitled to assert their right to the land till after death of the doweress, which was after the five years.—*Martin v. Conner*, 171 S. W. 125.

§ 46 (Tex.Civ.App.) Where plaintiff's uncle received money from plaintiff, agreeing to deposit it on interest and return it when plaintiff wanted it, *held*, that limitations ran from the date of its receipt, or at least from the expiration of a reasonable time for making the agreed deposit.—*Pollard v. Allen*, 171 S. W. 530.

§ 48 (Mo.App.) Where a note was executed in 1897, due in five years, limitations did not begin to run until its maturity, and hence an action begun in 1908 is not barred.—*Dubowsky v. Binggeli*, 171 S. W. 12.

§ 55 (Ark.) Action for overflow by obstruction in stream at crossing by a railroad, which obstruction had been increasing until within three years before the overflow and might have been removed, *held* not barred by limitations.—*St. Louis, I. M. & S. Ry. Co. v. Russell*, 171 S. W. 891.

§ 59 (Mo.App.) An action under Rev. St. 1909, § 10533, for a penalty for obstructing a public road is not within the statute of limitations (section 4946); the offense being continuing.—*Boonville Special Road Dist. v. Fuser*, 171 S. W. 962.

**(C) Personal Disabilities and Privileges.**

§ 72 (Ark.) The right of action of heirs of deceased to recover of purchasers at the administrator's sale, the land sold being deceased's homestead, cannot accrue during the minority of children of deceased.—*Martin v. Conner*, 171 S. W. 125.

§ 73 (Ark.) One is not relieved from the five-year statute of limitations relating to judicial sales, because she is a married woman.—*Martin v. Conner*, 171 S. W. 125.

The seven-year statute of limitations, Kirby's Dig. § 5056, for an action for land, by an express saving clause in favor of married women, extends their right till three years after discovery.—*Id.*

§ 73 (Mo.App.) The limitation statutes do not run as against a married woman.—*Dubowsky v. Binggeli*, 171 S. W. 12.

**(E) Absence, Nonresidence, and Concealment of Person or Property.**

§ 87 (Tex.Civ.App.) The departure from the state of a nonresident who had been temporarily present in the state did not suspend the running of limitations against a cause of action against him.—*Pollard v. Allen*, 171 S. W. 530.

**(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.**

§ 102 (Tex.Civ.App.) If plaintiff gave money to his uncle on his promise to put it at inter-

est for plaintiff and to return it when wanted, *held* that, if this created a trust, it was not a technical, continuing, or subsisting trust against which limitations would not run.—Pollard v. Allen, 171 S. W. 530.

**(H) Commencement of Action or Other Proceeding.**

§ 127 (Tex.Civ.App.) Where a widow of a railroad employé killed while engaged in interstate commerce instituted an action as widow under a state statute, it was not the beginning of a new action for her to file an amended petition as the personal representative of deceased seeking recovery under the federal Employers' Liability Act, and limitations did not apply.—St. Louis, S. F. & T. Ry. Co. v. Smith, 171 S. W. 512.

**IV. OPERATION AND EFFECT OF BAR BY LIMITATION.**

§ 173 (Ky.) In an action to reform a deed as against a nonresident grantor and to enjoin a judgment creditor of such grantor from levy and execution of oil and coal rights reserved by the grantor, *held* that the judgment creditor could not plead limitations as to actions for the reformation of a deed, since the plea was personal to the grantor.—Hyden v. Calames, 171 S. W. 186.

**LIMITING LIABILITY.**

See Carriers, §§ 159, 180.

**LIQUIDATED DAMAGES.**

See Damages, § 78.

**LIQUOR SELLING.**

See Intoxicating Liquors.

**LIS PENDENS.**

See Abatement and Revival, § 4.

**LIVE STOCK.**

See Carriers, §§ 206-230; Railroads, §§ 408-447.

**LOCAL OPTION.**

See Intoxicating Liquors, §§ 39, 40.

**LOGS AND LOGGING.**

See Carriers, § 105; Injunction, §§ 36, 52.

§ 3 (Tex.Civ.App.) Standing timber conveyed by an instrument giving the purchaser a specified time in which to remove the timber, and an extension of time on the purchaser first removing timber from the part of the land the vendor wished to cultivate, *held* forfeited by failure to remove within the specified time.—Chavers v. Henderson, 171 S. W. 798.

§ 4 (Ky.) A writing, authorizing defendant "to cut all timber on the Bryant land at the point known as the Spring Branch near Nobusiness creek and between Nobusiness creek and Rock creek," authorized the licensee to cut only the timber at that point, and not to cut all the timber on the Bryant land between the two creeks.—Chicago Veneer Co. v. Arnold, 171 S. W. 403.

In a writing purporting to authorize defendant to cut timber at a certain point on plaintiff's land in order to force a suit by third parties, *held* that, as to timber not cut for that purpose, defendant was under no obligation to and had no right to cut timber from the other land, and would be enjoined therefrom.—Id.

**LOST INSTRUMENTS.**

§ 23 (Tex.Civ.App.) On an issue as to the execution of an alleged lost deed to land by the patentee to F., under whom plaintiffs claimed, deeds from F. and from the patentee to other

portions of the same survey, which had been of record for many years, all of the parties having been long since dead, were admissible.—Houston Oil Co. of Texas v. Sudduth, 171 S. W. 556.

Where an alleged administrator's deed in plaintiff's chain of title was lost, a certificate of the administrator, reciting a sale and conveyance of the land as property belonging to the intestate to the alleged grantee in the deed, was admissible as a circumstance to show a conveyance from the patentee to the intestate.—Id.

**LOTTERIES.**

**I. REGULATION AND PROHIBITION.**

§ 3 (Ark.) A popularity contest, with no element of chance in it, *held* to be not illegal as a lottery.—Millsaps v. Urban, 171 S. W. 1198.

**LUMBER.**

See Logs and Logging.

**LUNATICS.**

See Insane Persons.

**MALICE.**

See Homicide, §§ 7, 11, 13, 23; Malicious Prosecution, §§ 16, 25, 27.

**MALICIOUS PROSECUTION.**

See Appeal and Error, § 1064; New Trial, § 39; Trial, § 251.

**I. NATURE AND COMMENCEMENT OF PROSECUTION.**

§ 12 (Mo.App.) Where one maliciously and without probable cause institutes bankruptcy proceedings against another, the latter may sue for malicious prosecution, even though there be no seizure of his person or property; bankruptcy proceedings being much more injurious to one than an ordinary civil suit.—McDonald v. Goddard Grocery Co., 171 S. W. 650.

**II. WANT OF PROBABLE CAUSE.**

§ 16 (Mo.App.) In an action for malicious prosecution, the evidence must show both malice and a want of probable cause for the prosecution.—McDonald v. Goddard Grocery Co., 171 S. W. 650.

Probable cause will justify the institution of a prosecution against another, however great the malice, since it is the presence of malice and the absence of probable cause that sustains an action for malicious prosecution.—Id.

§ 25 (Mo.App.) Advice of counsel taken in good faith in instances where the alleged malicious prosecution is dismissed negatives malice.—McDonald v. Goddard Grocery Co., 171 S. W. 650.

**III. MALICE.**

§ 27 (Ky.) In an action for malicious prosecution, "malice" is not merely the intentional doing of a wrongful act without legal justification, but is the mental intent or unlawful purpose, which is an essential to the action.—Keiner v. Collins, 171 S. W. 399.

**V. ACTIONS.**

§ 59 (Ky.) In an action for malicious prosecution against a peace officer who arrested plaintiff on the theory that she was a thief wanted at another place, testimony that the description of the thief contained in the circular letters sent out to peace officers over the state describing the thief fitted plaintiff is admissible.—Keiner v. Collins, 171 S. W. 399.

§ 72 (Ky.) An instruction generally defining probable cause, but not telling the jury what facts constituted probable cause in the particular case, is erroneous; what facts constituted

probable cause being for the court.—Keiner v. Collins, 171 S. W. 399.

In an action for malicious prosecution, an instruction *held* to correctly submit the question of probable cause to the jury.—*Id.*

## MALPRACTICE.

See Abatement and Revival, §§ 54, 72; Physicians and Surgeons, § 18.

## MANDATE.

See Appeal and Error, § 1188.

## MANSLAUGHTER.

See Homicide, §§ 39-43, 309.

## MARKET VALUE.

See Brokers, § 85.

## MARRIAGE.

See Bigamy; Embezzlement, § 11; Husband and Wife; Seduction, § 36; Statutes, § 115.

## MARSHALING ASSETS AND SECURITIES.

§ 1 (Tex.Civ.App.) The doctrine of marshaling assets will not be applied in favor of a party whose equities are inferior to that of others claiming the same securities.—Keasler v. Wray, 171 S. W. 534.

§ 2 (Tex.Civ.App.) Taking a junior mortgage on the remainder after sale of part of mortgaged chattels with the senior mortgagee's consent would not so far overcome the prior equities of the buyers as to compel marshaling in favor of the junior mortgagee against them.—Keasler v. Wray, 171 S. W. 534.

§ 4 (Tex.Civ.App.) A junior mortgagee who took a mortgage on the remainder after sale of part of mortgaged chattels, with the senior mortgagee's consent, but without waiving lien, and who later took an assignment of the senior mortgage, could not invoke the doctrine of marshaling securities as against equities of the buyers.—Keasler v. Wray, 171 S. W. 534.

## MASTER AND SERVANT.

See Work and Labor.

### I. THE RELATION.

#### (B) Statutory Regulation.

§ 11 (Tex.) The impairment of a corporation's right to discharge employes by the Black-listing Law cannot be sustained as an exercise of the police power.—St. Louis Southwestern Ry. Co. of Texas v. Griffin, 171 S. W. 703.

§ 16½ [New, vol. 16 Key-No. Series] (Tex.Civ.App.) The Workmen's Compensation Act is within the police power, and not contrary to public policy.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

#### (C) Termination and Discharge.

§ 20 (Tex.) Where a contract of employment is for an indefinite time, either party may end it at will without cause or notice.—St. Louis Southwestern Ry. Co. of Texas v. Griffin, 171 S. W. 703.

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

### (A) Nature and Extent in General.

§ 87½ [New, vol. 16 Key-No. Series] (Tex.Civ.App.) Assumption of risk is, under the Workmen's Compensation Act, not a defense to a servant's action for injury.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

§ 88 (Ky.) Where miners contracted to widen an entry in defendant's mine for so much a ton of coal taken out and so much a yard for slate, and they employed plaintiff to work by the day as a loader, plaintiff was defendant's servant.—Bon Jellico Coal Co. v. Murphy, 171 S. W. 180.

### (B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Ark.) A master must exercise ordinary care to make safe the place prepared for the servant while performing his work, and to such other parts of the premises that the master knows, or by ordinary care should know, the servant is accustomed to use.—St. Louis, I. M. & S. Ry. Co. v. Schultz, 171 S. W. 876.

§§ 101, 102 (Mo.App.) The work of installing a blowpipe in a sawmill to collect and convey sawdust, shavings, etc., from saws and planes, *held* within the rule requiring an employer to furnish a safe place to work.—Baxter v. Campbell Lumber Co., 171 S. W. 955.

§§ 101, 102 (Mo.App.) Master *held* required to exercise reasonable care to keep the dangers of the work within their inherent bounds.—Gummerson v. Kansas City Bolt & Nut Co., 171 S. W. 959.

§§ 101, 102 (Tex.Civ.App.) Failure of a master to furnish a servant a reasonably safe place to work rendered the master liable for injury proximately caused thereby.—Houston Lighting & Power Co., 1905, v. Conley, 171 S. W. 511.

§ 103 (Tex.Civ.App.) The employer's duty to stack sacks of meal, so as to render it safe to work about them, is nondelegable, and he is liable for negligent stacking, by which an employe is injured.—Memphis Cotton Oil Co. v. Gardner, 171 S. W. 1082.

§ 107 (Ark.) Where a servant for his own convenience adopts methods of work contrary to those expressly prescribed, and occupies places the master could not reasonably anticipate he would occupy, the master owes him no duty to make such places or methods safe.—St. Louis, I. M. & S. Ry. Co. v. Schultz, 171 S. W. 876.

§ 107 (Mo.App.) The duty of a master to furnish a reasonably safe place to work does not require him to provide against hazards incident to the employment, as when the danger is temporary, and arises from the progress of the work itself.—Cooney v. Laclede Gaslight Co., 171 S. W. 572.

§ 107 (Tex.Civ.App.) Mere temporary dangers created by fellow employes, due to no fault of plan or construction, are not within the rule imposing on an employer the duty to provide a safe place to work.—Memphis Cotton Oil Co. v. Gardner, 171 S. W. 1082.

Where a working place is made unsafe by the material therein or the construction thereof, an employer who negligently permits it to remain so is liable for injuries to an employe.—*Id.*

§ 112 (Ky.) On a single track railroad passing tracks cannot always be placed out in the open; hence it cannot be held negligent for a railroad company to place a passing track at a point on a curve where the view was obstructed by trees and an embankment.—Louisville & N. R. Co. v. Heinig's Adm'x, 171 S. W. 853.

§ 112 (Tex.Civ.App.) Where a railroad employe struck by an engine did not of necessity assume the position he did with reference to an adjacent track, the fact of the nearness of the two tracks could not be relied on as negligence.—Paris & G. N. R. Co. v. Lackey, 171 S. W. 540.

§ 116 (Tex.Civ.App.) Where defendant lumber company maintained a platform some 18.

feet high, and plaintiff was knocked from the platform and injured while at work thereon, defendant was negligent in failing to provide the platform with a guard rail.—Kirby Lumber Co. v. Hamilton, 171 S. W. 546.

§ 124 (Mo.App.) It is the master's duty to inspect the appliances furnished to a servant for use, both to see that they are reasonably safe to start with, and to keep them in that condition, so that the duty to inspect and make ordinary mechanical tests at reasonable intervals is an affirmative and continuous duty.—Cody v. Lusk, 171 S. W. 624.

§ 124 (Mo.App.) Master's duty to make reasonable inspection of place of work or instrumentality with which servant is required to work held an affirmative and continuing duty.—Nowotny v. St. Louis Brewing Ass'n, 171 S. W. 941.

§ 124 (Tex.Civ.App.) Under Acts 31st Leg. c. 26, § 5, Acts 31st Leg. (1st Ex. Sess.) c. 10, § 3, and Federal Safety Appliance Act, together with Act Cong. April 22, 1908, a railroad company, sued for injuries, caused by the giving away of a defective handhold, cannot escape liability on the ground that the car belonged to a different company, which it was only bound to inspect for apparent defects.—Missouri, O. & G. Ry. Co. v. Plemmons, 171 S. W. 259.

§ 125 (Mo.App.) A defect in the original construction of horses and extensions made by the master's servants and used to support a scaffold and a motor used in drilling an upright boiler charged the master with actual knowledge of the defect; and if it resulted from long usage without inspection it would warrant a finding of the master's constructive notice.—Cody v. Lusk, 171 S. W. 624.

§ 125 (Mo.App.) A master responsible for and knowing that a car was negligently loaded with steel vaults was required to exercise no more than reasonable care by the sending of experienced and competent men to unload the car.—Scoffin v. Abernathy Furniture Co., 171 S. W. 933.

§ 125 (Mo.App.) An employer is entitled to reasonable time to discover and repair a defect in the place of work, arising during the progress thereof.—Hicks v. Hammond Packing Co., 171 S. W. 937.

§ 125 (Tex.Civ.App.) An employer using dynamite in loosening stone on which an employé is working is chargeable with knowledge that loose stone may fall on the employé, and is liable for failing to remove it.—Paul Stone Co. v. Saucedo, 171 S. W. 1038.

§ 125 (Tex.Civ.App.) An employer is not liable for a mere temporary unsafe condition of place of work of which he has no notice or of which exercise of ordinary diligence would not inform him.—Memphis Cotton Oil Co. v. Gardner, 171 S. W. 1082.

Where the employer's vice president and the general foreman frequently passed through a room when stacking sacks of meal was being negligently done, the employer was chargeable with notice of the danger.—Id.

§ 129 (Mo.App.) Method of drilling an 11-foot boiler by standing it on end and working upon a scaffold supported on wooden horses with extensions to support a motor used in the work, which extension gave way while the horse was being moved, causing a servant to fall, held not the "proximate cause" of the injury; that being the defective extension which gave way.—Cody v. Lusk, 171 S. W. 624.

§ 129 (Tex.Civ.App.) Where an employé of a lumber company was injured by being knocked from a high platform not equipped with a guard rail, defendant's negligence in failing to provide such rail was the proximate cause of plaintiff's injury.—Kirby Lumber Co. v. Hamilton, 171 S. W. 546.

# (C) Methods of Work, Rules, and Orders.

§ 130 (Mo.App.) A servant may prove that the master adopted a method of work less safe than the usual method, though the less safe method must be one which of itself is not reasonably safe.—Cody v. Lusk, 171 S. W. 624.

§ 135 (Mo.App.) The placing of an 11-foot boiler on end instead of in a horizontal position, necessitating a scaffold and extensions to support a servant and a motor used in his work, even though the horizontal position was the method used in other railroad shops, held not of itself negligence warranting a recovery for injury from the giving way of the extension and a fall.—Cody v. Lusk, 171 S. W. 624.

The master may always prove custom to negative negligence in his method of work, and show that the act done or the instrumentalities or method used conformed to common usage in the same business.—Id.

§ 137 (Ark.) Railway engineer and fireman held entitled to presume that section foreman riding speeder would get off the track.—St. Louis, I. M. & S. Ry. Co. v. Morgan, 171 S. W. 1187.

§ 137 (Ky.) Duty of railroad company, shunting cars on tracks in railroad yards where many employes are at work on tracks, stated.—Louisville & N. R. Co. v. Johnson's Adm'r, 171 S. W. 847.

A railroad company must exercise reasonable care in the operation of its engines and trains in railroad yards so as to protect employes not specially charged with the duty of looking out for engines and trains.—Id.

§ 137 (Ky.) Where two trains were to pass at a given point, the failure of those in charge of the train which first reached the point and took the siding, to close the switch was not negligence where the train had been there only a few seconds.—Louisville & N. R. Co. v. Heinig's Adm'r, 171 S. W. 853.

§ 139 (Ky.) Where trains which were to pass at a given siding collided, though the waiting train took the siding sufficiently back to have escaped the passing train had the switch been closed, the cause of collision was not the negligence of those in charge of the waiting train stopping it too near the switch.—Louisville & N. R. Co. v. Heinig's Adm'r, 171 S. W. 853.

§ 141 (Ark.) It is the duty of a master to make rules for the protection of his servants and to make those rules known to the servants.—Ft. Smith Lumber Co. v. Shackelford, 171 S. W. 99.

§ 142 (Ky.) Where the rules as to the use of tracks at a point where there were four clearly showed, by reference to the tracks, which were to be used for passing, and an engineer was ordered to meet another train at that point, the rules as to the passing of the trains were sufficiently explicit.—Louisville & N. R. Co. v. Heinig's Adm'r, 171 S. W. 853.

§ 142 (Mo.App.) A railroad company may make reasonable rules for the operation of its road, and track laborers under the rules must look out for passing trains, and an engineer need not warn them unless in obvious danger.—Witham v. Delano, 171 S. W. 990.

§ 144 (Ark.) In order to constitute an abrogation of a rule promulgated by a railroad company for the safety of car repairers, an acquiescence on the part of the railroad company, either in express terms or by silence, after knowledge of habitual violation, must be shown.—St. Louis, I. M. & S. Ry. Co. v. Sharp, 171 S. W. 95.

§ 145 (Ky.) A rule of a railroad company prohibiting employes from riding on the pilots of engines in road service has no application to the act of a servant mounting a step in the rear of a pilot of an engine in order to reach the

cab with no intention of riding on the pilot.—*Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451.

A rule requiring a flagman to remain until a following train has been stopped *held* not applicable to a flagman who mounts a moving engine which he had stopped two or three stations back.—*Id.*

#### (D) Warning and Instructing Servant.

§ 150 (Ky.) A section foreman who directs one of his crew to go between cars to relieve his bladder, or who knows of the custom, *held* required to exercise ordinary care to warn him of the danger of an approaching car.—*Louisville & N. R. Co. v. Johnson's Adm'r*, 171 S. W. 847.

§ 150 (Mo.App.) Where two servants were carrying a heavy car sill and one of them dropped his end, that he did not warn plaintiff, did not show negligence on his part.—*Neth v. Delano*, 171 S. W. 1.

§ 153 (Mo.App.) Ordering a boy to splice a wire, broken in course of winding on a spool, without instruction or warning of danger, *held* negligence rendering the master liable for resulting injury to the boy's eye, struck by the wire.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

#### (E) Fellow Servants.

§ 159 (Ky.) The fellow-servant doctrine is a limitation on the common-law rule that a master is responsible for the negligent acts of his servants while acting in the course of their employment.—*Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Adm'r*, 171 S. W. 430.

§ 179 (Ky.) The federal Employers' Liability Act imposes on an employer liability for negligent acts of his servants, performed within the course of their employment.—*Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Adm'r*, 171 S. W. 430.

§ 179 (Mo.App.) Rev. St. 1909, § 5440, abolishing the defense of negligence of a fellow servant in actions for injuries to servants in operating a mine, does not apply where the injuries occurred while the servant was sinking a prospect hole.—*Allen v. Leach*, 171 S. W. 9.

§ 185 (Tex.Civ.App.) A servant who selected a location for a spool of wire which was to be unwound represented his master, who is liable for the servant's negligence in such act.—*Houston Lighting & Power Co.*, 1905, v. Conley, 171 S. W. 561.

§ 188 (Ark.) Where it is the duty of a superior servant to furnish for the master a safe place in which the inferior servants are to work, if the superior for his own purposes commits a wrongful act which injures a servant the master is not liable.—*Arkansas Natural Gas Co. v. Lee*, 171 S. W. 93.

§ 190 (Ky.) The act of a section foreman in asking men on a work train, in charge of a superior foreman in charge of the work, to jump from the train to escape injury from a collision, which the section foreman erroneously believed would occur, *held* to be in the course of his employment, within the federal Employers' Liability Act.—*Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Adm'r*, 171 S. W. 430.

§ 196 (Mo.App.) Where a cooper employed by a cider company was required to assist in stacking barrels ready for delivery, other servants who stacked the barrels which subsequently fell on the cooper were fellow servants, for whose negligence the master is not liable.—*David v. Clarksville Cider Co.*, 171 S. W. 594.

§ 201 (Tex.Civ.App.) When an employer's negligence in failing to provide an employé with a safe place to work was the proximate cause of his injury, the employer's liability was not affected by the fact that the employer's negli-

gence combined with the concurrent negligence of a fellow employé.—*Kirby Lumber Co. v. Hamilton*, 171 S. W. 548.

§ 201 (Tex.Civ.App.) Where an employer's negligence concurred with the negligence of fellow servants in the construction of a stack of sacks of meal, an employé, injured by falling of the stack, could recover.—*Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082.

The negligence of fellow servants in removing sacks of meal from a stack, concurring with the negligence of the employer in the construction of the stack falling on an employé, *held* not to defeat a recovery.—*Id.*

#### (F) Risks Assumed by Servant.

§ 203 (Tex.Civ.App.) Ordinary and extraordinary risks in the employment of a servant defined.—*Houston Lighting & Power Co.*, 1905, v. Conley, 171 S. W. 561.

§ 204 (Tex.Civ.App.) Under Acts 31st Leg. c. 26, § 5; Acts 31st Leg. (1st Ex. Sess.) c. 10, § 3, a brakeman injured by the giving way of a defective handhold did not assume the risk although he knew of the defect.—*Missouri, O. & G. Ry. Co. v. Plemmons*, 171 S. W. 259.

§ 205 (Mo.App.) An employé, ordered to tear down a platform, may assume that it was reasonably safe from the fact that he was ordered to work upon it, and need not carefully inspect it for planks insecurely fastened.—*Cooney v. Laclede Gaslight Co.*, 171 S. W. 572.

§ 206 (Mo.App.) A servant assumes the risk of dangers which inhere in his work when conducted in an ordinary and reasonably careful manner.—*Gummerson v. Kansas City Bolt & Nut Co.*, 171 S. W. 959.

§ 208 (Tex.Civ.App.) In an action for injuries to an employé thrown from an unguarded elevated platform, plaintiff *held* not to have assumed the risk.—*Kirby Lumber Co. v. Hamilton*, 171 S. W. 548.

§ 208 (Tex.Civ.App.) The risk of failure to provide a safe place to work is one not ordinarily assumed as incident to servant's employment.—*Houston Lighting & Power Co.*, 1905, v. Conley, 171 S. W. 561.

The selection of a safe place for the location of a spool of wire while it was being unreel was not a risk assumed by the servant who assisted in the unreeling.—*Id.*

§ 210 (Ky.) An engineer who has seen long service on a railroad assumes the risk of injury from the company's negligence in placing passing tracks on a curve where the view was obstructed by trees and an embankment.—*Louisville & N. R. Co. v. Heinig's Adm'r*, 171 S. W. 853.

An experienced engineer who knew that the line of defendant company was not provided with a block-signal system assumes the risk of injury from collision resulting from the failure of the company to so equip its line.—*Id.*

§ 211 (Tex.Civ.App.) An employé breaking stone at a place fixed by the employer *held* not to assume the risk of injury by loose rock falling on him.—*Paul Stone Co. v. Saucedo*, 171 S. W. 1038.

§ 213 (Ark.) Where a skilled machinist desiring to face the other side of a heavy rod endeavored to turn it around and replace it in the lathe, without calling for help, he assumed the risk of injury by having it fall on his finger.—*St. Louis, I. M. & S. Ry. Co. v. Middleton*, 171 S. W. 869.

§ 213 (Ky.) Where a switchman in railroad yards was standing between box cars and could not be seen by a brakeman on cars moving on the same track, the switchman assumed the risk of injury.—*Louisville & N. R. Co. v. Johnson's Adm'r*, 171 S. W. 847.

§ 217 (Mo.App.) A servant, ordered to demolish a platform, who is injured by stepping

on a plank fastened to a joist only by a cleat, which condition existed before the work commenced, did not assume the risk of injury therefrom where he did not know of the defect.—*Cooney v. Laclede Gaslight Co.*, 171 S. W. 572.

§ 217 (Tex.Civ.App.) In a railroad servant's action for injury from falling from a car load of lumber which he was trying to straighten with a defective pinch bar, *held*, that the facts appearing established the defense of assumption of risk.—*Houston & T. C. R. Co. v. Smallwood*, 171 S. W. 292.

§ 219 (Mo.App.) A servant in the hog-killing room of a packing plant who slipped into an open sewer containing boiling water to carry off the refuse, must be held to have assumed the risk, the danger being obvious.—*Robinson v. Hammond Packing Co.*, 171 S. W. 34.

§ 219 (Mo.App.) Experienced teamster *held* to assume risk of injury from the unloading of a car of heavy steel vaults, each row of which inclined forward, without chocks to keep them perpendicular.—*Scoffin v. Abernathy Furniture Co.*, 171 S. W. 933.

§ 222 (Mo.App.) An employé working in the presence of and in obedience to the peremptory command of his employer may rely on his superior knowledge and assume that the employer will not send him into a place of danger.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 956.

§ 226 (Mo.App.) Employé in brewery *held* not to assume risk of injury from explosion of ammonia tank arising from the employer's negligent failure to inspect.—*Nowotny v. St. Louis Brewing Ass'n*, 171 S. W. 941.

§ 226 (Mo.App.) An employé does not assume risks arising from the employer's negligence.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

#### (G) Contributory Negligence of Servant.

§ 228 (Ky.) The contributory negligence of a deceased servant does not bar recovery under the federal Employers' Liability Act, where defendant's negligence contributed to the injury.—*Louisville & N. R. Co. v. Heinig's Adm'r*, 171 S. W. 853.

§ 233 (Ky.) Where a track man attempted to operate a mine motor with the trolley pole extending forward, and was killed when the pole jumped the wire and was broken by striking against the roof of the mine, the employé created the danger himself, and there can be no recovery.—*North Jellico Coal Co. v. Disney*, 171 S. W. 192.

§ 233 (Mo.App.) A servant is not necessarily guilty of negligence in selecting out of a number, some good and some bad, a defective wooden horse with which to support a scaffold on which he was to work; the principle that a servant is negligent as a matter of law in selecting a defective appliance out of a large number applying only to such defects as are so obvious that reasonable care would discover them.—*Cody v. Lusk*, 171 S. W. 624.

§ 235 (Ky.) In the absence of a contract or special assumption of duty to inspect, a servant need not inspect the place where he works; the master being responsible for danger negligently permitted in such regard, unless it is patent or obvious.—*Bon Jellico Coal Co. v. Murphy*, 171 S. W. 160.

§ 235 (Mo.App.) Unless the duty to inspect the appliances furnished him for work is imposed on the servant, he may rely on the master's discharge of such duty and on the tools and appliances furnished as being reasonably safe.—*Cody v. Lusk*, 171 S. W. 624.

§ 238 (Mo.App.) A servant *held* not necessarily negligent in staying on one end of a scaffold supported by wooden horses while the other end was being moved a few inches, during which time it gave way from a defect not apparent to him, since he was only required to do what a reasonably prudent man would do un-

der the circumstances.—*Cody v. Lusk*, 171 S. W. 624.

§ 238 (Tex.Civ.App.) Proof that it was not customary in operating a hand car to look at the target to see whether a switch was open or closed would not relieve the operator from the exercise of ordinary care.—*St. Louis Southwestern Ry. Co. of Texas v. Anderson*, 171 S. W. 806.

§ 241 (Tex.Civ.App.) An employé engaged in breaking stone at a place designated by the employer *held* not guilty of contributory negligence.—*Paul Stone Co. v. Saucedo*, 171 S. W. 1038.

§ 243 (Ark.) Where a railroad's blue flag rule had been abrogated by disuse, failure of a car repairer to comply with the rule did not constitute contributory negligence which would relieve the company from liability for negligence of a switching crew in moving the car with knowledge of the repairer's dangerous position.—*St. Louis, I. M. & S. Ry. Co. v. Sharp*, 171 S. W. 95.

§ 243 (Ky.) It is the duty of a railroad engineer to examine bulletins posted, to give orders to trainmen as well as the orders actually delivered to him.—*Louisville & N. R. Co. v. Heinig's Adm'r*, 171 S. W. 853.

§ 246 (Ark.) Railway employé overtaken by train *held* bound to remove speeder from track if he could do so consistently with ordinary care for his own safety.—*St. Louis, I. M. & S. Ry. Co. v. Morgan*, 171 S. W. 1187.

§ 248 (Ky.) Where the conductor's observance of the rules of a railroad company would have prevented an accident notwithstanding the negligence of the engineer, recovery may be had for the death of the engineer under the federal Employers' Liability Act.—*Louisville & N. R. Co. v. Heinig's Adm'r*, 171 S. W. 853.

§ 248 (Tex.Civ.App.) To support a charge of actionable negligence of a railroad company on the doctrine of discovered peril, the employé, injured by being struck by an engine, must show facts authorizing a finding that the trainmen realized that the employé was in danger and neglected to resort to means they should have resorted to.—*Paris & G. N. R. Co. v. Lackey*, 171 S. W. 540.

#### (H) Actions.

##### § 250½ [New, vol. 15 Key-No. Series]

(Ky.) State courts in administering the federal Employers' Liability Act will follow the practice and procedure in the trial of common-law actions generally, except in so far as modified by the act.—*Louisville & N. R. Co. v. Johnson's Adm'r*, 171 S. W. 847.

§ 256 (Ark.) Where decedent, a car repairer, was killed while repairing a car being used in interstate commerce, and, while the complaint did not declare on the federal Employers' Liability Act, the answer pleaded that the car was being used in interstate commerce, the rights of the parties must be determined in accordance with such act.—*St. Louis, I. M. & S. Ry. Co. v. Sharp*, 171 S. W. 95.

§ 258 (Mo.App.) The negligence charged in the petition by an injured servant *held* to be the maintenance of an uncovered sewer in the hog-killing room of a packing plant and not the mere maintenance of the sewer.—*Robinson v. Hammond Packing Co.*, 171 S. W. 34.

§ 264 (Mo. App.) Where plaintiff's petition charged that he slipped into a sewer at one end of defendant's hog-killing room, which was negligently left uncovered, proof that he stepped into the sewer at another point where there was a cover constituted a fatal variance.—*Robinson v. Hammond Packing Co.*, 171 S. W. 34.

§ 265 (Ark.) In an action for death of an employé the burden is on plaintiff to prove negligence as alleged.—*St. Louis, I. M. & S. Ry. Co. v. Schultz*, 171 S. W. 876.

§ 265 (Ark.) On the evidence that railway employe was struck by train while attempting to remove speeder from track, *held*, if he was negligent, the burden of showing discovery of his peril rested on him.—*St. Louis, I. M. & S. Ry. Co. v. Morgan*, 171 S. W. 1187.

§ 265 (Mo.App.) Where two servants were carrying a heavy car sill and one of them dropped his end, causing the other to drop the sill on his foot, that the sill was dropped will not raise a presumption of negligence of the fellow servant.—*Neth v. Delano*, 171 S. W. 1.

The injured servant *held* to have the burden of proving negligence.—*Id.*

§ 265 (Mo.App.) The doctrine of *res ipsa loquitur* does not apply where the injury to a servant was caused by the falling of a barrel from a stack near where the servant was working.—*David v. Clarksville Cider Co.*, 171 S. W. 594.

§ 265 (Mo.App.) Where the injury to a servant is traced to a defect in the particular appliance being used by him in his work, the proof of the occurrence and its attendant circumstances warranted an inference of actionable negligence.—*Cody v. Lusk*, 171 S. W. 624.

§ 268 (Ky.) Evidence that, shortly before the accident to plaintiff, defendant's manager attempted to employ another, is inadmissible to show plaintiff's employment.—*Standard Oil Co. v. Marlow*, 171 S. W. 436.

§ 270 (Ky.) That it had long been the custom of trainmen to use the stirrup in the rear of the pilot of an engine to mount the engine while in motion *held* proper in rebuttal of evidence that the stirrup was only for the use of shopmen.—*Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451.

§ 270 (Tex.Civ.App.) Condition of a shaft, while not admissible to show negligence in that respect, because not pleaded, *held*, in a servant's action for injury from a belt coming off a pulley, admissible on the pleaded negligence of the belt being too short.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

As bearing on the alleged negligence, in a servant's action for injury from the coming off of a belt while he was putting it on, that it was too short, evidence that on a subsequent attempt to put it on the same pulley it came off is admissible.—*Id.*

§ 276 (Tex.Civ.App.) In a suit by a brakeman for injuries from the breaking of a handhold on a car, evidence *held* to justify a finding that the injuries were suffered in the manner asserted.—*Missouri, O. & G. Ry. Co. v. Plemmons*, 171 S. W. 259.

§ 277 (Ark.) In an action for personal injuries, evidence *held* to sustain a finding that plaintiff was, at the time of the accident, an employe of defendant.—*Ft. Smith Lumber Co. v. Shackleford*, 171 S. W. 99.

§ 278 (Ark.) Evidence *held* to show that a master owed no duty, either to keep the ladder from which the employe fell in a safe condition or to warn him that it was unsafe.—*St. Louis, I. M. & S. Ry. Co. v. Schultz*, 171 S. W. 876.

§ 278 (Ark.) Evidence that railway employe was struck by train while attempting to remove speeder from track *held* to make a prima facie case of negligence.—*St. Louis, I. M. & S. Ry. Co. v. Morgan*, 171 S. W. 1187.

§ 278 (Mo.App.) In an action for injuries to a servant when a barrel fell from a stack near by, evidence *held* insufficient to show that the fall was due to either the vibration of the ground where the barrels were stacked, or to the negligent stacking of the barrels, or, if they were negligently stacked, that the employer had knowledge thereof.—*David v. Clarksville Cider Co.*, 171 S. W. 594.

§ 278 (Mo.App.) Evidence *held* sufficient to warrant a finding that the plaintiff's son need-

ed instruction in regard to the particular work he was attempting, and received none.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 278 (Mo.App.) Evidence *held* to support allegation that ammonia tank, which exploded, causing employe's death, was unsafe and dangerous, and that its condition would have been revealed by the exercise of ordinary care.—*Nowotny v. St. Louis Brewing Ass'n*, 171 S. W. 941.

§ 278 (Mo.App.) In an action for injuries to a track laborer evidence *held* not to show that the engineer saw plaintiff in a place of obvious peril.—*Witham v. Delano*, 171 S. W. 990.

§ 278 (Tex.Civ.App.) Evidence *held* to show employer's failure to furnish a reasonably safe place to work.—*Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082.

§ 279 (Tex.Civ.App.) Evidence, in an action for injuries to a servant, *held* to support a finding that another servant was guilty of negligence in performing a nondelegable duty of the master.—*Houston Lighting & Power Co.*, 1905, v. Conley, 171 S. W. 561.

§ 281 (Ark.) In an action for death of a car repairer, while working under a car, by its being struck by another car switched onto the same track, evidence *held* to establish such an habitual disregard of the blue flag rule, with the knowledge and acquiescence of those required to enforce it, as to amount to its abrogation.—*St. Louis, I. M. & S. Ry. Co. v. Sharp*, 171 S. W. 95.

§ 284 (Ky.) In an action under the federal Employers' Liability Act for the death of a railroad employe, evidence will be sufficient to take the case to the jury where it would be sufficient if the action had been brought under the state law.—*Louisville & N. R. Co. v. Johnson's Adm'r*, 171 S. W. 847.

§ 284 (Tex.Civ.App.) In a personal injury action by one who had been sent by one defendant to install a cotton gin on the premises of the other defendant, evidence *held* sufficient to take to the jury the question whether the plaintiff was the servant of both or either of the defendants.—*Dawson v. King*, 171 S. W. 257.

§ 286 (Ark.) In an action for injuries to a brakeman while between cars of a lumber company, evidence *held* to require submission to the jury of the issue of negligence.—*Ft. Smith Lumber Co. v. Shackleford*, 171 S. W. 99.

§ 286 (Ark.) In an action for personal injury from failure to furnish a safe place to work, evidence *held* to warrant a submission of the master's negligence to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Middleton*, 171 S. W. 869.

§ 286 (Ky.) In an action under the federal Employers' Liability Act for the death of a railroad engineer killed in a collision, the question whether the conductor was negligent in failing to stop the train when he did not hear the engineer give meeting signals, etc., *held* for the jury.—*Louisville & N. R. Co. v. Heinig's Adm'r*, 171 S. W. 853.

§ 286 (Mo.App.) In an action for injuries to an employe, caused by stepping on an insecure board in a platform, whereby he fell, evidence *held* sufficient to take the question of defendant's negligence to the jury.—*Cooney v. Lucile Gaslight Co.*, 171 S. W. 572.

§ 286 (Mo.App.) Evidence *held* sufficient to carry to the jury the question whether it was reasonably safe for defendant's foreman to order plaintiff's son to attempt to splice a wire which had become broken, and which caused the injury.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 286 (Mo.App.) In a workman's suit for injuries by the employer's negligence in requiring

him to work about an unguarded ripsaw in violation of Rev. St. 1909, § 7828, the question whether the saw could have been safely and securely guarded was for the jury.—*Holt v. Hamilton-Brown Shoe Co.*, 171 S. W. 673.

§ 286 (Mo.App.) In an action for injuries to an employé by a defect in a step of a stairway, the question of the employer's negligence *held* for the jury.—*Hicks v. Hammond Packing Co.*, 171 S. W. 937.

§ 286 (Mo.App.) Whether the place where an employé worked was reasonably safe *held* for the jury.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 286 (Mo.App.) On evidence in a servant's action for injury to his eye from some liquid driven from an iron pipe under an anvil, master's negligence in not inspecting it to remove dangerous matter *held* for the jury.—*Gummerson v. Kansas City Bolt & Nut Co.*, 171 S. W. 959.

§ 286 (Tex.Civ.App.) Whether a master was negligent in selecting a place for a servant to work *held* a question for the jury.—*Houston Lighting & Power Co.*, 1905, v. Conley, 171 S. W. 561.

§ 287 (Mo.App.) Whether an injury to an employé was caused by the negligence of fellow servants *held* for the jury.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 288 (Ark.) In an action for personal injury from failure to furnish a safe place to work, evidence *held* to warrant a submission of assumption of risk to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Middleton*, 171 S. W. 869.

§ 288 (Ky.) A brakeman *held* not to assume, as a matter of law the risk of injury occurring while attempting to board an engine by stepping on a step on the pilot of an engine.—*Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451.

§ 288 (Mo.App.) Where an employé in the hog-killing room of a packing plant slipped into an open sewer at one end of the room containing boiling water, he cannot be said as a matter of law to have assumed the risk, where the sewer ordinarily contained only warm water.—*Robinson v. Hammond Packing Co.*, 171 S. W. 34.

§ 288 (Mo.App.) Evidence, in a servant's action for injury to his eye from caustic liquid driven from a pipe, collected as scrap iron, *held* to make assumption of risk for the jury.—*Gummerson v. Kansas City Bolt & Nut Co.*, 171 S. W. 959.

§ 288 (Tex.Civ.App.) Where a servant was injured by a ginhouse door falling upon him and there was no evidence that he knew of the defect which caused the fall, or that it was so obvious as to give him implied knowledge thereof, he did not assume the risk as a matter of law.—*Dawson v. King*, 171 S. W. 257.

§ 288 (Tex.Civ.App.) Whether a servant knew or ought to have known that a pinch bar, furnished him by defendant with directions to use it, was defective, and appreciated the danger of using it as directed, *held* for the jury.—*Houston & T. C. R. Co. v. Smallwood*, 171 S. W. 292.

§ 288 (Tex.Civ.App.) Whether an employé, injured by the falling of a stack of sacks of meal, assumed the risk *held* for the jury.—*Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082.

§ 289 (Ark.) In an action for injuries to a brakeman while between cars of a lumber company, evidence *held* to require submission to the jury of the issue of contributory negligence.—*Ft. Smith Lumber Co. v. Shackelford*, 171 S. W. 99.

§ 289 (Mo.App.) The negligence of a workman injured by contact with an unguarded ripsaw *held* a question for the jury.—*Holt v. Hamilton-Brown Shoe Co.*, 171 S. W. 673.

§ 289 (Mo.App.) In an action for injuries to an employé by a defect in a step in a stairway, the question of contributory negligence *held* for the jury.—*Hicks v. Hammond Packing Co.*, 171 S. W. 937.

§ 289 (Mo.App.) In action for death of employé from explosion of ammonia tank, question of contributory negligence *held* for the jury.—*Nowotny v. St. Louis Brewing Ass'n*, 171 S. W. 941.

§ 289 (Tex.Civ.App.) In an action for injuries to a servant who fell from the upper to the lower floor of a ginhouse, evidence *held* not to show that the servant was negligent as a matter of law.—*Dawson v. King*, 171 S. W. 257.

The contributory negligence of a servant is a question for the jury, unless the act is a violation of some law or the facts are undisputed.—*Id.*

§ 289 (Tex.Civ.App.) In an action for injuries to an employé thrown from an unguarded elevated platform in the course of his employment, whether he was guilty of contributory negligence *held* for the jury.—*Kirby Lumber Co. v. Hamilton*, 171 S. W. 546.

§ 289 (Tex.Civ.App.) Whether an employé, injured by the falling of a stack of sacks of meal, was guilty of contributory negligence *held* for the jury.—*Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082.

§ 291 (Ky.) In an employé's action for injuries, court *held* to have properly refused to submit issue as to supplying sufficient men to do the work in view of the uncontradicted evidence.—*McKee v. Cincinnati, F. & S. E. R. Co.*, 171 S. W. 425.

In a railway employé's action for injuries caused by backing a train against cars between which he was working, instructions *held* to have fairly given the law of the case.—*Id.*

§ 291 (Mo.App.) In an action for injuries to an employé demolishing a platform, an instruction *held* not objectionable, in that it left it to the jury to find that defendant could and plaintiff could not by ordinary care have discovered the insecure plank causing his injury.—*Cooney v. Laclede Gaslight Co.*, 171 S. W. 572.

§ 291 (Mo.App.) An instruction predicated recovery upon certain findings as to the cause of injury to a minor employé *held* not broader than the petition.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 291 (Mo.App.) An instruction submitting the matter of the employer's omission of care to furnish adequate light in the place in which a ripsaw was used *held* not erroneous as not supported by the evidence.—*Holt v. Hamilton-Brown Shoe Co.*, 171 S. W. 673.

§ 293 (Ark.) Instruction that railway engineer and fireman might presume that section foreman on speeder would get off the track, and that company was not liable if they used reasonable care and diligence after it became apparent that he was not going to do so, *held* improperly refused.—*St. Louis, I. M. & S. Ry. Co. v. Morgan*, 171 S. W. 1187.

§ 293 (Ky.) Admissions of a company's servant, competent against him, but not against the company, his codefendant having been admitted, it was error to give an instruction requiring a finding against both defendants, if the jury believes he was negligent.—*Standard Oil Co. v. Marlow*, 171 S. W. 436.

§ 293 (Mo.App.) In an action for injuries to an employé by stepping on a plank fastened to a joist only by a cleat, an instruction *held* not erroneous as authorizing a recovery for the failure to inspect a hazardous work over which defendant had no control.—*Cooney v. Laclede Gaslight Co.*, 171 S. W. 572.

§ 293 (Mo.App.) An instruction as to defendant's liability for furnishing a defective machine and for the negligent orders of its foreman *held* not to be such as to mislead or confuse the jury, although unnecessarily long and some-

what lacking in clearness.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 293 (Mo.App.) Instructions *held* not to impose on the employer too great a burden in furnishing a reasonably safe place to work.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 297 (Tex.Civ.App.) In a railroad servant's action for injury from falling from a car load of lumber he was trying to straighten, findings that he knew the danger of attempting to do the work without help and with a dangerous pinch bar *held* to establish the common-law defense of assumption of risk, even though he was inexperienced and had not been warned.—*Houston & T. C. R. Co. v. Smallwood*, 171 S. W. 292.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (A) Acts or Omissions of Servant.

§ 302 (Ark.) Where plaintiff, superintendent of defendant's telephone construction, was assaulted by B., assistant to defendant's general superintendent, neither of whom had any control over plaintiff, pursuant to a conspiracy to bring about plaintiff's resignation, such act was not in the furtherance of defendant's business, and it was not liable.—*Arkansas Natural Gas Co. v. Lee*, 171 S. W. 93.

§ 302 (Ky.) A company is liable for the negligence of the chauffeur of its general agent, who was delivering a machine repaired by the agent under his contract with the company, regardless of whether the agent was required to deliver the machine to the owner.—*National Cash Register Co. v. Williams*, 171 S. W. 162.

§ 305 (Tex.Civ.App.) If a chauffeur undertook to operate a family car by direction of the owner's inexperienced son, it is the act of the owner, irrespective of the son's agency.—*Prince v. Taylor*, 171 S. W. 826.

##### (C) Actions.

§ 330 (Ky.) In an action against a company for the negligence of the chauffeur of its general agent, a finding by the jury that the chauffeur at the time was delivering repair work which the agent was required to do under his contract with the company *held* not to be palpably against the weight of the evidence.—*National Cash Register Co. v. Williams*, 171 S. W. 162.

§ 333 (Ky.) An injured person, who sued a servant and his master jointly for the negligence of the servant, can recover from the master, where the verdict was silent as to the liability of the servant even though that silence be treated as a verdict for the servant.—*National Cash Register Co. v. Williams*, 171 S. W. 162.

#### MEASURE OF DAMAGES.

See Damages, §§ 95-120, 216.

#### MEASURES.

See Weights and Measures.

#### MECHANICS' LIENS.

##### II. RIGHT TO LIEN.

##### (B) Services Rendered and Materials Furnished.

§ 45 (Mo. App.) In a statement for a mechanic's lien against a mine mill, an item for wrench, tape, and asbestos wicking should be disallowed.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

§ 50 (Mo.App.) A claimant is not entitled to a lien for express charges and car fare, where there was no evidence that those charges became a part of the charges for items sold to be used in the structure, or that the buyer

agreed to pay the delivery charges.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

#### III. PROCEEDINGS TO PERFECT.

§ 139 (Mo.App.) A statement listing articles under their trade-names, and stating that they were used in the mill upon which the lien was claimed, is sufficient.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

§ 157 (Mo.App.) The inclusion in a mechanic's lien statement of items for delivery charges which might have been, but were not, so connected with the other items as to entitle the claimant to a lien therefor does not make the statement void.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

In a statement for a mechanic's lien against a mine mill, an item for wrench, tape, and asbestos wicking, though not allowable, does not make the statement void.—*Id.*

#### IV. OPERATION AND EFFECT.

##### (C) Priority.

§ 198 (Mo.App.) A contract for the sale of an interest in a mine mill to be erected on leased premises, where it would remain personal property under the terms of the lease, *held* to be a conditional sale of personal property, and not valid against a mechanic's lien under Rev. St. 1909, § 2889, unless recorded.—*Landreth Machinery Co. v. Roney*, 171 S. W. 681.

#### MEMORANDA.

See Evidence, § 271.

#### MENTAL ANGUISH.

See Commerce, §§ 8, 28; Telegraphs and Telephones, § 27.

#### MENTAL CAPACITY.

See Deeds, §§ 68, 196, 211; Evidence, § 472; Wills, § 44.

#### MERGER.

See Judgment, § 598.

#### MILITIA.

See Vendor and Purchaser, § 129.

#### MINES AND MINERALS.

See Fixtures, § 15; Infants, § 37; Master and Servant, § 88.

#### III. OPERATION OF MINES, QUARRIES, AND WELLS.

##### (B) Mining Partnerships and Companies.

§ 97 (Mo.) In action by one interested in incorporating certain mining properties to compel another party to account for an alleged secret profit on the purchase of a third party's interest, *held*, that there was no prima facie partnership between plaintiff and defendant, because they were promoters, and the burden was therefore on plaintiff to establish a partnership.—*Ringolsky v. Maud L. Mining Co.*, 171 S. W. 56.

§ 106 (Mo.) Where one of the incorporators of mining properties was induced to join in the contract to incorporate by the statements of another that his stock would be worth as much as the other's bonds, and that he might exchange if he so desired, *held*, that the other incorporators, or the corporation for them, could not compel an accounting, with respect to what he thereby obtained, more than the contract gave him, even assuming that he was a promoter.—*Ringolsky v. Maud L. Mining Co.*, 171 S. W. 56.

#### MINORS.

See Infants.

**MISREPRESENTATION.**

See Fraud.

**MITIGATION.**

See Homicide, § 27.

**MONEY RECEIVED.**

See Carriers, § 284; Corporations, § 121; Evidence, §§ 119, 341; Pleading, § 433; Sales, § 398.

**MONOPOLIES.**

See Abatement and Revival, § 39.

**II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.**

§ 17 (Tex.Civ.App.) A contract whereby a retail ice dealer agreed to purchase all of his ice from a certain manufacturer so long as the latter could supply his demand *held* to be a "conspiracy in restraint of trade" within Rev. St. 1911, art. 7798, subd. 1.—Wood v. Texas Ice & Cold Storage Co., 171 S. W. 497.

That a contract for the purchase of ice which was in restraint of trade under Rev. St. 1911, art. 7798, subd. 1, gave the purchaser the benefit of the market price, whatever it might be, does not render the contract valid.—Id.

A contract for the exclusive purchase of ice by a retail dealer from a wholesale dealer is a conspiracy in restraint of trade as defined by Rev. St. 1911, art. 7798, subd. 1.—Id.

**MORTGAGES.**

See Bankruptcy, § 205; Chattel Mortgages; Marshaling Assets and Securities, §§ 2, 4; Taxation, § 531; Trusts, § 44.

**I. REQUISITES AND VALIDITY.**

(A) Nature and Essentials of Conveyances as Security.

§ 38 (Ark.) Evidence *held* to support finding that absolute deed was not a mortgage, but that there was a sale with an option agreement for a resale.—Nance v. Polk, 171 S. W. 1195.

**III. CONSTRUCTION AND OPERATION.**

(D) Lien and Priority.

§ 151 (Ark.) As to the purchaser of some of the purchase-money notes, the vendor's lien reserved by a deed is not extinguished by reconveyance of the land, even against subsequent mortgagees who had no notice, except under Kirby's Dig. § 762.—Hebert v. Felheimer, 171 S. W. 144.

**IV. RIGHTS AND LIABILITIES OF PARTIES.**

§ 201 (Mo.App.) Where a mortgagee insures not his own risk, but that of the mortgagor at the latter's expense, the mortgagee, on collecting the policy after loss, is bound to account to the mortgagor.—Rutherford v. Sample, 171 S. W. 578.

**VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.**

§ 292 (Mo.App.) In a suit to recover a personal judgment against a mortgagor who had sold the mortgaged lands, evidence *held* to justify finding that the mortgagor consented to the release of portions of the property, and so was not discharged from liability as a surety.—Troll v. Dougherty & Bush Real Estate Co., 171 S. W. 665.

**VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.**

§ 298 (Tex.Civ.App.) Payment of a debt secured by mortgage discharges the mortgage, and

it cannot be continued as against a subsequent judgment creditor of the mortgagor by a new mortgage after the judgment.—First State Bank of Amarillo v. Jones, 171 S. W. 1067.

§ 319 (Tex.Civ.App.) A recital in a release executed by the president of a mortgagee bank that the note secured by the mortgage had been paid in full while the bank was the owner thereof supports a finding of payment.—First State Bank of Amarillo v. Jones, 171 S. W. 1057.

**IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.**

§ 336 (Tex.Civ.App.) A junior mortgagee is not injured by a private sale under a senior mortgage, which called for a public sale where the property could not be sold for the debt secured.—Fidelity & Deposit Co. of Maryland v. Albrecht, 171 S. W. 819.

§ 369 (Mo.) A trustee in a deed of trust *held* obliged to set aside a sale for about 4 per cent. of the value in the absence of the creditors, and resell the property or readvertise for sale at a future date.—Middleton v. Baker, 171 S. W. 328.

§ 376 (Ky.) Where a sale under a trust deed executed by a husband alone was made to pay debts, including a debt secured by a mortgage, in which the wife joined, of a part of the property worth more than the debt, but unmortgaged property was sold to pay the mortgage, the proceeds must be applied as if mortgaged property had been sold to discharge the mortgage.—Mulligan v. Mulligan, 171 S. W. 420.

**X. FORECLOSURE BY ACTION.**

(J) Sale.

§ 518 (Mo.App.) Where a beneficiary of a deed of trust purchased a tax bill on the property, paid general taxes, insurance, etc., he was bound to credit his bid on foreclosure against costs and such advancements and any balance remaining, together with the proceeds of insurance subsequently collected against the note, accounting to the grantor for any overplus.—Rutherford v. Sample, 171 S. W. 578.

(K) Deficiency and Personal Liability.

§ 561 (Tex.Civ.App.) Answer, in action for deficiency after foreclosure, alleging collusion between defendant primarily liable on the notes and plaintiff, *held* subject to some of the special exceptions which were sustained.—Bray v. Sewall, 171 S. W. 795.

**MOTIONS.**

See Appeal and Error, §§ 282-302; Continuance, § 37; Criminal Law, § 603; New Trial, §§ 112-163; Pleading, §§ 352, 369.

**MOTIVE.**

See Homicide, § 166.

**MOVING PICTURE SHOWS.**

See Sunday.

**MUNICIPAL CORPORATIONS.**

See Appeal and Error, § 1068; Bridges, § 46; Counties; Dedication, §§ 31, 35, 44; Electricity, § 19; Eminent Domain, § 2; Judgment, § 256; Limitation of Actions, §§ 6, 11; New Trial, § 89; Principal and Surety, § 82; Schools and School Districts; Street Railroads; Taxation, § 431; Trial, §§ 255, 308.

**I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.**

(A) Incorporation and Incidents of Existence.

§ 18 (Mo.) The act of the county court in incorporating a town in accordance with Laws 1871, p. 85, is a judicial act.—State ex rel.

Blair v. Center Creek Mining Co., 171 S. W. 356.

The judgment of the county court incorporating a municipality in accordance with Laws 1871, p. 85, cannot be collaterally attacked, but can only be questioned by a proceeding in quo warranto.—Id.

To assail an order of the county court incorporating a city or town, all essential infirmities resulting from the order must be raised by express pleading.—Id.

**(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.**

§ 28 (Mo.) As the right of a municipality to extend its boundaries gives to one of the interested parties legislative power, the reasonableness of such an ordinance is a subject of judicial inquiry.—State ex rel. Blair v. Center Creek Mining Co., 171 S. W. 356.

§ 33 (Mo.) Under Rev. St. 1899, §§ 5257, 5895, a municipality already incorporated by the judgment of the county court cannot, by virtue of an ordinance providing for incorporation as a city of its appropriate class and submitting the matter to the voters, change its boundaries.—State ex rel. Blair v. Center Creek Mining Co., 171 S. W. 356.

**II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.**

§ 58 (Tex.Civ.App.) A statute by which a municipality is organized is its organic act and the limit of its power, so that all acts beyond the scope of the powers there granted are void.—Tharp v. Blake, 171 S. W. 549.

§ 59 (Tex.Civ.App.) A municipal corporation may only exercise those powers granted in express words or necessarily implied in the powers expressly granted and those indispensable as distinguished from merely convenient to the authorized purposes.—Tharp v. Blake, 171 S. W. 549.

**IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.**

**(A) Meetings, Rules, and Proceedings in General.**

§ 90 (Ky.) Under Ky. St. § 3697, where a city's board of trustees consisted of five members, and one resigned, the remaining four had power to act.—Barry v. Town of New Haven, 171 S. W. 1012.

**(B) Ordinances and By-Laws in General.**

§ 120 (Ky.) In an ordinance for an improvement of a street to be constructed on the ten-year bond plan, as authorized by Acts 1912, c. 113, which was unconstitutional, the provisions for the method of payment under that act cannot be disregarded and the provisions for the construction sustained.—Hickman v. Kimbley, 171 S. W. 176.

**V. OFFICERS, AGENTS, AND EMPLOYEES.**

**(C) Agents and Employés.**

§ 214 (Tex.Civ.App.) Under Rev. St. 1911, art. 1042 et seq., and article 3078, an incorporated town had no authority to employ an attorney to contest an election by which it was voted to abolish the corporation or to bind the town for the fees for such services.—Tharp v. Blake, 171 S. W. 549.

§ 220 (Tex.Civ.App.) Where an incorporated town had no authority to employ an attorney to perform certain legal services, he could not recover the reasonable value thereof on a quantum meruit.—Tharp v. Blake, 171 S. W. 549.

**VII. CONTRACTS IN GENERAL.**

§ 226 (Tex.Civ.App.) An incorporated town can enter into valid contracts and incur debts

only when the making of such contracts is within the scope of its general corporate functions or of authority conferred by statute.—Tharp v. Blake, 171 S. W. 549.

§ 244 (Tex.Civ.App.) The employment of an attorney by a city or town council, if otherwise authorized, could only be accomplished by an ordinance or resolution.—Tharp v. Blake, 171 S. W. 549.

**IX. PUBLIC IMPROVEMENTS.**

**(A) Power to Make Improvements or Grant Aid Therefor.**

§ 269 (Ky.) A street, without regard to its previous condition, may be originally improved once at the expense of the abutting property owner.—Marret v. Jefferson County Const. Co., 171 S. W. 396.

§ 269 (Mo.App.) A city charter provision forbidding the improvement by the city of streets not acquired "according to the provisions of this charter and law" covers not only the streets acquired under provision of the charter, but also those acquired under statutory and common law.—Meyer v. Bobb, 171 S. W. 600; Same v. Goldsmith, Id. 606.

Under Rev. St. 1909, § 1882, the actual possession of only the traveled path of a road sought to be improved as a street held sufficient to extend the possession to the whole width of the proposed street, where the public had color of title by virtue of a plat showing the full width.—Id.

**(B) Preliminary Proceedings and Ordinances or Resolutions.**

§ 297 (Mo.App.) The record of a board of public improvement stating that an ordinance was approved notwithstanding a majority remonstrance, "the improvement being deemed necessary," held in compliance with a charter provision providing that the board of public improvement should report their reasons to the municipal assembly, where they adopted an improvement against the remonstrances of the majority of abutting owners.—Meyer v. Bobb, 171 S. W. 600; Same v. Goldsmith, Id. 606.

Under a charter provision providing that the board of public improvement should report their reasons to the municipal assembly when they adopt an improvement against the majority remonstrances, the recorded action of the board held sufficient to authorize its secretary to write to the municipal assembly that the board was of the opinion that the public interest demanded the improvement notwithstanding the remonstrances.—Id.

§ 301 (Mo.App.) Under Rev. St. 1909, § 9400, surface drainage in fourth-class cities can be legally undertaken only by ordinance.—Jones v. City of Caruthersville, 171 S. W. 639.

§ 304 (Ark.) The municipal authorities cannot order an improvement of a character different from that prayed for in the petition of property owners.—Harnwell v. White, 171 S. W. 108.

**(E) Assessments for Benefits, and Special Taxes.**

§ 450 (Ark.) Publication of an ordinance establishing an improvement district must be in strict compliance with the statute, so that one of the lots not being included in the publication, though lots on both sides of it, and owned by the same parties, are included, the district is not created.—McRaven v. Clancy, 171 S. W. 88.

§ 450 (Ark.) To authorize the establishment of an improvement district, a majority in value of the real property owners within the district must have petitioned for the improvement, designating its nature.—Harnwell v. White, 171 S. W. 108.

Under Kirby's Dig. § 5683, a city cannot, where a proposed improvement would require a greater assessment, create a district for the con-

struction of part of the proposed improvement or create several districts for the construction of the improvement by piecemeal.—*Id.*

Improvement district, though not organized in accordance with the petition, having constructed the improvements, have a de facto existence and may sue, though created to defeat the law limiting local assessment.—*Id.*

§ 450 (Ky.) Under Ky. St. § 2833, relating to public improvement of streets, *held*, that the test of a principal street was dedication to the use of the public, and that a parkway improved by the board of park commissioners by virtue of Ky. St. § 2848, was a "principal street," and hence an assessment for the improvement of the adjacent parallel street could not be extended back to the line of the parkway.—*Marret v. Jefferson County Const. Co.*, 171 S. W. 396.

§ 475 (Ky.) Under Ky. St. § 3706, relating to improvement of streets in towns of the sixth class, *held*, that it was within the power of the trustees to contract for an improvement either on a cash basis or on a deferred payment plan, or to give to the owners the option of paying either in cash or on a deferred payment plan.—*Morgan v. Figg*, 171 S. W. 416.

§§ 488, 489 (Ark.) Where a property owner agreed to pay an assessment in excess of the statutory limit, she is estopped to set up the invalidity of the assessments or the improvement districts.—*Harnwell v. White*, 171 S. W. 108.

A property owner *held* estopped to deny the validity of assessments for public improvements, but not estopped to deny liability for penalty and attorneys' fees.—*Id.*

§ 519 (Ky.) Under Ky. St. § 3706, relating to improvement of streets of the sixth class and the assessment of costs to the abutting property owners, *held*, that it was the intent of the Legislature that such assessments be a lien on the abutting property.—*Morgan v. Figg*, 171 S. W. 416.

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) Streets and Other Public Ways.

§ 705 (Mo.) Leading a mule by the rider of another mule, in a city street, with the use of a halter with a rein five or six feet held at the end thereof, is not negligence, if the mule has no vicious propensities.—*Lyman v. Dale*, 171 S. W. 352.

§ 705 (Mo.App.) Under Motor Vehicle Statute, § 8, par. 2, driver of automobile *held* required to slow down or stop when about to pass a street car, which had stopped to allow passengers to alight or embark, though going only six miles an hour.—*Grouch v. Heffner*, 171 S. W. 23.

Under Motor Vehicle St. § 8, par. 2, chauffeur *held* charged with the duty of slowing down or stopping automobile when approaching street car stopped at its usual place, though he did not see a person about to board the car.—*Id.*

§ 705 (Tex.Civ.App.) A mistake of judgment as to the competency of the driver of an automobile, however honestly made, is not a defense to a suit for injury caused by his negligence.—*Prince v. Taylor*, 171 S. W. 826.

§ 706 (Mo.) In an action in justice court for damages to a buggy wheel caused by a mule led through a city street by an employé of defendant, evidence *held* insufficient to sustain a verdict for plaintiff, whether the complaint be construed as alleging the leading of a wild and unruly mule in a negligent manner or the negligent leading of an ordinary mule.—*Lyman v. Dale*, 171 S. W. 352.

§ 706 (Mo.App.) In an action for injury from being struck by an automobile, brought under Rev. St. 1909, §§ 8519, 8523, providing that in turning the corner of intersecting roads, where the view is obstructed, automobiles shall not be

driven at more than six miles per hour, *held*, on the evidence, that defendant's negligence in turning the corner and plaintiff's contributory negligence in the emergency were for the jury.—*Heartsell v. Billow*, 171 S. W. 7.

§ 706 (Mo.App.) The application required by Laws 1911, p. 322, § 3, for the license number on a motor car is admissible to show the ownership of the car, although the application was for a different year and a different car.—*Hufft v. Dougherty*, 171 S. W. 17.

An allegation that the place in question was a city street in continuous use for public travel, *held* equivalent to an allegation that it was a place much used for travel, so as to authorize an instruction as to the degree of care required in such place by Laws 1911, p. 330, § 12, subd. 9.—*Id.*

§ 706 (Mo.App.) Where a person looked for approaching automobiles while walking from the sidewalk to street car tracks, he was not negligent as a matter of law in then devoting his attention to the street car and to his purpose of boarding it, instead of watching for automobiles.—*Grouch v. Heffner*, 171 S. W. 23.

Jury *held* justified in finding that negligence of automobile driver was the sole cause of an injury to a person struck by the automobile while passing around a street car to board it, whether he exercised the degree of care required by Motor Vehicle St. § 12, being for the jury.—*Id.*

§ 706 (Tex.Civ.App.) In a suit for injuries to a pedestrian by an automobile, a charge *held* properly refused as withdrawing an issue as to negligence in driving at all at the place of the accident.—*Prince v. Taylor*, 171 S. W. 826.

## XII. TORTS.

### (A) Exercise of Governmental and Corporate Powers in General.

§ 736 (Ky.) In the collection and disposition of garbage, a city acts for the public health and discharges a governmental function.—*City of Louisville v. Hehemann*, 171 S. W. 165.

### (B) Acts or Omissions of Officers or Agents.

§ 753 (Mo.App.) A city *held* not liable for injuries to plaintiff's lot by the street commissioner in constructing a drain without authority of an ordinance, though the city paid for the work under general appropriation ordinance.—*Jones v. City of Caruthersville*, 171 S. W. 639.

### (C) Defects or Obstructions in Streets and Other Public Ways.

§ 755 (Ky.) A municipality is not an insurer against accidents to persons using its thoroughfares.—*City of Ashland v. Boggs*, 171 S. W. 461.

§ 763 (Mo.App.) A city owes to pedestrians a greater diligence in looking after the safety of its streets, which are much traveled, than those where the travel is light.—*Willis v. City of St. Joseph*, 171 S. W. 27.

§ 764 (Mo.App.) A city is bound to exercise ordinary care to keep its streets safe and convenient for ordinary travel, including the use of bicycles, but need not exercise greater care for cyclists than other travelers.—*Bethel v. City of St. Joseph*, 171 S. W. 42.

§ 788 (Ky.) A municipality is not liable for injuries caused by defective streets, in the absence of actual notice of such defect, or unless it has existed so long that notice or knowledge thereof should be imputed.—*City of Ashland v. Boggs*, 171 S. W. 461.

§ 790 (Mo.App.) A city is chargeable with a policeman's knowledge of a defect in a sidewalk which causes injury to a pedestrian.—*Willis v. City of St. Joseph*, 171 S. W. 27.

§ 806 (Ky.) A pedestrian has the right to the free use of any part of the sidewalk open for public use, and the right to assume that it is free from obstructions and in a reasonably safe

condition for travel.—City of Ashland v. Boggs, 171 S. W. 461.

§ 818 (Mo.App.) In an action for personal injuries caused by a defective sidewalk, a contract for the grading of the street *held* not admissible to show that the contractor should have been made a party under Rev. St. 1909, § 8862.—Brown v. City of St. Joseph, 171 S. W. 935.

§ 821 (Ky.) Generally it is a question for the jury whether a city had notice of a defect in a street, yet where the facts are undisputed, and but one reasonable inference can be drawn from them, it becomes a question for the court.—City of Ashland v. Boggs, 171 S. W. 461.

§ 821 (Mo.App.) In an action for injuries from a fall on a sidewalk, *held*, that the question of the city's negligence was for the jury.—Willis v. City of St. Joseph, 171 S. W. 27.

In an action for injuries from a fall on a sidewalk, *held*, that plaintiff's negligence in not avoiding the defect was for the jury.—Id.

§ 821 (Mo.App.) In a suit against a municipality for injuries to a cyclist in a fall on its streets, evidence of the municipality's negligence *held* sufficient to go to the jury.—Bethel v. City of St. Joseph, 171 S. W. 42.

§ 821 (Mo.App.) In action for injury to a pedestrian falling on a sidewalk at night by striking an obstruction of which he knew, evidence *held* to require submission of contributory negligence to the jury.—Stephens v. City of El Dorado Springs, 171 S. W. 657.

§ 822 (Ky.) In an action against a city for personal injury from a fall on a sidewalk, *held*, on the evidence, that an instruction on contributory negligence was properly given.—Mulloy v. City of Louisville, 171 S. W. 190.

§ 822 (Mo.App.) In an action by a bicyclist hurt when his machine ran into a hole in the pavement, *held*, that defendant's instruction that the city owed no greater duty toward bicyclists than other travelers should have been given.—Bethel v. City of St. Joseph, 171 S. W. 42.

§ 822 (Mo.App.) In an action for injuries on a defective sidewalk, defendant's instruction on contributory negligence *held* improperly refused.—Stephens v. City of El Dorado Springs, 171 S. W. 657.

An instruction, that one knowingly using a defective sidewalk at night must grope or feel his way until he passes the place, should be qualified by omitting the word "grope" and adding "or has reason to believe as a result of the exercise of ordinary care that he has passed."—Id.

### XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

#### (A) Power to Incur Indebtedness and Expenditures.

§ 858 (Tex.Civ.App.) An incorporated town can enter into valid contracts and incur debts only when the making of such debts is within the scope of its general corporate functions or of authority conferred by statute.—Tharp v. Blake, 171 S. W. 549.

§ 865 (Ky.) The probable cost of maintaining and operating a municipal lighting plant cannot be considered in determining whether the construction of the system would entail an indebtedness greater than the city's constitutional limit.—Barry v. Town of New Haven, 171 S. W. 1012.

#### (C) Bonds and Other Securities, and Sinking Funds.

§ 918 (Ky.) Notice of election to create a debt and issue bonds by a sixth-class city having been given as prescribed by Ky. St. § 3705, and the debt having been approved, the trustees could provide the mode of creating the

debt, and levy a tax for interest and sinking fund by ordinance.—Barry v. Town of New Haven, 171 S. W. 1012.

A bond issue election *held* not avoided because several voters, after having voted for officers to be elected and having left the voting place, returned and were permitted to vote on the bond issue.—Id.

That election officers, instead of detaching and destroying unused ballots, returned them to the clerk was a mere irregularity which did not invalidate the election.—Id.

§ 919 (Ky.) Tax to pay interest and raise sinking fund to pay a municipal debt may be levied at any time before bonds are issued and sold.—Barry v. Town of New Haven, 171 S. W. 1012.

#### (D) Taxes and Other Revenue, and Application Thereof.

§ 971 (Mo.) Under Const. art. 10, § 11, and Rev. St. 1909, § 9347, an assessment for city taxes at a valuation greatly in excess of the valuation for county purposes cannot stand.—State ex rel. Blair v. Center Creek Mining Co., 171 S. W. 356.

### MURDER.

See Homicide, §§ 7-30, 250, 254, 309.

### MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 693-825.

### NAMES.

See Good Will, § 7; Parties, § 94; Process, § 31; Trade-Marks and Trade-Names.

### NECESSARIES.

See Husband and Wife, §§ 19, 268; Insane Persons, §§ 75, 79.

### NEGLIGENCE.

See Appeal and Error, §§ 213, 1004, 1064, 1169; Bridges, § 46; Corporations, § 320; Electricity; Highways, §§ 181, 184; Landlord and Tenant, §§ 162-169; Master and Servant, §§ 874-833; Municipal Corporations, §§ 705, 706, 753, 755-822; Principal and Surety, § 82; Railroads, §§ 95, 275-482; Street Railroads, §§ 85, 98, 100, 103; Trial, §§ 194, 219, 251, 296.

#### I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

##### (A) Personal Conduct in General.

§ 2 (Ky.) Where the only relation between the parties is contractual, the liability of one to the other for negligence must be based on a positive duty, because of the relationship, or because of the negligent manner in which some act which the contract provided for was done.—Dice's Adm'r v. Zweigart's Adm'r, 171 S. W. 195.

§ 2 (Mo.App.) Negligence is a breach of duty which one man owes to another, and where there is no duty there can be no "actionable negligence."—Cornett v. Chicago, B. & Q. R. Co., 171 S. W. 15.

§ 4 (Mo.App.) "Ordinary care" is such care as an ordinarily prudent person would be expected to exercise in the circumstances of the case.—Holt v. Hamilton-Brown Shoe Co., 171 S. W. 373.

##### (B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 16 (Mo.App.) Though plaintiff's leg was crushed when defendant's wagon was backed against a freight platform where he worked, it was not negligence for defendant to use the platform because it could also use another place.—Lauff v. J. Kennard & Sons Carpet Co., 171 S. W. 986.

§ 25 (Mo.App.) One hauling goods to a freight-house about which there are many people should look for and warn persons thereabout before backing his wagon against the platform.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

#### IV. ACTIONS.

##### (A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 119 (Mo.App.) Where specific acts of negligence are set forth in a petition containing general averments, the specific averments will be treated as superseding the general ones, and plaintiff can recover only on them.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

##### (C) Trial, Judgment, and Review.

§ 136 (Mo.App.) Contributory negligence is for the jury where the question is one about which reasonable minds may differ.—*Holt v. Hamilton-Brown Shoe Co.*, 171 S. W. 673.

§ 136 (Mo.App.) Plaintiff's contributory negligence in getting crushed between a freight platform and defendant's wagon *held* for the jury.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

§ 138 (Mo.App.) Even where the averment of negligence is general, the instructions should confine the jury to the particular acts of negligence shown by the testimony.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

A general requirement that the jury find defendant guilty of negligence before rendering judgment for plaintiff is not equivalent to instructions requiring them to find the specific acts of negligence charged.—*Id.*

An instruction *held* improper in not requiring the jury to find of what act of negligence defendant was guilty as charged in the petition.—*Id.*

§ 138 (Tex.Civ.App.) Under the evidence, *held* not error to refuse an instruction that the injured boy was on defendant's engine without invitation, and that defendant owed no duty except not to willfully or wantonly injure him.—*Gulf, T. & W. Ry. Co. v. Dickey*, 171 S. W. 1097.

§ 139 (Tex.Civ.App.) An instruction that defendant's hostler was not negligent unless he knew the valve was open when he turned on the injector, or unless he intentionally and wantonly scalded plaintiff's son, *held* properly refused.—*Gulf, T. & W. Ry. Co. v. Dickey*, 171 S. W. 1097.

§ 140 (Ark.) In an action for destruction of plaintiff's property by an alleged negligent fire, an instruction *held* a proper submission of the issue of proximate cause.—*Hays v. Williams*, 171 S. W. 882.

§ 142 (Tex.Civ.App.) A negative finding as to negligence and proximate cause *held* to authorize a judgment for defendant.—*Martinez v. Medina Valley Irr. Co.*, 171 S. W. 1035.

### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

### NEUTRALITY LAWS.

See Criminal Law, § 369.

### NEWLY DISCOVERED EVIDENCE.

See New Trial, §§ 99-108.

### NEW TRIAL.

See Appeal and Error, §§ 282-302, 528, 671, 722, 742, 867, 977, 981; Appearance, § 8; Criminal Law, §§ 918, 922, 942, 949, 956, 1083; Judges, § 51; Waters and Water Courses.

### II. GROUNDS.

#### (C) Rulings and Instructions at Trial.

§ 39 (Ky.) Where instructions in an action for malicious prosecution submitted elements of damage not raised by the pleadings, and improperly defined elements of the offense, a new trial should be granted.—*Keiner v. Collins*, 171 S. W. 399.

#### (D) Disqualification or Misconduct of or Affecting Jury.

§ 42 (Ky.) That a juror served as such on a former trial, on which peremptory instruction was given, *held* not in itself ground for new trial.—*McKee v. Cincinnati, F. & S. E. R. Co.*, 171 S. W. 425.

§ 44 (Tex.Civ.App.) A showing that jurors agreed to the verdict because of the argument of other jurors as to the amount of the attorney's fees *held* to entitle defendant to a new trial.—*Gulf, C. & S. F. Ry. Co. v. McKinnell*, 171 S. W. 1091.

#### (G) Surprise, Accident, Inadvertence, or Mistake.

§ 89 (Ky.) In an action against a city for personal injury received on the "north side of O. street and T. street," in which plaintiff located the accident at the "northeast" corner of T. and O. streets, *held* that defendant's proof at the trial that it was at the "northwest" corner did not warrant the grant of a new trial for plaintiff on the ground of surprise.—*Mulloy v. City of Louisville*, 171 S. W. 190.

#### (H) Newly Discovered Evidence.

§ 99 (Mo.App.) A motion for a new trial for newly discovered evidence is addressed to the discretion of the court.—*Laser v. Nelson*, 171 S. W. 6.

§ 101 (Mo.) A party to be entitled to a new trial on the ground of newly discovered evidence *held* required to show discovery since the trial, that no want of diligence prevented earlier discovery, that it was material, not cumulative, and not tending merely to impeach a witness.—*Sang v. City of St. Louis*, 171 S. W. 347.

§ 102 (Mo.) Lack of diligence in locating a witness after notification at the trial of the means of so doing, *held* fatal to a motion for new trial on the ground of his evidence.—*Sang v. City of St. Louis*, 171 S. W. 347.

§ 103 (Mo.App.) Newly discovered evidence, material only in case of a counterclaim by defendant, is not ground for a new trial, where the only defense was a general denial.—*Jennemann v. Bucher*, 171 S. W. 613.

§ 103 (Tex.Civ.App.) In an action on an alleged promise of a landlord to pay for groceries furnished his tenant, newly discovered evidence *held* not so material to the issue, though tending to discredit plaintiff's testimony, as to render the refusal of a motion for new trial reversible.—*Chilson v. Oheim*, 171 S. W. 1074.

§ 104 (Tex.Civ.App.) A new trial will not be awarded because of newly discovered cumulative evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Delmon*, 171 S. W. 799.

§ 108 (Mo.) Newly discovered evidence that a street lamp was lighted near the place of an accident from a defect in the street, *held* not inadequate ground for new trial, as not likely to change the result.—*Sang v. City of St. Louis*, 171 S. W. 347.

### III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 112 (Tex.Civ.App.) Where defendants filed a joint motion for a new trial, claiming that the verdict is against the weight of the evidence, the motion will be overruled, if the evidence supports the verdict as to any of the defendants.—*Martin v. Burr*, 171 S. W. 1044.

§ 124 (Tex.Civ.App.) Denial of new trial for the absence of defendant, who failed to show why he did not notify his counsel or the court of his absence, though he knew that his case would be called, *held* within the court's discretion.—*Muldoon v. J. E. Bray Land Co.*, 171 S. W. 1027.

§ 163 (Mo.App.) An order sustaining a motion for new trial ordinarily leaves the case as though no trial had taken place, except when the petition contains two or more counts, and the verdict is for plaintiff on one or more and for defendant on one or more.—*Wonderly v. Haynes*, 171 S. W. 564.

§ 163 (Mo.App.) The granting of a new trial on the sole ground that the verdict was excessive in effect overruled the other grounds assigned in the motion.—*Kelly v. City of Higinville*, 171 S. W. 966.

## NOMINAL DAMAGES.

See Damages, § 9.

## NOMINATION.

See Elections, §§ 124, 147.

## NONSUIT.

See Dismissal and Nonsuit.

## NOTARIES.

See Depositions, § 111.

## NOTES.

See Bills and Notes.

## NOTICE.

See Appeal and Error, § 430; Attorney and Client, § 77; Banks and Banking, § 148; Carriers, § 218; Evidence, § 185; Executors and Administrators, §§ 148, 388; Highways, § 161; Husband and Wife, § 267; Insurance, §§ 310, 553; Justices of the Peace, § 141; Landlord and Tenant, § 252; Master and Servant, § 125; Mortgages, § 151; Municipal Corporations, §§ 788, 790, 918; Receivers, § 35; Sales, § 418; Schools and School Districts, § 37; Vendor and Purchaser, §§ 224-243.

## NUISANCE.

See Action, § 50; Lewdness, § 10.

### I. PRIVATE NUISANCES.

#### (D) Actions for Damages.

§ 49 (Ky.) In an action by the owner of residence property for damages from the maintenance of a public dump, *held*, that he could show sickness and annoyance suffered by him or his family as depreciating the value of the property.—*City of Louisville v. Hehemann*, 171 S. W. 165.

§ 50 (Ky.) In an action by the owner of residence property for damages from the maintenance of a public dump, *held*, that the measure of damages was what would fairly and reasonably compensate for any diminution in the value of its use.—*City of Louisville v. Hehemann*, 171 S. W. 165.

## OBJECTIONS.

See Appeal and Error, §§ 195-238.

## OBSTRUCTIONS.

See Highways, § 161.

## OFFICERS.

See Beneficial Associations, § 14; Corporations, §§ 283-320, 398-448; Counties, §§ 81, 89; Court Commissioners; District and Prosecut-

ing Attorneys; Embezzlement; Injunction, § 13; Judges; Justices of the Peace; Receivers; Sheriffs and Constables.

## OPINION EVIDENCE.

See Criminal Law, § 479; Evidence, §§ 471-558.

## OPTIONS.

See Evidence, § 441.

## ORDERS.

See Appeal and Error.

## ORDINANCES.

See Municipal Corporations, §§ 297, 450.

## PARALLEL CITATIONS.

See Appeal and Error, § 761.

## PARENT AND CHILD.

See Death, § 95; Divorce, §§ 323, 324; Habeas Corpus, §§ 99, 112; Infants.

§ 5 (Ark.) In a suit by an adult daughter to recover from her father her earnings which she had deposited in a bank in the name of her father, evidence *held* to sustain a finding that the amount was deposited under a family partnership agreement, which she thought existed, but which the father denied.—*Penrose v. Baker*, 171 S. W. 482.

## PARKS.

See Municipal Corporations, § 450.

## PAROLE.

See Criminal Law, § 1208.

## PAROL EVIDENCE.

See Evidence, §§ 408-445.

## PARTIES.

See Appeal and Error, § 384; Corporations, § 320; Husband and Wife, § 221; Pledges, § 57; Venue, §§ 22, 32.

### I. PLAINTIFFS.

#### (A) Persons Who may or must Sue.

§ 6 (Mo.App.) Where plaintiff was the party interested in setting aside the release of a trust deed given to a third person for plaintiff's benefit, plaintiff can maintain the action in her own name notwithstanding the deed of trust designated such third person as beneficiary.—*Dubowsky v. Binggeli*, 171 S. W. 12.

### V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 94 (Ky.) The misnomer of defendant corporation could not properly be raised by demurrer, but should have been presented by answer or affidavit in the nature of plea in abatement disclosing the misnomer and defendant's true name.—*Studebaker Corporation of America v. Dodds & Runge*, 171 S. W. 167.

§ 97 (Ky.) Defendant having defended on the merits in the trial court, and it being conceded that it was the corporation intended to be sued, it was estopped to complain that judgment was rendered against it in its true corporate name.—*Studebaker Corporation of America v. Dodds & Runge*, 171 S. W. 167.

## PARTITION.

See Husband and Wife, § 221; Witnesses, §§ 139, 140.

## II. ACTIONS FOR PARTITION.

### (A) Right of Action and Defenses.

§ 16 (Tex.Civ.App.) Client holding a one-fourth interest in land as the attorney's trustee entitles the attorney to maintain partition. —Porterfield v. Taylor, 171 S. W. 798.

### (B) Proceedings and Relief.

§ 95 (Tex.Civ.App.) A judgment in partition that plaintiff take nothing and that defendants go hence, etc., held final.—Banks v. Blake, 171 S. W. 514.

## PARTNERSHIP.

See Appeal and Error, §§ 384, 1039; Mines and Minerals, § 97.

### I. THE RELATION.

#### (A) Creation and Requisites.

§ 19 (Mo.App.) Where plaintiff agreed that another could become his partner in a venture upon payment of one-half of the money he had expended and such third person gave plaintiff a worthless check, which was not accepted as absolute payment, the parties did not become partners between themselves.—Stundon v. Dahlenberg, 171 S. W. 37.

§ 20 (Mo.App.) Parties held to have become partners in a single venture for the resale of wool purchased for that purpose.—Stundon v. Dahlenberg, 171 S. W. 37.

#### (B) As to Third Persons.

§ 29 (Ky.) A contract, by which Q. agreed to sell certain automobiles for plaintiffs and to receive half the profits on such sales, held insufficient to make him plaintiffs' partner or, in the absence of express authority, to authorize him to cancel a contract between plaintiffs and defendant to purchase automobiles.—Studebaker Corporation of America v. Dodds & Runge, 171 S. W. 167.

§ 29 (Mo.App.) Plaintiff, who shipped wool to defendant for sale, held not bound by a payment to his alleged partner, who never became interested in the transaction because he had not paid his share.—Stundon v. Dahlenberg, 171 S. W. 37.

§ 30 (Ky.) A contract to remunerate an agent by paying him a share of the profits of the business does not of itself make the agent a partner in the business.—Studebaker Corporation of America v. Dodds & Runge, 171 S. W. 167.

§ 34 (Ky.) In order that persons between whom there is no actual partnership may be held liable as partners to third persons, a case of estoppel must be made out against them.—Studebaker Corporation of America v. Dodds & Runge, 171 S. W. 167.

## III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

### (C) Actions Between Partners.

§ 119 (Tex.Civ.App.) A petition by a partner held insufficient to authorize the appointment of a receiver for the firm, where it did not ask for any ultimate relief.—Style v. Lantrip, 171 S. W. 786.

## IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

### (D) Actions by or Against Firms or Partners.

§ 197 (Tex.Civ.App.) An ordinary partnership is not a legal entity, and can neither sue nor be sued in the firm name.—Style v. Lantrip, 171 S. W. 786.

§ 218 (Mo.App.) On undisputed facts the court may declare that a partnership exists without submitting that question to the jury.—Stundon v. Dahlenberg, 171 S. W. 37.

## PASSENGERS.

See Carriers, §§ 239-406.

## PAYMENT.

See Accord and Satisfaction: Bills and Notes, § 256; Compromise and Settlement; Husband and Wife, § 131; Mortgages, §§ 298, 319; Partnership, § 29; Release.

## II. APPLICATION.

§ 39 (Tex.Civ.App.) The application of a payment as intended and agreed cannot be diverted without the debtor's consent.—Keasler v. Wray, 171 S. W. 534.

## IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 70 (Mo.App.) Evidence of the nonentry of payments on the back of the note held admissible, where defendant claimed the note was paid.—Kieselhorst Piano Co. v. Porter, 171 S. W. 949.

## PENALTIES.

See Constitutional Law, § 70; Highways, § 161; Municipal Corporations, §§ 488, 489.

## PERJURY.

See Insurance, § 553.

## II. PROSECUTION AND PUNISHMENT.

§ 19 (Ark.) Under Const. art. 2, § 8, an indictment for perjury, not alleging that accused voluntarily appeared before the grand jury to give the testimony upon which the indictment was based, held fatally defective.—Claborn v. State, 171 S. W. 862.

§ 21 (Tex.Cr.App.) In view of Code Cr. Proc. 1911, arts. 439, 440, an indictment for perjury committed in testifying before the grand jury need not state the specific offense which the grand jury was investigating.—Bell v. State, 171 S. W. 239.

An indictment for perjury in testifying before the grand jury held not objectionable as showing that the grand jury did not confine its investigation to offenses committed in the county.—Id.

§ 24 (Tex.Cr.App.) An allegation in an indictment for perjury in testifying before the grand jury held not to render the indictment defective on the ground that defendant's statement was not susceptible of the construction placed on it by the indictment.—Bell v. State, 171 S. W. 239.

§ 25 (Tex.Cr.App.) An indictment for perjury held fatally defective under Pen. Code 1911, art. 309, where it failed to state that defendant's "testimony" was material to the inquiry before the grand jury.—Bell v. State, 171 S. W. 239.

An indictment for perjury in testifying before the grand jury held not subject to a motion to quash on the ground that defendant's statement could not have concerned a material inquiry because of Pen. Code 1911, art. 582.—Id.

§ 25 (Tex.Cr.App.) An indictment for perjury committed by defendant in testifying before the grand jury held insufficient for failure to allege that such testimony was material to the inquiry.—Scott v. State, 171 S. W. 243.

§ 26 (Tex.Cr.App.) An indictment for perjury in testifying falsely before the grand jury that defendant had not played any games of cards was not defective for failure to allege the places and times he had played such games or that he did not know that the players were not in a residence occupied by a family.—Bell v. State, 171 S. W. 239.

## PERSONAL INJURIES.

See Appeal and Error, §§ 1050, 1169; Bridges, § 46; Carriers, §§ 269-382; Commerce, §§ 8, 27; Damages, §§ 43, 95, 158, 208, 226;

Electricity; Evidence, §§ 127, 471; Highways, § 184; Landlord and Tenant, §§ 162-169; Master and Servant, §§ 87½-333; Municipal Corporations, §§ 818-822; Negligence; Railroads, §§ 275-400; Release, §§ 16, 17; Street Railroads, §§ 85-103; Telegraphs and Telephones, § 20; Trial, §§ 194, 252, 255.

## PEST HOUSES.

See Hospitals, § 4.

## PETITION.

See Pleading.

## PHOTOGRAPHS.

See Appeal and Error, § 1056; Evidence, § 359.

## PHYSICIANS AND SURGEONS.

See Appeal and Error, § 1043; Criminal Law, §§ 479, 814; Damages, § 160; Evidence, §§ 472, 477; Pleading, § 34; Rape, § 66.

§ 6 (Tex.Cr.App.) In a prosecution for unlawfully practicing medicine, evidence that defendant had a certain credit with a newspaper, *held* inadmissible.—Collins v. State, 171 S. W. 729.

In a prosecution for unlawfully practicing medicine, advertisement of an infirmity, followed by defendant's name as its physician and surgeon, *held* inadmissible, in the absence of a showing that defendant authorized it.—Id.

§ 14 (Mo.App.) Where a surgeon is called to treat an injury, it is not sufficient that he possesses ordinary skill and uses proper and approved medicines and appliances, but he is bound to use his reasonable skill and diligence in treating the particular case.—Fowler v. Burris, 171 S. W. 620.

§ 18 (Mo.App.) In an action against a surgeon for malpractice in treating plaintiff's broken wrist, an instruction on the measure of damages *held* erroneous as charging defendant with liability for the results, not only of his negligent treatment, but of the original accident in which the wrist was injured.—Fowler v. Burris, 171 S. W. 620.

Where a surgeon was sued for malpractice in treating plaintiff's broken wrist, he was only liable for the increased injury and pain of body and mind or impairment of the use of the arm occasioned by his own negligence.—Id.

In an action against a surgeon for malpractice, an instruction requiring that the surgeon exercise care and skill proportionate to the character of the injury that he treats, within the limits of all ordinary skill and knowledge, *held* erroneous as requiring too high a degree of care and skill.—Id.

§ 24 (Mo.App.) In an action by a physician for services rendered a third person at the request of defendant, a statement by the third person to an insurance company *held* inadmissible, in the absence of evidence that it was brought to the knowledge of the physician.—Hertel v. Cuba, 171 S. W. 565.

In an action for medical services rendered to a third person at the request of defendant, an instruction *held* properly refused in view of the evidence.—Id.

§ 24 (Tenn.) In an action by a company's doctor to recover amounts held out of the wages of employes for his alleged benefit under Acts 1889, c. 259, evidence *held* insufficient to show that any fund was withheld to pay the company's doctor rather than maintain hospitals, nurses, etc., or that any money was left of the fund.—Wagner v. Brady, 171 S. W. 1179.

## PLATS.

See Dedication, § 46; Evidence, §§ 335, 383.

## PLEADING.

See Abatement and Revival, § 81; Action, §§ 27, 32, 50; Appeal and Error, §§ 51, 195, 525, 1040; Bills and Notes, § 487; Corporations, § 121; Counties, §§ 104, 222; Courts, § 231; Criminal Law, § 400; Damages, §§ 141-160, 210; Drains, § 20; Ejectment, § 76; Evidence, § 366; Frauds, Statute of, § 144; Highways, § 184; Indictment and Information; Insurance, §§ 629, 635, 639; Interest, § 66; Intoxicating Liquors, § 274; Judgment, §§ 101, 252, 253; Justices of the Peace, §§ 90, 124, 174; Landlord and Tenant, § 55; Libel and Slander, § 80; Limitation of Actions, § 173; Master and Servant, §§ 256, 258, 264; Negligence, §§ 119, 138; Parties, § 94; Partnership, § 119; Pledges, § 57; Prohibition, § 11; Rape, § 66; Receivers, § 183; Sales, § 377; Set-Off and Counterclaim, § 35; Taxation, § 611; Time, § 9; Trial, §§ 250-253, 311; Trover and Conversion, § 32; Vendor and Purchaser, §§ 224, 285.

### I. FORM AND ALLEGATIONS IN GENERAL.

§ 34 (Mo.App.) A petition is to be liberally construed after verdict.—Gummerson v. Kansas City Bolt & Nut Co., 171 S. W. 959.

§ 34 (Tenn.) A bill by a company's doctor to recover money taken out of the wages of employes *held* to be extended to other things than those alleged by use of the character "etc."—Wagner v. Brady, 171 S. W. 1179.

An amendment to a pleading will not be held repugnant to the original averment, where a construction can be given which will avoid it.—Id.

§ 34 (Tex.Civ.App.) Petition to restrain official duty will be strictly construed, and every reasonable inference indulged in favor of the legality of the act.—Marion County v. Perkins Bros. Co., 171 S. W. 789.

§ 35 (Tex.Civ.App.) In a suit to restrain individuals from maintaining a disorderly house, used for the sale of liquor without a license, an allegation that the house was known as the "Ureka Club and Socorro Mutua Mexicana," *held* superfluous and not to show that defendants were dispensing liquor to members of a bona fide club.—Soto v. State, 171 S. W. 279.

### II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 58 (Tex.Civ.App.) In an action ex delicto outside the contract which induced the occasion for the wrong, the contract was a mere inducement, and should be so pleaded.—Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co., 171 S. W. 1103.

### IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 182 (Tex.Civ.App.) Rev. St. 1911, art. 1829, as amended, providing that special matters of defense not answered shall be taken as confessed, does not apply to matters anticipated by the petition.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

### V. DEMURRER OR EXCEPTION.

§ 194 (Ky.) Where defendants were permitted to answer on terms, the sufficiency of an answer tendered could be determined on motion to strike instead of demurrer.—Combs v. Frick Co., 171 S. W. 999.

§ 214 (Tex.) A demurrer admits the truth of the allegations of the pleading demurred to.—Tyler Building & Loan Ass'n v. Biard & Scales, 171 S. W. 1122.

**VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.**

§ 245 (Ky.) Under Civ. Code Prac. § 134, amendment of plaintiff's petition at the close of the evidence to conform to the proof, alleging that plaintiff's horse at the time of the accident was an ordinarily gentle one, and was being carefully driven, *held* a proper exercise of discretion.—Cincinnati, N. O. & T. P. Ry. Co. v. Dungan, 171 S. W. 1007.

§ 248 (Mo.) What constitutes the statement of a new cause of action in an amended pleading stated.—Broyles v. Eversmeyer, 171 S. W. 334.

§ 251 (Tex.Civ.App.) A petition, amended petition, and second amended petition cannot be construed together to support a judgment, where they do not conform to District and County Court Rules 13, 14 (142 S. W. xviii).—Smith v. Tipps, 171 S. W. 816.

**VII. SIGNATURE AND VERIFICATION.**

§ 291 (Mo.App.) A contract of insurance *held* not within the rule in Rev. St. 1909, § 1985, requiring a plea of non est factum to be under oath.—Colley v. National Live Stock Ins. Co., 171 S. W. 663.

§ 293 (Tex.Civ.App.) Where petition in trespass to try title by partnership showed that title to two of the surveys was in one partner and title to the other in the other partner, *held* that it was not necessary that plea in abatement be sworn to.—J. D. Fields & Co. v. Allison, 171 S. W. 274.

**XI. MOTIONS.**

§ 352 (Ky.) Where defendants were permitted to answer on terms, the sufficiency of an answer tendered could be determined on motion to strike instead of demurrer.—Combs v. Frick Co., 171 S. W. 999.

§ 369 (Ky.) Where plaintiff sued on a judgment and alleged a new promise to bar limitations, defendant could not compel plaintiff to elect whether he would prosecute on the judgment or on the new promise.—Braun's Ex'r v. Williams, 171 S. W. 906.

**XII. ISSUES, PROOF, AND VARIANCE.**

§ 375 (Mo.) Plaintiff is only required to prove those allegations necessary to a recovery, and those which are unnecessary may be rejected as surplusage.—Wessel v. Lavender, 171 S. W. 331.

§ 376 (Tex.Civ.App.) In action against sheriff for failure to record an attachment lien, admission in answer *held* to dispense with plaintiff's proof of the attachment and the return thereon.—Neville v. Miller, 171 S. W. 1109.

**XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.**

§ 406 (Mo.App.) The objection that a petition did not allege plaintiff was entitled to possession at the time of the conversion is waived unless raised by demurrer.—Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co., 171 S. W. 944.

§ 412 (Tex.Civ.App.) Any right of defendant to judgment on the pleadings, because of absence of reply to allegations of the answer, is waived by proceeding to trial without claim thereof.—Memphis Cotton Oil Co. v. Tolbert, 171 S. W. 309.

§ 426 (Mo.App.) Objections to a petition, by motions, are waived by answering.—Dubowsky v. Bingeli, 171 S. W. 12.

§ 430 (Mo.App.) The variance between a petition declaring upon a note and the note offered in evidence *held* immaterial, in the absence of an affidavit of surprise, under Rev. St. 1909, §§ 1846, 1847.—First Nat. Bank of Madison v. Stam, 171 S. W. 567.

§ 433 (Ky.) Where, in an action on a fire policy, the value of the property destroyed was determined, a defect in the petition in failing to allege that the property had some value was immaterial.—Connecticut Fire Ins. Co. v. Union Mercantile Co., 171 S. W. 407.

Where, in an action on a fire policy, the court considered evidence of value of the property destroyed, introduced to show fraud of insured in fixing value, a defect in the petition in failing to allege that the property had any value was immaterial.—Id.

§ 433 (Mo.App.) A petition in an action for money had and received, based on mistake, but not alleging that the mistake was mutual, is not open to objection after judgment, where the trial was had on the theory of mistake, without objection of either party.—Jennemann v. Bucher, 171 S. W. 613.

**PLEDGES.**

§ 21 (Tex.Civ.App.) When a collateral note has been delivered, the pledgee is the legal owner to the extent of the debt, and the pledgor owns the remainder.—Baldwin v. Jordan, 171 S. W. 1016.

§ 30 (Tex.Civ.App.) When a collateral note has been delivered, the pledgee can collect the note.—Baldwin v. Jordan, 171 S. W. 1016.

§ 53 (Tex.Civ.App.) One consenting to a pledge of his chattels by a third person to secure a loan for his benefit is not liable for a personal judgment, but the pledgee may only foreclose the pledge.—Killman v. Young, 171 S. W. 1066.

§ 57 (Tex.Civ.App.) Petition, in a suit on a note and to foreclose a lien upon a collateral note, *held* not insufficient because failing to allege that the collateral note was ever presented for payment, or that payment was refused.—Baldwin v. Jordan, 171 S. W. 1016.

In a suit on a note and to foreclose the lien on a collateral note, petition *held* not insufficient for not alleging that the maker of the collateral note had not paid it to plaintiff.—Id.

In an action on a note and to foreclose the lien upon a collateral note, the payor of the collateral note, who indorsed it in blank, was not a necessary defendant.—Id.

§ 57 (Tex.Civ.App.) Where one pledged his chattels to secure a debt due from a third person to the pledgee, the pledgee, to foreclose the pledge, must obtain a judgment establishing the debt.—Killman v. Young, 171 S. W. 1065.

**POLICE POWER.**

See Constitutional Law, § 81.

**POLICY.**

See Insurance.

**POLITICAL RIGHTS.**

See Elections.

**POOL HALLS.**

See Courts, § 90.

**POSSESSION.**

See Adverse Possession; Landlord and Tenant, §§ 128, 130; Trover and Conversion, § 32.

**POST NUPTIAL SETTLEMENT.**

See Husband and Wife, § 30.

**PRACTICE.**

For practice in particular actions and proceedings, see the various specific topics.

**PREJUDICE.**

See Appeal and Error, §§ 1027-1074.

**PRELIMINARY INJUNCTION.**

See Injunction, §§ 143, 152.

**PRESCRIPTION.**

See Adverse Possession; Easements, § 8; Highways, § 6; Limitation of Actions; Waters and Water Courses, § 152.

**PRESUMPTIONS.**

See Appeal and Error, §§ 907-938; Criminal Law, §§ 308, 311; Evidence, § 83.

**PRINCIPAL AND ACCESSORY.**

See Assault and Battery, §§ 18, 35; Criminal Law, §§ 59, 80; Homicide, § 80; Indictment and Information, § 174.

**PRINCIPAL AND AGENT.**

See Attorney and Client; Beneficial Associations, § 14; Brokers; Carriers, §§ 218, 406; Corporations, §§ 283-320, 308-448, 668; Escrows, § 4; Evidence, §§ 242-244; Insurance, § 84; Municipal Corporations, §§ 214, 220; Vendor and Purchaser, § 228; Witnesses, § 141.

**I. THE RELATION.****(A) Creation and Existence.**

§ 23 (Ky.) Where H., who made an agency contract with plaintiffs on defendant's behalf, was introduced to them by one of defendant's branch offices, the fact that H. signed himself "salesman" and was a mere soliciting agent did not show want of authority on his part to make the contract in question.—Studebaker Corporation of America v. Dodds & Runge, 171 S. W. 167.

§ 23 (Tex.Civ.App.) That persons who made false representations approached plaintiff as to trade of property owned by defendant held not sufficient evidence that they were defendants' agents.—Kirkland v. Rutherford, 171 S. W. 1031.

**II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.****(A) Execution of Agency.**

§ 76 (Tex.) An agent delivering a deed, executed by his principal, in violation of instructions, and with a design to defraud, held estopped to deny that title passed, and was liable to the principal for damages.—Tyler Building & Loan Ass'n v. Biard & Scales, 171 S. W. 1122.

**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.****(A) Powers of Agent.**

§ 102 (Mo.App.) Where the chairman of a political committee, without authority, employed an attorney to conduct an election contest, who employed plaintiff, there was no liability on the part of the individual members of the committee for plaintiff's services.—Owen v. Hadley, 171 S. W. 973.

§ 136 (Mo.App.) Where defendant, as agent for the collection of crop rent, paid over the proceeds to his principal, knowing he had sold the land, he is liable to the new owner.—Tillman v. Bungenstock, 171 S. W. 938.

§ 136 (Mo.App.) Where the chairman of a state committee employed an attorney to conduct an election contest, without authority, and he employed plaintiff at a specified price, the contract bound only the attorney for plaintiff's services.—Owen v. Hadley, 171 S. W. 973.

**(D) Ratification.**

§ 169 (Ky.) License to cut timber at a certain point on plaintiff's land in surveys claimed by third parties, made by an agent in order to force them to bring suit, in so far as executed by cutting the timber, the bringing of suit against plaintiff, and her successful defense thereof, held ratified by her.—Chicago Veneer Co. v. Arnold, 171 S. W. 403.

**(F) Actions.**

§ 189 (Tex.Civ.App.) Evidence as to false representations by agents held not admissible under allegations that they were made by defendants.—Kirkland v. Rutherford, 171 S. W. 1031.

**PRINCIPAL AND SURETY.**

See Bills and Notes, § 256; Corporations, § 218; Injunction, § 27; Replevin, § 126.

**II. NATURE AND EXTENT OF LIABILITY OF SURETY.**

§ 82 (Tex.Civ.App.) Where an engineering company's contract for the construction of a waterworks system required the company to manage the construction of the system, its bond, conditioned on faithful performance of its contract, covered negligence in failing to provide a proper superintendent and labor, resulting in loss to the city.—O'Neil Engineering Co. v. City of San Augustine, 171 S. W. 524.

**III. DISCHARGE OF SURETY.**

§ 115 (Mo.App.) It is the duty of a creditor holding collateral security to perform all acts necessary to make the security available, and if the security is lost by the creditor's failure, a surety for the debt is discharged to the extent of the loss.—Troll v. Dougherty & Bush Real Estate Co., 171 S. W. 665.

§ 116 (Tex.Civ.App.) The discharge of one of several sureties on a joint and several obligation does not release the others from liability for the released surety's portion of the debt.—Montgomery v. Boyd, 171 S. W. 273.

One surety on a joint and several obligation is not discharged because the creditor permits the cause of action against his co-surety to become barred by limitations.—Id.

§ 129 (Mo.App.) Where a surety for a debt expressly or impliedly consents to release a part of the security, he is not discharged.—Troll v. Dougherty & Bush Real Estate Co., 171 S. W. 665.

**IV. REMEDIES OF CREDITORS.**

§ 164 (Tex.Civ.App.) Where a judgment provided for execution against sureties only if sufficient property of the principal could not be found, the return of several executions against the principal nulla bona held prima facie sufficient to authorize a levy on the property of the sureties.—Magill v. Rugeley, 171 S. W. 528.

**V. RIGHTS AND REMEDIES OF SURETY.****(C) As to Co-Surety.**

§ 200 (Tex.Civ.App.) One of two sureties cannot, when there has been no payment, sue the other to compel payment of his share to the principal debtor, for payment to the creditor.—Zachry & Gearhart v. Peterson & Avant, 171 S. W. 494.

**PRIVILEGE.**

See Taxation, §§ 193, 230; Witnesses, §§ 203, 300.

**PRIVILEGED COMMUNICATIONS.**

See Libel and Slander, § 42.

## PROBABLE CAUSE.

See Malicious Prosecution, §§ 16, 25.

## PROBATE.

See Wills, §§ 205-481.

## PROCESS.

See Appearance, § 8; Corporations, §§ 665, 668; Criminal Law, § 614; Garnishment; Injunction; Judgment, § 17; Prohibition; Sequestration.

## I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

§ 31 (Tex.Civ.App.) Where a petition alleges that plaintiff was doing business in a trade-name, giving both his individual and trade-name, a citation issued only in the trade-name is not invalid.—*McManus v. Southern Fruit Julep Co.*, 171 S. W. 1033.

## II. SERVICE.

(C) Publication or Other Notice.

§ 100 (Ky.) In an action to reform a deed, where no warning order to the nonresident grantor was spread, held that the action was not commenced as against him.—*Hyden v. Calames*, 171 S. W. 186.

## PROHIBITION.

See Intoxicating Liquors.

## I. NATURE AND GROUNDS.

§ 3 (Mo.) The writ of prohibition is a discretionary remedy, and should be refused where the ordinary remedies of appeal, error, or certiorari are applicable.—*State ex rel. Warde v. McQuillin*, 171 S. W. 72.

§ 9 (Mo.) The writ of prohibition should not issue except to keep an inferior court within its jurisdiction.—*State ex rel. Warde v. McQuillin*, 171 S. W. 72.

§ 10 (Ark.) Where the chancery court attempted to enjoin execution of a judgment in a criminal proceeding, a writ of prohibition will be issued to prevent the court from exceeding its jurisdiction.—*Ferguson v. Martineau*, 171 S. W. 472.

§ 10 (Mo.) Prohibition will lie where an inferior tribunal is without jurisdiction of the subject-matter of the parties, or of the concrete case.—*State ex rel. Warde v. McQuillin*, 171 S. W. 72.

§ 11 (Mo.) Where the trial court had jurisdiction of the parties and subject-matter, and no demurrer to the petition had been urged, prohibition will not lie, on the theory that the trial court, was without jurisdiction, because the petition did not state a cause of action.—*State ex rel. Warde v. McQuillin*, 171 S. W. 72.

§ 13 (Ark.) That a chancery court which enjoined the execution of a criminal judgment did not propose to issue any further order is no ground for the denial of a writ of prohibition.—*Ferguson v. Martineau*, 171 S. W. 472.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 26 (Mo.) Where relators, seeking a writ of prohibition, move for judgment on the pleadings, the averments of the return are admitted.—*State ex rel. Warde v. McQuillin*, 171 S. W. 72.

## PROMISSORY NOTES.

See Bills and Notes.

## PROMOTERS.

See Corporations, § 448.

## PROPERTY.

See Exchange of Property; Fixtures; Good Will.

## PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

## PROSTITUTION.

See Abduction, §§ 1-11; Criminal Law, § 365; Lewdness; Witnesses, § 277.

## PROXIMATE CAUSE.

See Negligence, § 140.

## PUBLIC DEBT.

See Counties, §§ 182-222; Municipal Corporations, §§ 858-971.

## PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 269-519.

## PUBLIC LANDS.

## III. DISPOSAL OF LANDS OF THE STATES.

§ 175 (Tex.) A resurvey of public lands under Rev. St. 1911, arts. 5347-5349, is not conclusive against the state as to the location of a prior state grant.—*Post v. State*, 171 S. W. 707.

## PUBLIC SCHOOLS.

See Schools and School Districts.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

## PUBLIC USE.

See Dedication; Eminent Domain.

## PUFFING.

See Sales, § 269.

## PUNITIVE DAMAGES.

See Damages, § 87.

## QUANTUM MERUIT.

See Appeal and Error, § 1067; Municipal Corporations, § 220; Work and Labor.

## QUASHING.

See Indictment and Information, §§ 137, 139.

## QUESTIONS OF LAW AND FACT.

See Trial, §§ 139-145.

## QUIETING TITLE.

See Vendor and Purchaser, § 129.

## I. RIGHT OF ACTION AND DEFENSES.

§ 7 (Tex.Civ.App.) A will not probated does not constitute a cloud on title.—*Milner v. Sims*, 171 S. W. 784.

## QUOTIENT VERDICT.

See Criminal Law, § 866.

## QUO WARRANTO.

See Municipal Corporations, § 18.

## RAFFLING.

See Gaming, § 62.

## RAILROADS.

See Appeal and Error, §§ 302, 1050; Carriers; Commerce, § 8; Contracts, § 349; Costs, § 4; Death, § 99; Eminent Domain, § 283; Evidence, §§ 220, 530½, 558; Limitation of Actions, § 55; Master and Servant; Receivers, § 183; Street Railroads; Telegraphs and Telephones, § 20; Trial, § 194; Witnesses, § 268.

## II. RAILROAD COMPANIES.

§ 32 (Tex.Civ.App.) Under Rev. St. 1911, arts. 6439, 6630, where directors of a railroad corporation for 27 years after the sale of its franchise, etc., did not settle its affairs, or take charge of land owned by it, *held* that their interest therein had ceased.—Allison v. Richardson, 171 S. W. 1021.

## VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 95 (Ky.) Where a railroad crosses a turnpike through a cut, it is required by St. 1909, § 768, subsec. 5, to restore the pike and maintain its integrity as a highway.—Cincinnati, O. & T. P. Ry. Co. v. Dungan, 171 S. W. 1007.

Where guard rails on a bridge over railroad tracks were necessary to protect travelers, the railroad's failure to maintain them, by reason of which a traveler was injured, constitutes actionable negligence.—Id.

In an action for injuries by plaintiff being thrown over a bridge over defendant's railroad track through a gap negligently permitted to remain in the barricade, petition, as amended, *held* to state a cause of action.—Id.

§ 95 (Tex.Civ.App.) Under Rev. St. 1911, art. 6485, requiring a railroad company to restore a crossing, it is a question for the jury whether a crossing was properly restored or kept in repair.—Horton v. Texas Midland R. R., 171 S. W. 1023.

## X. OPERATION.

## (D) Injuries to Licensees or Trespassers in General.

§ 275 (Mo.App.) A laborer for an independent contractor, laying additional tracks for a railroad company, while on the right of way is a licensee by invitation, and is entitled to the same care for his safety as if employed by the railroad company.—Witham v. Delano, 171 S. W. 900.

## (F) Accidents at Crossings.

§ 310 (Ark.) Operatives of a motor car on a railroad track are bound to exercise reasonable care to avoid injury to travelers at crossings, whether commanded to do so by statute or not.—St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895.

§ 313 (Ark.) Kirby's Dig. § 6607, requiring operators of trains to keep a lookout, *held* not to apply to the operation of a motor car belonging to the railroad company.—St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895.

§ 350 (Ark.) Evidence *held* to require submission of plaintiff's alleged contributory negligence to the jury.—St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895.

§ 350 (Tex.Civ.App.) In an action for a crossing collision between an automobile and a car backed by a switch engine, the questions of discovered peril and contributory negligence *held* for the jury.—Southern Pac. Co. v. Walker, 171 S. W. 264.

The issue of negligence in not maintaining a flagman, on the theory of the crossing being unusually dangerous, *held* also for the jury.—Id.

§ 351 (Ark.) In an action for injuries to plaintiff in a collision with a railroad motor car at a crossing, an instruction authorizing a recovery on failure of operatives to use reasonable care

where plaintiff was not negligent *held* proper.—St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895.

## (G) Injuries to Persons on or near Tracks.

§ 387 (Mo.) For deceased to go to sleep with his head on the rail *held* an act of gross negligence, without which the negligence of the company would not have caused the death.—Hunt v. St. Louis & S. F. R. Co., 171 S. W. 64.

While a railroad violating an ordinance limiting the speed of its trains is guilty of negligence, as a matter of law, contributory negligence is a defense under the same rules as if the negligence were running the train at a speed which was excessive under the common law.—Id.

§ 397 (Ky.) Railroads being required to keep a headlight on an engine at night, testimony that a person was likely to be blinded by meeting a train, with a large headlight, at night, is improper as putting the company in a position of being guilty of negligence for doing what it was required to do.—Louisville & N. R. Co. v. Shoemaker's Adm'r, 171 S. W. 383.

The striking by a train, running on K. street, of a person on the track having been east of P. street, on a track straight for four blocks, evidence that K. street was not straight west of P. street was irrelevant.—Id.

§ 398 (Mo.) Evidence *held* to show that deceased had gone to sleep with his head on the rail.—Hunt v. St. Louis & S. F. R. Co., 171 S. W. 64.

§ 400 (Ky.) The question of speed of a train which struck a person on the track *held* for the jury.—Louisville & N. R. Co. v. Shoemaker's Adm'r, 171 S. W. 383.

Under the evidence, in an action for the striking of a person by a train, the track being along a street, *held*, the question of negligence, as well as of contributory negligence, was for the jury.—Id.

## (H) Injuries to Animals on or near Tracks.

§ 408 (Ark.) While a railroad company is not bound to maintain a fence to keep out cattle running at large, it is liable where it allows food to accumulate upon its right of way so as to attract such cattle into a place of danger.—St. Louis, I. M. & S. Ry. Co. v. Wilson, 171 S. W. 471.

§ 415 (Ark.) A lookout kept by one person on a railroad train is a compliance with Acts 1911, p. 275, unless by reason of curving track or other obstruction an efficient lookout cannot be kept by one person.—Taylor v. St. Louis, I. M. & S. Ry. Co., 171 S. W. 1182.

§ 415 (Mo.App.) In the absence of any requirement, an engineer was not required to give any signal for a private crossing.—Cornett v. Chicago, B. & Q. R. Co., 171 S. W. 15.

§ 419 (Mo.App.) Where a railroad engineer approaching a private stock crossing, gave stock signals, and could not reasonably expect that a cow would remain on the track until the train was too close to be stopped, the killing of it was not negligence.—Cornett v. Chicago, B. & Q. R. Co., 171 S. W. 15.

§ 428 (Ark.) Dogs are personal property for the negligent killing of which railroads are liable.—Taylor v. St. Louis, I. M. & S. Ry. Co., 171 S. W. 1182.

§ 441 (Ark.) Where the owner of a cow pastured on the commons claimed that she was attracted onto a railroad's right of way by its negligence in leaving out food, and was injured on the sagging wires of the right of way fence, the owner has the burden of proving negligence.—St. Louis, I. M. & S. Ry. Co. v. Wilson, 171 S. W. 471.

§ 441 (Mo.App.) In an action against a railroad for the negligent killing of a cow at a private crossing on plaintiff's farm, the plaintiff

had the burden of showing negligence.—*Cornett v. Chicago, B. & Q. R. Co.*, 171 S. W. 15.

§ 441 (Tex.Civ.App.) In an action for killing a mule, *held*, that the burden was on defendant to prove that the place where the mule went upon the right of way was within the necessary switch and depot limits, where a fence was not required.—*St. Louis, B. & M. Ry. Co. v. Knowles*, 171 S. W. 245.

§ 443 (Ark.) Killing plaintiff's dog at a crossing by operation of defendant's train *held* to establish prima facie case of defendant's negligence.—*Taylor v. St. Louis, I. M. & S. Ry. Co.*, 171 S. W. 1182.

Prima facie case made by proof that plaintiff's dog was killed by actually coming in contact with defendant's train at a crossing *held* not affected by the lookout statute, Acts 1911, p. 275.—*Id.*

Evidence *held* to warrant a finding of negligence of railroad operatives in failing to keep an efficient lookout which was the proximate cause of killing of plaintiff's dog at a crossing.—*Id.*

§ 446 (Ark.) In an action against a railroad for injuries to a cow which strayed onto the right of way, evidence of the railroad company's negligence in leaving out food to attract the animal and in allowing its fences to fall into disrepair *held* insufficient to go to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Wilson*, 171 S. W. 471.

§ 446 (Ky.) In an action against a railroad company for killing horses at a crossing, evidence *held* sufficient to go to the jury whether the horses a witness saw killed belonged to plaintiff.—*Campbell v. Mobile & O. R. Co.*, 171 S. W. 1002.

§ 446 (Tex.Civ.App.) Under conflicting evidence, in an action for the value of a mule killed by defendant's train, *held*, that the question whether defendant was guilty of negligence proximately causing the injury was for the jury.—*St. Louis, B. & M. Ry. Co. v. Knowles*, 171 S. W. 245.

§ 447 (Tex.Civ.App.) Refusal of instruction on proximate cause, in an action for the killing of a mule by defendant's train, *held* error, in view of instructions given on negligence without mention of proximate cause.—*St. Louis, B. & M. Ry. Co. v. Knowles*, 171 S. W. 245.

#### (I) Fires.

§ 453 (Ark.) Liability of a railroad for property burned while burning off its right of way defined.—*Kansas City Southern Ry. Co. v. Wilson*, 171 S. W. 484.

What constitutes negligence, sufficient to render a railroad company liable for destruction by fire which spreads from its right of way, depends upon the circumstances as they existed at the time.—*Id.*

§ 457 (Ark.) It is the duty of the foreman of a crew burning off a right of way to prevent the fire from escaping from the right of way.—*Kansas City Southern Ry. Co. v. Wilson*, 171 S. W. 484.

§ 482 (Ark.) Evidence in an action for damages from fire spreading from a right of way *held* sufficient to justify an inference that the sectionmen burning grass on the day previous to the day on which the property was destroyed were employed by defendant.—*Kansas City Southern Ry. Co. v. Wilson*, 171 S. W. 484.

Evidence in an action for damages from fire spreading from a right of way *held* to justify the inference that the section crew engaged in burning off the right of way the day before the property was destroyed were burning off the right of way on the day of the fire.—*Id.*

Evidence in an action for damages from fire spreading from a right of way *held* to justify an inference that the section foreman negligently left fire burning on the right of way, and that it escaped from the right of way and burned plaintiff's property.—*Id.*

## RAPE.

See Jury, § 131.

## II. PROSECUTION AND PUNISHMENT.

### (B) Evidence.

§ 51 (Tex.Cr.App.) Evidence *held* sufficient to sustain a conviction of rape by force or threats.—*Merkel v. State*, 171 S. W. 738.

## III. CIVIL LIABILITY.

§ 66 (Mo.) Where, in a civil action for rape, the petition charged that defendant administered to plaintiff medicine which caused unconsciousness, and assaulted her while unconscious, such allegation as to unconsciousness was surplusage and did not authorize an instruction that plaintiff could not recover unless she proved that the assault was committed while she was so unconscious.—*Wessel v. Lavender*, 171 S. W. 331.

In a civil action against a physician for alleged rape on a female patient, while unconscious from medicine administered to her by him, evidence *held* to entitle her to the submission of the question as to the assault to the jury.—*Id.*

## RATE.

See Carriers, §§ 189, 193; Insurance, § 183.

## RATIFICATION.

See Attorney and Client, § 103; Principal and Agent, § 169.

## REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Partition; Quieting Title; Trespass to Try Title.

## REBUTTAL.

See Trial, § 62.

## RECEIVERS.

See Appeal and Error, §§ 101, 384; Corporations, §§ 553, 556; Injunction, §§ 27, 125, 152; Partnership, § 119.

## II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 35 (Tex.Civ.App.) While notice of an application for the appointment of a receiver is not required by statute, notice should be given, save in case of emergency.—*Williams v. Watt*, 171 S. W. 266.

Though a petition did not warrant the appointment of a receiver without notice, such appointment will not be vacated on appeal for that reason, where an answer was filed.—*Id.*

## VI. ACTIONS.

§ 174 (Tex.Civ.App.) Action against a receiver not suable under Act March 3, 1911, § 60, for loss of goods, and accruing before his appointment, *held* not maintainable without permission of the court appointing him.—*Andrews v. Jeter & Co.*, 171 S. W. 838.

§ 183 (Tex.Civ.App.) Petition, in an action for the value of a mule killed by a train, *held* to state a cause of action against the receiver of the railroad company, based on the ground that the injury occurred after he became receiver.—*St. Louis, B. & M. Ry. Co. v. Knowles*, 171 S. W. 245.

## RECEIVING STOLEN GOODS.

§ 1 (Tex.Cr.App.) Facts *held* to show theft of the goods received and concealed, and not to raise the issue of embezzlement.—*Goldstein v. State*, 171 S. W. 709.

§ 4 (Tex.Cr.App.) That one in charge of the corporation alleged to be the original owner had employed a drayman to carry the goods to the depot from which they were stolen did not

take them out of his possession.—Zweig v. State, 171 S. W. 747.

§ 6 (Tex.Cr.App.) To constitute the offense of bringing stolen goods into the state it was not necessary that defendant himself should ship the goods, as if he was the procuring cause, he would be legally responsible.—Zweig v. State, 171 S. W. 747.

§ 7 (Tex.Cr.App.) An indictment for receiving stolen property and bringing it into this state need not name the time and place of the original taking.—Zweig v. State, 171 S. W. 747.

Under Pen. Code 1911, art. 1431, defining receiving stolen property, allegation in indictment that the property was received "in the county of St. Louis" held surplusage, or if an averment necessary to be proved, established by showing that the city was considered as part of the county.—Id.

Under Pen. Code 1911, arts. 1431, 1432, held that it was not necessary that the indictment allege the facts going to constitute theft by the original taker from whom it was received.—Id.

§ 8 (Tex.Cr.App.) In a prosecution for receiving stolen goods, all evidence which would have been admissible on a trial of the thief is admissible, with proof that accused knew the goods were stolen, and, with such knowledge, concealed them.—Goldstein v. State, 171 S. W. 709.

§ 8 (Tex.Cr.App.) In a prosecution for bringing stolen goods into the state, evidence held to show that defendant received the goods from the persons named in the indictment.—Zweig v. State, 171 S. W. 747.

§ 9 (Tex.Cr.App.) In a prosecution for bringing stolen goods into the state, held that refusal to submit a count, charging defendant with theft of the goods and the submission of a count charging him with receiving stolen goods knowing them to have been stolen, was proper.—Zweig v. State, 171 S. W. 747.

## RECEPTION OF EVIDENCE.

See Criminal Law, §§ 665-684; Trial, §§ 36-105.

## RECORDS.

See Appeal and Error, §§ 499-707, 837, 1236; Courts, § 116; Justices of the Peace, § 164; Mechanics' Liens, § 198; Vendor and Purchaser, § 265.

## REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments; Limitation of Actions, § 173; Process, § 100.

## REHEARING.

See New Trial.

## RELEASE.

See Mortgages, § 319; Payment; Principal and Surety, §§ 115-129; Witnesses, § 141.

### I. REQUISITES AND VALIDITY.

§ 16 (Ark.) Release of claim for personal injuries held avoided as for mistake of fact by physician's representations that injuries were not permanent, though not made fraudulently.—St. Louis, I. M. & S. Ry. Co. v. Morgan, 171 S. W. 1187.

§ 17 (Ark.) False representations to illiterate employé that release of claim for personal injuries contained contract for permanent employment held to avoid the release.—St. Louis, I. M. & S. Ry. Co. v. Morgan, 171 S. W. 1187.

### II. CONSTRUCTION AND OPERATION.

§ 29 (Mo.App.) The rule that a release of one joint wrongdoer is a release of all, is not changed by Rev. St. 1909, § 5431, allowing contribu-

tion after judgment between wrongdoers.—McDonald v. Goddard Grocery Co., 171 S. W. 650.

Where one, in fact, receives full satisfaction from one of several wrongdoers, he extinguishes his claim, and cannot recover thereon from the others, and in such case his intention to recover from such others could not prevail.—Id.

§ 34 (Ark.) A passenger believing that her injuries were slight, without fraud, having settled two days thereafter for a nominal sum, and executed a full release, was not entitled to recover for permanent injuries which subsequently developed.—Kansas City Southern Ry. Co. v. Armstrong, 171 S. W. 123.

§ 37 (Mo.App.) Where a sum was received from one or more of several wrongdoers or debtors, not in full satisfaction of the wrong or debt, in consideration of the injured party's agreement not to sue them, it was not a "release" at all but merely a "covenant not to sue" those paying, especially where the right of action against the other wrongdoers or debtors was expressly reserved, and the injured party might still successfully sue.—McDonald v. Goddard Grocery Co., 171 S. W. 650.

A covenant with the only wrongdoer or debtor not to sue is in effect a discharge.—Id.

In the construction of a release or covenant not to sue, the purpose is to discover the intention of the parties, which should govern.—Id.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 58 (Ark.) Evidence held insufficient to make question for jury as to whether promises of permanent employment on execution of release of claim for personal injuries were fraudulently made.—St. Louis, I. M. & S. Ry. Co. v. Morgan, 171 S. W. 1187.

## REMAINDERS.

See Eminent Domain, §§ 206, 308; Life Estates.

§ 17 (Tenn.) The seven-year statute of limitations will not run against the interest of a remainderman in land, during the existence of the life estate.—Southern Ry. Co. v. Jennings, 171 S. W. 82.

## REMITTITUR.

See Appeal and Error, § 1140.

## REMOVAL OF CLOUD.

See Quietting Title.

## RENT.

See Landlord and Tenant, §§ 184, 208.

## REPLEVIN.

See Justices of the Peace, § 43; Sequestration.

### IV. PLEADING AND EVIDENCE.

§ 63 (Tex.Civ.App.) An owner of chattels in possession of another is entitled to recover the same, unless the latter shows his right to possession on grounds alleged in his special defenses.—Killman v. Young, 171 S. W. 1065.

§ 70 (Tex.Civ.App.) Plaintiff, suing for chattels in the possession of defendant, alleging in an amended petition that she had not consented to a third person's pledge, and denying the effect of a bill of sale, did not thereby assume the burden of proof.—Killman v. Young, 171 S. W. 1065.

§ 71 (Mo.App.) Where plaintiff wrongfully replevined a piano belonging to defendant, evidence of the value of its use during the detention was admissible.—Kieselhorst Piano Co. v. Porter, 171 S. W. 949.

## VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 126 (Ark.) Under Kirby's Dig. § 6871, a summary judgment against a surety on a replevin bond *held* erroneous, where defendant had taken possession of the property on a retaining bond, though plaintiff thereafter obtained possession of the property.—*Schneider v. Co-ker*, 171 S. W. 898.

## REPUTATION.

See Abduction, § 11.

## REQUESTS.

See Criminal Law, §§ 824-829; Trial, §§ 255-267.

## REQUISITION.

See Criminal Law, § 351.

## RESCISSION.

See Contracts, § 264; Vendor and Purchaser, §§ 33-92.

## RES GESTÆ.

See Criminal Law, §§ 364-366, 368; Evidence, §§ 119-127.

## RES INTER ALIOS ACTA.

See Evidence, § 130.

## RES IPSA LOQUITUR.

See Carriers, § 316; Master and Servant, § 265.

## RES JUDICATA.

See Judgment, §§ 540, 701-744.

## RESTRAINT OF TRADE.

See Monopolies, § 17.

## RESULTING TRUSTS.

See Trusts, § 63½.

## REVENUE.

See Taxation.

## REVERSAL.

See Appeal and Error, §§ 1169-1180.

## REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1023-1175.

## REVIVAL.

See Abatement and Revival, § 72; Wills, § 199.

## RIGHT OF WAY.

See Easements.

## RIPARIAN RIGHTS.

See Waters and Water Courses, § 42.

## RISKS.

Assumption of, see Master and Servant, §§ 87½, 203-226, 288.

## ROADS.

See Highways.

## SALES.

See Brokers; Corporations, §§ 116, 117; Customs and Usages, § 17; Deeds; Dower, § 32; Execution, § 171; Executors and Administrators, §§ 137, 324-388; Frauds, Stat-

ute of, §§ 85, 89; Intoxicating Liquors; Mechanics' Liens, § 198; Monopolies, § 17; Vendor and Purchaser.

## I. REQUISITES AND VALIDITY OF CONTRACT.

§§ 19, 20 (Tex.Civ.App.) An agreement to repurchase *held* a sufficient consideration to support a new contract, though the buyer's debt was barred by limitations.—*Mahaney v. Lee*, 171 S. W. 1093.

§ 23 (Mo.App.) An offer to buy, met by a counter offer, is refused.—*Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co.*, 171 S. W. 944.

§ 40 (Mo.App.) A seller of a cow *held* not to falsely represent its soundness by a statement that the cow's bag was all right, though he had knowledge of a previous injury affecting the quality of the milk.—*Boston v. Alexander*, 171 S. W. 582.

§ 53 (Mo.App.) Where, during the time that the owner of a cow had her, the cow gave good milk and her bag was all right, the court could not say as a matter of law that she was afflicted with a permanent defect, from the fact that six or eight months before, while in the hands of another owner, she had given bad milk due to a temporary injury to her bag.—*Boston v. Alexander*, 171 S. W. 582.

## II. CONSTRUCTION OF CONTRACT.

§ 71 (Tex.Civ.App.) Under a contract for the sale of gasoline during a year, *held*, that defendant was not bound to supply plaintiff with gasoline beyond the minimum amount specified, except for plaintiff's own consumption.—*Holland v. Pierce-Fordyce Oil Ass'n*, 171 S. W. 1075.

§ 75 (Tex.Civ.App.) Where a firm sold certain articles at the first invoice price, a buyer was required to pay only such price, though the seller may have paid more than that price for the article.—*Midgley & Curtsinger v. Taylor*, 171 S. W. 301.

§ 87 (Mo.App.) Evidence *held* to sustain the finding that defendant sold all the corn raised on a plantation during 1911, and not only so much as he could deliver within 60 days after the sale.—*Horner v. Franklin*, 171 S. W. 568.

## IV. PERFORMANCE OF CONTRACT.

### (C) Delivery and Acceptance of Goods.

§ 162 (Mo.App.) A buyer who accepted a bill of lading for goods sold, when the goods had been received by the initial carrier, although the bill of lading did not so show, accepted the goods, and cannot rescind for delay in delivery.—*Corby Supply Co. v. Thompson*, 171 S. W. 661.

§ 181 (Mo.App.) In an action for the price of goods, evidence *held* sufficient to show delivery and acceptance of part of the goods.—*Hollrah-Dieckmann Refrigerator & Fixture Co. v. St. Louis House & Window Cleaning Co.*, 171 S. W. 576.

## VI. WARRANTIES.

§ 261 (Mo.App.) The statement by a seller of a cow that its bag was all right and that it was straight as a whip as far as he knew *held* not to constitute an express warranty that the cow was free from defects, though he had prior knowledge of an injury to her bag, where the buyer inspected the cow.—*Boston v. Alexander*, 171 S. W. 582.

§ 266 (Mo.App.) No agreement of the vendor to warrant against defects will be implied from mere representations of soundness.—*Boston v. Alexander*, 171 S. W. 582.

§ 268 (Mo.App.) Where representations of soundness of an article sold are made, *held* that there is an implied agreement to warrant, if the defects are not discoverable by ordinary inspection.—*Boston v. Alexander*, 171 S. W. 582.

§ 269 (Mo.App.) The rule of caveat emptor, in force in Missouri, will not permit the mere puffing of his ware by a vendor to be tortured into the expression of an intention to warrant the property as sound and free from defects which are open to the discovery of the purchaser upon a reasonable examination.—*Boston v. Alexander*, 171 S. W. 582.

§ 270 (Mo.App.) The statement by a seller of a cow that its bag was all right and that it was straight as a whip as far as he knew, *held* not to constitute an implied warranty that the cow was free from defects, though he had prior knowledge of an injury to her bag.—*Boston v. Alexander*, 171 S. W. 582.

§ 273 (Mo.App.) Defendant selling a dairy route to plaintiffs, and agreeing to sell them pure milk each day, to be sold to the customers, impliedly warranted that the milk would be reasonably suitable for that purpose.—*Eversole v. Hanna*, 171 S. W. 25.

§ 284 (Ky.) Where a vacuum cleaner is guaranteed to be satisfactory to defendant, he is the sole judge whether it is satisfactory.—*Dick v. James Clark, Jr., Electric Co.*, 171 S. W. 198.

§ 286 (Ky.) Where a mule sold with warranty of title was taken from the purchaser in proceedings to enforce a mortgage lien, the seller could comply with their warranty by purchasing at the sale and retendering it to plaintiff, with the value of the use while out of his possession.—*Lee v. Woods*, 171 S. W. 389.

§ 287 (Ky.) Where a vacuum cleaner is guaranteed to be satisfactory to defendant, and it is not, he must elect not to accept it, and return it within a reasonable time.—*Dick v. James Clark, Jr., Electric Co.*, 171 S. W. 198.

Election of a buyer of a vacuum cleaner to return it as unsatisfactory, 17 months after it was installed, *held* not made within a reasonable time; though the seller meantime was endeavoring to make it work.—*Id.*

§ 288 (Mo.App.) The fact that the buyer of milk, which was warranted pure, continued to accept impure milk is not a waiver of the breach of warranty.—*Eversole v. Hanna*, 171 S. W. 25.

## VII. REMEDIES OF SELLER.

### (B) Actions for Price or Value.

§ 340 (Mo.App.) The remedies of a seller, in case of the buyer's refusal to accept, stated.—*Roaring Fork Potato Growers' Ass'n v. C. C. Clemens Produce Co.*, 171 S. W. 584.

Where property sold must be manufactured or procured by the seller, the seller cannot force acceptance, where the buyer repudiates, save where equity will warrant specific performance.—*Id.*

Where plaintiff sold potatoes which it did not own at the time but had procured before defendant attempted to countermand the order, plaintiff could treat the potatoes as the property of defendant and ship them to it and recover the full purchase price.—*Id.*

§ 363 (Tex.Civ.App.) Where conflicting testimony made an issue as to whether one of the defendants was the purchaser of certain shingles or not, it was error to peremptorily instruct the jury that plaintiff, suing as assignee for the price, could not recover as against such defendant.—*Continental Bank & Trust Co. v. Dealey Bros.*, 171 S. W. 552.

### (F) Actions for Damages.

§ 377 (Tex.Civ.App.) The petition in a seller's action for breach of a new contract *held* not demurrable for failure to specifically allege that the old contract was merged in the new.—*Mahaney v. Lee*, 171 S. W. 1093.

§ 384 (Mo.App.) The measure of damages for the wrongful refusal of a purchaser of a cow

to receive it is the difference between the contract price and the market value of the property at the time of the refusal.—*Boston v. Alexander*, 171 S. W. 582.

## VIII. REMEDIES OF BUYER.

### (A) Recovery of Price.

§ 398 (Tex.Civ.App.) Where the seller of goods at the invoice price represented that the price of a certain article was \$2,000, which was paid by the buyer, whereas in fact the price was \$1,500, the measure of damages is the difference between the invoice price and that represented and collected.—*Midgley & Curtsinger v. Taylor*, 171 S. W. 301.

### (C) Actions for Breach of Contract.

§ 404 (Mo.App.) When time is made an element of a contract of sale, it is in the nature of a warranty, and, on failure of the seller to deliver on time, the buyer may either rescind, or receive the goods and recover damages for delay.—*Corby Supply Co. v. Thompson*, 171 S. W. 661.

§ 416 (Tex.Civ.App.) In action for damages from seller's delivery of inferior goods, evidence of a custom of the buyer to furnish shipping directions *held* inadmissible, since a violation of such custom did not induce the seller's breach of contract.—*Rhame Milling Co. v. Cunningham*, 171 S. W. 1081.

§ 417 (Mo.App.) In an action for breach of contract to sell plaintiff so much pure milk each day, evidence *held* sufficient to warrant a finding that the impurity of the milk was caused solely by defendant and not by plaintiff.—*Eversole v. Hanna*, 171 S. W. 25.

§ 418 (Ky.) Damages by reason of a seller's delay in shipping machinery *held* special and not recoverable without proof of antecedent notice.—*Combs v. Frick Co.*, 171 S. W. 999.

§ 418 (Mo.App.) In an action by a dairyman for breach of contract to furnish him with pure milk, a verdict for \$500 damages *held* not excessive under the evidence.—*Eversole v. Hanna*, 171 S. W. 25.

§ 418 (Tex.Civ.App.) Expected profits lost by the seller's breach in delaying shipments cannot be recovered, where the seller had no notice of the profits.—*Connellee v. Chas. O. Thompson Co.*, 171 S. W. 1076.

### (D) Actions and Counterclaims for Breach of Warranty.

§ 430 (Mo.App.) It is no defense to an action for breach of warranty of the purity of milk sold that the buyer sought to dispose of the unfit milk to his customers.—*Eversole v. Hanna*, 171 S. W. 25.

§ 442 (Mo.App.) The measure of damages for breach of warranty in a contract for the sale of milk is the difference between the market value of milk of the kind and quantity furnished and the market value of pure milk of the same quantity at the same time.—*Eversole v. Hanna*, 171 S. W. 25.

§ 445 (Ky.) Whether a buyer has elected to exercise an option to return within a reasonable time is for the jury, unless the delay is clearly unreasonable.—*Dick v. James Clark, Jr., Electric Co.*, 171 S. W. 198.

## IX. CONDITIONAL SALES.

§ 473 (Mo.App.) A purchaser from the original buyer, who took with knowledge that the original seller retained title until payment, is bound by the condition.—*Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co.*, 171 S. W. 944.

§ 479 (Mo.App.) Evidence *held* to show a conditional contract for sale of articles claimed to have been converted.—*Twentieth Century Ma-*

chinery Co. v. Excelsior Springs Mineral Water & Bottling Co., 171 S. W. 944.

On breach of a conditional contract of sale, the seller may either replevin the goods, sue for conversion, or waive his title and sue for the price.—Id.

Where a seller who reserved title until payment sued for the price, he did not waive his right to sue for conversion, where the former suit was not brought to judgment.—Id.

## SATISFACTION.

See Accord and Satisfaction; Compromise and Settlement; Payment; Release.

## SCHOOLS AND SCHOOL DISTRICTS.

### II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 37 (Ark.) Where new school district is sought to be created by including land in two other districts, failure to post the notice required by Kirby's Dig. § 7540, in one of the districts was fatal.—Lewis v. Young, 171 S. W. 1197.

## SEARCHES AND SEIZURES.

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## SEDUCTION.

See Criminal Law, § 400; Husband and Wife, §§ 302, 313; Indictment and Information, § 119.

### II. CRIMINAL RESPONSIBILITY.

§ 36 (Tex.Cr.App.) Offer of marriage, in order to constitute a defense to seduction, must be made before accused pleads to the indictment for seduction.—Baskins v. State, 171 S. W. 723.

## SELF-DEFENSE.

See Homicide, § 300.

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## SEPARATION.

See Husband and Wife, §§ 278, 279.

## SEQUESTRATION.

§ 20 (Tex.Civ.App.) Under Rev. St. 1911, art. 7107, authorizing obligors on a sequestration bond to return the property or any portion thereof, a verdict and judgment on the bond must find the value of the several items of property replevied.—Bishop v. Japhet, 171 S. W. 499.

## SERVANTS.

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## SET-OFF AND COUNTERCLAIM.

See Appeal and Error, § 51; Trial, § 139.

### II. SUBJECT-MATTER.

§ 35 (Ky.) Where plaintiff was a foreign corporation, defendant was entitled to allege in recoupment a claim for unliquidated damages arising out of the same transaction.—Combs v. Frick Co., 171 S. W. 999.

## SETTING ASIDE.

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## SETTLEMENT.

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### III. POWERS, DUTIES, AND LIABILITIES.

§ 130 (Tex.Civ.App.) Plaintiff, in action for sheriff's failure to record an attachment lien, held not entitled to damages if when he obtained the attachment he had actual notice of a prior conveyance by the attachment defendant.—Neville v. Miller, 171 S. W. 1109.

§ 138 (Tex.Civ.App.) In an action against a sheriff for damages for failure to record an attachment lien, plaintiff held to have the burden of showing he lost his lien thereby.—Neville v. Miller, 171 S. W. 1109.

## SIDEWALKS.

See Municipal Corporations, §§ 790, 800, 821.

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### I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 10 (Tex.Civ.App.) A contract, illegal in part, may be specifically enforced if the illegal part is severable, but not if the contract is entire.—Wicks v. Comves, 171 S. W. 774.

### II. CONTRACTS ENFORCEABLE

§ 53 (Ark.) A material representation, to defeat specific performance of a contract, need only be untrue in fact, so as to mislead the party to whom it is addressed, and the maker's knowledge of its falsity and intent to deceive are immaterial.—Taliaferro v. Boyd, 171 S. W. 105.

Where an owner of a hotel and lots on which it was situated represented to the purchaser that the property as fenced contained 1¼ acres, while one-seventh of an acre did not belong to him, the deficiency was material and sufficient to defeat specific performance by the owner.—Id.

Where a purchaser of a hotel and lots on which it was situated negotiated for a sale of the property to a third person without knowing the deficiency of one-seventh of an acre in the quantity of the land represented by the vendor as 1½ acres, he did not thereby waive the misrepresentation as to quantity, but could rely thereon to defeat specific performance.—Id.

**STARE DECISIS.**

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**I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.**

§ 64 (Tex.Civ.App.) Even if the sections of the Workmen's Compensation Act, authorizing creation and regulation of the Texas Employers' Insurance Association, violate Const. art. 12, §§ 1, 2, as to creation of private corporations, they may be eliminated without impairing the sections as to contributory negligence, assumed risk, and fellow servants.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

**III. SUBJECTS AND TITLES OF ACTS.**

§ 114 (Tex.Civ.App.) The Workmen's Compensation Act has but one subject, and that expressed in the title, in compliance with Const. art. 3, § 35; the ends to be reached, while more than one, all relating to the employer's

liability, and the proceedings for compensation of certain employes.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 115 (Tex.Civ.App.) Title of Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624), amending Rev. St. 1911, arts. 4621, 4622, 4624, concerning marital rights of parties and defining separate and community property, held sufficient within Const. art. 3, § 35.—*Winkie v. Conatser*, 171 S. W. 1017.

**IV. AMENDMENT, REVISION, AND CODIFICATION.**

§ 141 (Ky.) Acts 1912, c. 113, purporting to amend Ky. St. c. 89, by adding thereto section 3459a, providing for the construction of public improvements by cities of the third class on the ten-year bond plan, in fact amended section 3449, and is contrary to Const. § 51, requiring it to set forth at length the amended statute.—*Hickman v. Kimbley*, 171 S. W. 176.

**VI. CONSTRUCTION AND OPERATION.****(A) General Rules of Construction.**

§ 190 (Mo.) Where there is no ambiguity in the language of a statute, there is no room for construction.—*Trefny v. Eichenseer*, 171 S. W. 930.

§ 222 (Ky.) Statutes must be construed with reference to the principles of the common law in force at the time of their enactment, and do not change the common law beyond that which is expressed or which follows by necessary implication.—*Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Adm'r*, 171 S. W. 430.

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**II. REGULATION AND OPERATION.**

§ 85 (Tex.Civ.App.) Street car lines, having franchises to operate their cars in the streets, have rights which pedestrians must recognize, and pedestrians cannot lie down in the street in such a manner as to interfere with the regular running of cars.—*Scates v. Rapid Transit Ry. Co.*, 171 S. W. 503.

§ 98 (Tex.Civ.App.) Where an intoxicated man negligently stepped in front of an approaching street car, his would-be rescuer stands in the same position as the intoxicated man, and the negligence of the latter is attributed to the rescuer, so that no recovery can be had, though the street car company's servants were also negligent.—*Scates v. Rapid Transit Ry. Co.*, 171 S. W. 503.

§ 100 (Tex.Civ.App.) Where one run down by a street car received his injuries because of his intoxication, he is as a matter of law guilty of contributory negligence, defeating recovery.—*Scates v. Rapid Transit Ry. Co.*, 171 S. W. 503.

§ 103 (Tex.Civ.App.) To apply the doctrine of discovered peril, the party injured must be actually discovered in a position of danger by those operating the train or cars, and the fact that the operatives did not keep the required lookout furnishes no basis for an application of the doctrine.—*Scates v. Rapid Transit Ry. Co.*, 171 S. W. 503.

**STREETS.**

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**SUNDAY.**

§ 6 (Tex.Cr.App.) The conducting of a moving picture show on Sunday held a violation of the

Sunday law (Pen. Code 1895, art. 199), prohibiting the opening of theaters on Sunday.—*Lempke v. State*, 171 S. W. 217.

**SUPERSEDEAS.**

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**III. LIABILITY OF PERSONS AND PROPERTY.**

**(D) Exemptions.**

§ 193 (Ark.) In Const. 1868, art. 10, § 17, the exemption of useful privileges is as express and binding as the right to tax a useless one.—*State v. New York Life Ins. Co.*, 171 S. W. 871.

A franchise to exist as a corporation and the right of a foreign corporation to do business within the state are privileges within Const. 1868, art. 10, § 17.—*Id.*

The privileges which are exempt from taxation by Const. 1868, art. 10, § 17, are not limited to those conferred on individuals.—*Id.*

The provisions of former Constitutions authorizing the taxation of privileges held not to indicate that Const. 1868, art. 10, § 17, did not exempt the privilege of a foreign corporation to do business within the state.—*Id.*

Const. 1868, art. 10, § 17, when construed in view of the circumstances under which it was adopted, exempts from taxation the privilege of a foreign corporation to do business within the state.—*Id.*

§ 204 (Mo.) Exemptions from taxation should be strictly construed, since the purpose of the state to abandon its right to tax should not be

presumed.—St. Louis Lodge No. 9, B. P. O. E., v. Koeln, 171 S. W. 329.

§ 230 (Ark.) The right of a foreign insurance company to do business within the state is a privilege that is of real use to society so as to be exempt from taxation under Const. 1868, art. 10, § 17.—State v. New York Life Ins. Co., 171 S. W. 871.

§ 241 (Mo.) A lodge building used as a club for the members and their guests, the surplus funds of which are devoted to charity, is not exempt from taxation under Const. art. 10, § 6.—St. Louis Lodge No. 9, B. P. O. E., v. Koeln, 171 S. W. 329.

## V. LEVY AND ASSESSMENT.

### (B) Assessment Rolls or Books.

§ 431 (Mo.) While the certification of a city assessment by the county clerk, who as secretary of the county board of equalization, is its certifying officer, is sufficient authentication, the corrected land list of the county assessor, kept in accordance with Rev. St. 1909, §§ 11372, 11397, is the original record, and the city assessment must yield to it.—State ex rel. Blair v. Center Creek Mining Co., 171 S. W. 356.

## VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

§ 531 (Ky.) In the absence of statute authorizing the subrogation, a stranger having no interest in property, who pays taxes under an agreement with the owner that she shall be subrogated to the tax liens is not subrogated to such liens as against the holders of mortgage liens on the property, being a volunteer in the legal, though not in the ordinary, sense.—Gibson v. Western & S. Life Ins. Co., 171 S. W. 390.

## VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

### (C) Remedies for Wrongful Enforcement.

§ 611 (Tex.Civ.App.) A petition to enjoin collection of tax held insufficient for want of an allegation that collection had been attempted or threatened by a levy.—Marion County v. Perkins Bros. Co., 171 S. W. 789.

A petition to enjoin collection of a tax should allege the amount in controversy, usually the value of the property seized, to show the court has jurisdiction.—Id.

## TELEGRAPHS AND TELEPHONES.

See Appeal and Error, § 882; Commerce, § 28; Evidence, § 248.

## I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 20 (Ky.) In an action by a brakeman caught on a telephone wire running over the railroad track, the question whether the defendant owned and controlled the wire held, under the evidence, for the jury.—Cumberland Telephone & Telegraph Co. v. Laird, 171 S. W. 386.

Where a brakeman was caught on a sagging telephone wire extending over the track, and the question was whether the defendant owned and controlled the line, evidence that after the accident defendant's servants repaired the wire is admissible on the question of ownership.—Id.

## II. REGULATION AND OPERATION.

§ 27 (Tex.Civ.App.) A telegraph company receiving a message in Tennessee for delivery in Texas is liable for mental anguish caused by its failure to deliver the message in Texas.—Bailey v. Western Union Telegraph Co., 171 S. W. 839.

§ 54 (Tex.Civ.App.) A stipulation in a contract for transmission and delivery of an interstate message by a telegraph company, made a

common carrier by Act Cong. 1910, amending the Interstate Commerce Act, held invalid.—Bailey v. Western Union Telegraph Co., 171 S. W. 839.

A stipulation limiting liability for mistake, or delay, or failure to deliver, held void because unreasonable.—Id.

§ 71 (Ark.) Verdict for \$500 for delay in delivery of telegram informing plaintiff of the death of her sister, preventing her from attending the funeral, held excessive, and reduced to \$250.—Western Union Telegraph Co. v. Scanlon, 171 S. W. 916.

§ 74 (Ark.) Instruction to find for telegraph company in action for delay if sender knew that office of address was closed, held properly refused, where the operator agreed to transmit it immediately.—Western Union Telegraph Co. v. Scanlon, 171 S. W. 916.

## TENANCY.

See Landlord and Tenant.

## TENANCY IN COMMON.

## III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 55 (Tex.Civ.App.) A cotenant may recover the whole property as against one showing no title.—Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 171 S. W. 537.

§ 55 (Tex.Civ.App.) The rule that a tenant in common may recover possession of the entire tract as against a trespasser did not apply as against defendant, claiming under a deed which the grantors and their heirs for more than 50 years had recognized as valid, and which was insufficient only in the certificate of acknowledgment.—Houston Oil Co. of Texas v. Suduth, 171 S. W. 556.

## TENDER.

See Insane Persons, § 79; Judgment, § 440.

## TESTAMENTARY CAPACITY.

See Wills, § 44.

## THEATERS AND SHOWS.

See Sunday.

## THEFT.

See Larceny.

## THREATS.

See Deeds, § 211; Homicide, § 295.

## TIMBER.

See Logs and Logging.

## TIME.

See Criminal Law, § 711; Exceptions, Bill of, § 42; Limitation of Actions, §§ 45-48; Sales, § 404.

§ 9 (Ky.) Defendants having been given "until" the twenty-second day of the term in which to plead, an answer filed on that day was in time.—Combs v. Frick Co., 171 S. W. 999.

## TITLE.

See Adverse Possession; Dedication, § 35; Estoppel, §§ 38, 39; Executors and Administrators, § 148; Homestead, § 118; Husband and Wife, § 267; Quieting Title; Statutes, §§ 114, 115; Tenancy in Common, § 55; Trespass to Try Title; Vendor and Purchaser, §§ 129, 261, 269; Waters and Water Courses, § 152; Wills, § 205.

**TORTS.**

See Assault and Battery; Corporations, §§ 239, 492; Fraud; Libel and Slander; Malicious Prosecution; Negligence; Nuisance; Trover and Conversion; Waste.

**TOWNS.**

See Municipal Corporations; Schools and School Districts.

**TRADE-MARKS AND TRADE-NAMES.**

See Dismissal and Nonsuit, § 75; Mechanics' Liens, § 139; Process, § 31.

**IV. INFRINGEMENT AND UNFAIR COMPETITION.****(B) What Competition Unlawful.**

§ 70 (Ky.) Use of name, S. Company, by persons none of whom were named S., but who, under such name, engaged in the same business as C. & S., a long-established concern, *held* unfair competition, though S. Company was located in the S. building.—Crutcher & Starks v. Starks, 171 S. W. 433.

**TREES.**

See Logs and Logging.

**TRESPASS.**

See Fences, § 27; Tenancy in Common, § 55.

**TRESPASS TO TRY TITLE.**

See Appeal and Error, § 1039; Costs, § 32; Ejectment; Evidence, § 333; Pleading, § 293; Trial, § 350.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 6 (Tex.Civ.App.) Where defendant was in actual possession under deeds, plaintiff *held* bound to recover, if at all, upon the strength of his own title.—Allison v. Richardson, 171 S. W. 1021.

**II. PROCEEDINGS.**

§ 38 (Tex.Civ.App.) In trespass to try title involving a boundary dispute, proof of possessory title, though it made a *prima facie* case, *held* not to change burden of proof, and upon introduction of evidence in rebuttal the burden was on plaintiff to prove a legal title.—J. D. Fields & Co. v. Allison, 171 S. W. 274.

§ 41 (Tex.Civ.App.) In trespass to try title evidence *held* sufficient to sustain a finding that the heirs of a prior owner, other than H., conveyed their interests in the land to him.—Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 171 S. W. 537.

**TRIAL.**

See Appeal and Error, §§ 169-302, 499, 501, 547, 549, 553, 719, 842, 882, 907, 987-1010, 1033, 1062, 1064, 1066-1068, 1169, 1170; Assault and Battery, §§ 31, 43; Bigamy, § 13; Bridges, § 46; Brokers, § 88; Cancellation of Instruments, § 51; Carriers, §§ 187, 230, 320, 321; Continuance; Corporations, §§ 320, 674; Costs; Criminal Law, §§ 656-887, 1032-1064; Damages, §§ 208, 210, 214, 216, 221; Death, § 77; Electricity, § 19; Embellishment, §§ 47, 48; Eminent Domain, § 222; Guardian and Ward, § 182; Highways, § 184; Homicide, §§ 269-309, 340; Husband and Wife, § 314; Insurance, §§ 665, 666, 668, 825; Judgment, §§ 248-256; Jury; Landlord and Tenant, § 129; Larceny, §§ 68, 70; Libel and Slander, § 152; Malicious Prosecution, § 72; Master and Servant, §§ 284-297; Municipal Corporations, §§ 706, 821; Negligence, §§ 136-142; New Trial; Partnership, § 218; Physicians and Surgeons,

§§ 18, 24; Railroads, §§ 95, 350, 351, 400, 446, 447, 482; Rape, § 66; Receiving Stolen Goods, § 9; Release, § 58; Sales, §§ 363, 417, 445; Telegraphs and Telephones, §§ 20, 74; Trespass to Try Title; Venue; Waters and Water Courses, § 179.

**III. COURSE AND CONDUCT OF TRIAL IN GENERAL.**

§ 29 (Ark.) A remark by the trial judge, in denying to counsel the right to read parts of a deposition in the course of his argument, that the evidence of witnesses was introduced but once in his court, was not error.—Wells Fargo & Co. Express v. W. B. Baker Lumber Co., 171 S. W. 132.

**IV. RECEPTION OF EVIDENCE.****(A) Introduction, Offer, and Admission of Evidence in General.**

§ 36 (Tex.Civ.App.) Exclusion of evidence to prove plaintiff's employment *held* not error, where execution of written employment contract was not disputed.—Williams v. Phelps, 171 S. W. 1100.

§ 45 (Mo.App.) An offer of proof in support of a buyer's defense of breach of warranty *held* too indefinite and remote.—Steddings v. Dobbins, 171 S. W. 979.

**(B) Order of Proof, Rebuttal, and Re-opening Case.**

§ 62 (Mo.App.) Evidence that none of the seller's hogs which had been in the same inclosure with those sold, had the cholera *held* admissible to rebut a defense of breach of warranty in the sale of the hogs.—Steddings v. Dobbins, 171 S. W. 979.

**(C) Objections, Motions to Strike Out, and Exceptions.**

§ 85 (Tex.Civ.App.) Where objections to report of acts of state surveyor went to the whole report and did not call the court's attention to objectionable matter consisting of argument and opinions, the court *held* not required to exclude such objectionable matter.—Denton v. English, 171 S. W. 248.

§ 98 (Mo.App.) The court is not required to rule on objections to evidence as not within the issues, until it is offered.—Colley v. National Live Stock Ins. Co., 171 S. W. 663.

§ 105 (Tex.Civ.App.) The uncontradicted statement of the conclusion of a railway agent as to an interstate rate, admitted without objection, is sufficient proof of the rate.—Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114.

**V. ARGUMENTS AND CONDUCT OF COUNSEL.**

§ 115 (Ark.) Where there was no serious dispute between counsel as to the testimony contained in a deposition, the trial court did not abuse its discretion by refusing to permit defendant's attorney to read portions of the deposition in the course of his argument.—Wells Fargo & Co. Express v. W. B. Baker Lumber Co., 171 S. W. 132.

§ 121 (Ark.) In an action for injuries to plaintiff by being struck by a train as he was sitting asleep on the edge of a station platform, remarks of plaintiff's counsel that "the old engineer was blind" *held* not error.—St. Louis, I. M. & S. Ry. Co. v. McMichael, 171 S. W. 115.

§ 121 (Mo.App.) In an action for breach of contract to deliver corn, argument of plaintiffs' attorney that defendant's breach of contract to deliver all the corn sold, was caused by an advance in the corn market, was proper.—Horner v. Franklin, 171 S. W. 568.

Where, in an action for breach of contract, defendant proved that plaintiffs were bankrupt, they could not object that plaintiffs' counsel in argument stated to the jury that plaintiffs would

always be bankrupt, if they dealt with persons like defendant.—*Id.*

§ 121 (Tex.Civ.App.) In an action against a landlord on a promise to pay for groceries furnished his tenant, the deduction of counsel from the fact that the landlord stood for the tenant in 1910 that it was likely he again stood for him in 1911 was permissible.—*Chilson v. Oheim*, 171 S. W. 1074.

§ 125 (Tex.Civ.App.) Argument of counsel for a passenger, claiming to have contracted tuberculosis because of exposure on defendant's train, that he would not have tuberculosis but for the railroad is not improper as tending to cause the jury to award excessive damages.—*Missouri, K. & T. Ry. Co. of Texas v. Dellmon*, 171 S. W. 790.

§ 133 (Ark.) The error in permitting improper remarks of counsel is cured by instructions not to consider the same and by the remarks of counsel himself in disclaiming any intention to discuss facts not in the record.—*Ft. Smith Lumber Co. v. Shackelford*, 171 S. W. 90.

§ 133 (Ky.) Misconduct of counsel in stating that plaintiff wanted to get possession of defendants' property to put defendants out of business *held* cured by the prompt sustaining of an objection and the court's admonition that the jury should not consider the statement.—*Sandy Valley & E. Ry. Co. v. Bentley*, 171 S. W. 178.

## **VI. TAKING CASE OR QUESTION FROM JURY.**

### **(A) Questions of Law or of Fact in General.**

§ 139 (Ky.) Where there is any evidence to support plaintiff's contention, the question should be submitted to the jury.—*Greiner v. Alfred Struck Co.*, 171 S. W. 406.

§ 139 (Ky.) A common-law case must go to the jury where there is evidence conducing to support the petition, though the weight of the evidence numerically and in probative value is in conflict therewith.—*Louisville & N. R. Co. v. Johnson's Adm'x*, 171 S. W. 847.

§ 139 (Mo.App.) Where there was no substantial evidence to support defendant's counterclaim, the direction of a verdict for plaintiff on the counterclaim is not error.—*Brown v. Barr*, 171 S. W. 4.

§ 139 (Tex.) Where the evidence is such that reasonable men may differ, the question of fact is for the jury, and, when such that all reasonable men must draw the same conclusion, for the court.—*Cartwright v. Canode*, 171 S. W. 696.

§ 139 (Tex.Civ.App.) Where there was positive and negative testimony on the issue whether an engine bell was rung, the question is for the jury.—*Paris & G. N. R. Co. v. Lackey*, 171 S. W. 540.

§ 140 (Ky.) In an action tried by a jury, the trial judge may not reject the evidence of a witness merely because he does not appear to be telling the truth.—*Campbell v. Mobile & O. R. Co.*, 171 S. W. 1002.

§ 140 (Mo.App.) In an action for loss of earnings of plaintiff's son resulting from an injury received in defendant's employ, evidence *held* not to show that the boy's story of the accident was contrary to the physical facts, so as to require the direction of a verdict for defendant.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

The testimony on behalf of plaintiff cannot be disregarded although contrary to that of defendant, so as to require a verdict to be directed for defendant, unless plaintiff's testimony is directly, wholly, and beyond doubt contrary to physical laws.—*Id.*

§ 141 (Ark.) Where there was no evidence of negligence of defendant, it was error to submit the issue to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Middleton*, 171 S. W. 899.

§ 143 (Ky.) Where the evidence is conflicting the question should be submitted to the jury.—*Greiner v. Alfred Struck Co.*, 171 S. W. 405.

§ 145 (Ark.) Where the undisputed evidence showed that the consignee of an express package was located outside the delivery limits fixed by the company, it was prejudicial error to refuse a requested instruction to find that fact for the company, and to submit the question to the jury.—*Wells Fargo & Co. Express v. W. B. Baker Lumber Co.*, 171 S. W. 132.

### **(B) Demurrer to Evidence.**

§ 156 (Mo.App.) On a demurrer to the plaintiff's evidence the court will consider the evidence in its aspect most favorable to plaintiff's pleaded cause.—*Cornett v. Chicago, B. & Q. R. Co.*, 171 S. W. 15.

### **(D) Direction of Verdict.**

§ 169 (Mo.App.) It is as much the duty of a trial court to direct a verdict for defendant when the undisputed facts show no liability to have been incurred, as it is to submit conflicting evidence to the jury.—*Gilmore v. Modern Brotherhood of America*, 171 S. W. 629.

## **VII. INSTRUCTIONS TO JURY.**

### **(A) Province of Court and Jury in General.**

§ 191 (Mo.App.) An instruction *held* not erroneous as assuming that a pulley was defective, or that the wire which injured a minor employé broke, where the early part of the instruction required the jury to find such facts.—*Warnke v. A. Leschen & Sons Rope Co.*, 171 S. W. 643.

§ 191 (Tex.Civ.App.) In an action against the initial carrier for negligent handling and delay in transportation, a charge that the contract was for through shipment assumed a controverted fact.—*San Antonio & A. P. Ry. Co. v. Grady*, 171 S. W. 1019.

§ 192 (Mo.App.) In an action for injuries in a runaway caused by defendant's automobile in a city street, an instruction submitting the ownership of the car to the jury, but assuming agency of defendant's son who was driving the car, if defendant owned the car, *held* not erroneous under the evidence as assuming a controverted fact.—*Hufft v. Dougherty*, 171 S. W. 17.

§ 194 (Ark.) In an action for the death of a railroad car repairer while working on a car engaged in interstate commerce unprotected under the blue flag rule, an instruction that, if the rule had been abrogated by disuse, decedent's failure to comply with it would not of itself prevent a recovery *held* proper, under the Employers' Liability Act, and not objectionable as a charge on the weight of the evidence.—*St. Louis, I. M. & S. Ry. Co. v. Sharp*, 171 S. W. 95.

§ 194 (Ark.) In an action for delay in the delivery of an express package, an instruction that a false statement by the agent of the company that the package had not arrived rendered the company liable for damages accruing thereafter *held* erroneous as taking from the jury the question whether the act of the agent was negligence on the part of the company.—*Wells Fargo & Co. Express v. W. B. Baker Lumber Co.*, 171 S. W. 132.

§ 194 (Ark.) In an action for injuries at a crossing, a request to charge that the jury must accept the record of the railroad's train movements introduced in evidence unless they had reason to believe that it had been changed or tampered with was properly refused.—*St. Louis Southwestern Ry. Co. v. Mitchell*, 171 S. W. 895.

§ 194 (Tex.Civ.App.) A requested charge, which is on the weight of the evidence, and which, so far as proper, is covered by the general charge, is properly refused.—*Miller v. Campbell*, 171 S. W. 251.

§ 194 (Tex.Civ.App.) An instruction on diminished earning capacity as a measure of damages for personal injuries *held* not objectionable as a charge upon the weight of the evidence.—*Gulf, C. & S. F. Ry. Co. v. McKinnell*, 171 S. W. 1091.

§ 194 (Tex.Civ.App.) A requested instruction that, if the hostler cut off a valve, and thereafter the valve was opened by some person unknown, a verdict should be returned for defendant, *held* properly refused, as being, in effect, a peremptory instruction that defendant's hostler was not negligent.—*Gulf, T. & W. Ry. Co. v. Dickey*, 171 S. W. 1097.

#### (B) Necessity and Subject-Matter.

§ 203 (Mo.App.) An instruction on the measure of damages in case plaintiff recovered *held* not defective for failing to embrace all the issues and covering the defense.—*Dodt v. Prudential Ins. Co. of America*, 171 S. W. 855.

§ 203 (Mo.App.) Where plaintiff's due care in using a defective sidewalk at night was the decisive and only seriously contested question in an action against the city for his injuries, defendant was entitled to have such question presented to the jury by affirmative instructions.—*Stephens v. City of El Dorado Springs*, 171 S. W. 657.

§ 207 (Ark.) Where, during the argument, a controversy arose as to whether defendant's offer to compromise was an admission of liability, defendant was entitled to an instruction that such was not its effect.—*St. Louis Southwestern Ry. Co. v. Mitchell*, 171 S. W. 895.

§ 219 (Mo.App.) Where negligence was not the gist of the action, the use of the word in an instruction, without defining it, was not error.—*Kieselhorst Piano Co. v. Porter*, 171 S. W. 949.

#### (C) Form, Requisites, and Sufficiency.

§ 240 (Tex.Civ.App.) A requested charge, which is argumentative, and which, so far as proper, is covered by the main charge, is properly refused.—*Miller v. Campbell*, 171 S. W. 251.

§ 242 (Mo.App.) In an action for injuries to an employé, instructions *held* not misleading, though in form submitting the defense of assumption of risk instead of contributory negligence.—*Baxter v. Campbell Lumber Co.*, 171 S. W. 955.

§ 243 (Mo.App.) In an action for damages for waste by a tenant, instructions *held* not conflicting.—*First Nat. Realty & Loan Co. v. Mason*, 171 S. W. 971.

§ 244 (Ky.) An instruction as to the measure of damages for negligent killing, "in arriving at this the jury may take into consideration the age of decedent and the probable duration of his life," *held* objectionable as calling attention to specific facts.—*Louisville & N. R. Co. v. Shoemaker's Adm'r*, 171 S. W. 383.

#### (D) Applicability to Pleadings and Evidence.

§ 250 (Tex.Civ.App.) A case should be submitted to the jury on the issues raised by the pleadings and evidence, and the jury should not be permitted to dispose of the case on pleadings unsupported by evidence or on evidence not supported by pleadings.—*Martin v. Stires*, 171 S. W. 836.

§ 251 (Ky.) In an action for malicious prosecution, it is proper to charge that plaintiff cannot recover for false imprisonment.—*Keiner v. Collins*, 171 S. W. 399.

§ 251 (Mo.) Where one count of a petition to recover the value of a certificate of deposit wrongfully taken from plaintiff did not charge larceny of the certificate, an instruction which authorized an award of punitive damages in

case the certificate was stolen is improper, going beyond the pleadings.—*Keller v. Summers*, 171 S. W. 336.

§ 251 (Mo.App.) An instruction in an action for injuries received when defendant's wagon was backed against plaintiff *held* erroneous, in not confining the jury to the negligence pleaded.—*Lauff v. J. Kennard & Sons Carpet Co.*, 171 S. W. 986.

§ 251 (Tex.Civ.App.) A petition *held* insufficient to authorize the submission of an issue of aggravation of previous injury.—*Bulloch v. Missouri, K. & T. Ry. Co. of Texas*, 171 S. W. 808.

§ 251 (Tex.Civ.App.) In action for breach of contract to keep a road under a bridge free from inflammable material and to indemnify for damage from fire, instructions resting the liability on negligence *held* erroneous.—*Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.*, 171 S. W. 1103.

§ 252 (Ark.) Where the undisputed evidence showed that the consignee of an express package was located outside the delivery limits established by the express company, an instruction that, if the company accepted the package for transportation and delivery to the consignee, it must transport and deliver it with reasonable dispatch, was misleading.—*Wells Fargo & Co. Express v. W. B. Baker Lumber Co.*, 171 S. W. 132.

§ 252 (Ark.) An instruction, as to the carrier's duty in the operation of its trains, was erroneous where inapplicable to the evidence.—*Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 913.

§ 252 (Ky.) Where the evidence failed to show any physical suffering on the part of plaintiff by reason of the prosecution and her arrest, an instruction on such damages is improper.—*Keiner v. Collins*, 171 S. W. 399.

§ 252 (Mo.App.) Where there was no evidence of contributory negligence, a requested instruction on that issue was properly refused.—*Brown v. City of St. Joseph*, 171 S. W. 935.

§ 252 (Tex.Civ.App.) In an action for personal injuries to one traveling with a fruit car on a nontransferable pass issued to his principal, an instruction that plaintiff was a passenger if the conductor consented to his riding thereon is inapplicable to evidence that the consent to his riding was given by the conductor of a train other than the one on which he was when injured.—*Beard v. International & G. N. Ry. Co.*, 171 S. W. 553.

In an action for injuries to a licensee while in a railroad car, an instruction that the plaintiff could not recover for any defect in the brake was proper, where there was evidence that the brake was defective, but no evidence that there was any attempt to use the brake, since the defect could not have been the proximate cause of the injury.—*Id.*

§ 252 (Tex.Civ.App.) In an action by a stockholder asserting mismanagement by the directors, a charge on the duty of directors *held* abstract and properly refused.—*Thomas v. Barthold*, 171 S. W. 1071.

§ 253 (Ky.) There being evidence in support of the defense of contributory negligence, an instruction thereon should have been given.—*Louisville & N. R. Co. v. Shoemaker's Adm'r*, 171 S. W. 383.

#### (E) Requests or Prayers.

§ 255 (Mo.) In an action against a city, for personal injury from driving into a hole in a street, if defendant in the state of the proof desired to limit the recovery for future medical services to a nominal amount, it should have tested the right to do so by requesting an instruction to that effect.—*Sang v. City of St. Louis*, 171 S. W. 347.

§ 256 (Mo.App.) Defendant's objection to plaintiff's instruction on the measure of damages, correct as far as they went, were untenable, in the absence of any request for further instructions.—*Gummerson v. Kansas City Bolt & Nut Co.*, 171 S. W. 959.

§ 257 (Ark.) Under Kirby's Dig. § 6196, subd. 5, the judge in his discretion may require that requests to charge be submitted before the opening argument.—*St. Louis Southwestern Ry. Co. v. Mitchell*, 171 S. W. 895.

§ 260. It is not error to refuse a requested charge sufficiently covered by instructions given.

—(Ark.) *Ft. Smith Lumber Co. v. Shackelford*, 171 S. W. 99; *St. Louis, I. M. & S. Ry. Co. v. McMichael*, Id. 115; (Mo. App.) *Hertel v. Cuba*, 171 S. W. 565; (Tex. Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Dellmon*, 171 S. W. 799; *Bullock v. Missouri, K. & T. Ry. Co. of Texas*, Id. 808; *Prince v. Taylor*, Id. 826.

§ 260 (Ky.) In an action for injuries to a railroad flagman, a requested instruction as to nonliability in case he mounted an engine while out of the line of his employment held covered by the charge given.—*Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451.

§ 260 (Mo.App.) A requested instruction which was covered by other instructions, except as to one element which there was no evidence to sustain, was properly refused.—*Hufft v. Dougherty*, 171 S. W. 17.

§ 260 (Tex.Civ.App.) It is not error to refuse a requested charge covered by the general charge.—*Miller v. Campbell*, 171 S. W. 251.

§ 260 (Tex.Civ.App.) An instruction embraced in and covered by the special issues submitted was properly refused.—*J. D. Fields & Co. v. Allison*, 171 S. W. 274.

§ 260 (Tex.Civ.App.) A special charge embodying the same instructions previously given in the main charge should not be given.—*Heard v. International & G. N. Ry. Co.*, 171 S. W. 553.

§ 260 (Tex.Civ.App.) A special charge presenting in detail the elements of an affirmative defense should not be denied, though a general charge presents in a general manner the same defense.—*Atchison, T. & S. F. Ry. Co. v. Hill*, 171 S. W. 1028.

Where the evidence almost conclusively established a case against defendant, refusal of a special charge presenting the defense, where a general charge had been given, was not prejudicial.—*Id.*

§ 261 (Tex.Civ.App.) A special charge should direct the attention of the court and jury to the particular phase of the case sought to be presented.—*Missouri, K. & T. Ry. Co. of Texas v. Dellmon*, 171 S. W. 799.

§ 267 (Ark.) In a broker's action for commission, an instruction directing a verdict for defendant if the broker relinquished commission, held properly modified by making the relinquishment without condition.—*Ezell v. Barner*, 171 S. W. 911.

#### (F) Objections and Exceptions.

§ 279 (Tex.Civ.App.) Objection to a charge, "failing to charge \* \* \* correctly the measure of damages \* \* \* as to difference in market and actual value," held insufficient to show the trial court the error, as required by Rev. St. 1911, art. 1971, as amended by Acts 33d Leg.—*Pecos & N. T. Ry. Co. v. Grundy*, 171 S. W. 318.

#### (G) Construction and Operation.

§ 296 (Ark.) An instruction, that plaintiff could not recover unless he satisfied the jury by a preponderance of the evidence that his property was destroyed by defendants' negligence as alleged, was cured by other instructions that plaintiff was bound to establish his right to recover by a preponderance of the evidence.—*Hays v. Williams*, 171 S. W. 882.

§ 296 (Ky.) In an action against a company for the negligence of the chauffeur of the company's agent, a misleading instruction as to the employment of the chauffeur in the work of the company held cured by another instruction on that issue.—*National Cash Register Co. v. Williams*, 171 S. W. 162.

§ 296 (Ky.) In an action for breach of contract made on defendant's behalf by one representing it, an instruction as to plaintiffs' right to recover, omitting to require that plaintiffs must have relied on the representations of defendant and its holding out of H. as its agent, held cured by another part of the instruction.—*Studebaker Corporation of America v. Dodds & Runge*, 171 S. W. 167.

§ 296 (Mo.App.) An instruction that the law imposed upon the driver of an automobile the highest degree of care of a very prudent man in like circumstances held not erroneous as allowing recovery for general negligence not alleged in the petition, in view of a previous instruction limiting recovery to the negligence alleged in the petition.—*Hufft v. Dougherty*, 171 S. W. 17.

§ 296 (Mo.App.) An instruction for plaintiffs on the whole case, failing to incorporate defendant's defense, was not error where another instruction was given for defendant fully submitting his theory.—*Horne v. Franklin*, 171 S. W. 568.

§ 296 (Tex.Civ.App.) Any error, in an instruction in a boundary case, in laying too much weight on the beginning corner of a description was cured, where another paragraph of the charge expressly stated that no one corner had any greater force or dignity than another.—*Miller v. Campbell*, 171 S. W. 251.

### VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 311 (Tex.Civ.App.) Alleging and proving physical and mental condition which would necessarily result in loss of earning capacity is sufficient pleading and proof of diminished earning capacity, which may be ascertained by the jury from their common knowledge of men.—*Memphis Cotton Oil Co. v. Tolbert*, 171 S. W. 309.

§ 317 (Tex.Civ.App.) Right to object to misconduct of jurors held waived, where plaintiff knew of such alleged misconduct and failed to call same to the court's attention.—*Williams v. Phelps*, 171 S. W. 1100.

### IX. VERDICT.

#### (B) Special Interrogatories and Findings.

§ 350 (Tex.Civ.App.) In trespass to try title involving boundary dispute, held that court, in addition to submitting issue as to whether fence was on boundary line, should have submitted issue as to the location of the boundary if not at the fence.—*J. D. Fields & Co. v. Allison*, 171 S. W. 274.

Where the question in issue was whether a fence was on the boundary line and there was no dispute as to the existence of such fence or how long it had been there, the court properly refused to submit issues as to these matters.—*Id.*

§ 356 (Tex.Civ.App.) Where the jury find for defendant on the issues of negligence and proximate cause, held, that they need not answer other questions relating solely to defenses pleaded.—*Martinez v. Medina Valley Irr. Co.*, 171 S. W. 1035.

### X. TRIAL BY COURT.

#### (A) Hearing and Determination of Cause.

§ 370 (Ky.) In a suit to set aside a deed for undue influence and mental incapacity, the chancellor, in his discretion, might submit an issue of fact to obtain the advisory aid of the jury.—*Sellers v. Sellers*, 171 S. W. 449.

§ 374 (Ky.) In a suit to set aside a deed for undue influence and mental incapacity, the chancellor, in his discretion, might submit an

issue of fact to obtain the advisory aid of the jury.—*Sellers v. Sellers*, 171 S. W. 449.

**(B) Findings of Fact and Conclusions of Law.**

§ 398 (Tex.Civ.App.) In an action to enjoin a city from claiming land for a street, a finding that the purchasers from plaintiff's ancestor were not informed of her intention that the land in controversy should not be opened for street purposes, held to conflict with a finding that plaintiff informed all such purchasers that the land was reserved.—*City of Kaufman v. French*, 171 S. W. 831.

§ 404 (Ark.) In an action on a note, where the court failed to find as requested as to money paid out by defendant as surety for plaintiff, a finding that when the note in suit was given the parties settled all their accounts, concludes that issue.—*Cherry v. Peay*, 171 S. W. 924.

**XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.**

§ 415 (Mo.App.) Where, after the court rebuked plaintiff's counsel for improper argument, defendant's counsel said he was satisfied, defendant cannot complain of the improper argument.—*Brown v. Barr*, 171 S. W. 4.

**TROVER AND CONVERSION.**

See Action, § 27; Carriers, § 94; Corporations, § 492; Interest, § 68; Judgment, § 701; Pleading, § 406.

**I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.**

§ 8 (Tex.Civ.App.) Where possession of personalty was lawfully obtained by defendant, and no demand was made by plaintiff for the property, there was no conversion, unless possession was obtained on condition that payment would be made for it.—*San Antonio & A. P. Ry. Co. v. Smith*, 171 S. W. 282.

§ 11 (Mo.App.) Where defendant held and refused to pay for goods knowing that its vendor had acquired them under a conditional sale, there was a conversion.—*Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co.*, 171 S. W. 944.

**II. ACTIONS.**

**(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.**

§ 32 (Mo.App.) The petition must show plaintiff was entitled to possession of the property at the time of the suit for conversion.—*Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co.*, 171 S. W. 944.

The petition must allege the value of the property claimed to have been converted.—*Id.*

§ 34 (Tex.Civ.App.) Proof of several and distinct conversions by two persons will not support a recovery for a joint conversion.—*Continental Bank & Trust Co. v. Dealey Bros.*, 171 S. W. 552.

**(D) Damages.**

§ 44 (Tex.Civ.App.) The measure of damages for conversion is the market value of the property at the time and place of conversion, with interest at the time of trial.—*San Antonio & A. P. Ry. Co. v. Smith*, 171 S. W. 282.

§ 46 (Tex.Civ.App.) Where horses, when converted, were worth only \$10 a head, plaintiff was limited to such value, and could not recover at the rate of \$15 a head, on evidence that such was their value some two years after the conversion.—*Hancock v. Haile*, 171 S. W. 1053.

§ 53 (Tex.Civ.App.) Where plaintiff was entitled to recover the value of animals as damages for wrongful conversion, he was also entitled to

recover interest, as a part of the damages, from the date of the conversion.—*Hancock v. Haile*, 171 S. W. 1053.

**TRUST DEEDS.**

See Mortgages.

**TRUSTEE PROCESS.**

See Garnishment.

**TRUSTS.**

See Equity, § 21; Husband and Wife, §§ 19, 265; Limitation of Actions, § 102; Monopolies; Parties, § 6; Partition, § 16; Writings, § 141.

**I. CREATION, EXISTENCE, AND VALIDITY.**

**(A) Express Trusts.**

§ 1 (Ky.) To create a valid trust, there must be not merely an intention, but the transaction must be complete; and this rule applies to trusts created by voluntary dispositions.—*Reynolds v. Thompson*, 171 S. W. 379.

The holder of the legal title may create a valid trust, either by a declaration of trust or by a transfer of the title on specified trusts; but a mere intention to convey in trust is not sufficient.—*Id.*

§ 44 (Ky.) Evidence held not to show a creation by the owner of a mortgage note of a trust thereof in favor of another.—*Reynolds v. Thompson*, 171 S. W. 379.

**(B) Resulting Trusts.**

§ 63½ (Mo.App.) Where plaintiff's brother, who borrowed from her and from another sister, agreeing to secure both, executed only one deed of trust for the whole amount in the name of the sister's husband, plaintiff's right to set aside an improper release of the deed of trust and foreclose it is not affected by the statute of frauds.—*Dubowsky v. Binggeli*, 171 S. W. 12.

**(C) Constructive Trusts.**

§ 103 (Tex.Civ.App.) Client having conveyed one-fourth of a cause of action to recover land to her attorney, and having obtained a secret conveyance, held one-fourth of the land as the attorney's trustee.—*Porterfield v. Taylor*, 171 S. W. 793.

§ 110 (Ky.) Evidence, in an action to enforce a constructive trust, held to show that defendant had purchased land at a judicial sale in proceedings against plaintiff and had taken title in his son's name under an agreement that he would so purchase and would hold the land in trust as security for a debt owed to him by plaintiff.—*Koehler v. Almy*, 171 S. W. 147.

**V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.**

§ 276 (Ky.) A husband, who alone conveyed all his property to a trustee to support the wife and family and to convey the property and protect the wife's dower right, did not thereby relieve himself of the duty to support his wife, and he alone could complain of the action of the trustee in executing the trust, so far as it required him to support the wife, and of the refusal of the trustee to make an appropriation out of the trust estate for medical services for the wife.—*Mulligan v. Mulligan*, 171 S. W. 420.

**UNDUE INFLUENCE.**

See Descent and Distribution, § 91; Wills, §§ 166, 324.

**UNFAIR COMPETITION.**

See Trade-Marks and Trade-Names, § 70.

**UNLAWFUL DETAINER.**

See Forcible Entry and Detainer.

**USURY.****I. USURIOUS CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

§ 22 (Tex.Civ.App.) A maker of a note held to have paid usurious interest authorizing a judgment for double the amount, under Vernon's Sayles' Ann. Civ. St. 1914, art. 4982.—Lee v. White, 171 S. W. 1056.

**VACATION.**

See Judgment, § 460.

**VENDOR AND PURCHASER.**

See Brokers; Crops, § 5; Dedication, § 35; Deeds; Easements, § 16; Executors and Administrators, §§ 148, 388; Frauds, Statute of, §§ 56, 63; Homestead, §§ 118, 122; Infants, §§ 34, 37; Mortgages, §§ 151, 336, 369, 376, 518; Sales; Specific Performance.

**I. REQUISITES AND VALIDITY OF CONTRACT.**

§ 18 (Ark.) Payment to original holder of option to purchase land in extinguishment of his rights held not to extinguish assignee's rights where party making the payment knew of the assignment.—Nance v. Polk, 171 S. W. 1195.

§ 33 (Ky.) Where the land was as represented, the vendor's misrepresentation of his business connections is no ground for rescission; the purchaser not being damaged.—Bewley v. Moremen, 171 S. W. 996.

§ 44 (Ky.) Evidence, in a suit to rescind a contract of purchase of a farm for fraudulent representations as to value and productiveness, held to show that any representations made were substantially true.—Herahey v. Taylor, 171 S. W. 429.

**III. MODIFICATION OR RESCISSION OF CONTRACT.****(B) Rescission by Vendor.**

§ 92 (Tex.Civ.App.) A vendor held not entitled to rescind.—Miller v. Flattery, 171 S. W. 253.

**IV. PERFORMANCE OF CONTRACT.****(A) Title and Estate of Vendor.**

§ 129 (Mo.) The bringing of a suit to quiet title held an admission of record that plaintiff's title was defective, defeating his suit for specific performance of a contract for exchange of land.—Munyon v. Hartman, 171 S. W. 61.

**V. RIGHTS AND LIABILITIES OF PARTIES.****(A) As to Each Other.**

§ 208 (Ark.) Vendor, who after executing title bond executed mortgage on the same land, held not liable for the statutory damages under Kirby's Dig. §§ 1694, 1695.—Smith v. Joyce, 171 S. W. 1183.

**(C) Bona Fide Purchasers.**

§ 224 (Tex.Civ.App.) An administrator's deed only purporting to convey the interest of the estate in the property is prima facie a quitclaim only and insufficient to support a plea of innocent purchaser.—Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 171 S. W. 537.

§ 228 (Mo.App.) An agent's knowledge of a consent decree held not to estop him from acquiring a superior title to the land affected by the consent decree, where the acquired title was not based on the decree.—Barron v. H. D. Williams Cooperage Co., 171 S. W. 683.

§ 229 (Tex.Civ.App.) One claiming title to land is charged with notice of every matter affecting the estate, which appears on the face of any deed forming an essential link in the chain of his title, and also with notice of whatever he would have learned by any inquiry which the recitals therein required him to make.—Miller v. Flattery, 171 S. W. 253.

§ 232 (Tex.Civ.App.) Where, when a tram company purchased certain land, L. had possession of 86 acres under an unrecorded deed, his possession was not constructive notice to the tram company of a prior unrecorded deed to the balance of the tract.—Conn v. Houston Oil Co. of Texas, 171 S. W. 520.

§ 238 (Tex.Civ.App.) Where a tram company from which plaintiff acquired title was an innocent purchaser without notice of any superior outstanding title, it was immaterial that plaintiff, when it purchased, had knowledge of facts which would have charged the tram company with knowledge of a prior conveyance.—Conn v. Houston Oil Co. of Texas, 171 S. W. 520.

§ 243 (Tex.Civ.App.) On an issue as to whether a tram company, when it purchased the land in controversy, had knowledge of an outstanding title, evidence that its manager expressed a fear of litigation, and ordered a removal of the timber as quickly as possible, and that there was talk among its employees that the company's title was defective, was inadmissible.—Conn v. Houston Oil Co. of Texas, 171 S. W. 520.

**VI. REMEDIES OF VENDOR.****(A) Lien and Recovery of Land.**

§ 260 (Tex.Civ.App.) A remote purchaser of a part of a tract subject to a vendor's lien held to possess such equities as to demand a sale of the remainder in satisfaction of the lien and a sale of his part for any balance due.—Kynard v. Tucker, 171 S. W. 1086.

Where a part of a tract subject to vendor's lien notes was purchased for a valuable consideration, a foreclosure against that part could only be had for any balance due after ascertaining the value of the remainder owned by the holder of the notes.—Id.

§ 261 (Tex.Civ.App.) An assignee of a vendor's lien note without transfer of the title cannot recover the land.—R. B. Godley Lumber Co. v. Slaughter, 171 S. W. 779.

Transfer of a debt secured by a vendor's lien transfers the lien, but not the land.—Id.

Assignment of a purchase-money note and lien held not to pass to the assignee the title to the land.—Id.

§ 261 (Tex.Civ.App.) A transferee of vendor's lien notes may not demand a judgment for the notes and a foreclosure of the lien, and for a recovery of the land, but he must elect his remedy.—Smith v. Tipps, 171 S. W. 816.

§ 265 (Ark.) Though the vendor's lien reserved in a deed passes as an incident to the purchase-money notes on their assignment, they are not instruments affecting the title to real estate, within Kirby's Dig. § 763, so as to require their assignment to be recorded, as against subsequent purchasers of the land.—Hebert v. Fellheimer, 171 S. W. 144.

§ 266 (Ark.) As to the purchaser of some of the purchase-money notes, the vendor's lien reserved by a deed is not extinguished by reconveyance of the land.—Hebert v. Fellheimer, 171 S. W. 144.

§ 269 (Tex.Civ.App.) If a vendor can have foreclosure, he is limited to that remedy, and is not permitted to assert his superior title against his vendee or those claiming under him, when the equities of such persons so require.—Kynard v. Tucker, 171 S. W. 1086.

§ 270 (Tex.Civ.App.) A vendor retaining a lien for the price can only foreclose his lien and secure payment of the price where the equities of the purchaser or those claiming

under him so require.—Kynard v. Tucker, 171 S. W. 1088.

§ 275 (Ark.) Under Kirby's Dig. § 510, the vendor's lien reserved in a deed passes to, and may be enforced by, the purchaser of some of the purchase-money notes.—Hebert v. Fellheimer, 171 S. W. 144.

§ 285 (Tex.Civ.App.) A petition by a transferee of vendor's lien notes, which merely prays that the land be awarded to him, *held* not to support a judgment awarding the land to him.—Smith v. Tipps, 171 S. W. 816.

§ 285 (Tex.Civ.App.) Where a purchaser of a part of a tract subject to a vendor's lien did not assume payment of the debt, the holder of the vendor's lien notes could not recover a personal judgment.—Kynard v. Tucker, 171 S. W. 1086.

## VENUE.

See Garnishment, § 82.

## II. DOMICILE OR RESIDENCE OF PARTIES.

§ 22 (Tex.Civ.App.) Defendant W., who owed plaintiff only on a note, not being a necessary party to an action against defendant G. for money which came into its hands for the benefit of plaintiff, under an arrangement with W. that it should pay it to plaintiff, joinder of W. as defendant did not deprive G. of right to be sued in the county of its domicile.—Galveston Dry Goods Co. v. Mitchell, 171 S. W. 278.

§ 32 (Tex.Civ.App.) Evidence, in an action by the assignee of a claim, *held* not to show that the assignment was fraudulently made to affect the venue.—Rhome Milling Co. v. Cunningham, 171 S. W. 1081.

## VERDICT.

See Appeal and Error, §§ 987-1010; Criminal Law, §§ 885, 887; Trial, § 169.

## VERIFICATION.

See Pleading, §§ 291, 293.

## VICE PRINCIPALS.

See Master and Servant, §§ 150-201.

## VOTERS.

See Elections.

## WAGERS.

See Gaming.

## WAIVER.

See Abatement and Revival, § 81; Appeal and Error, § 1075; Assault and Battery, § 24; Carriers, § 218; Chattel Mortgages, § 225; Corporations, § 117; Courts, §§ 24, 231; Criminal Law, § 918; Estoppel; Exceptions, Bill of, § 42; Insurance, §§ 665, 755, 818; Justices of the Peace, § 157; Pleading, §§ 406, 412, 426; Sales, §§ 288, 479; Specific Performance, § 53; Trial, § 317.

## WARDS.

See Guardian and Ward.

## WAREHOUSEMEN.

See Carriers, § 189.

## WARRANTY.

See Insurance, § 264; Sales, §§ 261-288, 430, 442.

## WASTE.

See Landlord and Tenant, § 56.

§ 18 (Mo.App.) The measure of damages for waste is compensation to the extent the value of

the land is diminished.—First Nat. Realty & Loan Co. v. Mason, 171 S. W. 971.

§ 20 (Mo.App.) In a suit for waste, evidence of the diminished value of the inheritance is admissible, notwithstanding the value of the structures and fences destroyed, was specified in the petition.—First Nat. Realty & Loan Co. v. Mason, 171 S. W. 971.

## WATERS AND WATER COURSES.

See Covenants, § 74; Drains; Evidence, § 817; Levees; Limitation of Actions, § 55.

## II. NATURAL WATER COURSES.

### (A) Riparian Rights in General.

§ 42 (Tex.Civ.App.) A riparian owner has the right to take all the water he needs, if such use does not injure other owners, in which latter case he may have his just proportion.—Martin v. Burr, 171 S. W. 1044.

## VI. APPROPRIATION AND PRESCRIPTION.

§ 138 (Tex.Civ.App.) Right of action against riparian owners for using more than their just proportion of the water does not accrue, so as to be ground for a prescriptive title, until an injury is caused or threatened to the complaining owner.—Martin v. Burr, 171 S. W. 1044.

§ 140 (Tex.Civ.App.) The natural uses of water by a riparian owner take precedence over such unusual uses as irrigation, mills, mining, etc.—Martin v. Burr, 171 S. W. 1044.

§ 152 (Tex.Civ.App.) Where prescriptive title to the use of the water of a stream as against other riparian owners is set up by a defendant in an injunction suit, it must be alleged and proved that none of the plaintiffs were under disability.—Martin v. Burr, 171 S. W. 1044.

Evidence *held* to show that during the claimed prescriptive period some of the plaintiffs were under disability.—Id.

Defendants setting up prescriptive title against other riparian owners had the burden of showing which part of the flow of the stream they were claiming during the prescriptive period.—Id.

Evidence *held* insufficient to show that there was during the prescriptive period any injury to the complaining owners which would constitute a cause of action.—Id.

## VII. CONVEYANCES AND CONTRACTS.

§ 156 (Tex.) Agreement of owners of land on which there was a small lake *held* to give fishing rights as an easement appurtenant to the land, to which the title of a grantee was subject.—Thomas v. Fin & Feather Club, 171 S. W. 698.

Fishing club which had dammed a lake so as to overflow a slough *held* liable for cutting the dam and drawing away the water, so as to damage the fishing rights of an owner of land under the slough.—Id.

Written agreement as to fishing rights in the waters of a slough *held* terminated by defendant club's act in cutting its dam and lowering the water.—Id.

§ 158½ (Tex.) The owner of a slough, with fishing rights reserved therein, injured by defendant's cutting of a dam and lowering the level of the water, *held* entitled to recover damages to such rights and for decreasing the market value of his property.—Thomas v. Fin & Feather Club, 171 S. W. 698.

## VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 178 (Ark.) In an action for the flooding of 200 acres of land by a railway embankment, a verdict for \$4,000 damages *held* not excessive.—

St. Louis, I. M. & S. Ry. Co. v. Brundidge, 171 S. W. 859.

§ 179 (Ky.) In an action for the flooding of plaintiff's property, which he claimed was caused by defendant's erection of a bridge, evidence held insufficient to go to the jury, showing that the overflow resulted from an extraordinary rain which could not have been guarded against by ordinary prudence.—Greiner v. Alfred Struck Co., 171 S. W. 405.

## WAYS.

See Easements.

## WEAPONS.

See Criminal Law, §§ 815, 1134.

## WEIGHTS AND MEASURES.

§ 8 (Ark.) Under Acts 1905, p. 703, Acts 1907, p. 562, and Kirby's Dig. §§ 8003-8005, a cotton weigher is not entitled to the prescribed fees for weighing cotton, where his weights were not tested and stamped, though it was the neglect of the secretary of state and clerk of the county court that prevented the procuring of such weights.—Petty v. Lyons, 171 S. W. 112.

## WIDOWS.

See Dower.

## WILLS.

See Cancellation of Instruments, § 51; Descent and Distribution; Executors and Administrators; Quieting Title, § 7.

### II. TESTAMENTARY CAPACITY.

§ 44 (Ky.) Intoxication of testator, when he executed his will, held not ground for setting it aside, unless the intoxication was so great that he was entirely deprived of reason.—Holliday v. Holliday, 171 S. W. 156.

### IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 88 (Ky.) Courts make a distinction between testamentary deeds and a deed which is the result of an ordinary business transaction, where the parties are dealing with each other as business antagonists.—Sellers v. Sellers, 171 S. W. 449.

§ 88 (Mo.) Where a testator's widow was given a life estate with power to convey, a deed by her, which conveyed the remainder, reserving a life estate to herself, and which stated that the deed should vest the title to the estate in the grantees, was a present conveyance and not one in the nature of a will.—Priest v. McFarland, 171 S. W. 62.

(F) Mistake, Undue Influence, and Fraud.

§ 166 (Ky.) Evidence held to support a verdict against the will on the ground of undue influence.—Holliday v. Holliday, 171 S. W. 156.

(G) Revocation and Revival.

§ 199 (Ark.) A codicil, while a republication of the will, does not have the effect of reviving a devise, lapsed by reason of the death of the devisee, it, while mentioning her death, merely devising to another some of the property which had been devised to her, because of property which had been devised to the other having been sold by testator.—Gibbons v. Ward, 171 S. W. 90.

A codicil reciting the death of one of the residuary devisees, without any further disposition of the residue, manifests an unmistakable intention to give the whole residue to the surviving residuary devisees, preventing the lapsed interest therein becoming intestate property.—Id.

## V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

§ 205 (Tex.Civ.App.) Until a will is probated, it is no evidence of title.—Milner v. Sims, 171 S. W. 784.

(E) Jurisdiction, Limitations, and Laches.

§ 257 (Tex.Civ.App.) In an original proceeding, a suit to set a will aside, the district court cannot forestall action of the county court and deprive it of its original jurisdiction to determine validity of the will.—Milner v. Sims, 171 S. W. 784.

(D) Hearing or Trial.

§ 324 (Ky.) Where evidence of undue influence is circumstantial, the court should submit the issue, if all the circumstances, taken together, raise the question.—Holliday v. Holliday, 171 S. W. 156.

(J) Judgment or Decree.

§ 353 (Mo.) Where it clearly appeared that a will proven in 1885 was proven under Rev. St. 1855, c. 167, §§ 14, 16, 18, 21, 26, formal entry of judgment of probate might be made 40 years thereafter, the will having remained in proper custody, though never recorded.—Farris v. Burchard, 171 S. W. 361.

(M) Operation and Effect.

§ 431 (Tenn.) A defense, to a petition to contest a will, that petitioner is estopped because of a judgment of the probate court dismissing a prior petition pursuant to an agreement between the parties raises only an issue proper to be settled finally before the trial of the issue of devisavit vel non.—Shaller v. Garrett, 171 S. W. 486.

## VI. CONSTRUCTION.

(A) General Rules.

§ 452 (Ky.) In seeking the intent of a testator which governs the construction of the will, the rules of interpretation adopted by the courts must be followed, and an heir at law will not be disinherited except by express words or necessary implication.—McIlvaine v. Robson, 171 S. W. 413.

(B) Designation of Devisees and Legatees and Their Respective Shares.

§ 506 (Ark.) There being nothing in the will indicating a contrary intention, the word "heirs" in a devise to M., "her heirs and assigns forever," will be construed in its technical sense as one of limitation, and so not to prevent the devise lapsing on M. predeceasing testator.—Gibbons v. Ward, 171 S. W. 90.

§ 535 (Ky.) A codicil to a will devising a life interest to testator's son and his wife, reversion to testator's heirs, excluding the son from a distribution of the balance of the estate, and charging him with advancements, held to entitle the heirs of the son to share in the distribution of the reversion in the property devised to the son.—McIlvaine v. Robson, 171 S. W. 413.

(E) Nature of Estates and Interests Created.

§ 607 (Ark.) Where land was devised to testator's son and to the heirs of his body, such devise vested a life estate in him and a fee simple in his children under the statute abolishing fee tails.—Gist v. Pettus, 171 S. W. 480.

§ 614 (Ark.) A will and codicil held to vest in testator's son a life estate, with remainder to his heirs in fee.—Gist v. Pettus, 171 S. W. 480.

(H) Estates in Trust and Powers.

§ 693 (Mo.) Under a will giving property to the testator's wife for life, with power to sell, and remainder over to the children as to the property not sold, the wife can sell the re-

mainder in land, reserving to herself a life estate.—*Priest v. McFarland*, 171 S. W. 62.

## VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

### (A) Nature of Title and Rights in General.

§ 713 (Ky.) Where testator devised a reversion in land to the same heirs who would take under the statute, they take under the statute and not under the will.—*McIlvaine v. Robson*, 171 S. W. 413.

### (C) Advancements, Ademption, Satisfaction, and Lapse.

§ 758 (Ky.) Where testator devised a house and lot to a son for life, with reversion to testator's heirs, and divided the balance of his property among his other children, the other children are to be charged in the distribution of the reversion with the amounts they received under the will under Ky. St. § 1407.—*McIlvaine v. Robson*, 171 S. W. 413.

§ 775 (Ark.) A legacy or devise lapses, on the legatee or devisee dying before testator, except in the case provided by Kirby's Dig. § 8022, of a devise to a child or other descendant of testator.—*Gibbons v. Ward*, 171 S. W. 90.

### (F) Legacies Charged on Property, Estate, or Interest.

§ 820 (Ky.) Where testatrix left a general legacy to her granddaughter and then directed her real estate to be sold and the proceeds given to others, the legacy *held* a charge on the realty.—*Carter's Adm'r v. Reynolds*, 171 S. W. 1001.

## WITNESSES.

See Continuance, § 33; Criminal Law, § 603; Depositions; Evidence; Grand Jury, § 36; Perjury.

## II. COMPETENCY.

### (A) Capacity and Qualifications in General.

§ 35 (Tex.Cr.App.) Whether a witness is competent, so as to justify the introduction of his testimony given on a former trial, depends on his status at the time the testimony is offered in the subsequent trial.—*Goldstein v. State*, 171 S. W. 709.

§ 48 (Tex.Cr.App.) The words "or in any other jurisdiction," used in Code Cr. Proc. 1911, art. 788, subd. 3, *held* to include convictions in other states.—*Goldstein v. State*, 171 S. W. 709.

§ 78 (Tex.Cr.App.) The best evidence of the conviction of a felony in a foreign state of one offered as a witness is a copy of the indictment and judgment of conviction, properly certified, with a copy of the laws of that state showing that the acts constitute a felony.—*Goldstein v. State*, 171 S. W. 709.

Evidence of the incarceration in a penitentiary in a foreign state of a witness who had testified against accused in a prior trial, without proof of the offense of which he had been convicted, *held* insufficient to show his disqualification.—*Id.*

### (C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 139 (Tex.Civ.App.) Under Rev. St. 1911, art. 1841, a husband being a necessary party to a suit to partition land claimed by his wife, was not rendered a competent witness concerning an alleged gift to his wife by a decedent, notwithstanding Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624).—*Tannehill v. Tannehill*, 171 S. W. 1050.

In a suit to partition land of a decedent, the testimony of a defendant that she claimed the

land in controversy by gift from the decedent was properly excluded.—*Id.*

§ 140 (Tex.Civ.App.) In suit to partition land which married woman claimed by gift from decedent, her husband *held* an incompetent witness on account of interest, notwithstanding Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624), giving married women control over the rents from their separate real estate.—*Tannehill v. Tannehill*, 171 S. W. 1050.

§ 141 (Mo.App.) The named beneficiary in a deed of trust *held* entitled to testify in an action to vacate a release brought after the death of the maker of the trust deed by the one beneficially interested; it appearing that he was not even the agent of the actual beneficiary.—*Dubowsky v. Binggeli*, 171 S. W. 12.

## III. EXAMINATION.

### (A) Taking Testimony in General.

§ 240 (Tex.Civ.App.) Question to a witness whether her husband prior to his death acquired the interests of his brothers and sisters in the land in controversy by deed or deeds claimed to have been lost *held* not objectionable as leading.—*Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.*, 171 S. W. 537.

### (B) Cross-Examination and Re-Examination.

§ 268 (Ark.) Cross-examination of the secretary and manager of defendant, a lumber company, *held* proper on the issue whether the brakeman was an employe of the lumber company or of a railroad company.—*Ft. Smith Lumber Co. v. Shackleford*, 171 S. W. 99.

§ 268 (Tex. Cr. App.) Cross-examination of state's witness to show that the sale of liquor occurred at a time without the period of limitations *held* proper.—*Wade v. State*, 171 S. W. 713.

§ 268 (Tex.Civ.App.) Where, in an action involving a disputed boundary, a witness for defendant testified that he went with the county surveyor to properly locate surveys, plaintiff was entitled to cross-examine him as to his knowledge of the matter.—*Denton v. English*, 171 S. W. 248.

§ 271 (Mo.App.) Where a witness on cross-examination is asked a question referring to a certain document which the examiner had, the document should be shown to the witness before he is required to answer.—*Etna Life Ins. Co. v. Kansas City Electric Light Co.*, 171 S. W. 580.

§ 277 (Mo.) On trial for taking girl under 18 away from her father for purpose of prostitution, cross-examination of accused as to running houses of prostitution other than that which the girl was induced to enter *held* improper.—*State v. Corrigan*, 171 S. W. 51.

§ 277 (Tex.Cr.App.) Where accused claimed that he contracted the subsequent marriage through a mistaken belief that his former wife had divorced him, he may be cross-examined as to his knowledge of the whereabouts of his former wife, to aid in determining whether his mistake did not arise from want of proper care.—*Coy v. State*, 171 S. W. 221.

Where accused testified that his former wife wrote that she had procured a divorce, upon which he married again, but that the letter had been lost, he may be cross-examined as to the contents of the letter to enable the state to show that he was mistaken as to the statements therein.—*Id.*

§ 277 (Tex.Cr.App.) Where accused became a witness voluntarily in his own behalf, he was subject to cross-examination as any other witness.—*Serrato v. State*, 171 S. W. 1133.

### (C) Privilege of Witness.

§ 293 (Ark.) The policy of the law is to protect persons from criminal proceedings based

upon their evidence unless voluntarily given.—*Claborn v. State*, 171 S. W. 862.

§ 300 (Tex.Cr.App.) A defendant in a criminal prosecution has the right not to testify therein.—*Guerrero v. State*, 171 S. W. 731.

#### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

##### (A) In General.

§ 331½ (Tex.Cr.App.) Where defendant's wife, formerly the wife of deceased, testified that deceased was the father of her first child, the state was properly allowed, on cross-examination, to ask her if accused was its father.—*Hicks v. State*, 171 S. W. 755.

##### (B) Character and Conduct of Witness.

§ 350 (Tex.Civ.App.) It is improper to attempt to impeach a witness by asking him on cross-examination if he had been arrested in a city named on a charge of misdemeanor.—*Houston Chronicle Pub. Co. v. Tiernan*, 171 S. W. 542.

##### (C) Interest and Bias of Witness.

§ 372 (Ark.) Where a witness for plaintiff, suing for the flooding of land by a railway embankment, had testified on cross-examination that his sister owned land similarly situated, it was not error to sustain an objection as to whether she intended to bring a similar suit, since the witness' testimony had already shown any interest he might have.—*St. Louis, I. M. & S. Ry. Co. v. Brundidge*, 171 S. W. 859.

§ 372 (Tex.Cr.App.) The state's witness may be cross-examined as to whether a relative of his who was an enemy of accused had not induced him to make the complaint.—*Wade v. State*, 171 S. W. 713.

§ 377 (Ky.) In an action against a city for damages to residence property from the maintenance of a public dump, inquiry by defendant whether a witness had a similar suit against the city held to entitle plaintiff to show that the action was terminated, and hence was not interested.—*City of Louisville v. Hehemann*, 171 S. W. 165.

##### (D) Inconsistent Statements by Witness.

§ 379 (Tex.Cr.App.) Where the state's witness testified that an unlawful sale of intoxicants was made at one time, he may be cross-examined as to contradictory statements of the time of sale made out of court.—*Wade v. State*, 171 S. W. 713.

§ 388 (Tex.Cr.App.) On cross-examination of a witness for the defendant, the state could ask him, for impeachment purposes, whether, on the day following the alleged theft, he had made a written statement to the city attorney as to what occurred at the scene of the theft.—*Watts v. State*, 171 S. W. 202.

Permitting the county attorney, on cross-examination to lay a predicate for impeachment, to ask a witness for defendant whether he did not make certain statements before the grand jury held not error.—*Id.*

§ 389 (Ark.) Where a witness denied making a statement to a third person, the testimony of the third person that the witness had made the statement held admissible as impeaching testimony.—*Ft. Smith Lumber Co. v. Shackelford*, 171 S. W. 99.

§ 389 (Tex.Cr.App.) In a prosecution for homicide, where defendant's wife denied having made a certain statement to a deputy sheriff, the state could introduce him and prove that she had made such statement.—*Hicks v. State*, 171 S. W. 755.

§ 393 (Tex.Cr.App.) A statement by a witness before the grand jury, reduced to writing, identified by the assistant county attorney and signed by the witness, was admissible to impeach the witness, where a proper predicate had been laid.—*Watts v. State*, 171 S. W. 202.

§ 393 (Tex.Cr.App.) Testimony of a grand juror called to show discrepancies in the testimony of a witness for defendant, that he had translated her testimony to the grand jury, held not objectionable because he was not sworn in the grand jury to make such translation.—*Merkel v. State*, 171 S. W. 738.

§ 393 (Tex.Civ.App.) Where a witness for plaintiff deposed that he had heard a conversation between plaintiff and defendant as to the price for which defendant would feed stock, his former deposition that he had heard "the latter part" of the conversation held not to impeach him.—*Memphis Cotton Oil Co. v. Goode*, 171 S. W. 284.

§ 395 (Tex.Cr.App.) Where defendant sought to impeach a state's witness the state could support the witness' testimony by proof that before the trial he made statements similar to his testimony to others.—*Gonzales v. State*, 171 S. W. 1149.

##### (E) Contradiction and Corroboration of Witness.

§ 405 (Ark.) Plaintiff's denial on cross-examination that he received the injuries complained of in a previous fight held not conclusive as relating to a collateral matter.—*Robertson v. Sisk*, 171 S. W. 880.

§ 405 (Ky.) Where accused's mother who testified in her behalf denied that she told accused not to admit killing her husband, the state may introduce evidence contradicting the witness.—*Childers v. Commonwealth*, 171 S. W. 149.

§ 406 (Tex.Cr.App.) In a prosecution for homicide, where defendant had denied having had an altercation with a road overseer, even though the state might show that defendant had previously been convicted for such altercation, it was error to permit all the details of that transaction to be presented to the jury.—*House v. State*, 171 S. W. 206.

§ 407 (Ky.) Where the state introduces evidence to contradict accused's witnesses, accused is entitled to an opportunity to meet such evidence.—*Childers v. Commonwealth*, 171 S. W. 149.

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## WORK AND LABOR.

§ 4 (Mo.App.) Where plaintiff performed services for a political party, preliminary to an election contest, without intent to charge therefor, a promise to pay will not be implied.—Owen v. Hadley, 171 S. W. 973.

Where services are rendered for another, either with or without his knowledge or consent, and he knowingly avails himself thereof, he must pay their reasonable value.—Id.

One who is benefited by work performed is not liable therefor if credit is given solely to another at whose request it is performed.—Id.

§ 9 (Mo.App.) Where plaintiff's work and material in boring a well at defendant's request were of value, he could recover therefor, even though the boring was not shown to be of value to defendant.—Daniels v. McDaniels, 171 S. W. 14.

§ 9 (Mo.App.) Where a written contract for services has been fully performed by a servant, he may proceed on a quantum meruit to recover the value of such services, but cannot recover more than the contract price.—Owen v. Hadley, 171 S. W. 973.

§ 24 (Mo.App.) In an action for services, not based on a written contract, rendered by plaintiff to defendant, including personal attention, housekeeping, cooking, business matters, etc., the failure to prove the value of the services rendered is fatal to a recovery for plaintiff.—Gillen v. Haley, 171 S. W. 638.

§ 27 (Mo.App.) In an action on quantum meruit for the reasonable value of services, the contract is admissible, and the rights of the parties are to be determined thereby.—Owen v. Hadley, 171 S. W. 973.

## WORKMEN'S COMPENSATION ACTS.

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## WRITS.

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